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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

FEDERAL TRADE COMMISSION,	) Case No.: 00-00416 SI
	) (Related to C 00-00420 SI)
Plaintiff,	)
vs.	) **SUMMARY OF ARGUMENT AND EVIDENCE RE: DEFENDANTS' OPPOSITION TO PLAINTIFF'S**

BP AMOCO p.l.c., and ATLANTIC RICHFIELD COMPANY, Defendants.	))))))	**MOTION FOR PRELIMINARY INJUNCTION** **DATED: MARCH 1, 2000**

Introduction

The Federal Trade Commission has asked this Court to enjoin the closing of the merger between BP Amoco p.l.c. and ARCO. The European Commission approved the transaction in September, 1999.[1] The State of Alaska, with its wealth of expertise and great interest in the matter, also investigated the merger, negotiated the Charter agreement, and has intervened in support of the transaction. The FTC, however, is attempting to frustrate this global merger with a fatally flawed attack that ignores well established case law, the FTC's own Horizontal Merger Guidelines and its own prior practice.

Contrary to the FTC's claims, the merger between BP Amoco and ARCO, as announced on April 1, 1999, will benefit competition worldwide and in the United States, both in Alaska and in the lower 48 states. It will not substantially lessen competition nor tend to create a monopoly in any relevant market.

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[1]On September 29, 1999, the Competition Directorate of the European Commission approved the transaction subject only to BP Amoco divesting a few, small gas infrastructure assets in the southern North Sea.

COUNT I

The FTC cannot demonstrate a lessening of competition in crude oil sales to West Coast refiners for several key reasons. First, BP Amoco and ARCO do not compete in the U.S. West Coast states. BP Amoco sells Alaska crude oil in those states; ARCO does not. ARCO sells refined products in those states; BP Amoco does not. BP Amoco in Alaska produces crude oil to sell to others; ARCO in Alaska produces crude oil for its own refineries. Indeed, ARCO is a net buyer of crude oil from other sources because it does not have enough to supply its West Coast refining needs. (Defs.' Brief, § I(D))

Even if BP Amoco and ARCO competed in the sale of crude oil, which they do not, the FTC's allegations fail from the first key step of proper merger analysis: the definition of relevant market. The worldwide sale of crude oil is the relevant market. Expert economic and industry evidence, the evidence of the parties' own witnesses, and the parties' documents all demonstrate that Alaska North Slope crude oil sold into the West Coast is part of a worldwide market for the sale of crude oil. Indeed, the State of California has admitted it is part of an integrated world oil market.[2] (*Id.* at § I(A))

BP Amoco's refinery customers are sophisticated buyers who know market conditions, know what alternate crude oils are available from around the world, know what competitive prices are for those crude oils, and know how to negotiate contracts that reflect those facts. BP Amoco's conduct in selling to long-term customers, in selling on the spot market, and

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[2]Regional Petroleum Product Reserve Feasibility Study, California Energy Commission (Dec. 1993) at vii, 37-38 (DX 468)

in selling some of its ANS crude oil to the Far East is lawful, rational profit maximizing competitive conduct like that of numerous others in a competitive worldwide crude oil market. (*Id.* at § I(A))

The FTC also fails to follow its Guidelines in claiming that ARCO is a competitor or potential competitor in the sale of ANS crude oil. The FTC confuses, apparently deliberately, different economic activities. It repeatedly refers to "production" in arguing ARCO's alleged competitive position on the West Coast, but crude oil production is not a relevant market. Secondly, the FTC fails properly to recognize that ARCO's ANS production is used in its own refineries. Under the Commission's Guidelines such committed captive production is not part of the relevant crude oil sales market. Indeed, in the last major case in which the FTC sought to enjoin a merger, Dr. Carl Shapiro, the BP Amoco/ARCO expert economist here, testified on behalf of the FTC. His opinion there for the FTC was that captive supply should not be included in market calculations, a position adopted by the Court.[3] That same rule applies here. (*Id.* at § I(D-E))

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[3] *FTC v. Cardinal Health, Inc.*, 12 F. Supp.2d 34, 48 (D.D.C. 1998)

<u>COUNT II</u>

The FTC's claim that the merger will impair competition for oil and gas exploration leases in Alaska is also wrong. Again proper analysis shows that this merger does not raise antitrust concerns. There will be no reduction in output -- the amount of acreage put up for bid -- or in crude oil production as a result of the merger. Total revenues to Alaska and to the federal government from leasing for exploration will increase, not decrease, after the merger. The FTC's claim that the merger will allow the combined BP Amoco/ARCO to exclude competition in lease bidding is wrong. (*Id.* at § II)

Section 7 of the Clayton Act deals in probabilities, not ephemeral possibilities. The law establishes proper ways to analyze a Section 7 claim. The FTC apparently has decided that in this case the normal steps in the analysis should be ignored. The reason is clear. Under proper analysis, the FTC cannot demonstrate a likelihood of succeeding on its theory that the proposed transaction is likely to lessen competition in the sale of crude oil on the West Coast or in bidding for leases on the North Slope. (*Id.* at §§ I(E), II)

<u>The Alaska Charter And New Long Term Contracts</u>

Eight months after announcement of the merger, BP Amoco and ARCO agreed to contracts that will alter the way the merger will be implemented. As previously briefed, the Court must take into consideration the effect of the Alaska Charter and new long-term supply contracts to refiners in assessing the competitive effects of this transaction. The Charter with Alaska obligates BP Amoco, immediately upon the merger, to divest 175,000 barrels per day of production of ANS crude oil, to provide transportation assets, to sell hundreds of thousands of exploration acres, to make available seismic data, and to provide access to North Slope facilities and infrastructure. The long-term supply contracts assure 140,000 barrels per day to West Coast refiners that are substantial users of ANS oil. These transactions enhance the pro-competitive effects of the merger as it will be implemented. (*Id.* at §§ I(G); II(B))

COUNT III

The FTC's complaint that the merger would increase BP Amoco's ability to manipulate WTI oil futures markets for trading at Cushing, Oklahoma, raises alarms that are unfounded in fact and that are not properly the concern of the antitrust laws. The FTC has not adequately alleged nor attempted to prove any viable theory of adverse competitive effects resulting from this merger. The acquisition of ARCO assets, including the interests ARCO owns in the Seaway and Basin pipelines, crude oil storage tanks and pipelines in Cushing, and the ARCO in-line transfer business will not enhance BP Amoco's alleged ability to exercise market power. Moreover, the conduct feared by the FTC is not an antitrust harm and is fully regulated by other entities, including the Commodity Futures Trading Commission, the Federal Energy Regulatory Commission, and the New York Mercantile Exchange. Here, again, the FTC fails to act in this case as it does normally in analyzing mergers; the FTC regularly recognizes other regulations and assumes that companies will abide by those regulations. (*Id.* at III)

Finally, the FTC's manipulation specters are not ground to enjoin this worldwide transaction. The Cushing issue is a very small matter, involving less than ½ of 1% of the companies' combined assets. Divestiture after closing of the few ARCO assets in dispute easily could be accomplished. It is not necessary, however. Following through on assurances made to the FTC in meetings starting last November, BP Amoco/ARCO will have in place prior to the hearing definitive agreements to sell the ARCO assets at Cushing. Accordingly, BP Amoco will

never have any interest in or control over the assets the FTC claims it should not acquire. (*Id.* at §§ III, V)

* * *

In addition to the FTC's failure of proof, the closing of this merger should not be enjoined because the transaction will result in significant efficiencies which will be threatened by delay of the closing. As announced last April, the broad strategic purpose of this merger is to strengthen the worldwide competitive position of the merged BP Amoco/ARCO. That purpose will be accomplished by strengthening BP Amoco's competitive position in West Coast refining and marketing, in Asian natural gas production, and by eliminating substantial duplication of operations and activities between the companies in Alaska. Approximately $1 billion annually in pro-competitive efficiency savings were identified; approximately 80% of these outside of Alaska. Because of the Alaska Charter, approximately $60 million of the projected efficiencies in Alaska will not be achieved. Outside Alaska, the more than $800 million in efficiencies targeted worldwide remain. (*Id.* at § IV)

The equities, both public and private, weigh heavily in favor of closing this transaction without delay. Insecurities and uncertainty in Alaska, permanent losses in revenues to Alaska, the U.S. Government, and others because of delay in achieving increased production, loss of expected efficiencies and injury to employees and shareholders of the defendants will occur if closing is delayed. (*Id.* at § V)

The public interest will be served by denying the request for preliminary injunction and allowing the merger to close and the committed transactions to proceed.

DATED: March 1, 2000 Respectfully Submitted,

BY: ________________________________

One of the Attorneys for Defendants BP Amoco p.l.c. and Atlantic Richfield Company

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