violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45. The proposed complaint alleges that the merger will lessen competition in each of the following markets: (1) The production, sale, and delivery of ANS crude oil; (2) the production, sale, and delivery of crude oil used by targeted West Coast refiners; (3) the production, sale, and delivery of all crude oil used on the West Coast; (4) the purchase of exploration rights on the Alaskan North Slope; (5) the sale of crude oil transportation on TAPS; (6) the development for commercial sale of natural gas on the Alaskan North Slope; and (7) the supply of crude oil pipeline transportation to, and crude oil storage in, Cushing, Oklahoma. The competitive concerns underlying the allegations in the draft complaint are discussed in Part V of this analysis.

IV. The Proposed Consent Order

To remedy the alleged anticompetitive effects of the merger, the Proposed Consent Order requires Proposed Respondents to divest: (1) All of ARCO's assets and interests related to and primarily used with or in connection with ARCO's Alaska businesses; and (2) all of ARCO's assets related to its Cushing, Oklahoma crude oil business. Proposed Respondents will divest all of ARCO's Alaska assets to Phillips Petroleum Company (''Phillips''), an approved up-front buyer. The vast majority of these assets must be divested to Phillips within 30 days of the signing of the Proposed Consent Order. Some of the ARCO Alaska assets require third-party or governmental approvals and Proposed Respondents have up to six (6) months to divest those particular assets. Proposed Respondents will divest the Cushing assets to an acquirer or acquirers that receive the prior approval of the Commission and in a manner approved by the Commission. They must divest the Cushing assets within four (4) months of signing the Proposed Consent order.

For a period of ten (10) years from the date the Proposed Consent Order becomes final, the Proposed Consent Order prohibits the Proposed Respondents from acquiring, directly or indirectly, any ownership, leasehold or other interests in any of the assets they are required to divest without giving prior notice to the Commission.

The Proposed Consent Order also requires the Proposed Respondents to provide the Commission with a report of compliance with the terms of the Proposed Consent Order within thirty (30) days after the Order becomes final, and every sixty (60) days thereafter, until the Proposed Respondents have fully complied with the divestiture requirements under the Proposed Consent Order. The Proposed Respondents must also file annual compliance reports detailing their compliance with the notice provisions under the Proposed Consent Order.

Proposed Respondents have also agreed to a Hold Separate Order. The purpose of the Hold Separate Order is (a) to preserve the competitive viability of the assets required to be divested under the Proposed Consent Order, pending their actual divestiture, (b) to assure that no material confidential information is exchanged between BP Amoco and the held-separate businesses, and (c) to prevent interim harm to competition pending the divestitures. The Commission may immediately appoint an asset maintenance trustee to monitor both the ARCO Alaska businesses and the ARCO Cushing Assets which are to be divested, and, in the case of the Alaska assets, to monitor whether the necessary waivers and regulatory approvals are being expeditiously pursued.

Under the terms of the Hold Separate Order, if the Proposed Respondents have not completed the divestiture of the ARCO Alaska assets that do not require third party or regulatory approvals within thirty (30) days of consummating the merger of BP Amoco and ARCO, they must maintain the relevant ARCO Alaska businesses as imports for ANS crude oil if the price of ANS crude oil becomes non-competitive. Third, ARCO is the firm best positioned and most likely to find new sources of ANS crude oil, and bring that oil to market.

Entry into the crude oil markets implicated by this merger is unlikely to occur in a timely or sufficient manner to prevent the merger from reducing competition in the relevant markets. Entry has not constrained BP Amoco's exercise of market power to date. Nor is it likely that producers of other types of crude oils will supply West Coast refineries in a manner that would constrain BP Amoco's ability to exercise market power. The most compelling evidence is that they have not already done so, even as BP Amoco has been exercising market power directed at West Coast refineries for many years.

B. Bidding for ANS Crude Oil Exploration Rights

BP Amoco and ARCO are the two most important competitors in bidding for exploration leases for oil and gas on the Alaska North Slope. They own or control all exploration, development, and production assets and won over 60% of all State of Alaska lease auctions over the last decade. During that same period the top four firms won 75%. In the most recent North Slope lease sale, BP Amoco and ARCO collectively won more than 70% of the tracts bid.

After the merger, no single firm, or combination of firms, will be both large enough and sufficiently well informed with respect to the value of individual tracts, to replace the loss of revenues to the State of Alaska and the Federal Government, from bidding revenues. Moreover, the reduced competition in the bidding for oil and gas leaseholds will eventually result in less exploration and development, and less production of ANS crude oil.

New entry will not be timely, likely or sufficient to undermine the anticompetitive effects of the merger. Firms that lack the information, infrastructure, and interest in North Slope bidding will simply be unable to fill the void created by the loss of ARCO as an independent bidder for

Phillips is headquartered in Bartlesville, Oklahoma and is the sixth largest United States oil company. In 1999 it had total revenues of about $14 billion. Phillips currently has about a one percent interest in ANS crude oil production and about a 1.4% interest in TAPS. Phillips also owns oil and gas leases in the National Petroleum Reserve area of the North Slope.

The divestiture of ARCO's Alaska Businesses is intended to preserve the level of competition that existed before the merger in the production, sale and delivery of crude oil to the West Coast, bidding for exploration rights on the Alaskan North Slope, and in pipeline transportation services for ANS crude oil.

1. The Proposed Respondents Have Thirty (30) Days To Divest Most of the ARCO Alaska Assets to Phillips

Except for those ARCO Alaska assets that require consents, waivers, or approvals by regulatory authorities or other third parties before they may be transferred to Phillips (e.g., pipelines, oil and gas leases, rights of way), the Proposed Respondents must complete the required divestitures of the Alaska assets within thirty (30) days of the acquisition. The Proposed Respondents must cooperate with Phillips and use reasonable best efforts to assist Phillips in securing the consent and waivers that may be required from private entities.

[1] The provision that we would favor is explained, and its terms defined, further below.

[3] *See FTC* v. *BP Amoco plc,* Compl. ¶¶ 18, 23; Points and Authorities in Support of FTC Motion for a Preliminary Injunction at 7, 9–11.

[4] *See id.* at 7, n.13, 9–10 & nn. 16–18. (The public version of the FTC's Points and Authorities, with the parties' confidential information redacted, is available at /http://www.ftc.gov/os/bpamoco/index.htm. All references in this concurrence to the memorandum supporting the complaint are to that version.)

[5]

[2] *See FTC* v. *BP Amoco plc,* Civ. No. 00–0416–SI (N.D. Cal. filed Feb. 4, 2000), Compl. ¶ 18.

provision. In omitting any provision concerning exports, we do not understand our fellow Commissioners to condone the practices that we identified in our complaint. But we see no good reason for the omission.

First, the majority suggests that the divestitures ordered today eliminate the competitive overlap that was the central competitive concern raised by the proposed merger. While we believe that the divestiture to Phillips is effective and appropriate relief, and may even improve competition, we would also address directly the competitive concerns raised by past and potentially future exporting practices aimed at exploiting precisely the market power that the BP–ARCO merger places at issue. Today's consent permits both a realignment of operatorship interests on the Alaska North Slope and a vertical realignment, whereby BP's crude supply will now be aligned with what were ARCO's downstream assets, and ARCO's successor, Phillips, will likely replace BP as the principal supplier to the merchant (*i.e.*, non-vertically-integrated) market on the West Coast. How those realignments will affect the incentives and opportunities of BP and Phillips to continue BP's past practice of exporting to maintain West Coast prices is uncertain, as are future fluctuations in their production and reserves on the Alaska North Slope and their likely effects on those incentives and opportunities.

The majority believes that it is unnecessary to impose any restriction on exports [9] because ''BP likely will need to use most of its ANS crude oil production'' in the ARCO refineries it is acquiring on the West Coast, and because ''Phillips will have a much smaller share of ANS crude oil production than did BP.'' (We understand that Phillips' initial share of ANS crude oil production will be between 30 and 35%.) Even if true today, there is no assurance that in the future either company, in an uncertain and evolving marketplace, will not find itself in a position to engage in the same conduct BP engaged in previously. Any such risk should not be borne by the consumer.

Second, as noted above, precedent establishes that conduct relief ancillary to structural relief may be appropriate in a merger case to address related competitive concerns, even when the conduct restriction may, in doing so, restrain some lawful conduct.[10] Such relief is especially appropriate where, as in this case, the merger creates uncertainties in a market already characterized by exercises of market power that may harm consumers and where the relief imposed will increase the likelihood that competition will be fully restored. *See, e.g., Ford Motor Co.*, 405 U.S. at 578 (approving district court relief aimed at ''nurtur[ing]'' lost competition over an objection that the forces in the marketplace might suffice to restore it).[11]

Third, we believe that a narrow export-at-a-loss restriction like the one set forth above would effectively protect, and would in no way inhibit, free and vigorous competition.[12] We recognize that in 1995, Congress repealed an export ban on ANS crude oil, and we have no intention of undermining that repeal. However, as we have noted above, a consent agreement provision that narrowly prohibits exports (1) reasonably anticipated to be at a loss and (2) made ''knowingly and intentionally * * * for the purpose increasing the Spot Price of ANS crude oil in PADD V'' is far removed from a general export ban, and would leave firms entirely free to engage in normal, competitive export activities both within PADD V and elsewhere. Further, although the provision that we propose would be narrow, we believe that it would be effective. The proviso requiring that sales be reasonably anticipated to be at a loss to be suspect would give both the parties and FTC enforcement staff an objective benchmark, while the intent and purpose requirements—requirements familiar to antitrust law, *see, e.g., Aspen Skiing Co.* v. *Aspen Highlands Skiing Corp.*, 472 U.S. 585, 602 (1985)—would ensure that normal competitive conduct would be unaffected.

Under normal circumstances we favor structural rather than behavioral remedies. That approach underlies the substantial structural relief that the Commission unanimously requires in this case. However, we believe that in addition, the above-described export restriction is appropriate and warranted by the facts and circumstances of this case. Accordingly, we dissent from the majority decision not to include in the consent order a provision restraining in the future the manipulation of ANS crude supply to the West Coast that we believe occurred in the past.

[illegible]

[9] The provision that we advocate is not, of course, an export ban. It is, rather, a narrow restriction, targeted at exports that entail an extraordinary exercise of market power.

[10] It is well established that the Commission has a broad remedial discretion that would, where appropriate, permit substantial further relief against conduct that does not independently violate the antitrust laws. *See, e.g., Ford Motor Co.*, 405 U.S. at 575; *E.I. du Pont de Nemours*, 366 U.S. at 344. Courts have approved a variety of remedies against potentially lawful conduct as ancillary to structural relief, including future lawful participation in a market previously entered by means of unlawful merger, *Ford Motor Co.*, 405 U.S. at 575–76, an injunction against further acquisitions, *United States* v. *Grinnell Corp.*, 384 U.S. 563, 580 (1966), requirements of prior Commission approval for future joint ventures, mergers or acquisitions, *Yamaha Motor Co.* v. *FTC*, 657 F.2d 971, 984–85 (8th Cir. 1981); *Luria Bros. & Co.* v. *FTC*, 389 F.2d 847, 865–66 (3d Cir. 1968), and prohibitions of sales between joint venture partners, *United States* v. *Alcan Aluminum Ltd.*, 605 F. Supp. 619 (W.D. Ky. 1985).

[11] The majority emphasizes that ''it is not the Commission's mandate to use merger enforcement as a vehicle for imposing its own notions of how competition may be 'improved.' '' We of course agree that merger enforcement is not an appropriate vehicle for ''improving'' markets in ways unrelated to the merger. But as the precedents cited in footnote 10, above, exemplify, it is equally fundamental that mergers must be viewed, and the competitive concerns that they raise addressed, in the practical and dynamic context of the markets in which they occur. *See, e.g., Brown Shoe Co.* v. *United States*, 370 U.S. 294, 321–23 (1962).

[12] The majority expresses concern that our provision would not ''apply equally to all producers'' of ANS crude oil. It is true that our provision would place restrictions on the two parties before us, who will also be the two largest producers of ANS crude oil, that would not apply to smaller competitors. But our narrow restriction would not prevent them from competing vigorously—only from engaging in a practice that the Commission's complaint identified as an exercise of market power that distorted competition. Because the mandate of this agency is to protect competition, not the individual interests of particular competitors, we are not concerned about inhibiting BP and Phillips' ability to exercise market power by manipulating West Coast prices.

concern over the relatively high price of gasoline on the West Coast, but people will be cruelly disappointed if they are led to believe that the export restriction would have a detectable effect on the situation. Moreover, it is not the Commission's mandate to use merger enforcement as a vehicle for imposing its own notions of how competition may be ''improved.'' Instead, Congress has directed the Commission only to prevent any harm to competition that is likely to flow from a merger. We believe that the planned divestitures already accomplish that goal.

We acknowledge that the parties are willing to sign an order with an export restriction. We need not speculate about whether they were induced to do so because of a compelling need to strike a deal promptly, or because they believe the restriction in unnecessary or unenforceable. Whatever the reason, in light of the structural relief the proposed order achieves, we see no need to bind the parties to an unnecessary behavioral provision.

For the reasons set forth above, we do not believe that the export restriction should be included in the proposed order.

[FR Doc. 00–10008 Filed 4–20–00; 8:45 am]
BILLING CODE 6750–01–M

FEDERAL TRADE COMMISSION