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STATEMENT OF

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REGARDING HB 2376

ON BEHALF OF

ARCO CHEMICAL COMPANY

APRIL 30, 1990

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Re: HB 2376, 1990 Session
Pennsylvania Antitrust Act

Good morning. My name is David L. Cohen, and I am a partner specializing in antitrust law in the Philadelphia-based law firm of Ballard, Spahr, Andrews & Ingersoll. We represent ARCO Chemical Company and we appreciate the opportunity to present to this Committee the views of ARCO Chemical about the proposed Pennsylvania Antitrust Act, HB 2376.

ARCO Chemical produces and markets industrial chemicals throughout the Commonwealth of Pennsylvania and, in fact, throughout most of the world. The company is headquartered in Newtown Square, Delaware County, in Pennsylvania.

ARCO Chemical is subject to the federal antitrust laws in all of its business activities. The Company devotes a lot of time and effort trying to comply with those laws, which as you know, are broad and general in scope and are often very difficult to apply to particular, complex factual situations.

There are several reasons why ARCO Chemical is interested in HB 2376. If a Pennsylvania Antitrust Act will impose different regulatory requirements on the Company than are already contained in federal law, the Company's antitrust compliance efforts will be rendered a great deal more complicated and costly, and in some instances, might prevent the Company from taking advantage of profitable opportunities which federal law would allow it to take. Even if the Commonwealth's antitrust requirements will be no different from those of the federal government already in place, ARCO Chemical believes that it still has an important stake in the well-being of the Pennsylvania economy and the efficient working of its legal system.

In short, ARCO Chemical thinks antitrust laws are important, and the Company has opinions that it hopes you will find to be worthy of your consideration. These views fall into two categories: (i) first, whether there is any real need for state antitrust legislation in Pennsylvania; and (ii) assuming that such legislation is appropriate, some specific comments about certain of the provisions contained in HB 2376.

DO WE NEED STATE ANTITRUST LEGISLATION?

The threshold question in considering state antitrust legislation is whether we need it. Antitrust litigation makes profligate use of the courts' time. The federal courts in Pennsylvania are experienced and competent in handling antitrust

cases; Pennsylvania state courts are not. Moreover, the state court system is already overloaded in a number of counties. In addition, the overwhelming majority of companies transacting business in Pennsylvania are engaged in "interstate commerce" and are, therefore, already subject to the federal antitrust laws.

In these circumstances, there is at least a legitimate public policy concern whether the benefits of a Pennsylvania antitrust law would outweigh the costs of decreased efficiency in the Commonwealth's judicial system. This is a significant question of public policy that ARCO Chemical would urge this Committee to consider carefully.

SPECIFIC COMMENTS ON HB 2376.

Assuming this Committee determines that it makes sense for Pennsylvania to have a state antitrust statute, ARCO Chemical submits that there are several problems with HB 2376. Our most significant comments are as follows:

1. Definition of the Offense.

The conduct prohibited by the bill is defined in Sections 3 and 4. Although the language of those sections has some resonance with Section 1 of the Sherman Act, there are some differences.

I make my living studying the federal antitrust laws and advising clients as to their meaning and interpretation, and

I am frankly a little puzzled as to the intended content of Sections 3 and 4 of HB 2376. It is unclear whether the draftsman is intending to expand the prohibitions of the Sherman Act or to change those prohibitions in some unspecified way. It is also unclear, for example, whether mergers are covered.

ARCO Chemical believes that it is important that state antitrust laws conform with federal law. In the absence of such national uniformity, we could end up with a national economy that is shackled by 51 sets of overlapping and conflicting rules. Interestingly, after 1,000 years of such conflict, the European Economic Community is trying to unite and eliminate the situation that balkanized antitrust laws would create.

Consequently, ARCO Chemical's strong recommendation is that this Committee should follow the lead of the majority of other jurisdictions that have adopted state antitrust laws and use statutory language identical to Section 1 of the Sherman Act and include a provision that the state law shall be construed in accordance with federal law and precedents.

I would also note that a state-level analog to Section 2 of the Sherman Act should be avoided because such a prohibition on the state level raises special problems -- the status of so-called "local monopolies." Many of Pennsylvania's counties have small populations, and the local economy may be large enough to support only one lumberyard, food store, or drug store. This type of enterprise is usually considered small business and is not the normal object of antitrust regulation, but it becomes a

prime target if you seek to regulate monopolies in relevant markets within the Commonwealth as HB 2376 would appear to do.

2. Exclusions.

Section 5 of HB 2376 contains a number of exclusions. Given ARCO Chemical's opposition to expansive state antitrust laws, the Company urges you to consider the broadest list of exclusions possible, consistent with your own balance of the public policy considerations involved. Consider the following problems raised by the current draft of HB 2376:

◆ Would the "human labor" exemption contained in Section 5(a) apply if the administrator of the only hospital in a small county was faced with a demand from its medical staff to upgrade professional standards and a complaint from non-staff physicians in town that they were being discriminated against?

◆ Do you want to provide exemptions for banks, or capital markets, which have to work well if the economy is to flourish?

◆ A lot of Pennsylvanians live or die with their professional sports teams. Do you intend to regulate this area?

◆ Pittsburgh has been going through a painful process of reorienting its economy from heavy industry to high technology. There is a special federal statute, passed in 1986, which provides a partial, but very significant, antitrust exemption for research and development joint ventures. Do you

want to at least exclude R & D joint ventures that have been registered under the federal law?

3. Official Investigations.

Section 7 of HB 2376 vests the Attorney General with broad investigatory powers into the affairs of citizens before commencing litigation. Although ARCO Chemical believes that this power is appropriate, HB 2376 contains two basic defects that are not found in the federal practice:

◆ First, ARCO Chemical believes that it is a serious mistake to involve the prosecuting attorney in every Pennsylvania county in the exercise of this investigative power. ARCO Chemical believes that the investigative power should be limited to the Attorney General (as it is in the federal legislation and in the other bills currently pending in Harrisburg). ARCO Chemical thus strongly urges that the option to refer investigations and prosecutions to county DAs be deleted from Section 7.

◆ Second, ARCO Chemical believes that HB 2376 does not give reasonable protection to the confidentiality of private information obtained by the Attorney General under legal compulsion. The Company recommends strongly that specific and detailed safeguards as to confidentiality be incorporated into any final legislation.

4. Damages; Criminal Penalties.

HB2376 provides for treble damages in "flagrant" cases, with criminal penalties of up to \$1 million in fines (for corporations) or up to \$100,000 in fines and three years imprisonment for individuals. Although these sanctions are commensurate with those provided under federal law, ARCO Chemical believes that they are too harsh for any valid purposes that a Pennsylvania antitrust law might serve.

In this context, it is important to note the proper focus and purpose of state antitrust statutes. The federal antitrust laws remain alive and well, and individual citizens and the Attorney General remain empowered to enforce their provisions in the federal courts. The only legitimate purpose of state antitrust legislation is to fill gaps in the federal system -- essentially to provide legal redress against localized trade restraints which might have a low enforcement priority with federal agencies or which might not be reachable under the jurisdiction of the Sherman Act.

Thus, the natural target of state antitrust laws is not John D. Rockefeller, but the small local businessman who through ignorance or greed imposes unreasonable restraints on his local or regional economy. When New Jersey passed a new state antitrust law a few years ago, the first individuals sued by the Attorney General included a small nurseryman who tried to impose maximum resale prices on his customers, and a club of practical

nurses who agreed over teacups which sections of their hometown each of them would service.

For targets of this kind, ARCO Chemical respectfully suggests that the penalties provided by HB 2376 are too severe. If International Salt Company refuses to sell its patented salt dispensers unless its customer agrees to buy the Company's unpatented salt tablets, there may be major harm to competition and someone should arguably go to jail. This result can be accomplished under the federal antitrust laws. The same is not true, however, if the only drugstore in a small town tries to level its inventories by selling toothpaste in a package with toothbrushes.

CONCLUSION

Thank you for your patience and your attention. I will be glad to address any questions you may have for me.