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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

CHUGACH CONSUMERS AND RAY KREIG, Plaintiffs, vs. CHUGACH ELECTRIC ASSOCIATION, INC., Defendant.	Case No. 3:06-cv-00280-TMB Trial Ct. No. 3AN-06-13323 CI

OPPOSITION TO MOTION FOR EXTENSION OF TEMPORARY RESTRAINING ORDER

Defendant Chugach Electric Association, Inc. ("Chugach") respectfully submits this opposition to plaintiffs Chugach Consumers and Ray Kreig's (hereinafter "plaintiffs") Motion for Extension of Temporary Restraining Order. Because plaintiffs have not established the necessary elements for the issuance of a temporary restraining order, the motion should be denied.

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I. INTRODUCTION

Chugach has three labor contracts with International Brotherhood of Electrical Workers, Local Union 1547 ("IBEW"), all of which expired on June 30, 2006. Chugach began preparing for renegotiation of the labor contracts in the fall of 2005. In preparation for that process, Chugach hired two outside labor counsel, William Mede and Parry Grover, to assist in the bargaining. Both Mede and Grover have extensive experience negotiating labor contracts on behalf of employers. Chugach's attorneys and negotiators interviewed numerous Chugach managers to identify work rule revisions that would be beneficial to Chugach. Chugach also studied the labor contracts and bargaining options. Chugach developed a comprehensive bargaining strategy which were presented to and evaluated and approved by Chugach's Board of Directors. Affidavit of Mary Tesch ("Tesch Aff."), ¶ 3.

Chugach's bargaining team, its attorneys and its Board of Directors spent many, many hours preparing for the negotiations and developing Chugach's bargaining strategy. Chugach developed a bargaining plan to modernize the Outside Agreement by revising work rules to return various management rights to Chugach that had been surrendered or compromised in prior Outside contracts. Chugach was well aware that to obtain work rule concessions from the union and employees, bargaining would be difficult and wage and benefit increases would likely be necessary to obtain union and bargaining unit approval for such concessions. Id., ¶ 4.

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Negotiations with the IBEW started in spring 2006. The bargaining was overseen in great detail by Chugach's Board of Directors. Tesch and Mede regularly reported to the Board of Directors in Executive Session regarding the progress of the negotiations. The Board of Directors was kept informed of numerous details of the bargaining process and made all significant decisions regarding wage and benefit levels to be offered to the union based upon the work rule concessions obtaining during the bargaining. Id., ¶ 5.

On November 6, 2006, the Chugach Board of Directors passed a motion in open session at a special board meeting authorizing its bargaining representatives to make a specific contract offer to the IBEW to bring the negotiations to a conclusion. See Exhibit A. The Chugach bargaining team presented that offer to the IBEW on November 9, 2006. See Exhibit B. On November 22, 2006, the IBEW communicated that its members had ratified and approved that agreement the previous day. See Exhibit C.

The Chugach Board of Directors was scheduled to vote to ratify the collective bargaining agreement at a duly authorized board meeting on December 6, 2006. See Exhibit A. Two days prior to that meeting, plaintiffs filed an Emergency Complaint and Request for Immediate Restraining Order ("RCA Complaint") with the Regulatory Commission of Alaska ("RCA") asking the RCA to, among other things, 1) prohibit Chugach from ratifying the collective bargaining agreement with the IBEW, RCA Complaint ? 49, 2) order that Chugach conduct a wage study as defined by plaintiffs and the RCA, id., ? 50, 3) order that all Chugach labor contracts would require pre-approval

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by the RCA, id., ¶4) order than the RCA require some undefined "reform of the Chugach labor situation," id., ¶¶ 52, 54. See Exhibit D.

When the RCA apparently failed to act on plaintiffs' request for a restraining order as promptly as plaintiffs desired, they filed a lawsuit in the Superior Court for the State of Alaska requesting issuance of a temporary restraining order. See Exhibit E. Chugach was granted approximately 4 hours to respond. See Exhibit F. The Superior Court issued a temporary restraining order less than an hour after Chugach filed its response, apparently without any meaningful consideration of the legal issues raised by Chugach on the merits. Instead, the Superior Court questionably reserved consideration of the merits for a hearing scheduled for December 15, 2006, nine days later. The Superior Court also failed to require plaintiffs to post any bond, notwithstanding the mandatory requirements of Alaska R. Civ. P. 65(c). See Exhibit G.

Almost simultaneously with issuance of the Superior Court temporary restraining order, Chugach removed this lawsuit to this Court. Plaintiffs have now moved the Court to extend the temporary restraining order issued by the Superior Court which expired on December 16, 2006, until sometime in January of 2007 after the Court rules on plaintiffs' motion to remand this matter to Superior Court.

Chugach submits plaintiffs' motion should be denied for the following principle reasons:

1. Plaintiffs' request for injunctive relief is moot because a valid and binding

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collective bargaining agreement between Chugach and the IBEW came into being when the IBEW accepted Chugach's authorized offer and ratified its acceptance with a membership vote. Simply stated, there is nothing left to enjoin.

2. The RCA is preempted by federal labor law from granting the relief which plaintiffs seek from it: orders which would interfere with the substantive terms of the collective bargaining agreement between Chugach and the IBEW. The RCA has no more authority than the courts or the NLRB to sit at Chugach's shoulder as Chugach and the IBEW negotiate the substantive terms of a labor contract governed by federal law.

3. The relief which plaintiffs seek by way of an injunction which would prevent finalization of a collective bargaining agreement based upon nothing more than plaintiffs' dissatisfaction with the substantive terms of the agreement is unprecedented and an illegal intrusion upon the free market forces which are to control in that area.

4. Chugach will suffer significant irreparable harm if any injunction is granted which prevents it from recognizing the benefits of the bargain it struck with the IBEW in the Outside Agreement. While the wage and benefits increases of the new Outside Agreement are retroactive, it is not feasible to give retroactive effect to the work rule revisions. Those gains can only be realized prospectively. Thus, Chugach and its customers are being financially harmed by this lawsuit every day the new Outside Agreement is not given effect.

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II. ARGUMENT

A. Applicable Legal Standards.

The Ninth Circuit is "extremely cautious" of issuing preliminary injunctions where the requested relief goes beyond the maintenance of the status quo. Stanley v. Univ. of S. Cal., 13 F.3d 1313, 1319 (9th Cir. 1994) (quoting Martin v. Int'l Olympic Comm'n, 740 F.2d 670, 674-75 (9th Cir.1984)).

The Ninth Circuit considers injunctive relief in light of (1) the likelihood of success on the merits; and (2) the relative balance of potential hardships between the parties and the public. State of Alaska v. Native Vill. of Venetie, 856 F.2d 1384, 1389 (9th Cir. 1988), rev'd on other grounds, 522 U.S. 1103 (1997). A party is entitled to a preliminary injunction only "if the moving party demonstrates either a combination of probable success on the merits and the possibility of irreparable injury or that serious questions are raised [as to the merits] and the balance of hardships tips sharply in his favor." Id. See also Dep't of Parks and Recreation for the State of Cal. v. Bazaar Del Mundo Inc., 448 F.3d 1118, 1123 (9th Cir. 2006) (applying same test). These "formulations represent two points on a sliding scale in which the required degree of irreparable harm increases as the probability of success decreases." Bazaar Del Mundo, 448 F.3d at 1092).

Plaintiffs are unable to make the requisite showing of success on the merits or that the balance of hardships weighs in its favor.

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1. Likelihood of Success on the Merits.

Under the traditional test, a party must show a likelihood of success on the merits in order to be entitled to preliminary injunctive relief. Native Village of Venetie, 856 F.2d at 1389. "[E]ven if the balance of hardships tips decidedly in favor of the moving party, it must be shown as an *irreducible minimum* that there is a fair chance of success on the merits." Stanley, 13 F.3d at 1319 (quoting Martin, 740 F.2d at 674-75). See also Senate of the State of Cal. v. Mosbacher, 968 F.2d 974 (9th Cir. 1992) (injunction may not be granted except upon showing of at least a fair chance of success on the merits.) Similarly, in Harper v. Poway Unified School District, 445 F.3d 1166, 1187-88 (9th Cir. 2006), the Ninth Circuit found that a high school student was not entitled to an injunction permitting him to wear a T-shirt condemning homosexuality at school because the court "seriously doubted" he would prevail on merits on his claim that the school violated his First Amendment rights).

2. Balance of Hardships.

An injunction may not issue absent a showing that serious hardship will result if injunctive relief is not granted. Mosbacher, 968 F.2d at 977. Plaintiffs are unable to meet this requirement. A showing of irreparable harm cannot be based on conjecture. See Ranchers Cattleman Action Legal Fund United Stockgrowers of Am. v. U.S.D.A., 415 F.3d 1078, 1105 (9th Cir. 2005) (no showing of irreparable harm based on possibility of stigma to American beef industry if injunction preventing Canadian meat from

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entering country was not issued after bovine spongiform encephalopathy was detected in Canadian animals).

B. Plaintiffs Are Unable To Establish Either A Showing Of Probable Success On The Merits Or That They Have Raised Serious Questions As To The Merits.

1. This Lawsuit is Moot Because a Valid, Binding Collective Bargaining Agreement Already Exists between Chugach and the IBEW.

As discussed above, on November 6, 2006, the Chugach Board of Directors passed a motion in open session at a special board meeting authorizing its bargaining representatives to make a specific contract offer to the International Brotherhood of Electrical Workers, Local Union 1547 ("IBEW"). The IBEW bargaining team accepted that offer and its members ratified and approved that agreement.

Based upon that sequence of events, a valid and enforceable collective bargaining agreement has already been formed and the National Labor Relations Act ("Act") requires Chugach to sign the agreement. Under these circumstances, it would most likely be a violation of Sections 8(a)(5) or 8(d) of the Act for the Chugach Board of Directors to hinder the execution of the final contract at this point in time. See Enidine, Inv. and Dist. Lodge No. 76, Int'l Ass'n of Machinists & Aerospace Workers, AFL-CIO, 251 N.L.R.B. 1262 (August 27, 1980).

In Enidine, an attorney employed to negotiate for the employer came to an oral agreement with the union and the union membership voted to accept the contract under the terms negotiated. However, once the agreement was reduced to writing, the

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individuals authorized to sign the contract on behalf of the employer refused to sign. Id. at 1263–65. The National Labor Relations Board ("NLRB") held "[t]he facts clearly reveal that the parties were in agreement as to all the terms of a contract and that the execution of final agreement merely required signatures on the basic agreement…The failure to reveal readiness to meet and sign such agreements . . . clearly reveals conduct violative of Section 8(a)(5) and (1) of the Act." Id. at 1265. See also Quiel Bros. Elec. Sign Serv. Co., Inc. and Local 477, Int'l Bhd. of Elec. Workers, AFL-CIO, 153 N.L.R.B. 326 (June 22, 1965) (employer violated Sections 8(a)(5) and (1) when its negotiators held themselves out as having authority and actually did have authority to negotiate and to agree on contract amendments, offer made to and accepted by union and its membership, but employer later refused to sign contract).

Because a valid and binding labor contract came into being in this case when the IBEW accepted Chugach's authorized offer and ratified its acceptance with a membership vote, the injunctive relief plaintiffs request is moot.

2. Federal Labor Law Preemption Doctrines Do Not Permit the Intrusion Which Plaintiffs Request Upon the Substantive Terms of the Collective Bargaining Process Between Chugach and the IBEW.

Under the Supremacy Clause of the United States Constitution, state law is preempted where Congress explicitly states an intent to occupy a field and exclude state regulation; where the federal interest in the subject matter regulated is so dominant that no room remains for state action, indicating an implicit intent to occupy the field; and

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where the state regulation at issue conflicts with federal law or stands as an obstacle to the accomplishment of its objectives. Pacific Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190, 203-04 (1983); Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 153 (1982); Sprint Spectrum L.P. v. Mills, 283 F.3d 404, 414-15 (2d Cir. 2002).

Federal labor law creates the rights at issue in this case. "The doctrine of labor law preemption concerns the extent to which Congress has placed implicit limits on 'the permissible scope of state regulation of activity touching upon labor-management relations.' " N.Y. Tel. Co. v. N.Y. State Dep't of Labor, 440 U.S. 519, 527 (1979) (plurality opinion) (quoting Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters, 436 U.S. 180, 187 (1978)).

> Cases that have held state authority to be pre-empted by federal law tend to fall into one of two categories: (1) those that reflect the concern that 'one forum would enjoin, as illegal, conduct which the other forum would find legal' and (2) those that reflect the concern 'that the (application of state law by) state courts would restrict the exercise of rights guaranteed by the Federal Acts.'

Lodge 76, Int'l Ass'n of Machinists and Aerospace Workers, AFL-CIO v. Wis. Employment Relations Comm'n, 427 U.S. 132, 138 (1976) (hereinafter "Machinists") (quoting UAW v. Russell, 356 U.S. 634, 644 (1958).

The first category, known as Garmon preemption, developed from a line of cases that focused on the primary jurisdiction of the NLRB. San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 244-47 (1959). Garmon and its progeny hold that the Act

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preempts state regulation that either arguably prohibits conduct subject to the regulatory jurisdiction of the NLRB under Section 8 of the Act or facilitates conduct prohibited by Section 7 of the Act. Id., Sears, Roebuck & Co., 436 U.S. at 182; Amalgamated Ass'n of Street Elec. Ry. & Motor Coach Employees v. Lockridge, 403 U.S. 274, 290-91 (1971).

The second category, known as Machinists preemption, "requires the preemption of any state regulation of activity that, although not directly regulated by the Act, was intended by Congress 'to be controlled by the free play of economic forces' in a 'zone free from all regulations, whether state or federal.' " Chamber of Commerce of U.S. v. Lockyer, 463 F.3d 1076, 1085 (9th Cir. 2006) (quoting Machinists, 427 U.S. at 140, and Bldg. & Constr. Trades Council of the Metro Dist. v. Assoc. Builders & Contractors of Mass./R.I., Inc., 507 U.S. 218, 226 (1993) (hereinafter "Boston Harbor").

Machinists holds that neither states nor the NLRB is "afforded flexibility in picking and choosing which economic devices of labor and management shall be branded as unlawful" and that both are without authority to attempt to "introduce some standard of properly 'balanced' bargaining power" or to define "what economic sanctions might be permitted negotiating parties in an 'ideal' or 'balanced' state of collective bargaining." Id. at 149-50 (citations omitted) (quoting NLRB v. Ins. Agents' Int'l Union, 361 U.S. 477, 497 (1960)).

> The NLRA is concerned primarily with establishing an equitable process for determining terms and conditions of employment, not with particular substantive terms of the bargain that is struck when the parties are negotiating from relatively equal positions.

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Metro. Life Ins. Co. v. Mass., 471 U.S. 724, 753 (1985).

Thus, state or local action is preempted if it regulates the use of economic weapons that are recognized and protected under the Act such that the state or local government has entered "into the substantive aspects of the bargaining process to an extent Congress has not countenanced." Machinists, 427 U.S. at 149 (quoting Ins. Agents, 361 U.S. at 498). See also N.Y. Tel., 440 U.S. at 533.

" 'Machinists pre-emption preserves Congress' intentional balance between the uncontrolled power of management and labor to further their respective interests' in an area free from regulation." Lockyer, 463 F.3d at 1085-86 (quoting Boston Harbor, 507 U.S. at 226). Accord Metro. Life Ins. Co., 471 U.S. at 750-51; Garner v. Teamsters, Chauffeurs & Helpers Local Union, 346 U.S. 485, 500 (1953) ("For a state to impinge on the area of labor combat designed to be free is quite as much an obstruction of federal policy as if the state were to declare picketing free for purposes or by methods which the federal Act prohibits.").

> . . . state attempts to influence the substantive terms of collective-bargaining agreements are as inconsistent with the federal regulatory scheme as are such attempts by the NLRB . . ..

Machinists, 427 U.S. at 153.

Applying these principles, preemption has been found where a city sought to influence the outcome of labor negotiations by refusing to renew a franchise unless the employer settled a strike with its union, Golden State Transit Corp. v. City of Los

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Angeles, 475 U.S. 608, 618 (1986), and where a state sought to regulate the compensation of owner drivers through state anti-trust law, Local 24 of the Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen and Helpers of Am., AFL-CIO v. Oliver, 358 U.S. 283, 295-96 (1959). Cf. United Air Lines, Inc. v. Indus. Welfare Comm'n, 28 Cal. Rptr. 238, 247 (Cal. Ct. App. 1963) (order of state labor board preventing wage deductions for employee uniforms preempted by Railway Labor Act).

The following comprehensive discussion contained in Oliver is instructive in this case:

> Within the area in which collective bargaining was required, Congress was not concerned with the substantive terms upon which the parties agreed. The purposes of the Acts are served by bringing the parties together and establishing conditions under which they are to work out their agreement themselves. To allow the application of the Ohio antitrust law here would wholly defeat the full realization of the congressional purpose. The application would frustrate the parties' solution of a problem which Congress has required them to negotiate in good faith toward solving, and in the solution of which it imposed no limitations relevant here. . . . We believe that there is no room in this scheme for the application here of this state policy limiting the solutions that the parties' agreement can provide to the problems of wages and working conditions. Since the federal law operates here, in an area where its authority is paramount, to leave the parties free, the inconsistent application of state law is necessarily outside the power of the State. . . . Of course, the paramount force of the federal law remains even though it is expressed in the details of a contract federal law empowers the parties to make, rather than in terms in an enactment of Congress. . . . If there is to be this sort of limitation on the arrangements that unions and employers may make with regard to these subjects, pursuant to the collective bargaining provisions of the Wagner and Taft-Hartley Acts, it is for Congress, not the States, to provide it.

Oliver, 358 U.S. at 295-96 (internal citations omitted).

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Here, the relief which plaintiffs seek from the RCA, and the injunction they have requested in order to preserve the status quo so that the RCA can grant that relief, tread far over the line of impermissible interference by both a state agency and the courts into matters which are exclusively reserved for the free play of market forces under the Act. Plaintiffs request that the Court order Chugach not to sign the Outside Agreement it has negotiated with the IBEW in order to permit the RCA to 1) make determinations as to the prudence of that labor contract, 2) order Chugach to expend resources in additional studies, and 3) potentially order reformation of the labor contract as the RCA determines might be appropriate, exceeds the bounds of lawful involvement by the NLRB, state or federal courts or the RCA in the collective bargaining process.

The Act makes it plain that federal law establishes the basic procedural ground rules and that the parties themselves determine the substantive outcomes without governmental interference subject only to "the free play of economic forces." Machinists, 427 U.S. at 140. It is impermissible for a "state [to] attempt to influence the substantive terms of collective-bargaining agreements," just as much as it would be for the NLRB or courts to do so. Id. at 153 (emphasis supplied). The RCA has no more authority than the courts or the NLRB to sit at Chugach's shoulder as Chugach and the IBEW negotiate a labor contract governed by federal law and to dictate terms of the agreement, such as compensation rates; order Chugach to undertake additional and possibly costly and delaying studies; and grant or withhold its approval to the final

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substantive outcome of the negotiations.

In addition, the relief which plaintiffs seek from the RCA conflicts with Section 8(d) of the Act which provides, in relevant part, as follows:

> For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession . . ..

29 U.S.C. § 158(d).

Section 8(d) requires only that parties negotiate in good faith the "wages, hours, and other terms and conditions of employment." The Supreme Court has specifically forbidden the NLRB from requiring parties to agree to specific contractual provisions. See H.K. Porter Co. v. NLRB, 397 U.S. 99, 108-09 (1970). In fact, Section 8(d) affirmatively requires parties such as Chugach to execute a written contract once agreement has been reached. Providence Alaska Med. Ctr. And Laborers' Int'l Union of N. Am., Local 341, 2004 WL 1370633 (N.L.R.B. Div. of Judges, June 9, 2004) ("Section 8(d) of the Act explicitly requires the parties to a collective-bargaining relationship to execute 'a written contract incorporating any agreement reached if requested by either party.'"). Any order to the contrary would run afoul of Garmon preemption by prohibiting that which is expressly required by Section 8(d) of the Act. Plaintiffs have failed to direct this court to a single decision from any jurisdiction granting a state

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regulatory agency, or the state or federal courts, the extraordinary power to enjoin a party from signing a collective bargaining agreement where agreement has been reached between an employer and a union.

Likewise, repudiation of a collective bargaining agreement is an unfair labor practice under Sections 8(a)(1) and 8(a)(5) of the Act. See, e.g., Horizon Group of New England and S. N.J. Laborers Dist. Council and Laborers Local Union No. 1153, 347 N.L.R.B. No. 74, 2006 WL 2206815, *21 (N.L.R.B. July 31, 2006) (finding violation of Section 8(a)(1) and (5) of the Act where employer repudiated collective bargaining agreement with union); Tri-Produce Co. and Fresh Fruit And Vegetable Workers, Local No. 78-B, United Food and Commercial Workers Int'l Union, AFL-CIO, CLC, 300 N.L.R.B. 974, 987 (1990) ("By repudiating the agreement reached with Union . . . and refusing to execute a memorandum containing the terms of that agreement, Respondent engaged in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act."). Any order requiring Chugach to do so would similarly run afoul of Garmon preemption by requiring Chugach to do that which is prohibited by Sections 8(a)(1) and 8(a)(5).

Finally, the question in the first instance as to whether a binding collective bargaining agreement has already come into existence between Chugach and the IBEW is one which falls within the jurisdiction of the federal courts under 29 U.S.C. § 301. Mack Trucks, Inc. v. Int'l Union, United Auto., Aerospace and Agric. Implement Workers of Am., UAW, 856 F.2d 579, 590 (3rd Cir. 1988); Int'l Bhd. of Elec. Workers, Local 532 v.

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Brink Constr. Co., 825 F.2d 207, 212 (9th Cir. 1987). That is the fundamental question in this case upon which all else rests because if a valid and binding labor contract came into being when the IBEW accepted Chugach's authorized offer and ratified its acceptance with a membership vote, then there is nothing left to enjoin. That question is properly outside the jurisdiction of the RCA given the strong federal interest in uniform rules of interpretation of federal labor law. Again, plaintiffs cite no contrary authority.

3. The Regulatory Commission of Alaska Has No Authority under Alaska Law to Grant the Relief Plaintiffs Have Requested of It.

Chugach has filed a pleading with the RCA which addresses the reasons why it does not have authority under Alaska law to make the determinations and issue the relief requested of it by plaintiffs. A copy of that briefing is attached hereto and incorporated herein as Exhibit H.

C. Issuance Of The Requested Restraining Order Would Result In Irreparable Harm To Chugach.

Any interference with implementation of the Outside Agreement between Chugach and the IBEW would result in substantial and irreparable harm to Chugach. In negotiating that agreement, Chugach achieved material concessions from the IBEW in terms of changes to work rules.

The revised work rules that will yield monetary savings for Chugach once they are implemented include, but are not limited to, the following sections of the contract: Sections 5.1.2.1 and 5.1.2.2 which make changes favorable to management to the meal

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provisions of the contract, Section 5.2.3 regarding holiday compensation which yields cost savings by specifying that certain hours are no longer paid at triple time, Section 6.1.1 which contains more favorable apprentice ratios for Chugach, Section 8.9 regarding oversized items which expands the type of equipment that can be utilized by warehousemen, Section 11.3.4 regarding transportation of electrical equipment which also expands the duties of warehousemen to utilize certain equipment, Section 11.4 regarding call-outs and switching which gives Chugach greater latitude to utilize hot apprentices, and Section 15.3.1 regarding classification committee procedures which streamlines and expedites the classification committee process significantly. Tesch Aff., ¶ 12. Collectively, Chugach estimates those work rule revisions will save it more than $1,300,000 over the next three years. Id., ¶ 10.

Chugach was also successful in negotiating other revisions to the Outside Agreement that modify various work rules that are likely to save the utility money but have not been included in estimated cost savings because the savings are difficult to quantify. Those work rule revisions include:

Section 8.11, Random Drug Testing - Expands random testing to all employees in the bargaining unit. Hopefully, with employees knowing they are now subject to random drug and alcohol testing at any time, drug or alcohol use/abuse will be further minimized. If one fatal or serious accident is avoided because of this new work rule, the dollar savings could be enormous. Additionally, conventional wisdom is that random drug

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testing reduces employee absenteeism and leads to increased productivity.

Section 3.5.1, Apprentice Layoffs - Chugach negotiated the right to lay off NECA temporary employees and in certain circumstances not be required to lay off apprentices. This will yield cost savings for the utility because apprentice wage rates are less than journeyman rates.

Section 5.1.3.4, New Sunday Through Thursday Loop Wagon - New contract language gives Chugach flexibility to establish a new Sunday through Thursday loop wagon. This will yield greater efficiencies/productivity when Chugach elects to establish such a new loop wagon.

Probationary Employees - Chugach negotiated the right to release probationary employees without that decision being subject to grievance or arbitration. This language precludes any backpay or other monetary costs being ordered under the contract for discharged probationary employees.

Section 4.3.1(b), Leave Without Pay - Added new contract language to reduce leave without pay abuse, including requirement that an employee on leave without pay for certain absences in excess of 40 cumulative hours pays his pro-rata share of monthly health care premiums.

Section 4.4, Sick or Disability Leave - The prior Outside Agreement gave employees up to two years leave without pay, depending upon employee's years of service, for sick or disability leave. The new contract language specifies the one and two

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year caps on sick leave are calculated on a cumulative basis using a rolling five year period. The new contract language limits the amount of such leave to the five year period. Id., ¶ 13.

If implementation of the Outside Agreement were to be enjoined, Chugach would irrevocably lose the benefits of those concessions. The first year wage and pension increases negotiated in the new Outside Agreement are to be given retroactive effect to July 1, 2006. It is not feasible to give retroactive effect to the work rule revisions negotiated in the new Outside Agreement. The monetary savings to be realized by Chugach from the work rule revisions in the new Outside Agreement can only be realized prospectively. Therefore, Chugach is being financially harmed by this lawsuit every day the new Outside Agreement is not given effect because Chugach is being deprived, on a daily basis, of the monetary savings that it will realize from the new work rules that have been adopted. While plaintiffs claim the purpose of their lawsuit is to save Chugach consumers money, it is having precisely the opposite effect. The lawsuit is financially harming Chugach customers. Id., ¶ 11.

In addition, Chugach was successful in the negotiations in resisting IBEW efforts to secure more restrictive work rules including the following areas: erosion of work force (would have made it more difficult to contract out); temporary employees (would have further restricted ability to use temporary employees); holidays (dropped proposal for extra holiday); aircraft (would have adopted more rigorous aircraft standards to transport

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employees); licenses and certifications (would have increased Chugach's costs); health care (would have increased Chugach's costs); life insurance (would have increased Chugach's costs). A reopening of the collective bargaining agreement could put those issues back on the table and subject Chugach to additional labor costs. Id., ¶ 14.

D. At A Minimum, Plaintiffs Must Be Required To Post A Bond In An Amount Sufficient To Hold Chugach Harmless From The Loses Which It Will Sustain If A Temporary Restraining Order Is Issued.

At a minimum, no injunctive order should issue unless and until plaintiffs post a bond in an amount sufficient to cover the loses which Chugach will sustain if a temporary restraining order is issued. Such a bond must, at a minimum, cover the quantifiable economic losses Chugach will sustain by not being able to implement the work rules changes in the Outside Agreement and the costs it is undergoing in this litigation. At a minimum, that amount should be no less than $250,000.

III. CONCLUSION

Because plaintiffs have adduced no evidence that they are likely to succeed on the merits, and because the balance of hardships weighs heavily in favor of Chugach, plaintiffs' request for an extension of the temporary restraining order should be denied.

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Dated this 18th day of December, 2006.

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Certificate of Service

I certify that on the 18th of December, a true
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