UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

	)	**Public**
In the Matter of	)	
	)	
UNION OIL COMPANY OF CALIFORNIA,	)	**Docket No. 9305**
	)	
a Corporation.	)	
	)	

BRIEF OF AMICUS CURIAE EXXON MOBIL CORPORATION IN SUPPORT OF COMPLAINT COUNSEL'S APPEAL OF THE INITIAL DECISION AND ORDER DISMISSING THE COMPLAINT

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IDENTITY AND INTEREST OF *AMICUS CURIAE*

ExxonMobil Corporation, a global energy and petrochemical company, refines and markets gasoline in California. It is subject to California's reformulated gasoline (RFG) regulations developed during a landmark public-private collaborative standard-setting effort. In March 2001, ExxonMobil filed a petition with this Commission, asking it to investigate the anticompetitive conduct of Union Oil Company of California (Unocal) relating to that effort.[1] As explained in ExxonMobil's petition, Unocal engaged in a pattern of deceptive conduct that distorted the standard-setting process and increased the potential market power of its RFG patent portfolio. Unocal has exploited its market power by taking actions aimed at collecting substantial patent-infringement damages and licensing fees.

In August 2001, after some preliminary fact-finding, the Bureau of Competition opened an investigation of Unocal's conduct and, over the next 20 months, engaged in exhaustive fact-finding and analysis. In March 2003, the investigation culminated in the Commission's decision to issue a formal complaint charging Unocal with violations of Section 5 of the Federal Trade Commission Act (FTC Act) and seeking an injunction to prohibit it from enforcing its RFG patents in California. On the eve of trial, however, Administrative Law Judge D. Michael Chappell dismissed the complaint on the grounds that most of Unocal's allegedly anticompetitive conduct is beyond the substantive reach of the antitrust laws and that the Commission lacks jurisdiction to pursue the remaining charges.

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[1] *See* Mem. of Exxon Mobil Corporation in Support of Request That the Federal Trade Commission Investigate the Unfair Competition Issues Raised by Unocal Corporation's Patenting of Reformulated Gasoline Standards (Mar. 14, 2001).

ExxonMobil has vital interests directly affected by the outcome of this proceeding. Along with other participants in the process, ExxonMobil was deceived by Unocal's misrepresentations; it now operates under regulations distorted by Unocal's deception; and it has been a target of Unocal's efforts to exploit its market power.[2] In addition, ExxonMobil will inevitably be presented with opportunities to participate in other public-private collaborative efforts. It has a continuing interest in ensuring that the federal antitrust laws remain a viable weapon against anticompetitive abuses of such efforts. In light of those interests, and its long and intensive involvement with Unocal's acquisition and exploitation of market power over the production of RFG in California, ExxonMobil can offer a useful perspective on the issues posed by the current appeal.

BACKGROUND

The ALJ dismissed the complaint against Unocal for failure to state a claim. When reviewing a case in this posture, the Commission presumes all factual allegations of the complaint to be true and draws all reasonable inferences from the facts alleged in favor of complaint counsel. *See In re TK-7 Corp.*, 1989 FTC Lexis 32. In the sections below, we summarize the allegations of the complaint, related information in the public record, and the ALJ's decision, with a particular emphasis on those aspects that implicate *Noerr-Pennington* immunity issues.

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[2] *See Union Oil Co. of Cal. v. Atlantic Richfield Co.*, 34 F. Supp. 2d 1208 (C.D. Cal. 1998) (upholding jury determination that Unocal's initial patent had not been proven to be invalid, that ExxonMobil and other refiners had infringed it, and that refiners should pay a royalty of 5.75 cents per gallon of infringing gasoline sold in California), *aff'd,* 208 F.3d 989 (Fed. Cir. 2000).

A. Unocal's Anticompetitive Conduct

The complaint alleges that Unocal has obtained and exploited unfair competitive advantage from certain fuels technology patents by successfully executing a scheme that involved its subversion of California's process for establishing air-quality regulations. The alleged scheme, although complex and multifaceted, can be divided into two major phases. The first phase involved Unocal's acquisition of potential market power through its deceptive participation in the public-private collaborative process used to develop California's RFG standards in parallel with its filing and prosecution of an undisclosed patent application. Compl. ¶¶ 2-5, 33-48, 50-59, 76-92. The second phase involved a range of activities through which Unocal enhanced and exploited its market power. Those activities included making extensive amendments to its pending patent claims to track the RFG specifications more closely; delaying for years the disclosure of its patent plans to ensure that California and the refining industry would be locked into specifications covered by its patent claims; continuing to file patent applications to make it more difficult for refiners to meet the RFG specifications without infringing Unocal's patents; and licensing and enforcing patents that the regulators had unwittingly transformed into highly effective tools for restraining competition. *See* Compl. ¶¶ 6, 60-62, 64, 68, 71-72, 93-95.

1. Unocal's Use of Deception to Acquire Market Power in the Fuels Technology Market

In December 1990, Unocal filed its initial patent application with the Patent and Trademark Office (PTO) describing directional relationships of eight fuel properties to three types of tailpipe emissions. After filing the application, Unocal engaged in a series of deceptive communications and otherwise misleading conduct before the California Air Resources Board (CARB) and other entities, including competitor refiners, that resulted in the adoption of

standards substantially covered by the claims of its initial and subsequent RFG patents. Compl. ¶¶ 33-59.

The complaint identifies two ways in which Unocal used deception to promote the adoption of RFG standards that would increase the potential market power of its undisclosed patent claims. First, the complaint describes a series of deceptive communications directed to CARB officials, including, most notably, Unocal's declaration that it had abandoned any proprietary rights to its RFG research. Compl. ¶ 41 (quoting Unocal's statement that it "now considers this data to be nonproprietary and available to CARB, environmental interest groups, other members of the petroleum industry, and the general public upon request"). Unocal represented that it was willing to release its proprietary rights in return for CARB's agreement to pursue the adoption of a "predictive model" that would significantly reduce the cost of complying with the RFG regulations. Compl. ¶¶ 39, 47, 48. Unocal made this statement after presenting research to CARB purportedly showing the emissions-reduction importance of controlling a fuel property known as T50 – the temperature at which 50 percent of a fuel sample evaporates when heated under certain standardized conditions. Compl. ¶ 37.

As a result of Unocal's representations, the complaint alleges, CARB adopted regulations incorporating a T50 specification and later amended the regulations to include a predictive model that has a T50 parameter. Compl. ¶¶ 43, 45, 47. When it took those actions, CARB was unaware that Unocal was prosecuting a patent application with the intention of collecting substantial royalties from refiners operating in compliance with the regulations and that the inclusion of T50 in the regulations and in the predictive model strengthened Unocal's potential market power. Compl. ¶¶ 42, 78.

The second way in which Unocal allegedly used deception to increase the market power of its patent position involved misrepresentations and misleading conduct directed at other private participants in the standard-setting process. In particular, the complaint alleges that Unocal made false and misleading statements to fellow members of the Auto/Oil Air Quality Improvement Research Group (Auto/Oil) and the Western States Petroleum Association (WSPA). *See* Compl. ¶¶ 50-59, 81-90. For example, when Unocal voluntarily shared its research results with Auto/Oil, it made no reservation of any proprietary rights and, in fact, declared that the research was in the "public domain." Compl. ¶¶ 54, 82. Similarly, Unocal participated in a WSPA study to estimate all of the costs that would be incurred to produce RFG in compliance with the new standards but withheld from the other participants highly relevant information – namely, its plans to charge a royalty on every gallon of RFG that it could bring within its patent claims. Compl. ¶¶ 58, 85, 87, 88.

Unocal's deception of Auto/Oil and WSPA participants prevented them from working to eliminate or reduce CARB's reliance on Unocal's proprietary research or taking other actions to stop Unocal from obtaining substantial market power. Compl. ¶ 90. In addition, by falsely representing that it was disclaiming any proprietary interest based on its emissions research, Unocal deprived refiners of the opportunity to consider whether to delay or abandon their refinery modification plans or to make design changes to improve their ability to avoid whatever patent claims might issue. *Id.*

In November 1991, CARB adopted the new RFG standards. Compl. ¶ 44. The public-private collaborative process continued, however, with work on the development of the predictive model. In June 1994, that process culminated in CARB's adoption of a mathematical model for determining compliance with the RFG standards. Compl. ¶¶ 47. During the course of

the predictive model effort, Unocal interacted regularly with CARB and fellow WSPA members, ostensibly working to develop a predictive model that would provide flexibility and reduce the cost of blending RFG meeting the new standards. Compl. ¶¶ 48, 78(c). At no time did Unocal disclose that it was pursuing and intended to enforce a patent that would undermine the stated goals of the predictive model effort – increasing flexibility and reducing costs. Compl. ¶ 48, 78(c), 83, 85-88.

2. Unocal's Exploitation of Its Market Power over the California Fuels Technology Market

As the public-private RFG collaborative effort drew to a close, the stage was set for the second phase of Unocal's scheme – the enhancement and exercise of the potential market power it had achieved through its manipulation of the CARB standard-setting process. By June 1994, when CARB incorporated the predictive model into the regulations, Unocal knew that its initial patent application had been allowed. In fact, Unocal knew long before then of favorable PTO action on its patent application. In July 1992, Unocal received notification that the PTO had approved most of its pending patent claims. Compl. ¶ 61. In February 1993, after its submission of various claim amendments, Unocal received notice of allowance of all its pending claims. Compl. ¶ 62.[3] Unocal disclosed none of these favorable actions.

Even after the patent's formal issuance in February 1994, Unocal chose to continue its silence. Not until it received inquiries in January 1995 from the presidents of Chevron and Texaco about its intentions did it publicly acknowledge that it had obtained, and planned to

[3] In June 1993, Unocal filed a "divisional application" with the PTO, which enabled it to pursue additional patents based on its emissions research. Compl. ¶ 63. Between March 1995 and November 1998, Unocal filed a series of four continuation and division patent applications, all of which claimed priority based on the December 1990 filing date of its original patent application. Complaint ¶¶ 66, 67. Unocal disclosed none of these applications, which ultimately resulted in the issuance of four patents directed to additional fuel compositions and methods of blending. These additional patents, which achieved greater coverage of the RFG standards, were all based on the same research that Unocal had told CARB and other industry members was in the public domain.

enforce, a patent. *See* Compl. ¶ 64. At that time, Unocal stressed the patent's market power, publicly stating that it "cover[ed] many of the possible fuel compositions that refiners would find practical to manufacture and still comply with the strict [CARB] Phase 2 requirements." Compl. ¶ 64.

When CARB adopted the new specifications in November 1991, it recognized that refiners would have to make substantial changes to their facilities. To provide sufficient lead time, CARB set March 1996 as the RFG compliance deadline. Refiners embarked on major plant modifications requiring the investment of billions of dollars. They did not know of Unocal's patent plans when they designed and began implementing their investment programs. Compl. ¶¶ 6, 59.

By the time that Unocal announced its intention to enforce its broad patent claims, refiners had already spent enormous sums. Making new modifications in response to the patent would have imposed substantial additional costs and prevented refiners from meeting the 1996 RFG effective date. Compl. ¶¶ 59, 92-93. Similarly, the complaint alleges, CARB could not then modify the regulations to provide significant blending flexibility to enable refiners to avoid the patent claims. Compl. ¶¶ 6, 94. Thus, only when the refining industry and CARB were irrevocably committed to specifications and plant modifications that dramatically increased the value of the patent did Unocal disclose and begin to exploit its carefully acquired market power.

After publicizing its patent and its own assessment of the market implications of the patent's coverage of the CARB standards, Unocal took additional action to exploit its market power. It has collected $91 million to date in royalties in patent litigation and is seeking hundreds of millions more. Compl. ¶¶ 9, 68-71 (describing *Union Oil Co. of Cal. v. Atlantic Richfield Co.,* 34 F.Supp. 2d 1208 (C.D. Cal. 1998) and *Union Oil Co. of Cal. v. Valero Energy*

Corp., No. 2:02cv593 (C.D. Cal.)). In addition, Unocal has entered into licensing agreements with eight companies. Although the terms of the agreements are confidential, Unocal has announced that they are based on a "'uniform' licensing schedule" ranging from 1.2 to 3.4 cents per gallon, depending on volume of gasoline produced under the license. Compl. ¶ 72.

The complaint alleges that CARB was an unwitting and unwilling participant in Unocal's monopolization scheme. Compl. ¶¶ 39-42. California's subsequent actions leave no doubt that Unocal's acquisition and exercise of market power conflicts with the state's goals. California has actively opposed Unocal's efforts to achieve an anticompetitive result that the state never intended.

In the *Atlantic Richfield Co. v. Union Oil Co. of Cal.* litigation, California (joined by 33 other States and the District of Columbia) urged the Supreme Court to review and reverse the Federal Circuit's decision upholding the district court's determination that Unocal's initial patent had not been shown to be invalid. California argued that Unocal had misused the standard-setting process to obtain monopoly power that the state had not intended to authorize, and that this "distort[ion] and abuse[ ]" of the CARB proceeding could serve as an unfortunate "model for similar mischief in a variety of important environmental and consumer protection contexts."[4] After the Supreme Court declined to review the Federal Circuit's decision,

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[4] *Amicus Curiae* Brief of [33 States] and the District of Columbia in Support of Pet. for Writ of Cert. at 1, *Arco v. Unocal*, No. 00-249 (U.S. 2000), *cert. denied*, 531 U.S. 1183 (2001). The Solicitor General, at the invitation of the Supreme Court, also filed an amicus brief expressing the views of the United States on whether the Court should review the Federal Circuit's decision. Although the Solicitor General expressed deep concerns about "possible misuse of the regulatory process," he counseled against granting certiorari because the Federal Circuit's decision raised only "narrow" patent law questions and thus did not "present an appropriate vehicle to address" those concerns. Brief of the United States as *Amicus Curiae* at 10, 19. *Arco v. Unocal*, No. 00-249. The Solicitor General also emphasized the availability of alternative "mechanisms" for remedying the problem, noting specifically that this Commission can "address 'gaming' of a regulatory system" to achieve market power. *Id.* at 20. The Solicitor General evidently saw no antitrust immunity or jurisdictional barrier to the Commission's "impos[ition of] non-patent remedies against parties who make affirmative misrepresentations to a public or private regulatory body involved in setting industry standards." *Id.* at 22.

California, acting through CARB, turned to this Commission, urging it to take enforcement action. In a letter to the Commission, CARB emphasized that, "[t]aken as a whole, Unocal's actions threatened the integrity of the rulemaking process" and adversely "affect[] not just the price of gasoline but also the trust that can be placed in future public-private collaborative efforts to set regulatory standards." Letter from Kenny, Executive Director, CARB, to Simons, Director, Bureau of Competition, FTC, of 7/12/01, at 1, 5.

B. The ALJ's Decision Dismissing the Complaint

In the Initial Decision, the ALJ identifies two distinct sets of claims against Unocal and gives separate rationales for dismissing each. The ALJ dismissed the first set of claims – that Unocal unlawfully restrained competition by deceiving CARB into adopting RFG standards with unintended anticompetitive implications and then taking additional actions to exploit those standards – on the ground that the FTC Act does not reach this conduct. He dismissed the second set of claims – that Unocal also restrained competition by deceiving, and affecting the business and investment decisions of, other private participants in the standard-setting process, independent of the influence that it achieved through manipulation of CARB – on the ground that administrative adjudication of such claims would encroach on the exclusive jurisdiction of federal district courts over actions arising under federal patent law.

We believe, for reasons articulated in complaint counsel's submissions below and previous decisions of this Commission, that the ALJ erred in disclaiming jurisdiction over the second set of claims.[5] This brief, however, does not address the jurisdictional argument. Instead,

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[5] *See In re American Cyanamid*, 63 F.T.C. 1747 (1963) (ruling that 28 U.S.C. § 1338(a) does not deprive the Commission of jurisdiction to adjudicate section 5 matters that implicate significant patent issues), *administrative jurisdiction upheld but decision vacated on other grounds*, 363 F.2d 757, 771 (6th Cir. 1967), *on rehearing*, 72 F.T.C. 623 (1967), *aff'd sub nom. Charles Pfizer & Co. v. FTC*, 401 F.2d 574 (6th Cir. 1968); *see also In re Schering-Plough Corp.*, No. 9297, slip op. at 35 (Dec. 8, 2003) ("If it were logically necessary to decide the

we focus on the novel, context-specific immunity issues raised by the ALJ's decision. In our view, his analysis of those issues improperly limits the reach of the FTC Act.

The ALJ determined that the *Noerr-Pennington* doctrine defeats antitrust claims based both on Unocal's deception of CARB and on its subsequent exploitation of the CARB standards to restrain competition in the fuels technology market. *See* Initial Dec. at 29-58. In analyzing Unocal's fraudulent conduct before CARB, the ALJ ruled that *Noerr* immunity applies notwithstanding the complaint's allegations that Unocal's misrepresentations had led CARB to adopt standards having unintended anticompetitive implications. *See* Initial Dec. at 2, 31-58 (discussing *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), and *United Mine Workers v. Pennington*, 381 U.S. 657 (1965)). Such misrepresentations are actionable, according to the ALJ, only if made to an agency "using an adjudicatory process." Initial Dec. at 33. Because the ALJ found that the RFG administrative process, taken as a whole, was more properly classified as quasi-legislative than quasi-adjudicatory, he concluded that Unocal's deception of CARB was *Noerr*-protected. Initial Dec. at 32-40.

In a separate application of petitioning immunity, the ALJ determined that *Noerr* also shields Unocal from liability for actions taken to exploit the unintended anticompetitive implications of the RFG standards. The ALJ acknowledged that those standards do not operate, of their own force, to restrain competition in the fuels technology market. Initial Dec. at 50. Rather, the antitrust injury at issue results from Unocal's separate efforts to enforce the patent rights that CARB had unwittingly enhanced. Initial Dec. at 21-22 (summarizing complaint ¶¶ 60-72). The ALJ also recognized that CARB neither foresaw nor intended to authorize Unocal's

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issue of patent validity in order to decide whether the agreements in issue here were reasonable, we would do so – regardless of the difficulties.").

efforts to restrain competition in the fuels technology market. *See* Initial Dec. at 46-47 ("the alleged anticompetitive scheme was undertaken, not by the state, but instead, by [Unocal]"). Nevertheless, the ALJ ruled that Unocal's post-petitioning efforts to exploit the RFG standards were sufficiently related to its antecedent petitioning conduct for *Noerr* immunity to shield both phases of its scheme.

According to the ALJ, it was "not solely private conduct – Respondent's enforcement of its valid patents – that caused the anticompetitive harm," but rather private conduct made possible by "valid governmental action" (specifically, by CARB's adoption of RFG "regulations that substantially overlap[ped with Unocal's] patents"). Initial Dec. at 50. That the RFG standards provided a necessary predicate for the anticompetitive patent-enforcement efforts was sufficient, in the ALJ's view, to expand Unocal's immunity under *Noerr* to shield not only its petitioning before CARB but also its exploitation of the market power that CARB unwittingly conferred.

SUMMARY OF THE ARGUMENT

The complaint in this case describes a novel and intricate scheme, carried out over more than a decade, to collect enormous monopoly profits that no government official has approved. Unocal stands accused of executing a carefully orchestrated plan to deceive state officials and competitors to accrue illicit market power in the fuels technology market. It is further accused of exploiting this market power to collect royalties from gasoline producers and, by extension, consumers under patents that derive their value from the effects of its fraudulent scheme. The ALJ excused Unocal from answering these charges, ruling that the *Noerr-Pennington* doctrine bars any federal antitrust review of Unocal's conduct.

The initial decision expands *Noerr* immunity, and correspondingly constricts antitrust enforcement, beyond all precedent or reasonable purpose. During the first phase of the

anticompetitive scheme described in the complaint, Unocal deceived California into adopting fuel specifications that vastly enhanced the power of Unocal's patents. This fraud was effectively undetectable, since Unocal exercised exclusive control over information concerning its patent application. The efficacy of the fraud is apparent on the face of the administrative decision that Unocal set out to influence, which clearly shows that California relied on Unocal's fraudulent misrepresentations in establishing the technical specifications of the RFG regulations – particularly a specification that substantially boosted the power of Unocal's patents.

The ALJ's ruling that *Noerr* protects this fraud subverts both the consumer interests that animate federal antitrust laws and the federalism concerns that provide the only plausible basis for withholding antitrust remedies for fraudulent petitioning of states. *Noerr* holds that a private party who merely advocates state action in restraint of competition cannot be held accountable for anticompetitive harms that flow directly from a state decision to impose the requested restraint. But, where a private party obtains a state restraint on competition through fraud on an administrative agency, it can reasonably be held accountable for resulting antitrust injury. The restraint in this circumstance is the party's own, not the government's. *See, e.g., Woods Exploration & Producing Co. v. Aluminum Co. of America*, 438 F.2d 1286 (5th Cir. 1971). Antitrust tribunals should not hesitate to make this attribution where the effect of the fraud is apparent on the administrative record, and there is no danger of unwanted federal scrutiny of state decision making. Moreover, the personal rights of the antitrust defendant are no obstacle in this situation, since the perpetrator of a fraud has no First Amendment claim to petitioning protection. *See MacDonald v. Smith*, 472 U.S. 479 (1985).

These principles require the denial of *Noerr* immunity for Unocal's conduct before CARB in this case. Unocal's deliberate misrepresentation of information to which only it had

access displaced California as the decision maker with respect to the adoption of technical standards that enhanced Unocal's power in the fuels technology market. It is apparent on the administrative record that the decision would have come out differently had Unocal told the truth. Legal proceedings to remedy antitrust injury caused by fraudulent petitioning of this character pose no threat to state interests. Indeed, California has strongly supported retention of an effective federal antitrust remedy for Unocal's fraud, both to reverse Unocal's subversion of the RFG process and to maintain antitrust liability as an essential check against similar fraud in future standard-setting efforts.

The second broad phase of the anticompetitive scheme alleged in the complaint involved Unocal's exploitation of the market power that California had unwittingly conferred. The antitrust injuries at issue in this case did not flow directly from the state action requested by Unocal's fraudulent petitioning. The harms arose only when Unocal undertook private actions to collect royalties on patents that had been transformed by its successful fraud on the state. The ALJ erred in treating Unocal's royalty-collection efforts as an extension of its petitioning conduct for purposes of *Noerr*. Even if Unocal's conduct before California regulators enjoyed protection under *Noerr,* that protection, as *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976), demonstrates, would not extend to Unocal's subsequent marketplace conduct to reap the rewards of its fraud on the state. Indeed, *Noerr* immunity for mere petitioning cannot be extended to insulate from antitrust scrutiny Unocal's overall anticompetitive scheme, which involved not only communications with CARB but a range of non-petitioning conduct as well.

Unocal's alternative contention, advanced in the briefing below, that its royalty collection efforts qualify as *Noerr*-protected petitioning activity in their own right also fails. Unocal has argued that its reliance, in part, on litigation and threats of litigation to collect royalties requires

that all of its efforts to collect royalties be regarded a *Noerr*-protected campaign to obtain federal court assistance. The Supreme Court's decision in *Walker Process Equipment, Inc. v. Food Mach. & Chem. Corp.*, 382 U.S. 172 (1965), demonstrates that *Noerr* does not immunize efforts to enforce a fraudulently procured patent, even in litigation. Unocal's efforts to enforce a fraudulently transformed patent deserve no greater protection. Here, as in *Walker Process,* an extension of *Noerr* immunity would eliminate any effective check on the misuse of patent rights for anticompetitive purposes that form no part of legitimate, congressionally sanctioned rewards for innovation.

In any event, Unocal's royalty-collection efforts have not been confined to litigation and threats of litigation. The complaint describes a wide-ranging anticompetitive scheme. That scheme includes royalty-collection efforts that clearly do not qualify as petitioning conduct, such as the execution of private licensing agreements. It also includes misrepresentations to private parties that could not conceivably be classified as *Noerr*-protected petitioning conduct. In addressing a wide-ranging anticompetitive scheme that includes both protected and unprotected elements, an antitrust tribunal may consider the entire scheme in determining liability and crafting an appropriate remedy. *See United States v. Singer Mfg. Co.,* 374 U.S. 174 (1963). In this case, conduct that lies beyond any plausible claim of immunity, considered in the context of the scheme as a whole, provides ample basis for a finding that Unocal violated section 5 of the FTC Act, and for the imposition of an appropriate remedy.

The initial decision, in short, subverts the interests of California and its consumers in the preservation of federal antitrust remedies for the conduct alleged here. The Commission should reject both aspects of the ALJ's unprecedented and unwarranted extension of *Noerr* immunity.

ARGUMENT

The ALJ's ruling that section 5 of the FTC Act reaches neither Unocal's fraudulent efforts to obtain RFG standards enhancing the potential market power of its undisclosed patent application, nor its subsequent exploitation of those standards for anticompetitive ends, reflects a fundamental misunderstanding of the origins and purposes of petitioning immunity. In the discussion that follows, we initially review the origins and contours of petitioning immunity, including its derivation from the federalism-based doctrine of state-action immunity. We then show that both aspects of the ALJ's immunity ruling – his determinations that antitrust law cannot reach either Unocal's fraudulent conduct before CARB or its overall scheme, including its non-petitioning conduct to enhance and exploit of the unintended anticompetitive implications of the RFG standards – extend petitioning immunity beyond existing precedent in a manner that subverts the fundamental purposes of the doctrine.

I. AS AN IMPLIED EXCLUSION FROM THE COVERAGE OF THE ANTITRUST LAWS, THE PETITIONING IMMUNITY DOCTRINE MUST BE CAREFULLY TAILORED TO CONFORM TO THE LIMITS OF ITS LEGITIMATE PURPOSES

The Supreme Court has recognized that the antitrust laws "are as important to the preservation of economic freedom ... as the Bill of Rights is to the protection of our fundamental civil freedoms." *United States v. Topco*, 405 U.S. 596, 610 (1972). Thus, the Court has stated that implied exclusions for private anticompetitive conduct are "disfavored, much as are repeals by implication." *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 636 (1992) (describing limits on state-action immunity).

While remaining faithful to that overriding principle, the Court has recognized that federalism concerns must be taken into account when construing the reach of federal antitrust laws. In *Parker v. Brown*, 317 U.S. 341 (1943), the Court explained that, under the "dual system

of government" created by our Constitution, "an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress." *Id.* at 351. It therefore declined to interpret the Sherman Act to reach restraints on competition imposed by states acting in their regulatory capacity. *Id.* As the Court later noted in *Noerr,* "where a restraint upon trade or monopolization is the result of valid governmental action, as opposed to private action, no violation of the [Sherman] Act can be made out." *Noerr,* 365 U.S. at 136.[6]

The authority of the states to take regulatory action that restrains competition carries with it the ability to authorize anticompetitive actions by private parties. Where private anticompetitive conduct is "truly the product of state regulation," state-action immunity attaches to it. *Patrick v. Burget*, 486 U.S. 94, 100 (1988). At the same time, however, the Supreme Court has recognized that society as a whole – and consumers in particular – would pay an unacceptable price if federalism principles could be invoked to shield anticompetitive conduct of a fundamentally private character from antitrust liability at the expense of the familiar and substantial . . . "federal interest in enforcing the national policy in favor of competition." *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 110 (1980). Accordingly, the Court has held that, in order for privately implemented restraints on competition to receive state-action protection, "the challenged restraint must be one clearly articulated and affirmatively expressed as state policy," and "the policy must be actively supervised by the State itself." *Ticor Title,* 504 U.S. at 636 (internal quotation marks omitted).

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[6] Complaint Counsel has argued that immunity from antitrust enforcement under the FTC Act is narrower, in some respects, than immunity under the Sherman Act. *See* Complaint Counsel's Sur-Reply Memorandum in Opposition to Union Oil Company of California's Motion for Dismissal of Complaint Based upon *Noerr-Pennington* Immunity at 26-30 (Sept. 26, 2003) (FTC Sur-Reply); *see also Ticor*, 504 U.S. at 634 (identifying without resolving the possibility that the coverage of "the antitrust statutes can be distinguished" based on differences in their substantive proscriptions and enforcement mechanisms). We argue that, even under general Sherman Act principles, petitioning immunity cannot protect Unocal from antitrust liability for the conduct alleged in the complaint.

The determination that the antitrust laws leave states free to regulate in restraint of competition implies that they also leave private parties free to request that states exercise this regulatory authority. The Court initially identified this implication of state-action immunity in *Noerr*, stating that the "whole concept of representation depends upon the ability of the people to make their wishes known to their representatives." 365 U.S. at 137. After all, the Court noted, a system of rules preserving the power of state governments to restrain competition while prohibiting private parties from "inform[ing] the government of their wishes" would regulate "political activity" rather than "business activity." *Id.* Finding no indication that the Sherman Act was intended to operate in that manner, the Court ruled that "mere solicitation of governmental action with respect to the passage and enforcement of laws" cannot serve as the basis for antitrust liability. *Id.* The doctrine of petitioning immunity, as the Court has more recently explained, was originally conceived as a "corollary to *Parker*" immunity for state-imposed restraints on competition. *City of Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 365, 379-80 (1991). The doctrine thus provides that "federal antitrust laws also do not regulate the conduct of private individuals in seeking anticompetitive action from the government." *Id.* at 380.[7]

The scope of petitioning immunity is determined in part by the First Amendment. The "right to petition," as the Court observed in *Noerr,* "is one of the freedoms guaranteed by the bill of rights, and we cannot . . . lightly impute to Congress an intent to invade these freedoms." 365 U.S. at 138 (1961). As the Court explained in *Omni*, it would be "peculiar in a democracy, and

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[7] Although originally recognized in the context of efforts to influence state regulation, the Court later extended the doctrine to cover petitioning of federal authorities. *See United Mine Workers of America v. Pennington*, 381 U.S. 657, 670 (1965) (union's requests for assistance from the United States Secretary of Labor and the Tennessee Valley Authority not actionable under the Sherman Act, even if intended to cause competitive harm to nonunion mine operators).

perhaps in derogation of the constitutional right 'to petition the government for a redress of grievances,' U.S. Const. Amdt. 1, [for federal law] to establish a category of lawful state action that citizens are not permitted to urge." 499 U.S. at 379.

But the right to petition does not preclude civil liability for willfully deceitful communications with the government. *See MacDonald v. Smith*, 472 U.S. 479, 483 (1985) (First Amendment right to petition does not confer immunity from claims that false statements to government officials defamed nominee for public office; false accusations concerning nominee analogized to the prosecution of "baseless litigation"). "However broad the First Amendment right to petition may be, it cannot be stretched to cover petitions based on known falsehoods." *Whelan v. Abell*, 48 F.3d 1247, 1255 (D.C. Cir. 1995).[8]

The complaint in this case accuses Unocal of resorting to deliberate deceit to obtain the government's unwitting assistance for its scheme to restrain competition. Such deliberate deceit is clearly beyond the protection of the First Amendment. Thus, any immunity from accountability under the antitrust laws that Unocal could claim for this conduct must be justified based on federalism concerns – that is, on the states' interests in avoiding federal antitrust-related interference with their continued administration of "their own laws for the protection and advancement of their people." *Ticor*, 504 U.S. at 632. Those concerns do not here support *Noerr* immunity but instead favor the application of the federal antitrust laws to protect the integrity of state administrative processes.

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[8] *See also Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731 (1983) ("Just as false statements are not immunized by the First Amendment right to freedom of speech, . . . baseless litigation is not immunized by the First Amendment right to petition."); *see also Clipper Exxpress v. Rocky Mtn. Motor Tariff Bureau, Inc.*, 690 F.2d 1240, 1261 (9th Cir. 1982) ("There is no first amendment protection for furnishing with predatory intent false information to an administrative or adjudicatory body."); *compare Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 19-20 (1990) (First Amendment does not preclude liability for statements that "reasonably impl[y] false and defamatory facts regarding public figures or officials, such statements were made with knowledge of their false implications or with reckless disregard of those individuals must show that truth").

II. PETITIONING IMMUNITY DOES NOT PROTECT UNOCAL FROM LIABILITY FOR ANTITRUST HARM THAT WAS UNMISTAKABLY CAUSED BY ITS DELIBERATE, UNDETECTABLE MISREPRESENTATIONS TO CARB

The ALJ's initial decision focuses primarily on one component of the anticompetitive scheme described in the complaint – Unocal's manipulation of the CARB decision-making process by falsely representing that it claimed no proprietary interest in fuel technologies that it was promoting. Petitioning immunity for this aspect of Unocal's anticompetitive conduct, even if properly available, would not dispose of the wider scheme alleged in the complaint, as explained in Part III below. As a threshold matter, however, the ALJ's decision cannot stand even if the broader context is disregarded and Unocal's fraudulent misrepresentations to CARB are considered in isolation. Those misrepresentations, standing alone, are actionable under the antitrust laws.

The Supreme Court has stated that a variety of "illegal and reprehensible practice[s] [can] corrupt the administrative or judicial process" in ways that "result in antitrust violations." *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 513 (1972); *see id.* at 517 (Stewart, J., concurring in the judgment). Misrepresentations, the Court explained, "are not immunized when used in the adjudicatory process," even if "condoned in the political arena." *Id.* at 513. In *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492 (1988), the Court revisited the question of petitioning immunity for abuse of governmental processes. It there confirmed that, "in less political arenas" than the publicity campaign involved in *Noerr*, "unethical and deceptive practices can constitute abuses of administrative or judicial process that may result in antitrust violations." *Id.* at 500 (citing *California Motor Transp.* with approval) (footnote omitted).

More recently, in *Professional Real Estate Investors, Inc. v. Columbia*, 508 U.S. 49 (1993) (*PREI*), the Court considered petitioning immunity in the context of a claim that certain

copyright infringement litigation had been a "sham," brought solely to interfere with lawful competition, and that the prosecution of such sham litigation was actionable under the antitrust laws. *Id.* at 51-52. The Court held that the filing of a lawsuit is not actionable under a sham exception to *Noerr* unless the suit is "objectively baseless" and brought in bad faith to injure competition through operation of the litigation process. Id. at 65. It declined, however, to delineate further the extent to which deliberate misrepresentations before agencies or courts are actionable under the antitrust laws. Rather, the Court referred to *California Motor Transport's* "surveying [of] the 'forms of illegal and reprehensible practice which may corrupt the administrative or judicial processes and which may result in antitrust violations,'" but then specifically reserved the question "whether and, if so, to what extent *Noerr* permits the imposition of antitrust liability for a litigant's fraud or other misrepresentations." *Id.* at 61 n.6 (quoting *California Motor Transp.*, 404 U.S. at 513, and citing *Walker Process* 382 U.S. 172).[9]

Thus, for the present, the Supreme Court has left to lower tribunals the task of determining the contours of the rule for misrepresentations to administrative agencies. Those tribunals must perform that task, mindful of *Walker Process's* continued vitality and *Allied Tube's* general instruction that the scope of petitioning immunity depends upon "the context and nature of the activity" at issue. 486 U.S. at 499. In the briefing below, Complaint Counsel showed that the "context and nature" of the fraudulent conduct alleged here disfavor petitioning immunity. A closer examination of Unocal's misrepresentations concerning the consequences of regulating T50 strongly reinforces this point. On the facts as alleged, Unocal's misrepresentations in that

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[9] *See also Kottle v. Northwest Kidney Centers,* 146 F.3d 1046, 1060-62 (9th Cir. 1998) (noting that *PREI's* clarification of the sham exception to *Noerr* immunity did not affect *Walker Process* as a separate limitation); *USS-POSCO Indus. v. Contra Costa County Building & Constr. Trades Council, AFL-CIO* , 31 F.3d 800, 810 (9th Cir. 1994) (rejecting claim that *PREI* "effectively overrules *California Motor Transport,*" which *PREI* cited with approval while acknowledging that "the cases dealt with different questions").

regard were unquestionably essential to CARB's decision to include T50 in the RFG standards and in the predictive model. Neither precedent nor the principles underlying *Noerr* support the extension of petitioning immunity to deliberate misrepresentations that can clearly be shown, without undue intrusion by an antitrust tribunal into the relevant state decision-making process, to have caused a state unwittingly to take action that harms competition.

A. *Noerr* Immunity Protects Private Participation in, Not Private Usurpation of, Governmental Decision-Making

Noerr, as we have seen, drew upon *Parker*'s distinction between private and governmental decisions to restrain trade. The Sherman Act, *Noerr* stated, "forbids only those trade restraints and monopolizations that are created, or attempted, by the acts of 'individuals or combinations of individuals or corporations." 365 U.S. at 135. Where, on the other hand, "a restraint upon trade or monopolization is the result of valid governmental action, as opposed to private action, no violation of the Act can be made out." *Id.* at 36. The imposition of liability for "mere solicitation of governmental action," the Court reasoned, would violate established understandings of responsibility for government action: "under our form of government the question whether a law [restraining competition] should pass, or if passed be enforced, is the responsibility of the appropriate legislative or executive branch of government . . . ." *Id.* at 13; *see id.* & n.17.

In a case where a state acts directly to restrain trade and the relevant private conduct is limited to "mere solicitation of governmental action," *Noerr* identifies the governmental action as the cause of the restraint and denies Sherman Act coverage. *Id.* at 138. By contrast, where a private party effectively *controls* the outcome of a regulatory decision by perpetrating a fraud on a public decision maker – that is, where a private party uses an instrumentality of government as an unwitting victim and tool – the rationale for immunity under *Noerr* has no application. There

is, in this circumstance, no "political" decision to which an antitrust tribunal owes deference; there is only the will of the perpetrator of the fraud, imposed on the process. The private party, not the government, bears responsibility for the harm to competition, and private action is the relevant focus of antitrust analysis.

1. *Walker Process* and Related Cases Withhold *Noerr* Immunity from Private Parties Who Usurp Governmental Power

Private parties' fraudulent misrepresentations to public decision makers who rely on the truthfulness of the information received can usurp governmental decision making and eliminate any basis for *Noerr* immunity. *Walker Process,* 382 U.S. 172, is illustrative. There, the defendant in a patent infringement action filed an antitrust counterclaim, alleging competitive harm arising out of the bad faith prosecution and enforcement of a groundless patent. The Supreme Court held that proof that the patent holder had obtained its patent "by knowingly and willfully misrepresenting facts to the Patent Office .... would be sufficient to strip [the patent holder] of its exemption from the antitrust laws" for antitrust injuries resulting from "the patent's enforcement." *Id.* at 177-78.[10]

The Supreme Court also examined the question of antitrust liability for petitioning abuses that distort governmental decision making in *California Motor Transport.* There, the Court found that *Noerr* did not protect a conspiracy to file unsupported administrative and judicial challenges in order to deny potential competitors effective access to those tribunals. Such a conspiracy, the Court found, would effectively "usurp" the tribunals' decision-making processes. *Id.* at 512 (emphasis supplied); *see id.* at 511 (conspirators allegedly "became the regulators of

[10] *See also Nobelpharma AB v. Implant Innovations, Inc.,* 141 F.3d 1059, 1068-72 (Fed. Cir. 1998) (*Walker Process* claim based on the invalidity of patent procured by fraud is distinct from claim that infringement litigation was actionable "sham" of the type recognized in *PREI*).

the grants of rights, transfers, and registrations to [the plaintiffs]") (citation omitted).[11] This analysis, like the analysis in *Walker Process*, supports the imposition of antitrust liability where a party, acting in bad faith, has effectively exercised control over a critical aspect of the decision-making process.

Lower courts have also denied *Noerr* immunity to fraudulent misrepresentations that result in anticompetitive governmental action. In *Woods Exploration & Production Co. v. Aluminum Co. of America*, 438 F.2d 1286 (1971), the Fifth Circuit denied *Noerr* protection to defendants who willfully filed false information on which state regulators of natural gas production relied in issuing an order that restrained competition. Under these circumstances, the court of appeals stated, "the Commission [was not] *the real decision maker*," and *Noerr* provided no protection against antitrust liability. *Id.* at 1295 (emphasis added); *see Cheminor Drugs, Ltd. v. Ethyl Corp.*, 168 F.3d 119, 124 (3d Cir. 1999) (stating that "a *material* misrepresentation that affects the very core of a litigant's . . . case will preclude *Noerr-Pennington* immunity").[12]

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[11] The Supreme Court has interpreted the holding of *California Motor Transp.* narrowly, limiting it to situations in which the "conspirators' participation in the governmental process was itself claimed to be a 'sham.'" *Omni*, 499 U.S. at 381-82; *see id.* at 380 (describing *California Motor Transp.* as the "classic example . . . of frivolous objections to the license application of a competitor, with no expectation of achieving denial of the license but simply in order to impose expense and delay"). This narrow construction was not based on any notion that such conspiracies to deny access should be protected, but on a concern that recognition of an access-denial exception to *Noerr* could entangle antitrust tribunals in excessive regulation of the political process. *See id.* at 382. In section II.A.2, *infra,* we explain why that concern is not applicable here.

[12] *See also Potters Med. Ctr. v. City Hosp. Ass'n*, 800 F.2d 568, 580-81 (6th Cir.1986) (stating that "knowing and willful submission of false facts to a government agency falls within the sham exception," but finding no factual support for claim of willfulness); *Clipper Exxpress v. Rocky Mtn. Motor Tariff Bureau, Inc.*, 690 F.2d 1240, 1259-63 (9th Cir. 1982); *Israel v. Baxter Labs., Inc.*, 466 F.2d 272, 278 (D.C. Cir.1972) ("No actions which impair the fair and impartial functioning of an administrative agency should be able to hide behind the cloak of an antitrust exemption"; reversing dismissal of complaint alleging misrepresentation and other improper interference with FDA drug-approval process); *DeLoach v. Phillip Morris Cos.*, 2001 U.S. Dist. LEXIS 16909, *44 (M.D.N.C. 2001) (USDA "relied on [defendants'] truthfulness"; it "did not and, in fact, could not" verify the truth, "since [defendants'] production needs are confidential, closely guarded information").

Armstrong Surgical Ctr. v. Armstrong Cty. Mem. Hosp., 185 F.3d 154 , 163, 164 & n.8 (3d Cir. 1999), is not to the contrary. There the Third Circuit distinguished *Walker Process*, reasoning that the Patent Office "effectively and necessarily delegates to the applicant the factual determinations underlying the issuance of a patent," whereas the state decision makers in *Armstrong* were able to identify a factual dispute and assess the credibility of conflicting representations. Thus, as the FTC observed in its brief opposing certiorari in *Armstrong*,

One prominent treatise has summarized the point this way:

> There certainly is no privilege for misrepresentations to administrative agencies that base their decisions on information provided by the parties. Moreover, there is no reason here to differentiate for these purposes between adjudication and rule making or between rules grounded exclusively in a hearing record and those grounded in less formal procedures.

1 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶ 203 at 169 (2d ed. 2000) (citing *Woods Exploration*).[13] Under the reasoning of these authorities, which is rooted in the logic of *Noerr* itself, where fraudulent misrepresentations result in the effective usurpation of governmental authority by private actors, resulting restraints on competition are treated as private rather than public acts.

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the antitrust plaintiff in that case was "not well placed to argue . . . that respondents effectively 'usurp[ed]' the legitimate public decision-making process." Brief for the United States and the Federal Trade Commission as *Amici Curiae* 20, *Armstrong Surgical Ctr. v. Armstrong Cty. Mem. Hosp.*, No. 99-905 (U.S. 2000) (quoting *California Motor Transp.*, 404 U.S. at 512).

[13] Professor Floyd makes a similar point in his study of *Noerr* immunity in relation to fraudulently obtained government action, observing that

> [T]o the extent that *Noerr* immunity is accorded to private petitioning as a 'corollary' to the immunity normally accorded to the effects of the completed governmental action that the petitioning seeks, the rationale for protection is significantly undermined where the governmental action in question has been induced by intentional misrepresentations, and therefore does not represent a deliberate determination of governmental policy.

and that

> Where private parties have subverted governmental action by their deliberate fraud, it ignores reality to assert that only a valid expression of governmental policy, rather than the antecedent private action, is the source of the anticompetitive effects at issue.

C. Douglas Floyd, *Antitrust Immunity for the Anticompetitive Effects of Government Action Induced by Fraud*, 69 Antitrust L. J. 403, 415 (2001) (footnote omitted).

2. *Omni's* Concerns That Antitrust Liability for Wrongful Petitioning Could Lead to the Deconstruction of State Decision-Making Processes Are Not Implicated Where the Basis for the Government's Decision Is Apparent

Where the adjudication of antitrust claims would require federal tribunals to deconstruct state decision-making processes, federalism concerns weigh in favor of immunity. That is the teaching of *Omni*, 499 U.S. 365. There, the Court noted that, to determine whether private billboard companies had conspired with members of a city council to restrain competition, an antitrust tribunal would be required to "look behind the actions of state sovereigns" in a manner that would raise significant federalism concerns. *Id.* at 379. In light of those concerns, the Court ruled that *Noerr* protected the private lobbying activity, reasoning that it would be "impracticable or beyond that scope [of antitrust laws] to identify and invalidate lobbying that has produced selfishly motivated agreement with public officials." *Id.* at 383; *see id.* at 377 (rejecting proposed conspiracy exception to *Parker* immunity for state decision makers; reasoning that this "would require the sort of deconstruction of the governmental process and probing of the official 'intent' that we have consistently sought to avoid").

Omni's concern that antitrust tribunals avoid "deconstruction of the governmental process" is consistent with earlier references to the distinction, under *Noerr*, between misrepresentations in political and non-political decision making processes. *See Allied Tube*, 486 U.S. at 500 (citing *California Motor Transport*). In political contexts, "usurpation" cannot be established without intrusive inquiries into the effect of the misrepresentation or other corrupt conduct. *Omni* involved a polar extreme: the legislative process, where it is almost never possible to determine, without probing the minds of the legislators, whether misconduct or misrepresentation changed the result. By contrast, where governmental action is accompanied by a formal statement of reasons, setting forth the legal basis for the action taken, the effect of a

misrepresentation can often be determined without an inquiry into the subjective impressions of decision makers. "Non-political" or "quasi-adjudicatory" processes generally provide such statements of reasons and, accordingly, more often allow determinations of the effects of misrepresentations without undue intrusion into state processes. As discussed in the following section, CARB's decision on the administrative record to regulate T50 requires no subjective deconstruction, and the concerns articulated in *Omni* are not present.

It should also be noted that the State, in this case, has supported the preservation of a federal antitrust remedy for usurpation of its administrative process. A similar situation arose in *Ticor*, where the Court addressed the scope of the active supervision element of the *Midcal* test of state-action. The dissenters in *Ticor* objected to the majority's application of a rigorous active supervision standard, arguing that application of this test would "necessarily put[ ] the federal court[s] in the position of determining the efficacy of a particular State's regulatory scheme, in order to determine whether the State has met the requisite level of active supervision" *Ticor*, 504 U.S. at 645 (Rehnquist, C.J., dissenting) (internal quotation marks omitted). The majority acknowledged this point but found compelling countervailing benefits to states. *Id.* at 637. Citing the views expressed by state *amici curiae*, the Court stated that:

> If the States must act in the shadow of state-action immunity whenever they enter the realm of economic regulation, then our doctrine will impede their freedom of action, not advance it. ... By adhering in most cases to fundamental and accepted assumptions about the benefits of competition within the framework of the antitrust laws, we increase the States' regulatory flexibility

Id. at 636.

Here, as in *Ticor*, state preferences concerning the value of antitrust liability, notwithstanding the potential for federal antitrust scrutiny of its decision-making processes,

should be considered.[14] There is no benefit from a rule that forces states either to suffer fraudulent monopolization or to protect themselves by subjecting their administrative proceedings to full judicial fact-finding and on-the-record investigatory procedures. California should be permitted to rely on the protection of the federal antitrust laws if that is its preference.

3. Where Outcome-Determinative Usurpation of an Administrative Decision-Making Process Can Be Conclusively Determined on the Administrative Record, Application of *Noerr* Immunity Would Undermine the State's Interests

The allegations of the complaint, together with reasonable inferences drawn therefrom, make out a claim that Unocal effectively usurped the CARB decision-making process with respect to T50. Unocal's misrepresentations about the non-proprietary nature of its research concerning the relationship between T50 and tailpipe emissions provided the justification for CARB's decision to include that property as a controlled parameter in the regulations. CARB could not legally have regulated T50 without the technical evidentiary support that Unocal provided. CARB cited no other research satisfying the legal requirement that it have an evidentiary basis for incorporating a particular fuel parameter in its RFG standards. In fact, CARB's reliance on Unocal's research is plain on the face of the administrative record. In its Final Statement of Reasons for Rulemaking, CARB stated: "Unocal has evaluated the effects of T50, and it is the results from this study that form the basis for the T50 specification."[15]

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[14] *See also Clipper Exxpress*, 690 F.2d at 1262 & n.34 (noting the ICC's argument that misrepresentations given immunity could go undetected); *Litton Sys. v. AT&T*, 487 F. Supp. 942, 956 (S.D.N.Y. 1980) (finding that federal administrative supervision "is not undercut but is complemented and reinforced by affording judicial relief for cynical evasion and corruption of that system for unfair competitive advantage"), *aff'd,* 700 F.2d 785 (2d Cir. 1983).

[15] CARB Final Stmt. of Reasons at 69 (issued Nov. 1992). The Statement of Reasons was introduced below as Appendix D to Unocal's motion to dismiss on *Noerr* immunity grounds. The Initial Decision includes a statement of the ALJ's rationale for taking official notice of this document. Initial Dec. at 10.

Moreover, CARB could not properly have included T50 in the fuel standards or the predictive model had it known that doing so would subject Unocal's competitors and California consumers to unknown royalty costs under a pending patent. California law required CARB to take action to meet specified emissions-reduction targets using "the most cost-effective combination of control measures." Cal. Health & Safety Code §43018(c) (West 1996); *See id.* §§ 43013(a), (e) (requiring findings of cost-effectiveness). CARB also would have been required to justify its adoption of standards that could be expected to give one refiner such enormous potential leverage over the rest of the industry. See Cal. Gov't Code § 11346.4(a) (West 1992). Thus, had it been informed that Unocal was pursuing RFG patent rights for financial gain, CARB would have had to reach an acceptable resolution of the potential royalty and competitive balance implications or take some other action to avoid conferring a potentially crippling patent monopoly. Adopting standards that set the stage for potentially unlimited royalties would not have been an authorized "cost effective" option, much less a rational one.

It is also apparent that nothing in the regulatory process allowed CARB or other participants independently to ferret out or counter misrepresentations about patent rights. Information about Unocal's pending patent was confidential and inherently undetectable. *See* Complaint ¶¶ 17, 18, 27, 43, 45, 48, 80, 94.

These features of the CARB process for setting the RFG standards establish that Unocal's misrepresentation regarding its proprietary rights was outcome-determinative. CARB's decision to regulate T50 was not "political" in the *Noerr* sense because the legal basis for the decision is ascertainable from the face of the administrative record, much as a judicial opinion reflects the court's basis for decision. That record shows, as California has repeatedly emphasized, that the state was not the real decision maker with regard to the use of T50 in the RFG standards. It

would never have made such a decision had it known the truth. Before the Supreme Court, California vigorously complained that Unocal had "commandeered," "hijack[ed]," and "plunder[ed]" the state's regulatory process. *See Amici Curiae* Brief of [33 States] and the District of Columbia at 4, 5 *Arco v. Unocal* (No. 00-249). California has thus made clear its belief that Unocal, through deception, had arrogated to itself the role of regulatory decision-maker.

Like courts, administrative agencies are typically obliged to issue reasoned decisions complying with legal constraints and to base their orders on determinative facts submitted by private parties. Moreover, like courts, they often cannot independently investigate certain facts. Regardless of whether a court or an administrative agency is involved, such circumstances permit an antitrust tribunal to conduct a straightforward, objective analysis of whether a misrepresentation determined the outcome. *See, e.g., Woods Exploration,* 438 F.2d at 1295 (agency's order "rested on false facts adduced by defendants"). Moreover, when an agency has expressly stated the basis for its decision, there is no concern that the denial of *Noerr* immunity will lead to an improper "deconstruction" of state decision-making processes by a federal antitrust tribunal. The legal constraints on CARB and the administrative record are effectively part of the decision itself, and do not require a subjective "deconstruction."

B. In Ruling That CARB's Process Was Legislative in Character, the ALJ Incorrectly Assessed CARB's Actions at a Level of Generality Unrelated to the Harm to Competition

In the ALJ's view, the applicability of *Noerr* immunity to Unocal's misrepresentations depended on the character of the administrative decision-making process. The ALJ quoted *PREI*'s reference to the difference between potentially actionable "'unethical conduct in the adjudicatory process'" and "'misrepresentations, condoned in the political arena,'" and surveyed lower court decisions applying that distinction. Initial Dec. at 32-34 (quoting *PREI,* 508 U.S. at

61 n.6). Based on this review, the ALJ determined that the issue of *Noerr* immunity turned on whether the CARB process, viewed as a whole, was more accurately characterized as "quasi-legislative" or "quasi-adjudicatory." Initial Dec. at 34.

This approach does not make sense when assessing *Noerr's* applicability to deliberate misrepresentations made to an administrative agency that has broad responsibilities and that performs diverse functions, both as a general matter and within the context of a particular proceeding. In the case of such agencies, the *Noerr* inquiry properly focuses on the nature of the misrepresentation, the issue to which it was directed, its effect on the agency's disposition of that issue (as reflected on the administrative record), and the ability of the agency or other participants in the process to correct the misrepresentation. The breadth and character of the agency's responsibilities and functions shed little light on those issues.

In *Woods Exploration*, for example, the Fifth Circuit looked to the effect that particular misrepresentations had on specific decisions by state regulators of natural gas production. The state regulators exercised significant discretion. Although they were charged with predicting natural gas demand to set production limits, they were not bound by any statutorily prescribed forecasting procedure. The regulators usually relied on privately submitted forecasts, aggregated using an agency-prescribed formula. But they were also "empowered to consider other factors" if they disagreed with the aggregate forecasts of demand that this method produced. 438 F.2d at 1292. In determining that *Noerr* did not shield the submission of false forecasts, the court focused on how the defendants' misrepresentations affected a particular order. *Id.* at 1297. The general nature of the agency and the character of its regulatory processes as a whole were not relevant to the inquiry.

The same approach should pertain here. The issue is not whether CARB was engaged in setting general standards, or whether CARB exercised policy-making discretion with respect to certain decisions. The nature of CARB's RFG proceeding is relevant, as *Woods Exploration* and the logic of the *Noerr* doctrine indicate, only insofar as it illuminates the particular decision that was affected by Unocal's deception. The question is whether Unocal's misrepresentations respecting the proprietary nature of its research resulted (and can be reliably shown on the record to have resulted) in CARB's decision to control T50.

The ALJ's abstract administrative law analysis of the general nature of the CARB decision-making process expands *Noerr* beyond any realistic account of the doctrine's relevance. CARB has many different functions and engages in many different activities. It employs technical experts as well as appointed board members and exercises broad authority to set air quality standards. CARB issues standards covering stationary sources (such as factories and power plants), mobile sources (such as automobiles and lawnmowers), and fuels. A single proceeding can require CARB to make numerous decisions on a wide range of procedural and substantive issues. Depending on the issue, these decisions were no doubt subject to a variety of procedures and limitations. CARB's decision to regulate T50, however, was clearly subject to significant constraints – particularly the obligation to achieve emissions reduction targets in a manner that was cost effective and took account of potential adverse effects on business enterprises. In light of those constraints, CARB *could not* have decided to incorporate T50 in the standards in the absence of Unocal's misrepresentation.

More fundamental, the initial decision fails to acknowledge CARB's necessary dependence on the truthfulness of Unocal's assurance that it claimed no proprietary rights in its T50 research. The ALJ analyzed the CARB proceeding as a whole, without regard to the effects

of the particular misrepresentations alleged in the complaint, concluding that CARB was engaged in a "policy making exercise." Initial Dec. at 41. The ALJ noted that CARB had conducted an "independent cost analysis" and received comments pertaining to RFG standards from "51 entities." Initial Dec. at 43. Based on these considerations, the ALJ determined that "CARB was not wholly dependent on [Unocal] in its rulemaking proceeding," and that "*Noerr-Pennington* applies." Initial Dec. at 43. But that reasoning fails to recognize that only Unocal could know whether it was pursuing proprietary rights. The ALJ thus illogically concluded that, because Unocal was not the only participant in the process, CARB was not dependent on it for information to which no one else had access.

III. THE ALJ MISAPPLIED *NOERR* TO SHIELD UNOCAL FROM LIABILITY FOR A MULTIFACETED ANTICOMPETITIVE SCHEME THAT INCLUDED SUBSTANTIAL NON-PETITIONING CONDUCT

The initial decision's unwarranted expansion of *Noerr* immunity was not limited to its protection of the fraudulent misrepresentations by which Unocal exercised effective control over a critical aspect of the RFG standards. The ALJ also invoked *Noerr* to shield Unocal from antitrust liability for its overall scheme, including efforts undertaken outside of the CARB arena, to exploit the RFG standards' unintended anticompetitive implications. This second extension of *Noerr,* like the first, is inconsistent with the purposes of the petitioning immunity doctrine and unsupported by the cases that have applied it.

A. *Noerr* Protection Does Not Shield Unocal's Exploitation of the RFG Standards

The antitrust harms described in the complaint did not flow directly from CARB's adoption of the RFG standards. The complaint specifically alleges that "Unocal's enforcement of its patent rights is the proximate cause of substantial competitive harm and consumer injury." Complaint ¶ 95; *see id.* ¶¶ 42-43, 48-49, 98. Indeed, under the facts as alleged, there was no

harm to competition until Unocal took affirmative steps to exploit the RFG standards. If not for Unocal's private efforts to collect royalties on the patents that CARB had unwittingly enhanced, adoption of the RFG standards would not have produced the anticompetitive harm that the complaint seeks to redress.

The ALJ determined, however, that antitrust harms arising out of the exploitation of the RFG standards through the collection of patent royalties from RFG producers are not properly attributable to Unocal. Notwithstanding his acknowledgement that the "alleged anticompetitive scheme was undertaken, not by the state, but instead by [Unocal]," Initial Dec. at 47, the ALJ ruled that California's role in facilitating this restraint on competition was sufficient to relieve Unocal of responsibility. In the ALJ's view, because the anticompetitive harm was not caused "solely [by] private conduct," it must be treated as the "result of valid government action [to which] *Noerr-Pennington* applies." Initial Dec. at 50. This extension of *Noerr* to cover post-petitioning anticompetitive conduct on the ground that was nominally authorized by the petitioned-for governmental action conflicts with established principles of antitrust immunity.

1. *Noerr* Does Not Shield Non-Petitioning Conduct

Antitrust law does not impose liability on private parties for anticompetitive harms caused by governmental decisions to restrain competition. Thus, a private party who successfully petitions for state regulatory action cannot incur antitrust liability for competitive harms that the requested action causes, whether directly through state-administered restraints on competition (*see, e.g., Pennington*, 381 U.S. at 671), or indirectly through clear authorization and adequate supervision of privately administered restraints (*see, e.g., Patrick*, 486 U.S. at 100).[16]

[16] *See also, e.g., Sessions Tank Liners, Inc. v. Joor Mfg., Inc.*, 17 F.3d 295, 299 (9th Cir. 1994) (finding immunity from antitrust liability where "injuries for which [the plaintiff] seeks recovery flowed directly from government action"); *see generally* Areeda & Hovenkamp, *Antitrust Law* ¶ 229 at 519 ("[T]he private party is

The act of petitioning, however, does not automatically confer immunity for all that follows. Where petitioning fails to elicit state action of the sort required to immunize private conduct in restraint of competition, immunity for the act of petitioning does not confer a license to engage in anticompetitive conduct in the marketplace.

That *Noerr* immunity shields only petitioning conduct, and not a multi-faceted scheme involving non-petitioning conduct, is evident from decisions denying state-action immunity for private anticompetitive conduct. In *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976), a utility sought authorization from state regulators to provide free light bulbs to its customers – an arrangement that allegedly allowed the company to use its state-approved monopoly in the market for electric power to compete on unfair terms in the market for light bulbs. Although Detroit Edison's request for authorization to distribute light bulbs was undoubtedly protected under *Noerr*, its subsequent distribution of light bulbs, under nominal authority of its state approved rate schedule, was not protected. The Court specifically rejected the utility's contention that *Noerr* also shielded its post-petitioning marketplace conduct, stating that *Noerr* "did not involve any question of either liability or exemption for private action taken in compliance with state law." 428 U.S. at 601.

Four years after its decision in *Cantor*, the Court adopted the clear articulation and active supervision test in *Midcal, supra.* Decisions of the courts of appeals and this Commission applying that test provide further illustrations of the principle that petitioning for state authorization to restrain competition cannot, in itself, immunize subsequent anticompetitive

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immune where government is the key deciding force and either approves with intent to displace antitrust law or compels the challenged action. The private party is not immune where the operative restraint results from its own private action inadequately supervised by the government pursuant to a policy to displace the antitrust laws.").

conduct. For immunity to attach, these decisions hold, the state-conferred authorization must satisfy both components of the *Midcal* test.[17]

Unocal's post-petitioning conduct differs from the post-petitioning conduct at issue in most state-action cases in that its royalty collection efforts draw in part on rights conferred by federal patent law. Federal patent law specifically authorizes holders of valid patents to take certain actions to restrain competition. Thus, if Unocal had disclosed its patent application and CARB had knowingly adopted RFG standards that dramatically enhanced the power of Unocal's patents rights, Unocal's collection of royalties would not raise antitrust concerns – even if CARB's supervision of Unocal's exploitation of the standard was somewhat less active than *Midcal* might ordinarily require. Indeed, if CARB, by remarkable coincidence, had adopted RFG standards that enhanced Unocal's patents in a proceeding free of the deceptions and manipulations alleged here, it is unlikely that subsequent royalty collection efforts would raise significant antitrust concerns. *See FTC v. Indiana Fed'n of Dentists,* 476 U.S. 447 (1986). According to the allegations of the complaint, however, Unocal has sought to restrain competition in a manner that neither CARB nor the Congress has endorsed. Neither the complexity of Unocal's scheme, nor its partial reliance on patent rights that have not been shown to be invalid, as we discuss in more detail in Part III.B below, can relieve Unocal of

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[17] *See, e.g., Columbia Steel Casings Co., Inc. v. Portland Gen. Elec. Co.,* 111 F.3d 1427, 1439-41 (9th Cir. 1997) (utility commission order accepting utilities' division of city into exclusive service areas did not immunize utilities' subsequent anticompetitive conduct because there was no clearly articulated state policy favoring such a restraint on competition); *California CNG, Inc. v. Southern California Gas Co.*, 96 F.3d 1193, 1201 (9th Cir. 1996) (because rate filing by regulated utility gave state regulators' inadequate notice that requested tariff was "not high enough to provide for full recovery of costs," regulators' receipt and approval of the filed rates could not qualify as "clear articulation of [a] state policy" sufficient to immunize subsequent anticompetitive implementation of rate schedule); *In re New England Motor Rate Bureau, Inc.*, FTC Docket No. 9170, 1989 WL 1126783, at *47 (Aug. 18, 1989) (where competitors jointly propose rates to a state regulatory body, marketplace conduct to collect those rates is not immune unless the regulators review the rates on the merits, thereby satisfying the "active supervision" requirement of state action immunity doctrine).

accountability for anticompetitive harms that responsible government officials at the state or federal level have not had an opportunity to review and approve.

The rule could hardly be otherwise. If, as the ALJ's analysis indicates, the pursuit of protected petitioning activity necessarily sufficed to immunize anticompetitive conduct predicated on the state's response to that petitioning, *Midcal* would almost never apply. As Professors Areeda and Hovenkamp point out, "most special interest legislation that forms the basis of subsequent 'state action' challenges was probably initiated through private petitioning by the benefited interest group." *Antitrust Law* ¶ 229 at 24 (Supp. 2003). To extend immunity to all anticompetitive conduct that is nominally permitted by a governmental response to petitioning would drastically undercut the careful limits that *Midcal* imposes on state-action immunity for private parties. *Id.* (noting that although liquor dealers in *Midcal* petitioned for price fixing legislation, "once the legislation was in place, private acts implementing this legislation could still be challenged as unsupervised").[18]

The ALJ cited no authority for extension of petitioning immunity to Unocal's post-petitioning efforts to exploit the RFG standards. In briefing the issue, Unocal cited a single case, *A&M Records, Inc. v. A.L.W., Ltd.*, 855 F.2d 368 (7th Cir. 1988), in support of its claim that *Noerr* immunity encompasses both petitioning activity and post-petitioning efforts "to take advantage of the governmental action." *See* Union Oil Co. of Cal. Reply Mem. in Support of its Mot. for Dismissal of the Compl. Based on *Noerr-Pennington* Immunity (filed Sept. 9, 2003) [hereinafter Unocal Reply Br.]. Unocal Reply Br. at 29. But *A&M Records* is of no help to Unocal here.

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[18] *See id.* ¶ 229 at 520-21 (2d ed. 2000) ("[A]lthough a private party is completely immune for seeking the legislation, ... Noerr provides no shield for the private party's own subsequent market behavior under this statute. Inadequately authorized or insufficiently supervised private conduct remains liable under the antitrust laws.").

A&M Records involved a copyright infringement action in which the copyright holders successfully invoked *Noerr* immunity to defeat counterclaims that their lobbying for improved copyright protection violated antitrust law. The copyright holders also defeated the counterclaimants' challenges to their post-petitioning conduct, but not on the basis of *Noerr*. To the contrary, the court expressly recognized that petitioning immunity for the copyright owners' efforts to persuade Congress to expand their property rights did not shield subsequent private actions taken in supposed reliance on the legislation that they obtained. *See* 855 F.2d at 372 & n.8 (assuming without deciding that copyright holders "could be liable under the antitrust laws" for their post-petitioning conduct).[19] The court dismissed the antitrust claims relating to the post-petitioning conduct – an alleged conspiracy to drive a record rental company out of business through enforcement of copyright protections – because of insufficient evidence of the alleged conspiracy, not because of *Noerr* immunity. Thus, although *A&M Records* does not directly implicate *Midcal*'s limitations on state-action immunity, its analysis of the relationship between petitioning and post-petitioning conduct at the federal level is consistent with the teaching of the state-action authorities.

[19] *A&M Records'* recognition that post-petitioning action to exploit the copyright statute could be subject to antitrust limits notwithstanding *Noerr* protection of the antecedent lobbying effort is supported by Supreme Court decisions that have in fact imposed antitrust liability in analogous circumstances. *See, e.g., United States v. Philadelphia Nat'l Bank*, 374 U.S. 321 (1963) (successful petition for Comptroller of the Currency's approval of proposed bank merger did not confer antitrust immunity for subsequent action to execute merger; Comptroller lacked statutory authority to resolve antitrust issues); *California v. Federal Power Comm'n*, 369 U.S. 482 (1962) (successful petition for FPC approval of merger did not confer antitrust immunity because Commission lacked statutory authority to resolve antitrust issues). In these cases, as in the state-action cases discussed above, *Noerr's* protection of efforts to obtain favorable governmental action did not shield subsequent private efforts to exploit that action.

2. CARB's Recognition That the New RFG Standards Would Raise Refiners' Costs Does Not Immunize Unocal's Exploitation of Those Standards for Anticompetitive Ends That CARB Neither Foresaw Nor Intended

In the briefing below, Unocal argued that its actions were beyond the reach of the antitrust laws because CARB in fact intended for the RFG standards to restrain competition. In particular, Unocal disputed "Complaint Counsel's . . . claim that the CARB did not intend to restrain competition through its regulations," citing CARB's estimates that its RFG rule could "increase the price of gasoline in California by 12 to 17 cents per gallon," and its recognition that these cost increases could have anticompetitive effects. Unocal Reply Br. at 24 (citing CARB Statement of Reasons 77, 11). These statements by CARB, however, in no way constitute state authorization for Unocal's anticompetitive patent enforcement efforts.

The *Midcal* test is a "rigorous" one, designed to "ensure that private parties [can] claim state-action immunity from Sherman Act liability only when their anticompetitive acts [are] truly the product of state regulation" such that they "promote[ ] state policy, rather than merely the party's individual interests." *Patrick v. Burget*, 486 U.S. at 100-101; *see also Ticor*, 504 U.S. at 636 (implied immunity for anticompetitive conduct is "disfavored, much as are repeals [of the antitrust laws] by implication"). "[T]he analysis asks whether the State has played a substantial role in determining the specifics of the economic policy. The question is . . . whether the anticompetitive scheme is the State's own." *Id.* at 635.

Unocal's exploitation of the RFG gasoline standards for its own anticompetitive ends plainly cannot qualify for state-action immunity under *Midcal*. CARB's projection that new RFG standards would increase refiner costs in no way signaled a decision to alter the terms of competition in the market for CARB-compliant fuels technology by investing Unocal with the power to extract monopoly profits. Because of Unocal's fraudulent misrepresentations, CARB

remained unaware of the anticompetitive implications of its RFG standards until enormous investments predicated on those standards had effectively foreclosed pursuit of a different approach. As the ALJ recognized, the "anticompetitive scheme" alleged in the complaint was undertaken by Unocal "not by the [S]tate" (Initial Dec. at 47), thereby negating any claim to state-action immunity for post-petitioning exploitation of the RFG standards.

B. Unocal's Reliance on Patent Litigation, Among Other Measures, to Exploit the Unintended Anticompetitive Potential of the RFG Regulations Cannot Confer Petitioning Immunity on Its Entire Scheme to Restrain Competition

In its submissions to the ALJ, Unocal also argued that its patent enforcement efforts qualify as *Noerr*-protected petitioning activity and are thus beyond the reach of the antitrust laws. According to Unocal, petitioning immunity for patentees with non-sham patent claims includes both the actual prosecution of infringement claims in the courts and other "attempts to enforce the patents that are short of litigation." Unocal Reply Mem. at 29-30. This final effort to avoid accountability under the antitrust laws must be rejected. *Noerr* does not provide a safe harbor for anticompetitive schemes merely because their implementation relies in part on litigation or threats of litigation.

Walker Process recognized an antitrust remedy for competitive harm resulting from enforcement of a fraudulently procured patent. 382 U.S. at 175-76. Nothing in that decision, or the cases that have applied it, requires that the antecedent fraudulent conduct arise in the Patent Office. Indeed, an antitrust action to remedy the fraudulent enhancement of a patent through a scheme like Unocal's avoids some of the difficulties that were presented in *Walker Process* itself. In that decision, the Court permitted litigation of an antitrust counterclaim that directly challenged prior rulings of the Patent Office and the courts, as well as the antitrust defendant's entire course of patent-related petitioning. *See id.* at 177. The antitrust claims against Unocal have far more modest implications. The complaint in this case presents no challenge to the

validity of Unocal's patents, or even to its ability to enforce them outside of California. The complaint seeks only to litigate antitrust issues that have not yet been considered by any agency or court on behalf of California consumers, who have had no voice in the patent litigation.[20] The remedy requested in the complaint would only prevent Unocal from exploiting the market power it obtained through its subversion of the California standard-setting process.

In any event, the complaint does not depend on *Walker Process* because much of what Unocal has done to exploit the unintended anticompetitive implications of the RFG standards clearly falls outside the range of *Noerr*-protected petitioning conduct. Courts have offered differing assessments of the scope of *Noerr* protection for efforts to enforce patents. Unocal has cited decisions that take a relatively expansive view of *Noerr* protection in this context.[21] Other decisions take a more limited view.[22] Under any view, however, there can be no doubt that

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[20] Moreover, to the extent that antitrust enforcement combats the abuse of patent rights, it advances an important patent law value. As the Supreme Court explained in *Precision Instrument Mfg. Co. v. Automotive Maint. Mach. Co.*, 324 U.S. 806, 815 (1945):

> In the instant case Automotive has sought to enforce several patents and related contracts. Clearly these are matters concerning far more than the interests of the adverse parties. The possession and assertion of patent rights are 'issues of great moment to the public.' A patent by its very nature is affected with a public interest . . . The far-reaching social and economic consequences of a patent, therefore, give the public a paramount interest in seeing that patent monopolies spring from backgrounds free from fraud or other inequitable conduct and that such monopolies are kept within their legitimate scope.

(Citations omitted); *accord Walker Process*, 382 U.S. at 176-77.

[21] *See* Unocal Reply Mem. at 30 n.16 (citing, *inter alia*,); *Coastal States Mktg. Inc. v. Hunt*, 694 F.2d 1358 (5th Cir. 1983) (infringement notices "reasonably and normally attendant to litigation" and therefore protected).

[22] A series of recent cases shows that in at least some circumstances even settlements of litigated patent disputes can give rise to antitrust liability. *See In re Cardizem CD Antitrust Litig.*, 332 F.3d 896 (6th Cir. 2003) (ruling that it was per se unlawful for patent holding pioneer drug company to enter into litigation settlement under which would-be generic manufacturer was paid to delay entry); *In re Terazosin Hydrochloride Antitrust Litig.*, 164 F. Supp. 1340 (S.D. Fla. 2000); *In Re Schering-Plough Corp.*, No. 9297, slip op. (Dec. 8, 2003) (settlement agreements in patent litigation between pioneer drug manufacturer and would-be generic competitors constituted "unreasonable restraints on trade because they were likely to cause consumer harm [through delayed generic entry] that outweighed any associated pro-consumer efficiencies"). *See generally* Herbert Hovenkamp, Mark Janis, & Mark A. Lemley, *Anticompetitive Settlements of Intellectual Property Disputes,* 87 Minn. L. Rev. 1719, 1724 (2003) (where settlement agreements in intellectual property dispute "unreasonably restrain competition even assuming the

important aspects of Unocal's royalty collection efforts cannot qualify as *Noerr*-protected petitioning.

The complaint alleges, most notably, that Unocal has collected royalties through private licensing agreements. Patent licensing has long been understood to be subject to antitrust scrutiny.[23] Indeed, extending *Noerr* immunity to private patent-licensing agreements, on a theory that the threat of potential infringement litigation helps to shape such agreements, would effectively extinguish the enforcement of federal antitrust law in vast areas of the economy. In addition, the complaint describes a variety of other non-petitioning actions that Unocal took to gain market power, including misrepresenting to its competitors that its technology was non-proprietary and in the "public domain" (Complaint ¶ 52) and concealing its acquisition of patents designed to track the RFG specifications (Complaint ¶ 60).[24]

When confronted with a wide-ranging anticompetitive scheme encompassing both protected and non-protected activities, an antitrust tribunal may consider the entire course of conduct in adjudicating liability and crafting an appropriate remedy. In *United States v. Singer Mfg. Co.*, 374 U.S. 174 (1963), the government charged that Singer and two European sewing machine manufacturers had conspired to suppress Japanese competition in the American market. One critical component of the alleged conspiracy involved cross-licensing agreements that settled patent litigation among the alleged co-conspirators. The settlement concentrated a

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[intellectual property] rights in question were fully valid and enforced," the restrictions "should be unlawful regardless of the legitimacy of the underlying [intellectual property] right.").

[23] *See, e.g., United States v. New Wrinkle, Inc.*, 342 U.S. 371, 380 (1952) (cross-licensing agreements with price restrictions constitute per se antitrust violations); *Ethyl Gasoline Corp. v. United States*, 309 U.S. 436, 457-61 (1940) (patent on gasoline additive did not permit patentee to execute patent license that fixed the prices of gasoline).

[24] This non-petitioning conduct, which is not shielded by Noerr immunity, by itself warrants Section 5 action pursuant to the Commission's broad authority to remedy unfair competition and trade practices. See *Atlantic Refining Co. v. FTC*, 381 U.S. 357, 367 (1965).

number of related patents in Singer's hands, allegedly to facilitate the prosecution of patent infringement actions aimed at discouraging Japanese entry into the U.S. market.

The government argued that the cross-license agreement that resolved the alleged conspirators' patent litigation was itself "illegal apart from the other circumstances present." *Id.* at 190. The Court, however, found it unnecessary to address this litigation-related conduct in isolation, ruling that "the entire course of dealings between the parties, *including the cross-license agreement*, establishe[d] a conspiracy or combination in violation of the Sherman Act." *Id.* at 190 n.7 (emphasis supplied). Although the Court expressly accepted the validity of the patents, it held that the overall arrangement reflected a "concerted action to restrain trade" in violation of the Sherman Act. *Id.* at 195, 1999.[25] The Court, in short, refused to allow the participants in an anticompetitive scheme involving the misuse of bona fide patent rights to use the judicial process as a refuge from the antitrust laws.

Several courts of appeals have reached similar results in antitrust cases involving regulated utilities accused of restraining competition in retail markets through execution of regulatory "price squeezes." A price squeeze typically arises when a utility is allowed to increase its federally regulated wholesale rates without obtaining a corresponding increase in state-regulated retail rates. As a result, would-be competitors in the retail sector cannot purchase and resell at a profit. In adjudicating price squeeze claims, courts have recognized the need to proceed carefully in defining antitrust limits on the exercise of lawful monopoly power by regulated utilities, just as they have with respect to defining antitrust limits on the exercise of

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[25] *See also Kobe, Inc. v. Dempsey Pump Co.*, 198 F.2d 416, 425 (10th Cir. 1952) (although bringing of infringement actions is not, in itself, an antitrust violation, "when considered with the entire monopolistic scheme which preceded them ... they may be considered as having been done to give effect to the unlawful scheme"). *cf. Pennington*, 381 U.S. at 670 & n.3 (although "joint efforts to influence public officials" are "not illegal either standing alone or as part of a broader scheme itself violative of the Sherman Act," evidence of these efforts may still be admissible "to show the purpose and character of the particular transactions under scrutiny.")

patent rights. Nevertheless, several courts of appeals have recognized that such price squeezes can give rise to antitrust liability, at least when they occur as part of a broader anticompetitive scheme.[26] In *Kirkwood*, the Eighth Circuit specifically rejected the utility's claim that petitioning immunity for its rate submissions precluded application of antitrust law, stating that "[t]he *Noerr-Pennington* doctrine will not protect a utility that manipulates the federal and state regulatory processes to achieve anticompetitive results." 671 F.2d at 1181.[27] The protected status of the utility's rate submission, considered in isolation, like the protected status of the patentees' requests for judicial relief in *Singer,* considered isolation, did not preclude the court from addressing the anticompetitive effects of the larger anticompetitive scheme that encompassed this petitioning conduct.

In short, even if an aspect of Unocal's conduct, when viewed in isolation, enjoys *Noerr* protection, the overall anticompetitive scheme, which encompassed not only Unocal's misrepresentations to CARB but also a range of non-petitioning activities to achieve and exploit market power, does not. Under *Singer* and similar cases, Unocal cannot hide behind a slice of

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[26] *City of Anaheim v. Southern Cal. Edison,* 955 F.2d 1373, 1378-79 (9th Cir. 1992); *City of Kirkwood v. Union Elec. Co*, 671 F.2d 1173 (8th Cir 1982); *City of Mishawaka v. American Elec. Power* Co, 616 F.2d 976, 986-87 (7th Cir 1980) (although no single aspect of the utility's conduct, considered "separately and in a vacuum," was illegal, the "mix of ...various ingredients of utility behavior in a monopoly broth," including threats to wholesale power supplies and acquisitions of municipal systems as well as the alleged price squeeze, "produce[d] the unsavory flavor"); *see also City of Groton v. Conn. Light & Power Co.*, 662 F.2d 921, 931-32 (2d Cir. 1981) (recognizing viability of price squeeze theory, but affirming district court finding that the record, "view[ed] ... as a whole even as we discuss its component issues separately," failed to demonstrate the requisite "anticompetitive intent."). *But cf. Concord v. Boston Edison Co.*, 915 F.2d 17, 28 (1st Cir 1990) (distinguishing *Kirkwood* and *Mishawaka* and indicating that interpreting that "a price squeeze in a fully regulated industry such as electricity will not normally constitute 'exclusionary conduct' under [the] Sherman Act").

[27] One district court has held that rate squeezes are *Noerr*-protected. *See Norcen Energy Res. Ltd. v. Pacific Gas & Elec.*, 1994 WL 519461 ** (N.D. Cal. 1994) (construing *Omni* to preclude antitrust claims based on non-sham petitioning conduct). Although that decision declined to follow *Kirkwood* and *Mishawaka*, it failed to recognize that in each of these cases, the use of dual regulatory regimes to execute a price squeeze represented part of a broader pattern of exclusionary conduct by the defendant utility. *See Concord*, 915 F.2d at 28 (distinguishing *Kirkwood, Mishawaka*, and *Groton* on this basis); *see also City of Anaheim*, 955 F.2d at 1378 (holding that utility's specific intent to use rate regulatory mechanisms for monopolistic purposes, which may be demonstrated by reference to "the actions of the utility, taken as a whole," establishes a proper balance between lawful monopoly power permitted by utility laws and antitrust limitations on anticompetitive conduct).

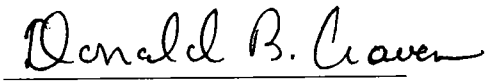
purportedly immunized conduct to avoid an adjudication of the antitrust issues raised by its entire anticompetitive scheme.

CONCLUSION

For the reasons set forth above, the Commission should reverse the ALJ's ruling that *Noerr* immunity shields Unocal from antitrust liability for its fraudulent conduct before CARB and for its exploitation of the unintended anticompetitive implications of CARB's RFG standards, reinstate the complaint, and remand this case for an administrative trial to resolve disputed factual issues.

DATED: January 14, 2004

Respectfully submitted,



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I certify that on January 14, 2004, I caused true and correct copies of the Motion for Leave to File Brief as *Amicus Curiae* and the accompanying Brief of *Amicus Curiae* Exxon Mobil Corporation to be served as described below.

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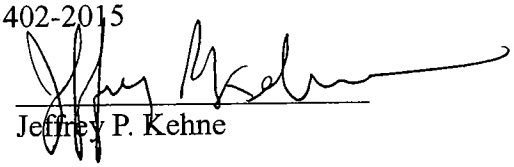

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