

**UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION**

\_\_\_\_\_  
In the Matter of )

UNION OIL COMPANY OF CALIFORNIA, )

a Corporation. )  
\_\_\_\_\_

Docket No. 9305

Public

**MOTION OF EXXON MOBIL CORPORATION  
FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE**

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Dated: January 14, 2004

Pursuant to 16 C.F.R. § 3.52(j), Exxon Mobil Corporation respectfully moves for leave to file a brief *amicus curiae* in this matter. ExxonMobil is a global energy and petrochemical company. The company refines and markets gasoline in California, and is therefore subject to California's reformulated gasoline (RFG) regulations, which were developed during a landmark public-private collaborative standard-setting effort. ExxonMobil has vital interests directly affected by the outcome of this proceeding. Like other participants in the standard-setting effort, ExxonMobil was misled by misrepresentations and other deceptive conduct through which Union Oil Company of California (Unocal) distorted California's standard setting process to increase the potential market power of its RFG patent portfolio. Moreover, ExxonMobil now operates under regulations that were shaped by Unocal's deceptions; and it has been a target of Unocal's efforts to exploit its market power.<sup>1</sup> In addition, ExxonMobil will inevitably be presented with opportunities to participate in other public-private collaborative efforts. It therefore has a continuing interest in ensuring that federal antitrust law remains available to combat anticompetitive abuses of such efforts.

In March 2001, ExxonMobil filed a petition with this Commission, requesting that it investigate Unocal's anticompetitive conduct relating to the RFG rulemaking.<sup>2</sup> The petition explained that Unocal had engaged in a pattern of deceptive conduct that distorted the standard-setting process and increased the potential market power of its RFG patent portfolio,

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<sup>1</sup> See *Unocal 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 per infringing gasoline sold in California), *aff'd*, 208 F.3d 989 (Fed. Cir. 2000).

<sup>2</sup> See Memorandum 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).

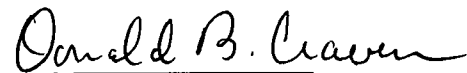
and that Unocal has since exploited that market power by taking actions aimed at collecting substantial patent-infringement damages and licensing fees. In March 2003, following an extensive investigation by the Bureau of Competition, the Commission decided to issue a formal complaint charging Unocal with violations of Section 5 of the Federal Trade Commission Act and seeking an injunction to prohibit it from enforcing its RFG patents in California.

In November 2003, just before the trial was scheduled to begin, 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. The determination that the antitrust laws do not reach much of the conduct described in the complaint raises important issues pertaining to the breadth and proper application of the *Noerr-Pennington* immunity doctrine. The proposed *amicus* brief demonstrates in detail that the Initial Decision erred in ruling (1) that *Noerr* immunity precludes the imposition of antitrust liability based on the fraudulent conduct in which Unocal is alleged to have engaged during the California standard setting process; and (2) that this immunity shielded not only Unocal's petitioning conduct, but also its subsequent efforts to exploit the market power that California unintentionally conferred.

ExxonMobil respectfully suggests that the attached brief, which is informed by the company's long history with the rulemaking at issue and its knowledge of the intricate facts of Unocal's acquisition and exploitation of market power in the California fuels technology market, will assist the Commission in its consideration of this important case. As a California refiner and a participant in CARB rulemakings, ExxonMobil offers a perspective that should enhance the Commission's ability to evaluate the applicability of *Noerr* immunity to Unocal's misconduct.

For these reasons, Exxon Mobil respectfully requests that the Commission grant its motion for leave to file the attached *amicus curiae* brief.

Respectfully submitted,



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**UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION**

Commissioners: Timothy J. Muris, Chairman  
Mozelle W. Thompson  
Orson Swindle  
Thomas B. Leary  
Pamela Jones Harbour

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[Proposed] ORDER

Upon consideration of the Motion of ExxonMobil Corporation for Leave to File Brief as Amicus Curiae, the Commission finds that the proposed brief *amicus curiae* may assist in the determination of the matters presented by this appeal. Accordingly,

IT IS ORDERED that ExxonMobil be and it hereby is granted leave to file the proposed *amicus curiae* brief.

By the Commission.

Issued: \_\_\_\_\_, 2004