
UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
WASHINGTON D.C.

In the Matter of

UNION OIL COMPANY OF CALIFORNIA,
a corporation.

Docket No. 9305

RESPONDENT’S MOTION FOR SUBPOENA AD TESTIFICANDUM
UNDER RULE OF PRACTICE 3.36

INTRODUCTION

Respondent Union Oil Company of California (“Unocal”) brings this motion pursuant to Federal Trade Commission Rule of Practice 3.36, 16 C.F.R. § 3.36, for the issuance of a subpoena requiring the appearance of Dean Simeroth, a California Air Resources Board employee, to testify at the hearing in this matter. Complaint Counsel do not oppose the issuance of the subpoena pursuant to this Motion. Because the testimony sought meets the requirements set out in Rule 3.36, and additionally because Mr. Simeroth resides in the United States, we respectfully ask that the Motion be granted and that the subpoena be issued as requested. An unsigned subpoena for Mr. Simeroth is attached at Exhibit A.

Mr. Simeroth is the Chief of the Criteria Pollutants Branch of CARB and was so during Phases 1, 2 and 3 of the CARB RFG regulations. Mr. Simeroth was deposed in this case (in the United States) and all was identified on Respondent’s Witness List. He may testify regarding matters relating to the matters raised or implicated in his previous depositions, including his role in the development of the regulations and his communications internally at CARB and with others outside of CARB regarding the regulations and Unocal’s patent.

ARGUMENT

Rule 3.36(b) of the Commission Rules of Practice requires the party seeking issuance of a subpoena for the appearance of an official or employee of a governmental agency to make a specific showing regarding the requested subpoena. With respect to subpoenas to be served within the United States, the party must show:

- (1) the material sought is reasonable in scope;
- (2) the material sought is reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of any respondent; and
- (3) the information or material sought cannot reasonably be obtained by other means.

16 C.F.R. § 3.36(b). The subpoena *ad testificandum* sought by Unocal satisfies each of these requirements.

Under the Scheduling Order in this matter, the party must also show that the subject for the subpoena is located in the United States. Mr. Simeroth was deposed in discovery of this matter. All depositions took place in the United States, Mr. Simeroth is an employee of a California government agency, and resides in the United States. (*See* Krueger Letter to Goldman, attached to this Motion at Ex. B.)

The material sought is reasonable in scope. Mr. Simeroth was directly involved in the CARB Phase 2 and Phase 3 processes. The testimony sought from him falls into at least four categories:

- Testimony related to the CARB Phase 2 Regulatory process including but not limited to the origins of interest in regulating the properties ultimately regulated (including T-50), and specifically including the role and influence of ARCO and the analysis of the cost-effectiveness of the regulations;

- Testimony related to CARB's consideration of patents in any regulatory process from 1989 to the present;
- Testimony related to CARB's communications regarding Unocal; and
- Testimony related to whether CARB was locked into or constrained in its ability to modify or amend the Phase 2 regulations.

In addition, the material sought is reasonably relevant to the allegations of the Complaint, to the proposed relief, or to Unocal's defenses. The testimony sought by Unocal from Mr. Simeroth goes directly to certain essential elements of Complaint Counsel's case. The testimony is also directly relevant to Unocal's *Noerr-Pennington* and Statute of Limitations defenses.

Finally, the testimony sought for the hearing cannot be obtained by other means. Mr. Simeroth's position during the development of the CARB regulations and his knowledge regarding the specific facts of this case are unique. There is no other witness or exhibit that could substitute for the testimony of Mr. Simeroth.

CONCLUSION

For the reasons stated, Unocal's Motion should be granted and the subpoena issued as requested to Dean Simeroth.

Dated: December 6, 2004.

Respectfully submitted,

ROBINS, KAPLAN, MILLER & CIRESI L.L.P.

By: Signature on File with Commission

Martin R. Lueck
David W. Beehler
Sara A. Poulos
Diane L. Simerson
Bethany D. Krueger

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Minneapolis, Minnesota 55402-2015
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and

GIBSON, DUNN & CRUTCHER, LLP

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Washington, D.C. 20036-5306
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Fax: 202-530-9558

ATTORNEYS FOR UNION OIL COMPANY OF
CALIFORNIA

EXHIBIT A



United States of America
Federal Trade Commission
SUBPOENA

1. TO

Dean C. Simeroth
California Air Resources Board
1000 "I" Street
P.O. Box 2815
Sacramento, CA 95812

c/o Matthew J. Goldman, Esq.
Office of the Attorney General
California Department of Justice
1300 I Street, Suite 125, P.O. Box 944255
Sacramento, CA 94244-2550

This subpoena requires you to appear and give testimony at the date and time specified in Item 3 at the request of Counsel listed in Item 7 at a hearing and proceeding described in Item 4.

2. LOCATION OF HEARING

Room 532, Federal Trade Commission Building
600 Pennsylvania Avenue N.W.
Washington, D.C. 20580

3. DATE AND TIME OF HEARING

January 10, 2005
10:00 a.m.

4. SUBJECT OF PROCEEDING

In the Matter of Union Oil Company of California – Docket No. 9305

5. RECORDS YOU MUST BRING WITH YOU

Not applicable

6. ADMINISTRATIVE LAW JUDGE

The Honorable D. Michael Chappell

7. COUNSEL REQUESTING SUBPOENA

Martin R. Lueck, Esq.
Robins, Kaplan, Miller & Ciresi L.L.P.
2800 LaSalle Plaza
800 LaSalle Avenue
Minneapolis, Minnesota 55402

DATE ISSUED

ADMINISTRATIVE LAW JUDGE'S SIGNATURE

GENERAL INSTRUCTIONS

APPEARANCE

The delivery of this subpoena to you by any method prescribed by the Commission's Rules of Practice is legal service and may subject you to a penalty imposed by law for failure to comply.

MOTION TO LIMIT OR QUASH

The Commission's Rules of Practice require that any motion to limit or quash this subpoena be filed within the earlier of 10 days after service or the time for compliance. The original and ten copies of the motion must be filed with the Secretary of the Federal Trade Commission. Send one copy to the Requesting Counsel named in Item 7 and to all other parties prescribed in the Rules of Practice.

TRAVEL EXPENSES

The Commission's Rules of Practice require that fees and mileage be paid by the party that requested your appearance. You should present your claim to Counsel listed in Item 7 for payment. If you are permanently or temporarily living somewhere other than the address on this subpoena and it would require excessive travel for you to appear, you must get prior approval from Counsel listed in Item 7.

This subpoena does not require approval by OMB under the Paperwork Reduction Act of 1980.

RETURN OF SERVICE

I hereby certify that a duplicate original of the within subpoena was duly served: (check the method used)

- in person.*
- by registered mail.*
- by leaving a copy at principal office or place of business, to wit:*

on the person named herein on:

(Month, day and year)

(Name of person making service)

(Official title)

EXHIBIT B

BETHANY D. KRUEGER
(612) 349-8535

November 30, 2004

VIA FACSIMILE

Matthew J. Goldman, Esq.
Deputy Attorney General
Department of Justice
State of California
1300 I Street, Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550

Re: In the Matter of Union Oil Company of California
FTC Docket No. 9305
Our File No. 028012-0008

Dear Mr. Goldman:

This letter is to confirm our conversation in which you confirmed that Mr. Dean Simeroth, an employee of the California Air Resources Board, is a resident of the State of California.

As I indicated to you, Unocal will file a motion for the subpoena of Mr. Simeroth in the next few days. I am assuming, as you did last year, that you will agree to accept service of a subpoena on behalf of Mr. Simeroth. Please let me know if this is not the case.

I will endeavor to keep you updated as to scheduling around the holidays and the projected length of Complaint Counsel's case. Thank you very much for your assistance in this matter.

Very truly yours,

ROBINS, KAPLAN, MILLER & CIRESI L.L.P.



Bethany D. Krueger

BDK/dl

CERTIFICATE OF SERVICE

I hereby certify that on December 6, 2004, I caused an original and two (2) paper copies, and an electronic copy (via e-mail) of Respondent's Motion for Subpoena Ad Testificandum Under Rule of Practice 3.36 to be filed with:

Donald S. Clark, Secretary
Federal Trade Commission
600 Pennsylvania Ave. NW, Rm. H-159
Washington, DC 20580
E-mail: secretary@ftc.gov

I hereby certify that on December 6, 2004, I also caused two paper copies of Respondent's Motion for Subpoena Ad Testificandum Under Rule of Practice 3.36 to be delivered via Hand Delivery to:

The Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Ave. NW
Washington, DC 20580

I hereby certify that on December 6, 2004, I also caused one paper copy via Hand Delivery or Federal Express as indicated of Respondent's Motion for Subpoena Ad Testificandum Under Rule of Practice 3.36 to be served upon each person listed below as indicated:

J. Robert Robertson, Esq.
Bureau of Competition
Federal Trade Commission
601 New Jersey Avenue NW, Drop 6264
Washington, DC 20001
Via Hand Delivery

Geoffrey Oliver, Esq. through service upon
Chong S. Park, Esq.
Bureau of Competition
Federal Trade Commission
601 New Jersey Avenue NW, Drop 6264
Washington, DC 20001
Via Hand Delivery

Matthew J. Goldman, Esq.
Deputy Attorney General
Department of Justice
State of California
1300 I Street, Suite 125
Sacramento, CA 94244-2550
Via Federal Express

Signature on File with Commission
Bethany D. Krueger

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
WASHINGTON, D.C.

In the Matter of

UNION OIL COMPANY OF CALIFORNIA,
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**ORDER GRANTING RESPONDENT'S MOTION FOR ISSUANCE OF
SUBPOENA AD TESTIFICANDUM FOR DEAN SIMEROOTH OF THE
CALIFORNIA AIR RESOURCES BOARD**

On December 6, 2004, pursuant to Rule 3.36 of the Commission's Rules of Practice, Respondent filed a Motion for Issuance of Subpoena *Ad Testificandum* for Dean Simeroth of the California Air Resources Board. The Motion provides a brief description of the intended testimony of Mr. Simeroth. Respondent has also represented that Mr. Simeroth is located in the United States. Complaint Counsel does not oppose Respondent's Motion.

Based on the brief description provided, the testimony sought is reasonable in scope, reasonably relevant, and cannot reasonably be obtained through other means. Accordingly, IT IS HEREBY ORDERED that the Motion is GRANTED.

In accordance with Commission Rule 3.36(c), Respondent may forward a request to the Secretary of the Commission, with this Order attached, for an authorized subpoena *ad testificandum* to be served on Mr. Simeroth. Respondent shall serve a copy of this Order on Mr. Simeroth at the time that it serves the subpoena.

ORDERED:

Dated: December ____, 2004

D. Michael Chapell
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that on December 6, 2004, I caused an original and two (2) paper copies, and an electronic copy (via e-mail) of Order Granting Respondent's Motion for Subpoena Ad Testificandum For Dean Simeroth of the California Air Resources Board to be filed with:

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Geoffrey Oliver, Esq. through service upon
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601 New Jersey Avenue NW, Drop 6264
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Matthew J. Goldman, Esq.
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Signature on File with the Commission
Bethany D. Krueger