

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

In the Matter of

**UNION OIL COMPANY OF CALIFORNIA, a
corporation.**

DOCKET NO. 9305

**UNOCAL'S MOTION FOR A SUBPOENA FOR THE PRODUCTION OF DOCUMENTS
FROM THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**

INTRODUCTION

The Complaint in this action alleges that Unocal committed fraud on the California Air Resources Board ("CARB") during its participation in CARB's process to develop "Phase 2" regulations for low-emissions motor gasolines, including the California Predictive Model for reformulated gasoline ("RFG"). Moreover, the Complaint alleges that Unocal then used the CARB Phase 2 regulations to allegedly gain monopoly power and commit antitrust violations. Unocal respectfully moves the Administrative Law Judge – pursuant to Rule 3.36 of the Commission's Rules of Practice, 16 C.F.R. § 3.3—for an Order Allowing Issuance of a Subpoena for the Production of Documents to the United States Environmental Protection Agency ("EPA") as discovery into the allegations regarding CARB and into Unocal's potential defenses. Complaint Counsel has stated that it does not oppose the principle of this motion, but will not state a definitive position until it has read the papers.

Unocal's proposed Specifications to the EPA, (with Definitions and Instructions) are attached as Exhibit A hereto.

RELEVANT CONTEXT FOR THIS MOTION

Both CARB and the EPA enacted regulations in the early 1990's calling for refiners to begin making and selling reformulated gasoline to reduce harmful automobile emissions. Because

scientists at Unocal did not believe the industry would pursue research broadly enough, these scientists conducted independent research and identified the key gasoline properties that primarily affect different types of emissions. Unocal would eventually disclose its research to both CARB and the EPA in private meetings so that these agencies could consider a different approach to regulating emissions than was being discussed. While Unocal shared the same presentation with both CARB and the EPA, the two agencies enacted different regulations.

Unocal seeks discovery from the EPA for two primary reasons. First, Unocal seeks relevant information to show that CARB's alleged reliance on Unocal's research disclosure is not credible, since other regulators who reviewed such research at the EPA do not contend they were "defrauded." Just as importantly, Unocal understands the EPA has had several interactions with CARB regarding CARB's regulations (including EPA decisions dealing with requests by CARB to opt out of certain Federal regulation requirements), and that CARB worked closely with the EPA on the phase-in of EPA RFG. With regard to the California Predictive Model for RFG, Unocal understands that, in developing its predictive model, CARB evaluated three other modeling approaches including that used by the EPA.

ARGUMENT

Rule 3.36(b) of the Commission Rules of Practice requires the party seeking issuance of a subpoena for the production of documents from 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 *duces tecum* sought by Unocal satisfies each of these requirements.

I. The Material Sought is Reasonable in Scope.

The documents sought from the EPA by Unocal fall into the following general categories:

- documents related to communications about the Unocal Patents;
- documents related to communications with Unocal related to RFG or regulations;
- Documents related to any analyses by the EPA or EPA staff of data provided to the EPA by Unocal;
- documents related to "private meetings" held in connection with the EPA Phase 2 RFG regulatory process;
- Documents related to the recommendation by EPA staff and the vote of the EPA with regard to the EPA Phase 2 RFG regulations;
- Documents related to the EPA's consideration of any patents in connection with any regulatory process;
- Documents related to the CARB Phase 2 regulations or corresponding Predictive Model; and
- Documents referring or relating to the effectiveness of any proposed or actual EPA or CARB RFG regulations.

Unocal does not believe that the subpoena it requests would be unduly burdensome to the EPA.

Unocal believes that each of these categories of documents is kept by the EPA in the ordinary course of business. While the number of documents may be fairly voluminous, it is a set of documents that should be readily identifiable and accessible. If the number of responsive documents is too voluminous for the EPA to copy, Unocal is willing to inspect and copy responsive documents rather than to have the EPA provide copies of the documents in order to accommodate the EPA.

II. The Material Sought Is Reasonably Expected to Yield Information Relevant to the Allegations of the Complaint, to the Proposed Relief, or to Unocal's Defenses.

The documents sought from the EPA by Unocal are reasonably expected to yield information relevant to Complaint Counsel's allegations of fraud – more specifically, to allegations

that CARB has justifiably and/or detrimentally relied on any statement or non-statement by Unocal by exploring, among other things, the EPA's consideration of Unocal's presentation, the EPA's interactions with CARB regarding RFG regulations and their respective predictive models, alternatives to the CARB regulations, the cost of such alternatives, the effect of such alternatives on the environment, and the like. This information also goes directly to the element of causation. Indeed, Complaint Counsel itself acknowledges that information regarding the EPA is reasonably expected to yield information relevant to the allegations of the Complaint, in that a number of Complaint Counsel's document requests to Unocal call for documents relating to, e.g., "EPA RFG Regulations" Exhibit B, Complaint Counsel's First Request for Production of Documents and Things Issued to Respondent Union Oil Company of California Inc., at p. 2, ¶ 8); meetings between Unocal shareholders relating to the EPA (*Id.* at ¶ 9); communications with the press and stock analysts relating to the EPA (*Id.* at ¶ 10); and public or investors relations activities relating to the EPA (*Id.* at ¶ 11).

III. The Material Sought Cannot be Obtained by Other Means.

The information and material Unocal seeks from the EPA cannot reasonably be obtained by other means. The EPA deals with refiners across the country on regulatory issues, and its members and staff has devoted decades to studying emissions, considering clean air regulations alternatives, monitoring air quality and evaluating cost issues. Moreover, the EPA members and EPA staff alone possess their notes, correspondence, internal memoranda, records from public and private meetings during the process to establish RFG regulations, etc.

CONCLUSION

For the reasons stated, Unocal's Motion should be granted.

Dated: April 4, 2003

Respectfully submitted,

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

Original Signature on File with Commision

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