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UNITED STATES OF AMERICA

BEFORE FEDERAL TRADE COMMISSION

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In the Matter of

Union Oil Company of California,         Docket No. 9305  
a corporation.

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DEPOSITION OF MICHAEL P. KENNY

VOLUME I, PAGES 1 - 159

May 15, 2003

(The following is the deposition of MICHAEL

P. KENNY, taken pursuant to Notice of Taking  
Deposition, via videotape, at the Hyatt Regency  
Hotel, Sacramento, California, commencing at  
approximately 1:35 o'clock a.m., May 15, 2003.)

APPEARANCES:

On Behalf of Union Oil Company of California:

David H. Beehler and Anthony I. Hoppa  
Robins, Kaplan, Miller & Ciresi, L.L.P.  
2800 LaSalle Plaza  
800 LaSalle Avenue  
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On Behalf of the Federal Trade Commission:

Dean C. Graybill, Chong S. Park and  
Lisa D. Fialco  
Federal Trade Commission  
Bureau of Competition  
601 New Jersey Avenue, N.W., Drop 6264  
Washington, D.C. 20001

16:01:00 1 A. No.

16:01:03 2 Q. Do you have any understanding as to why the  
16:01:05 3 EPA could accomplish a predictive model in a shorter  
16:01:09 4 timeframe?

16:01:12 5 A. No.

16:01:30 6 Q. In 1996 you as general counsel or executive  
16:01:35 7 officer -- let me see. Let me back up.

16:01:38 8 In 1996 you became executive --

16:01:40 9 A. I was both. First half of the year I was  
16:01:42 10 general counsel, second half of the year I was  
16:01:45 11 executive officer.

16:01:47 12 Q. That was my uncertainty. In 1996 were you  
16:01:49 13 asked on behalf of CARB to become an active party  
16:01:51 14 litigant in a lawsuit between my client and a bunch  
16:01:54 15 of major refiners?

16:01:56 16 MR. PARK: Objection, vague as to form as  
16:01:59 17 to "you."

16:02:00 18 A. I was asked by -- I was asked by whom?

16:02:02 19 Q. The HellerEhrman firm representing refiners  
16:02:07 20 in litigation against my client.

16:02:10 21 A. Could you repeat the whole question? Make  
16:02:12 22 sure I understand it.

16:02:13 23 Q. Were you asked in 1996 by lawyers  
16:02:17 24 representing the refiners in litigation against my  
16:02:20 25 client to join and become an active party litigant in

16:02:26 1 terms of CARB?

16:02:27 2 MR. PARK: Objection, form, vague as to

16:02:29 3 term "you."

16:02:31 4 A. Yes.

16:02:33 5 Q. You declined.

16:02:37 6 A. That's incorrect.

16:02:42 7 Q. Did you attempt to intervene in the 1996

16:02:49 8 trial?

16:02:50 9 A. No.

16:02:52 10 Q. Okay. Do you have an understanding of what

16:02:53 11 the term "active party litigant" means?

16:02:56 12 A. Yes.

16:02:59 13 Q. Did you in 1996 determine to become an

16:03:03 14 active party litigant? And I'm using the word "you"

16:03:07 15 here for CARB.

16:03:09 16 MR. GOLDMAN: Objection to the extent that

16:03:09 17 it may call for information that could be protected

16:03:12 18 by the deliberative-process privilege. With that

16:03:18 19 admonition, don't disclose anything that would be

16:03:22 20 subject to that privilege.

16:03:24 21 A. ARB did determine in 1996 that it should

16:03:26 22 intervene and it should participate.

16:03:31 23 Q. Did it intervene in the district court

16:03:35 24 trial?

16:03:36 25 A. No, it did not.

16:03:38 1 Q. When did it determine it should intervene  
16:03:40 2 and in what proceeding?

16:03:43 3 A. It determined in 1996, shortly after the  
16:03:45 4 request was made, that it should intervene.

16:03:48 5 Q. And how did it exercise that intervention,  
16:03:51 6 if at all?

16:03:52 7 A. It did not exercise that intervention.

16:03:58 8 Q. Okay. So in 1996 it is asked to intervene  
16:04:02 9 as an active party litigant. It determined that it  
16:04:07 10 should do so. Were there decisions as to when it  
16:04:21 11 might actually intervene?

16:04:33 12 THE WITNESS: Should I go ahead and answer  
16:04:34 13 this?

16:04:35 14 MR. GOLDMAN: Well it's actually a "yes" or  
16:04:36 15 "no" question, so I think you can answer it --

16:04:39 16 A. Yes.

16:04:39 17 MR. GOLDMAN: -- "yes" or "no."

16:04:40 18 Q. What was the decision?

16:04:47 19 MR. GOLDMAN: I think you can answer the  
16:04:48 20 ultimate decision as long as you do not go into any  
16:04:53 21 mechanics of the decision, because that would be  
16:04:55 22 protected by the deliberative-process privilege.

16:04:58 23 A. The ARB determined that it should  
16:05:00 24 intervene. It ultimately did not intervene.

16:05:05 25 Q. Why?

16:05:24 1 MR. GOLDMAN: To avoid an unnecessary and  
16:05:32 2 perhaps improper blanket instruction not to answer, I  
16:05:36 3 would like a break right now to confer with Mr.  
16:05:41 4 Kenny. Thank you.

16:05:45 5 THE REPORTER: Off the record, please.

16:13:00 6 (Recess taken.)

16:13:00 7 BY MR. BEEHLER:

16:13:01 8 Q. Sir, you testified that the ARB determined  
16:13:04 9 that it should intervene. It ultimately did not  
16:13:08 10 intervene. Why?

16:13:12 11 A. The process requires that when the ARB  
16:13:14 12 makes a determination to involve itself in  
16:13:16 13 litigation, that it actually obtain approval from the  
16:13:19 14 Governor's office to pursue that litigation. A  
16:13:23 15 request was made to the Governor's office to  
16:13:25 16 intervene. That request was denied.

16:13:27 17 Q. Who made the request?

16:13:29 18 A. I believe I made the request.

16:13:30 19 Q. Was there a board meeting that occurred  
16:13:33 20 prior to you making the request?

16:13:36 21 A. No, I don't believe there was.

16:13:41 22 Q. By what authority did you make the request?

16:13:45 23 A. I made the request --

16:13:46 24 I cannot recall the specific time. If I  
16:13:48 25 made the request as general counsel, I did so because