

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

MEMORANDUM OF THE UNION OIL COMPANY OF CALIFORNIA
REGARDING APPLICABILITY OF NOERR IMMUNITY FOLLOWING REMAND

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The Commission's decision reversing Your Honor's dismissal of the Complaint states that "[i]f Unocal continues to assert *Noerr-Pennington* protection, the ALJ will need to resolve any relevant, disputed facts regarding the context of CARB's proceeding and the nature of Unocal's alleged misrepresentations/omissions." *In re Union Oil Co. of Cal.*, No. 9305, slip op. at 55 (FTC July 6, 2004). Unocal respectfully requests leave to file this memorandum to advise the Court of its intention to continue to assert *Noerr* immunity and to summarize the evidence that is relevant to the analysis mandated by the Commission's opinion. Unocal will submit a Trial Brief in which it plans to address the remaining issues in the case at the time prescribed for this filing by the Amended Scheduling Order.

Unocal respectfully submits that Your Honor's decision to dismiss the Complaint was well grounded and that the Commission's decision cannot be reconciled with the case law. Nevertheless, even application of the Commission's erroneous standard for analyzing this case will compel dismissal of the Complaint.

I. Factual Background

The California Air Resources Board ("CARB") is an agency created by the State of California to regulate air quality in the state. The 1988 California Clean Air Act directed CARB to take regulatory action "to achieve the maximum degree of emission reduction possible from vehicular and other mobile sources . . . at the earliest possible date." CAL. HEALTH & SAFETY CODE § 43018(a). The Act also instructed CARB to take actions that "are necessary, cost-effective and technologically feasible" to achieve various percentage reductions of specific emissions types by December 31, 2000. *Id.* § 43018(b). The Act provided no guidance as to the types of measures that CARB could take to reduce emissions, leaving it to CARB to determine what types of regulations to adopt. It also provided no guidance on how CARB was to reconcile

the apparently contradictory goals of achieving “the maximum degree of emission reduction possible” while enacting cost-effective regulations. *Id.* § 43018(a)-(b). CARB considered a variety of regulatory options that even included banning the use of gasoline. RX 5 at CARB 0000868-69. CARB ultimately decided to carry out its mandate by regulating both automobile emission systems and gasoline composition.

In 1990, CARB adopted new regulations, known as the Phase 1 reformulated gasoline (“RFG”) rules, which established new requirements for the Reid vapor pressure (“RVP”) levels in gasoline, mandated the use of gasoline additives, and banned the use of lead in gasoline. RX 10 at CARB0000278. CARB then set upon a more ambitious program to develop new regulations, which became known as the Phase 2 RFG rules, to achieve further, and more dramatic, reductions in emissions from mobile sources by regulating gasoline composition. To develop these regulations, CARB embarked upon a process of extensive informal consultations with various interest groups to obtain ideas for how best to structure its regulatory program. In the course of this process, CARB officials met informally on numerous occasions with representatives of the automobile industry, the refining industry, and health and environmental advocacy groups. CARB encouraged its staff to meet with these interested parties to obtain broad input into its decisionmaking. Kenny Dep. (CARB), 5/15/03, at 90:10-91:11.¹

¹ The following convention is used for the citation of depositions in this memorandum. Depositions taken in this proceeding are cited with the deposition’s date. Depositions taken by Complaint Counsel during the investigational hearings in this matter are cited with the designation “IH.” Depositions of CARB officials taken in connection with the ‘393 patent litigation between Unocal and California refiners are identified by reference to the year of the deposition.

A. The Pre-Rulemaking Consultation Process

During CARB's informal consultations, and before having any substantive communications with Unocal relevant to its regulatory process, CARB's staff was informed of a potential relationship between gasoline emissions and a gasoline property known as T50, which refers to the temperature at which 50 percent of the gasoline is distilled or evaporates. RX 5 at CARB0000718, CARB0000724. For example, in the fall of 1990, representatives from Toyota met with CARB staff to discuss the effects of distillation temperatures on exhaust emissions. RX 177. Toyota emphasized to CARB that a "T50 decrease of 10-15° C produces 12-25% Reduction of HC of CO emissions." RX 177 at CARB-FTC 0018090. Additionally, Toyota urged CARB: "It is Hoped the Range of T50 Distribution in the US Will Be Reduced. This will Contribute to Improved Air Quality." *Id.*; see also Fletcher Dep. (CARB), 7/8/03, at 135:6-137:6.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]²

CARB staff became interested in learning about the effects of T50 on emissions no later than January 1991. In a January 1991 communication regarding a potential study of the impact of various gasoline properties on emissions, CARB staff wrote that "it is critical for the purposes of the study and regulation to have lower T50." RX 113. Lobbying activities by various interested parties reinforced CARB's interest in learning about T50. [REDACTED]

² [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED] At a public workshop on June 11, 1991, [REDACTED]
[REDACTED]

Throughout the regulatory development phase, CARB staff maintained very close contacts with representatives of the Atlantic Richfield Company (“ARCO”). In 1989, CARB issued a press release in which it praised ARCO’s efforts in developing a new “cleaner gasoline” that “reflects the direction of the ARB’s future regulation.” RX 108 at CARB-FTC 0052522. In 1991, as CARB’s staff was gearing up for a reformulated gasoline rulemaking, the staff was particularly interested in the composition of ARCO’s EC-X, which was a successor to the “cleaner gasoline” touted in CARB’s 1989 press release.

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] Thereafter, on or before July 21, 1991, CARB staff prepared two drafts of proposed Phase 2 regulations, one of which specified a T50 value of 190° F and the other of 200° F. RX 198 at CARB-FTC 0030878 (190°); RX 184 at CARB 1003057 (200°); [REDACTED]
[REDACTED]

On June 20, 1991, CARB officials met with Unocal representatives on an ex parte basis as part of the informal consultation process that preceded CARB’s Phase 2 rulemaking. This

meeting occurred five months after CARB officials wrote of the criticality of T50 [REDACTED]. At this meeting, Unocal representatives disclosed to CARB for the first time that research conducted by company scientists had shown that that automobile emissions levels could be predicted with a high degree of accuracy based on the levels of ten gasoline properties. *See, e.g.*, RX 24. One of the properties discussed at the meeting was T50, which Unocal's research had shown to be a significant predictor of emissions levels. *Id.* at 035.

Unocal's purpose in informing CARB of these findings was to persuade CARB to adopt regulations based on gasoline performance rather than gasoline formulas. Unocal believed that CARB should regulate emissions by using a "predictive model" that incorporated equations that predict emissions levels based on relevant gasoline properties. Instead of specifying maximum or minimum levels for particular gasoline properties, such regulations could specify maximum emissions levels and determine whether a gasoline was compliant through the predictive model. This approach would allow each refiner to choose the most efficient method for reducing emissions in light of the characteristics of its refining operations. Beach Dep. (Unocal), 6/19/03, at 23:3-25:4.

Unocal engaged in this lobbying in the hope of persuading CARB not to require the use of oxygenates in gasoline, which it feared would result in a mandate to use a chemical known as MTBE. Croudace IH Dep. (Unocal), 2/21/02, at 220:15-24. Unocal feared that such a mandate would place it at a competitive disadvantage because it lacked MTBE production facilities while competitors such as ARCO had such facilities. Lamb IH Dep. (Unocal), 1/16/02, at 27:16-28:19. Unocal's research showed that the beneficial effects that had been attributed to MTBE in fact resulted from the decrease in T50 levels associated with MTBE. *Id.* at 29:4-13.

Unocal's regulatory strategy was to advocate the adoption of a pure predictive (equivalency) model approach and to keep oxygen levels unrestricted in the Phase 2 regulations. CX 226 at 001. A Unocal memorandum prepared in advance of the meeting with CARB underscored that Unocal's goal was to secure a predictive model approach and avoid "unnecessary minimums or maximums on fuel parameters (*e.g.*, oxygen)." CX 240 at 001. Although Unocal was also interested in informing CARB about the importance of T50, it did not want CARB to regulate this property. Beach IH Dep. (Unocal), 1/23/02, at 62:6-63:22. Unaware that CARB had already formed a view on the subject, Unocal decided to let CARB know of the importance of T50 in order to avoid an oxygenate mandate. Company officials feared, however, that by "showing them [CARB] that data they might fall in love with T50." *Id.* at 61:22-62:5. They decided to take the risk because of the enormous benefits that would have accrued to the company, in the form of reduced regulatory compliance costs, if CARB were to adopt a predictive model.

CARB staff asked Unocal to disclose equations that Unocal had referenced at its June 20, 1991 meeting. By letter dated July 1, 1991, Unocal provided the equations to CARB and asked that CARB maintain their confidentiality. RX 2. Unocal's letter also stated, however, that Unocal would consider making the equations and supporting data public if CARB were to pursue a meaningful dialogue on a predictive model approach to Phase 2 gasoline. *Id.* Such public disclosure would have been necessary for CARB to rely on the information in promulgating regulations. *See* Simeroth Dep. (CARB), 7/9/03, at 124:12-125:18; Boyd Dep. (CARB), 8/22/03, at 146:19-147:10.

[REDACTED]

[REDACTED]

These draft regulations sought to regulate gasoline composition by specifying limits for eight specific fuel properties, including T50. On August 1, 1991, CARB published draft regulations in which it specified a T50 value of 200° F. RX 184 at CARB 1003057. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]³

CARB's proposal to regulate T50 had the support of a number of interest groups, including the automobile industry. At a workshop convened by CARB on August 14, 1991, GM proposed a 200° F limit for T50. RX 185 at CARB-FTC 0058586; Fletcher Dep. (CARB), 7/8/03, at 209:20-210:20. Toyota and Nissan also supported a 200° F limit for T50. RX 10 at CARB0000317.

B. Unocal's Waiver of Confidentiality Restrictions on Its Data

On July 25, 1991, after CARB had already drafted its regulations with a proposed T50 limitation, Unocal sent to CARB for the first time a computer disk containing the data that its representatives had discussed with CARB staff the previous month. RX 327. The data came from a 10-car study conducted by Unocal to test the relationship of various gasoline properties on emissions. *See, e.g.*, RX 327; RX 522; Chan Dep. (CARB), 8/29/03, at 8:16-11:15, 13:4-21. CARB understood that the emissions data on this disk was to be treated as confidential. Simeroth Dep. (CARB), 7/9/03, at 112:13-115:10. When printed out, the data consisted of 17 pages of columns of numbers, of which a sample is shown below (RX 1152):

³

[REDACTED] The 210° F limit remained in the Phase 2 regulation as adopted. RX 338 at CARB-FTC 0050184.

study	vehicle	fuel	hc	comp	co	comp	nox	comp	arom	olef	satur	mtbe	benzen	sulfur	ron	mon	t10	t50	t90	rvp
Unocal	9 A	0.23	2.54	0.11	9.6	0	90.4	0.	10	94	89.4	122	206	291	9.2					
Unocal	9 A	0.22	2.16	0.1	9.6	0	90.4	0.	10	94	89.4	122	206	291	9.2					
Unocal	9 A	0.24	2.39	0.11	9.6	0	90.4	0.	10	94	89.4	122	206	291	9.2					
Unocal	9 A	0.2	2.81	0.14	9.6	0	90.4	0.	10	94	89.4	122	206	291	9.2					
Unocal	9 A	0.19	2.08	0.1	9.6	0	90.4	0.	10	94	89.4	122	206	291	9.2					
Unocal	146 A	0.3	2.48	0.22	9.6	0	90.4	0.	10	94	89.4	122	206	291	9.2					
Unocal	146 A	0.21	2.17	0.19	9.6	0	90.4	0.	10	94	89.4	122	206	291	9.2					
Unocal	146 A	0.27	1.93	0.22	9.6	0	90.4	0.	10	94	89.4	122	206	291	9.2					
Unocal	385 A	0.82	5.4	1.23	9.6	0	90.4	0.	10	94	89.4	122	206	291	9.2					
Unocal	385 A	0.9	6.99	1.28	9.6	0	90.4	0.	10	94	89.4	122	206	291	9.2					
Unocal	385 A	0.99	8.86	1.28	9.6	0	90.4	0.	10	94	89.4	122	206	291	9.2					
Unocal	50M A	0.22	1.12	0.83	9.6	0	90.4	0.	10	94	89.4	122	206	291	9.2					
Unocal	50M A	0.2	1.21	0.93	9.6	0	90.4	0.	10	94	89.4	122	206	291	9.2					
Unocal	50M A	0.2	0.99	0.93	9.6	0	90.4	0.	10	94	89.4	122	206	291	9.2					
Unocal	7BC A	0.46	2.17	0.89	9.6	0	90.4	0.	10	94	89.4	122	206	291	9.2					
Unocal	7BC A	0.39	1.91	0.76	9.6	0	90.4	0.	10	94	89.4	122	206	291	9.2					
Unocal	7BC A	0.34	1.49	0.89	9.6	0	90.4	0.	10	94	89.4	122	206	291	9.2					
Unocal	7BC A	0.39	1.97	0.9	9.6	0	90.4	0.	10	94	89.4	122	206	291	9.2					
Unocal	815 A	0.18	1.93	0.3	9.6	0	90.4	0.	10	94	89.4	122	206	291	9.2					
Unocal	815 A	0.22	1.84	0.39	9.6	0	90.4	0.	10	94	89.4	122	206	291	9.2					
Unocal	815 A	0.19	2.11	0.32	9.6	0	90.4	0.	10	94	89.4	122	206	291	9.2					
Unocal	826 A	0.27	3.12	0.86	9.6	0	90.4	0.	10	94	89.4	122	206	291	9.2					

There is no evidence that any CARB employee ever considered this data at any time before the conclusion of rulemaking.⁴ Further, CARB could not have relied on the data when it published its draft regulations in which it proposed to set a T50 specification of 200° F. Because Unocal had requested that its data be treated as confidential, and CARB does not rely on information that submitters are unwilling to disclose publicly. *See* Simeroth Dep. (CARB), 7/9/03, at 124:12-125:18; Boyd Dep. (CARB), 8/22/03, at 146:19-147:10.

At some point after receiving Unocal's data, CARB's staff expressed its interest the possibility of a regulation based on a predictive model. CARB publicly stated on August 1, 1991, in connection with its publication of the proposed regulations that contained the T50 specification of 200° F, that it also intended "to develop predictive models based on past and current vehicle testing programs." RX 268 at CARB 10003064. To facilitate the use of Unocal's data in developing a predictive model, the staff asked Unocal to lift the confidentiality

⁴ After its receipt of the disk containing the data, CARB sent the disk to the State of California's Teale Data Center to be loaded onto a central computer. RX 121. A file containing Unocal's data was allegedly created at the Teale Data Center on August 2, 1991, a day after CARB published its regulation proposing to limit T50 to 200° F. *Id.* There is no evidence that any CARB employee attempted to use the data at any time before the conclusion of the rulemaking.

designation that it had attached to its data. Lamb IH Dep. (Unocal), 1/16/02, at 135:18-137:10. Without the ability to make the data public, CARB could not consolidate it with other data in the mega-database of vehicle tests that CARB was compiling. Fletcher 1996 Dep. (CARB), 6/17/96, at 203:8-204:12.

In response to CARB's professed interest in developing a predictive model, on August 27, 1991, Unocal's Dennis Lamb sent a letter to CARB's Executive Officer, James Boyd, that lifted the confidentiality of the data. RX 3. The letter's subject line read: "PUBLIC AVAILABILITY OF UNOCAL RESEARCH DATA." The subject line was followed with three paragraphs of text, which are replicated here in their entirety:

On June 20, 1991, certain Unocal representatives met with Peter Venturini and other members of his staff. During that meeting, we presented the results of three phases in Unocal's Vehicle/Fuels testing program. We subsequently made the data base available to staff and agreed to make the data public if necessary in the development of a predictive model for use in the certification of reformulated gasoline.

The staff has now proposed to develop such a predictive model and requested that we make the data public.

Please be advised that Unocal now considers this data to be non-proprietary and available to CARB, environmental interest groups, other members of the petroleum industry, and the general public upon request.

RX 3.

It is obvious from the face of the letter that the subject of the letter was solely the public availability of data and that Unocal was agreeing merely to "make the data public," as requested by CARB staff. The data referred to in the letter is, according to the letter, contained in the "data base [that Unocal had made] available to staff and agreed to make the data public if necessary in the development of a predictive model." *Id.* This is the same data that Unocal sent to CARB on July 25, 1991, and which CARB never even examined before the conclusion of its Phase 2 rule-

making. That the letter refers to this data—and only to this data—is not merely Unocal’s conjecture. It is also CARB’s position on the matter. See RX 327 (producing “the original diskette containing the data base referred to in Dennis Lamb’s August 27, 1991 letter”). CARB understood the letter to refer solely to the confidentiality of the data from the 10-car study of which a partial printout is reproduced above.

Unocal’s intentions regarding the letter are disclosed in internal Unocal communications prepared shortly before and shortly after the letter. A memorandum summarizing an internal strategy meeting that took place five days before the date of the letter states that to facilitate CARB’s adoption of a predictive model “Unocal will notify CARB that it will waive its rights to confidentiality of the 514 Project data.” RX 155 at U 0083539. And three days after sending the letter, Mr. Lamb told his management that “[w]e have agreed to make our 5/14 data public in order for CARB to use it at the workshop and in technical justification for the model.” RX 157.

C. The Phase 2 RFG Rulemaking

On October 4, 1991, CARB initiated a rulemaking to promulgate Phase 2 RFG regulations by publishing a Notice of Public Hearing to Consider Adoption of and Amendments to Regulations Regarding Reformulated Gasoline. RX 66. Under California law, as CARB recognized, the “rulemaking process begins with the release of the notice.” Kenny Dep. (CARB), 5/15/03, at 67:4-68:15; see also CAL. GOV’T CODE § 11346.4 (1991). In the Notice, CARB stated that “[t]he public hearing will be conducted in accordance with the California Administrative Procedure Act, Title 2, Division 3, Part 1, Chapter 3.5 (commencing with section 11340) of the Government Code.” RX 66 at CARB0000545. The cited procedures are applicable “to the exercise of any quasi-legislative power” by CARB. CAL. GOV’T CODE § 11346. Under California law, CARB’s rulemakings are “quasi-legislative” proceedings. *Western*

States Petroleum Ass'n v. Superior Court, 9 Cal. 4th 559, 567 (1995); see also *Kenny Dep. (CARB)*, 5/15/03, at 23:9-24-10. The promulgation of quasi-legislative rules is “an authentic form of substantive lawmaking.” *Yamaha Corp. v. State Bd. of Equalization*, 19 Cal. 4th 1, 6 (1998).

In the proposed regulations, as in the draft regulations that CARB had published two months earlier, the agency proposed to regulate eight fuel properties, including T50. RX 52 at 010 (Table I-2). But whereas the August 1 draft had a T50 specification of 200° F, the draft regulations proposed a T50 specification of 210° F. *Id.* [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Following the publication of the proposed regulations, CARB accepted both written and oral comments from interested persons. The oral comments were provided at a two-day hearing convened on November 21 and 22, 1991, at the conclusion of which CARB’s board adopted the proposed regulations, with some modifications. RX 60; RX 189. Unocal, and the majority of the refining industry, opposed the proposed regulations, which they deemed to be too costly. Unocal opposed both the regulatory concept of regulating fuel properties generally and CARB’s proposal to impose a limit on T50 specifically. According to CARB’s Final Statement of Reasons for Rulemaking, Unocal had argued, among other things, that:

- “We don’t see the specification for T50 as necessary.” RX 10 at CARB0000315.
- “[N]o further action is necessary to achieve [statutorily-mandated emission] reductions,” as “[e]xisting regulations will achieve reduction[s]” sufficient to fulfill the statutory mandate. *Id.* at CARB0000322.

- CARB should adopt a predictive-model based approach and link the compliance date to the adoption of such a model, such that “[f]or every month delay in the adoption of a predictive model after January 1992, there should be a corresponding one month delay in the effective date of the Phase 2 regulations.” *Id.* at CARB0000442.

Not surprisingly, the one refiner to support the adoption of the regulations was ARCO. Referring to industry lobbying to relax CARB’s proposed specification for T50, which was the product of a [REDACTED], ARCO stated that “considerable pressure is being exerted to relax the T50 specification” and urged CARB to resist this pressure. RX 10 at CARB0000317. [REDACTED]

[REDACTED]

[REDACTED]⁵

ARCO prevailed. On November 22, 1991, CARB’s Board voted to adopt the proposed regulations published by the agency the previous months with only minor modifications. RX 10 at CARB0000275-76. Unocal, however, continued to oppose the Phase 2 rules and to argue for delay in their implementation. Unocal urged CARB to delay the implementation of the regulations in June 1992 (RX 39 at CARB0003225) and again in September 1992 (RX 42 at CARB0004779). As late as January 1994, at a meeting with CARB Chairwoman Jananne Sharpless, Unocal argued that the Phase 2 rules were wholly unnecessary and that a low-emissions vehicle program coupled with an aggressive automobile inspection and maintenance program would be sufficient to meet air quality requirements. RX 200.

⁵ [REDACTED] At the CARB Board hearing at which the Phase 2 regulations were adopted, ARCO’s representative George Babikian testified that Phase 2 reformulated gasoline “should be somewhere around 16 cents a gallon” RX 60 at CARB0001191. [REDACTED]

D. CARB's Analysis of Cost-Effectiveness

Although the statutory mandate required CARB, among other things, to adopt cost-effective regulations, CARB's evaluation of the cost-effectiveness of its proposed Phase 2 regulations evinced a low priority for this criterion. The agency assigned the task of conducting the cost-effectiveness analysis for its regulations to a junior engineer who had no prior experience in performing cost-effectiveness analysis and provided him with no training on the subject. This engineer, Jim Aguila, learned about the subject from a cost-effectiveness guidance document that CARB made available to the public. Aguila Dep. (CARB), 7/24/03, at 7:21-8:1, 16:10-17:18, 21:1-9; RX 195. According to this document, cost-effectiveness "is neither the sole nor the dominant criterion for decisionmaking," as "[t]he primary mandate is to achieve the state air quality standards by the earliest practicable date." RX 195 at CARB-FTC 0039609.

In conducting his analysis, Mr. Aguila relied solely on information that CARB first sought from refiners, on a voluntary basis, on August 14, 1991. Aguila Dep. (CARB), 7/24/03, at 53:1-54:18, 89:11-91:12, 135:11-14. CARB requested the cost data from the refiners two weeks *after* it had already published a draft regulation that prescribed specific limits for various fuel properties, including T50. *See* RX 184. Because of the failure of most refiners to respond, and the incompleteness of the responses of those refiners that did respond, CARB ended up relying on limited investment and operating cost data from only two out of the 30 California refineries. Simeroth Dep. (CARB), 7/9/03, at 234:23-236:1; Aguila Dep. (CARB), 7/24/03, 160:19-163:5; 164:19-165:10, 176:8-177:7, 203:20-206:9.

The low priority that CARB attached to its cost-effectiveness "analysis" is demonstrated by the way in which the agency projected the operating costs of compliance with its proposed regulations. CARB's Final Statement of Reasons for Rulemaking, in reliance on Mr. Aguila's work, stated that operating costs would amount to 50% of the capital costs of regulatory

compliance. RX 10 at CARB0000357. Mr. Aguila determined that operating costs would amount to 50% of capital costs on the basis of data from *only two refiners*, one of which had estimated operating costs at 25% and the other at 40%. Aguila Dep. (CARB), 7/24/03, 167:3-16. CARB subjected Mr. Aguila's work to no supervision or review for methodological soundness. *Id.* at 16:10-19:4. In spite of the shoddiness of this cost-effectiveness analysis, CARB rejected proposals to delay promulgating its regulations to complete more rigorous cost studies. Boyd (CARB) Dep., 8/22/03, at 170:12-71:21.

Under the guidelines on which Mr. Aguila relied, it is appropriate to "adopt measures that are less cost-effective on a dollars per ton basis, if the potential emission reductions are greater." RX 195 at CARB-FTC 0039620. In its Final Statement of Reasons for Rulemaking, CARB rejected the view "that control measures [must] be adopted in the precise order of their respective cost-effectiveness" RX 10 at CARB0000379. CARB also rejected proposals by various refiners to conduct an incremental analysis of the cost-effectiveness of individual parameters of its Phase 2 regulation, whereby the incremental cost and benefit of each fuel property (such as T50 or RVP) would be determined. RX 10 at CARB0000373.

In its Final Statement, CARB estimated the cost of the Phase 2 RFG regulations at \$7,000-11,000 per ton of pollution avoided. RX 10 at CARB0000360. This amount was deemed to be cost-effective under a "going rate" approach, whereby CARB compares the cost of pollution abatement on a per ton basis to "the upper cost bound for measures recently adopted or proposed for adoption." RX 195 at CARB-FTC 0039612. Under this approach, the "going rate" that defined the upper bound of cost-effectiveness was \$32,000 per ton. Sharpless Dep. (CARB), 8/6/03, at 205:13-206:5; *see also* RX 60 at CARB 0001357 (\$50,000 upper bound).

This approach to cost-effectiveness explains CARB’s rejection of Unocal’s objections to the cost of the proposed Phase 2 rules. Unocal argued to CARB that the then-proposed rules would impose significantly greater costs than CARB was projecting, which Unocal estimated at \$16,000-20,000 per ton. RX 10 at CARB0000456. Converting these figures to a cost per gallon, CARB took Unocal’s estimate to mean that the regulations would impose costs of 23 cents per gallon, as compared to CARB’s estimate of 12 to 17 cents per gallon. *Id.* CARB rejected Unocal’s argument on the basis that the higher cost figure supplied by Unocal was well within the zone of cost-effectiveness: “[E]ven if the cost-effectiveness of Phase 2 RFG is changed by 25 percent as suggested by Unocal, the Phase 2 RFG cost-effectiveness would still be comparable to recently adopted regulations.” *Id.* [REDACTED]

[REDACTED]

E. The Political Nature of Advocacy During the Phase 2 RFG Rulemaking

Participants in CARB’s Phase 2 RFG rulemaking viewed the rulemaking as a political exercise. [REDACTED]

[REDACTED]

WSPA’s efforts focused on countering ARCO’s lobbying. [REDACTED]

[REDACTED]

[REDACTED] WSPA’s lobbying efforts featured [REDACTED]

[REDACTED]

[REDACTED]

In spite of these counter-lobbying efforts, ARCO proved to be influential throughout all phases of the process. Its success was no accident. [REDACTED]

[REDACTED]

[REDACTED] ARCO successfully persuaded CARB staff [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

F. Industry’s Use of the Term “Proprietary” to Connote “Confidential”

Unocal’s August 1991 letter waiving the confidentiality of the company’s data was, as its subject line states, about the “PUBLIC AVAILABILITY OF UNOCAL RESEARCH DATA.”
RX 3. Unocal used the term “non-proprietary” in that letter synonymously with “non-confidential.” This usage was consistent with the standard industry practice in dealings with CARB. [REDACTED]

[REDACTED]

[REDACTED] See, e.g., RX 328; RX 996. [REDACTED]

[REDACTED] See RX 206A.

It is not surprising then, that CARB’s executive director, to whom Unocal addressed its letter, testified that the term “proprietary” is often used as a “synonym” for confidential. Boyd Dep. (CARB), 8/22/03, at 209:19-213:9.⁶ Further, Mr. Boyd understood Unocal’s letter to signify that Unocal’s data could be “made public and utilized in – in trying to come up with a – a – regulation.” *Id.* at 183:7-21. And CARB testified, through the Rule 3.33(c) deposition of Peter Venturini, that there was no material difference between the term “non-proprietary” as used in Unocal’s letter and the term “non-confidential”:

⁶ More broadly, the use of the term “proprietary” as a synonym for confidential is common outside the petroleum industry as well. See, e.g., *Wiener v. NEC Elecs., Inc.*, 848 F. Supp. 124, 125-28 (N. D. Cal. 1994) (discovery decision using the terms “proprietary” and “confidential” interchangeably), *overruled on other grounds by*, *Cybor Corp. v. FAS Techs.*, 138 F.3d 1448 (Fed. Cir. 1998).

Q. If Unocal had said “not confidential” in that letter instead of “non-proprietary,” you would have used the information, the equations, the data, the presentation slides as you actually did.

A. Correct.

Venturini Dep. (CARB), 5/14/03, at 503:6-10. The same witness testified that the thought did not occur to him when CARB received the August 27 letter that the letter had “anything to do with patent rights.” *Id.*, 5/13/03, at 69:19-22.

There is no evidence that CARB ever examined Unocal’s data prior to its promulgation of the Phase 2 rulemaking. This is not surprising, given that CARB had expressed an interest in using the data for the purpose of developing a predictive model. *See* RX 3; RX 155 at U 0083539; RX 157. CARB only initiated its study of a predictive model after the conclusion of the Phase 2 RFG rulemaking. *See* Cleary Dep. (CARB), 8/7/03, at 96:1-11 (Cleary did not begin work developing the model until November or December of 1991); *id.* at 96:12-17 (predictive model database was built by November or December of 1991). At all times since lifting the confidentiality of its data, Unocal has complied with its pledge to treat its data as “non-proprietary and available to CARB, environmental interest groups, other members of the petroleum industry, and the general public upon request.” RX 3. The company has not asserted any proprietary rights over the data and has not sought to block anyone else from using the data.

G. CARB’s Lack of Interest in Intellectual Property Rights

Given CARB’s understanding, it is unsurprising that CARB did not understand Unocal’s waiver of confidentiality to be a waiver of rights in any technology or to refer in any way to patents. CARB never asked Unocal whether it possessed any patents related to its research. *See* Complaint Counsel’s Responses and Objections to Respondent’s Second Set of Requests for Admissions, Resp. 8 (herein after “RFA Resps.”). Indeed, CARB never inquired of any

company whether it had any patent rights. RFA Resps. 8, 11, 12. Thus, although CARB modeled Phase 2 RFG after ARCO's EC-X, CARB never considered whether ARCO had any patents or pending patents related to RFG. Venturini Dep. (CARB), 5/13/03, at 159:1-160:13.⁷ In the prior Phase 1 RFG rulemaking, CARB did not inquire about patent rights after learning of a Unocal "patent-pending development" related to the subject matter of the rule. RX 165 at CARB-FTC 0060533; RFA Resps. 8, 10-12; Simeroth Dep. (CARB), 7/9/03, at 20:21-22:21.

The absence of an expression of CARB interest in patents reflected the fact that CARB has no written or formal policy requiring rulemaking participants to disclose patent applications. Boyd Dep. (CARB), 8/22/03, at 251:17-252:7. No one at CARB was responsible for determining whether proposed regulations would be affected by existing or potential patents. Venturini Dep. (CARB), 5/13/03, at 140:25-142:12. CARB also had no policy against using patented technology in CARB regulations. Boyd Dep. (CARB), 8/22/03, at 251:17-252:21. Even today, CARB does not ask persons who comment on its proposed regulations whether they have any patent application that may relate to those regulations. Venturini Dep. (CARB), 5/13/03, at 144:25-148:5.

Unocal, as the Complaint alleges, did have a patent application pending at the Patent and Trademark Office in 1991, which related to clean-burning gasoline compositions. Unocal did not disclose this application to CARB because it had never been put on notice of the existence of an obligation to disclose issued patents, let alone patent applications, which are protected from public disclosure by patent law.⁸ Like many companies—including a number of the other

⁷ CARB also never asked ARCO, which was championing a regulatory mandate to use MTBE and had invested heavily in MTBE manufacturing facilities, whether it had any patents related to MTBE. Boyd Dep. (CARB), 8/22/03, at 220:2-16; Courtis Dep. (CARB), 8/28/03, 133:10-135:14.

⁸ In 1991, all patent applications were deemed confidential throughout the application process.

California refiners—Unocal’s internal policy was to keep patent applications confidential. As just seen, CARB never adopted a policy regarding patent disclosure and never asked anyone about patents (or applications). At the time of the Phase 2 rulemaking, moreover, Unocal could not have known whether its application would be granted and, if so, what claims would be allowed. The only Patent and Trademark Office (“PTO”) action with respect to the application prior to the promulgation of the Phase 2 rulemaking was a notice of the rejection of all of Unocal’s patent claims. RX 852 at UFTC 004810. Unocal received its first patent based on that application, U.S. patent 5,288,393 (“the ‘393 patent”), in February 1994. CX 337.

H. CARB’s and the Refiners’ Reaction to Unocal’s Patent Grant

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Significantly, when CARB learned in 1995 of the issuance of the '393 patent, no CARB board member, CARB staff member, or any other California state official suggested that Unocal had misled CARB by failing to apprise it of its patent application or by telling CARB that certain of its emissions data was "non-proprietary." A March 1995 internal CARB memorandum that analyzed the issues surrounding the issuance of the '393 patent did not even imply that Unocal did anything to mislead CARB. RX 64. Reflecting the agency's understanding that Unocal had not violated any duty to CARB in obtaining its patent, CARB's Executive Officer James Boyd sought assurances from Unocal that it would "not raise patent infringement issues" as to a

⁹ [REDACTED]

reformulated gasoline test program that was then being conducted by CARB. RX 50. Unocal consented. Using language that clearly spoke to a waiver of specified patent rights, Unocal agreed that it “will not seek an injunction against an infringement of its patent” or “collect monetary damages” against “the producer or users of the test program fuel for the announced amount of 600,000 gallons.” RX 49.

Since that time, Unocal has obtained four other patents that are derived from the original application that led to the issuance of the ‘393 patent. Answer ¶ 15. At no time since learning of any of Unocal’s patents has CARB or its staff given serious consideration to modifying the agency’s regulations to make it easier for refiners to avoid any of Unocal’s patents. The reason given for this failure was not an alleged regulatory “lock-in” as the Complaint alleges. The real reason, according to CARB’s Rule 3.33(c) testimony through Peter Venturini, was that, even after Unocal won a judgment, CARB did not believe that its ‘393 patent was valid and infringed. Venturini Dep. (CARB), 5/14/03, at 402:25-403:19.

Even after Unocal had won an infringement judgment against the major refiners on the ‘393 patent, which had been sustained by a denial of the refiners’ motion for judgment as a matter of law, CARB did not take Unocal’s patent into account in amending its RFG regulations. Even after this judicial ruling, CARB viewed the ‘393 patent as being “still in a state of flux” and “believed that there were concerns with the validity of the patent.” Venturini Dep. (CARB), 5/14/03, at 402:25-403:19. CARB thus believed a patent that was sustained by a judgment after trial was surrounded with too much uncertainty prior to the exhaustion of appeals to be taken into account in its regulatory decisions. Yet according to Complaint Counsel, this same government agency would have dramatically redirected its Phase 2 regulations had it merely learned of the

existence of Unocal's *application* for the same patent, which had been rejected in its entirety at the time of the promulgation of the Phase 2 RFG rules.

I. Unocal's Participation in Industry Groups' Advocacy Before CARB

During the period leading to the Phase 2 RFG rulemaking, Unocal participated in two industry groups' efforts to influence CARB. One was the Auto/Oil Air Quality Improvement Research Program ("Auto/Oil") and the other was WSPA. The Complaint alleges that Unocal misled participants in these groups into believing that it had no patents or patent applications that may read on reformulated gasoline and that, but for this alleged fraud, members of these entities would have altered their advocacy before CARB and would have incorporated knowledge of the Unocal's unissued patents into their refinery investment decisions. Compl. ¶ 90. In addition, the Complaint alleges that Unocal's independent research actually belonged to the Auto/Oil Program as the work of the program. *Id.* ¶ 53.

Unocal had no duty to make any kind of disclosures to members of the two programs. Complaint Counsel seek to create a duty out of the fact Unocal had given some cost information to WSPA for use in a cost study. *See* Compl. ¶ 57. But Unocal had no duty to provide accurate cost information to an organization comprised of its horizontal competitors, and, there is no evidence that Unocal provided inaccurate information in any event. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] It was never asked for information about any other kind of royalty or any future patent.

The Complaint also alleges that Unocal presented results of its research to WSPA. Compl. ¶ 58. There is no evidence, however, that Unocal ever represented that it was foregoing its rights on all technology associated with the research by presenting information about its research. It is quite common for researchers to disclose data or research results in public forums

without foregoing the right to exploit their intellectual property by mere virtue of such disclosure. Linck Rpt. at 10. No inference about intellectual property rights may be drawn from such disclosures. [REDACTED]

[REDACTED]

[REDACTED]

With respect to Auto/Oil, the Complaint alleges that Unocal had told the organization that it was placing its data in the public domain. Compl. ¶ 54. The person who purportedly made this statement denies having done so. Jessup IH Dep. (Unocal), 1/25/02, at 125:4-12. And the author of the document attributing this statement to Unocal could not specifically recall the use of the words “public domain,” and interpreted those words to mean merely that “data was available to any interest – any interested party who may want to access the data.” Meyer 1996 Dep. (Auto/Oil Attorney), 7/23/96, at 23:1-5, 24:8-25:12. The Complaint also alleges that Unocal’s independent research became the “work of the program” by mere virtue of Unocal’s disclosure of some of its research results to members of the group. But the Auto/Oil program’s agreement regarding the group’s research activities expressly provided that research conducted independently by members of the group “shall not be deemed to be undertaken by the program.” RX 226 at U 0003040-41 (¶ 6.B). The agreement contains an integration clause that makes it clear that no amendment “will be valid unless in a writing signed by each and every member.” *Id.* at U 0003050 (¶ 15). No such writing has been designated as an exhibit by Complaint Counsel, as no such writing exists.

The Complaint alleges that members of the two organizations would have altered their lobbying activities had they known about Unocal’s patent application. As discussed above, re-finer members of the two programs, with the exception of ARCO, lobbied vigorously against the

CARB Phase 2 RFG regulations, including the T50 parameter. ARCO lobbied for the regulations [REDACTED]

[REDACTED]

The Complaint also alleges that refiners would have altered their refinery investments had they known about Unocal's patent application. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

J. CARB's Lack of Alternatives to the Phase 2 Regulations

The Complaint alleges that CARB would have adopted different regulations or brokered some license agreement had it become aware of Unocal's patent application prior to the conclusion of the Phase 2 RFG rulemaking. But CARB's Rule 3.33(c) testimony leaves no room for any such alternative. Through the testimony of Mr. Venturini, CARB took the position that it

would have adopted *no regulation* had it merely learned of the existence of Unocal's patent application: "[I]f the patent had been disclosed to us, there would not have been a regulation." Venturini Dep. (CARB), 5/14/03, at 519:18-520:2; *id.* at 510:6-520:2. According to the same testimony, CARB would have made this decision regardless of the potential rate of infringement of the patent or the cost of patent avoidance. *Id.* at 518:7-23. In other words, even if CARB had believed that the patent would almost never be infringed or could be avoided for a trivial cost, it would have shut down its rulemaking, according to CARB's official testimony.¹⁰

But failure to adopt regulations would have resulted in the imposition upon California of a draconian Federal Implementation Plan ("FIP") that would have been needed to bring the state into compliance with the Federal Clean Air Act. Pedersen Rpt. at 5-6. CARB itself recognized that failure to adopt Phase 2 regulations would have caused "renewed legal challenges from U.S. EPA for failing to abide by our State Implementation Plan." RX 62 at CARB 0010092. A study commissioned by the California Governor's Office found that the imposition of a FIP would have cost the state at least \$8.4 billion in direct costs and \$17.2 billion in lost output, and would have resulted in the loss of 165,000 jobs. RX 334.

The Complaint alleged that Unocal's enforcement of its patents caused consumer injury. For such injury to exist, Unocal's actions, if wrongful, would have had to deprive CARB of the ability to adopt a more cost-effective pollution abatement program than the one that it did adopt, taking Unocal's royalties into account. Significantly, Complaint Counsel's economic expert, Professor Carl Shapiro, does not even suggest that the FIP alternative would have been more

¹⁰ In contrast to this testimony, CARB's official Final Statement of Reasons for the Phase 2 RFG rulemaking concluded that even a regulation that would cost 25% more than CARB had projected would be cost-effective and justifiable. RX 10 at CARB 0000456.

cost-effective than the existing regulations, taking into account Unocal's patent royalties. Indeed, he does not identify a single regulatory alternative that CARB could have adopted at the time of its Phase 2 rulemaking had it known of Unocal's patent application that would have been more cost-effective.

II. This Proceeding Is Barred by the *Noerr* Doctrine

On November 25, 2003, Your Honor issued an Initial Decision granting Unocal's motion for dismissal of the Complaint based on the doctrine of antitrust petitioning immunity. That decision, Unocal submits, correctly noted that the Supreme Court has recognized only two narrow exceptions to *Noerr* immunity: the "sham" invocation of governmental processes and the provision of false information under oath in the context of an *ex parte* patent application process. The Initial Decision found that neither exception was applicable in the context of a quasi-legislative rulemaking that established fuel regulations covering the entire state of California.

On June 7, 2004, the Commission reversed the Initial Decision and remanded this action for trial. In its opinion, the Commission promulgated a novel seven-factor test as a means of distinguishing between "political" or "non-political" proceedings and defining the scope of *Noerr* immunity. *In re Union Oil Co. of Cal.*, No. 9305, slip op. at 31-32 (FTC July 6, 2004) (hereinafter "Op."). As described below, the Commission's opinion attempts to work a fundamental redefinition of the *Noerr* doctrine that is irreconcilable with a long line of Supreme Court holdings on the scope of petitioning immunity. Accordingly, Unocal expressly reserves its rights to challenge this legal standard in any future proceedings.

It is clear, however, that the *Noerr* doctrine bars this proceeding even under the erroneous, restrictive interpretation of petitioning immunity set forth by the Commission. The Phase 2

RFG rulemaking at issue here was “political in the *Noerr* sense.” Each of the factors articulated by the Commission mandates the application of the petitioning immunity to Unocal’s conduct:

First, CARB had no “norms of conduct” (Op. at 32) that established expectations that persons lobbying the agency for favorable regulatory treatment will always act truthfully. To the contrary, as CARB’s Chairwoman testified, advocates before the agency “are not always forthcoming with all information.” Sharpless Dep. (CARB), 8/6/03, at 167:13-168:6.

Second, CARB possessed enormous regulatory discretion. This discretion was so broad as to encompass the power to “[r]equire the use of fuels other than gasoline.” RX 5 at CARB0000868. CARB rejected this option because it “could not be wisely done on the basis of only emissions.” *Id.* at CARB0000869.

Third, CARB was not reliant on Unocal for any information relating to its intellectual property rights. CARB never indicated the slightest interest in intellectual property rights during its Phase 2 RFG rulemaking, and continued to ignore such rights in its subsequent rulemakings.

Fourth, it is impossible to trace the causation of CARB’s regulatory outcome to any supposed Unocal misrepresentation. CARB’s board members never explained their vote on the Phase 2 regulations and there is no evidence that Unocal’s representations to CARB played an outcome-determinative role in CARB’s decisionmaking.

Fifth, Unocal did not make any misrepresentation or omission to disclose, let alone a material one. CARB understood Unocal to be authorizing the disclosure of data on a particular disk, and not to be granting a broad waiver of future intellectual property rights. Unocal’s representations to CARB in its August 1991 letter cannot objectively be construed as waiving any intellectual property rights or implying that no such rights existed.

Sixth, this case does not involve a falsity that is “clear and apparent with respect to particular and sharply defined facts.” Op. at 36. Unocal’s statement regarding the confidentiality of its data was not a statement about patent rights at all, and certainly not a clear statement about the absence or waiver of such rights. And Unocal’s statement that a predictive model would be cost-effective plainly states a policy position and not a sharply defined fact.

Seventh, Unocal’s statements to CARB did not “undermine[] the very legitimacy of the government proceeding.” Op. at 36. Indeed, CARB’s Executive Director, to whom Unocal addressed the waiver of confidentiality, could not even recall Unocal’s communication. Boyd Dep. (CARB), 8/22/02, at 182:22-184:18. This is hardly consistent with a misrepresentation that “infect[s] ‘the very core’ of the case.” Op. at 36. Moreover, CARB’s continued disbelief in the validity of Unocal’s patents, and consequent refusal to alter its regulation to take the patents into account, even after Unocal won an infringement judgment cannot be reconciled with any claim that awareness of a mere patent application would have been material to CARB’s decisionmaking.

A. The *Noerr* Doctrine and the Commission’s Opinion Reversing the Initial Decision

1. The *Noerr* Doctrine Broadly Protects Advocacy Directed Toward Obtaining Governmental Action

The foundations of the *Noerr* doctrine were briefed extensively by Unocal in connection with its Motion to Dismiss and Complaint Counsel’s appeal to the Commission. In *Noerr*, the Supreme Court recognized that the antitrust laws have no place in regulating the solicitation of governmental action that injures competition. *Eastern R.R. President’s Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 140-41 (1961) (“The proscriptions of the Act, tailored as they are for the business world, are not at all appropriate for application in the political arena.”). Sub-

sequent decisions have confirmed that the principles outlined in *Noerr* apply not only to legislative petitioning, but also to solicitation of action from the executive and judicial branches. *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965). “[T]he *Noerr* doctrine sweeps broadly and is implicated by both state and federal antitrust claims that allege anticompetitive activity in the form of lobbying or advocacy before any branch of either federal or state government.” *Kottle v. Northwest Kidney Centers*, 146 F.3d 1056, 1059 (9th Cir. 1998).

The *Noerr* doctrine affirms two key constitutional principles—the right to petition for governmental action and federalism. In *Noerr*, the Court recognized that “to a very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives,” and that the threat of antitrust liability arising from such communications would chill the public’s ability “to freely inform the government of their wishes.” *Noerr*, 365 U.S. at 137.

Using the antitrust laws to police petitioning conduct raises equally serious federalism concerns because establishing a causal link between petitioning and anticompetitive governmental actions requires deconstructing the government’s decisionmaking. The Supreme Court has warned against “deconstruction of the governmental process and probing of the ‘official intent’” to identify government actions infected by improper petitioning conduct. *City of Columbia v. Omni Outdoor Advertising*, 499 U.S. 365, 377 (1991). Rather than the antitrust laws, “the remedy for such conduct rests with laws addressed to it and not with courts looking behind sovereign state action at the behest of antitrust plaintiffs.” *Armstrong Surgical Center, Inc. v. Armstrong County Mem’l Hosp.*, 185 F.3d 154, 162 (3d Cir. 1999).

The danger that the Supreme Court highlighted is amply illustrated in this proceeding. Complaint Counsel intend to call six current and former CARB officials as witnesses in an attempt to probe CARB's "official intent" and establish a link between Unocal's petitioning and the agency's decisions that are the direct cause of the competitive injury alleged by the Complaint. The official record of the rulemaking, by contrast, reveals no such link.

The Supreme Court has recognized only two narrow exceptions to *Noerr* immunity—for "sham" invocation of governmental processes and enforcement of a patent secured by fraud on the Patent and Trademark Office. The "sham" exception to *Noerr* relates solely to instances in which a private actor "use[s] the governmental *process*—as opposed to the *outcome* of the process—as an anticompetitive weapon." *City of Columbia*, 499 U.S. at 380. Similarly, the exception for fraud on the PTO recognized by the Court in *Walker Process Equip., Inc. v. Food Mach. & Chem. Corp.*, 382 U.S. 172 (1965), has never been applied by any court outside the patent application setting.

2. The Commission's Decision Conflicts with Established Precedent

Several aspects of the Commission's opinion lie in direct conflict with established precedent. The Commission interpreted the sham exception to *Noerr* immunity in a manner that has been specifically rejected and criticized by the Supreme Court. It also disregarded the consistent bifurcation observed in the *Noerr* case law between the "political arena" and adjudications and established a new, inherently subjective distinction between political and non-political proceedings. The Commission's test is not only unknown in the case law, but it is not even consistent with the language of the Commission's own Complaint. That Complaint alleged specifically, albeit incorrectly, that Unocal's conduct was unprotected because CARB's rulemaking process was "quasi-adjudicatory," in recognition that those courts that have accepted an exception to

Noerr for misrepresentations have done so only in the context of adjudicative proceedings. The opinion’s error is compounded by its dismissive treatment of basic administrative law principles that distinguish between adjudications and quasi-legislative actions.

The reasoning of the Commission’s opinion rests on a misunderstanding of the relationship between misrepresentations and the sham exception. The opinion asserts that the Supreme Court has “left open” this issue and criticizes the Initial Decision for describing the exception as being “confined to ‘situations in which persons use the governmental *process* as opposed to its *outcome* as an anticompetitive weapon.’” Op. at 24 (emphasis in original). It further asserts that nothing in the case law “precludes treating misrepresentation as a variant of sham.” *Id.* at 25.

The Supreme Court, however, sees things differently. The Court has specifically warned against attempting to condemn “improper means” of petitioning under the rubric of “sham.” *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 507 n.10 (1988). The Court emphasized that “[s]uch a use of the word ‘sham’ distorts its meaning and bears little relation to the sham exception *Noerr* described to *cover activity that was not genuinely intended to influence governmental action.*” *Id.* (emphasis added). The Court’s criticism of the sweeping concept of “sham” that the Commission has now embraced was grounded in the concern that the concept of “sham,” untethered from its foundation as a tool for identifying harm caused by *private* action, could easily become “no more than a label courts could apply to activity they deem unworthy of antitrust immunity.” *Id.*; see *Prof’l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 55 (1993) (“*PRE*”). Accordingly, the Court’s recent jurisprudence underscores that the “sham” exception applies *only* to “a defendant whose activities are ‘not genuinely aimed at procuring favorable government action’ at all, not one ‘who genuinely seeks to achieve his government result, but does so *through improper means.*’” *Omni*, 499 U.S.

at 380 (internal citations omitted, emphasis in original). “To extend [sham] to a context in which the regulatory process is being invoked genuinely . . . would produce precisely that conversion of antitrust law into regulation of the political process that we have sought to avoid.” *Id.* at 382.

The Commission’s misreading of the sham exception has important consequences for the remainder of the analysis. The only context in which the Supreme Court has recognized antitrust liability for misrepresentations to an administrative agency was in *Walker Process*, which involved fraud in the *ex parte* setting of submissions under oath to a patent examiner. The Court has never extended *Walker Process* beyond those specific circumstances. Moreover, although the Commission’s opinion cites *PRE* as allegedly leaving open “the relationship between misrepresentations and the sham exception,” Op. at 24, the cited text makes clear that the Court viewed misrepresentation as wholly separate from sham, and left open only whether *Walker Process* could be extended to judicial litigation rather than confined to the patent application process. See *PRE*, 508 U.S. 49, 61 n.6. Thus, no existing exception to *Noerr* immunity provides a foundation for the radical pruning of the doctrine proposed by the Commission’s opinion.

The Commission’s opinion also erred in focusing its *Noerr* analysis on an unprecedented and ill-defined distinction between political and “non-political” proceedings. This distinction is inconsistent with the case law, which analyzes whether proceedings are political or *adjudicative* in assessing the scope of petitioning immunity. Even the Complaint in this action alleges that *Noerr* protection is lacking because CARB’s rulemaking was *quasi-adjudicatory*. Compl. ¶¶ 26, 96. The Complaint’s choice of language was deliberate. The political/adjudicative distinction has been applied by many courts. By contrast, Unocal is not aware of any decision prior to the issuance of the Commission’s opinion that analyzes *Noerr* by contrasting political and “non-political” proceedings, and the Commission’s opinion cites none.

The distinction between political (or quasi-legislative) and adjudicative proceedings is deeply ingrained into the case law discussing misrepresentations in the context of petitioning immunity. This distinction tracks the Supreme Court’s suggestion that “misrepresentations, condoned in the political arena, are not immunized when used in the adjudicatory process.” *California Motor Transport*, 404 U.S. at 512-13. Quoting the same language in *PRE*, the Supreme Court underscored that it was an open question “whether, and if so, to what extent *Noerr* permits the imposition of antitrust liability for a *litigant’s* fraud or other misrepresentations.” *PRE*, 508 U.S. at 61 n.6 (emphasis added). This focus on contrasting adjudications with proceedings in the political arena is echoed in the leading text on antitrust law, which states that “[c]ompared with the legislative process, improper behavior in the adjudicatory or judicial context is more readily defined as improper and more widely regarded as reprehensible.” I Phillip E. Areeda & Herbert Hovenkamp, *ANTITRUST LAW* ¶ 203d at 169 (2d ed. 2000).

The distinction between political and adjudicative proceedings has also been strictly followed by the lower courts in analyzing misrepresentations under *Noerr*. Even the cases cited by the Commission as ostensible support for its novel political/non-political distinction make clear that the relevant inquiry is actually focused on whether a proceeding is adjudicative or within the political arena. *See, e.g., Kottle v. Northwest Kidney Centers*, 146 F.3d 1056, 1061 (9th Cir. 1998) (analyzing “whether the executive entity in question more resembled a judicial body, or more resembled a political entity”); *Boone v. Redevelopment Agency*, 841 F.2d 886 (9th Cir. 1988) (distinguishing between adjudicative and legislative proceedings); *Clipper Express v. Rocky Mountain Motor Tariff Bureau, Inc.*, 690 F.2d 1240, 1261 (9th Cir. 1982) (contrasting characteristics of “political sphere” and “adjudicatory sphere”); *Metro Cable Co. v. CATV of Rockford, Inc.*, 516 F.2d 220 (7th Cir. 1975) (distinguishing between the “adjudicative, as oppos-

ed to [] political, setting” for *Noerr* immunity analysis); *Friends of Rockland Shelter Animals Inc. v. Mullen*, 313 F. Supp. 2d 339, 343 (S.D.N.Y. 2004) (distinguishing between misrepresentations in lobbying and in the adjudicative process); *Livingston Downs Racing Assn, Inc. v. Jefferson Downs Corp.*, 192 F. Supp. 2d 519 (M.D. La. 2001) (analyzing “whether the Commission, an executive agency, is more akin to a political entity or to a judicial body”).

These cases use the term “political” interchangeably with “legislative” or “policymaking” to distinguish between the legislative or quasi-legislation function of establishing rules for future conduct and the adjudicative or quasi-adjudicative function of applying existing law to contested facts. *See, e.g., Boone v. Redevelopment Agency*, 841 F.2d at 896 (distinguishing “political” or “essentially legislative” actions on the one hand from “adjudicative” actions on the other). As one case cited by the Commission emphasizes, *Noerr* immunity is aimed at protecting “action designed to influence policy.” *Woods Exploration & Producing Co. v. Aluminum Co. of America*, 438 F.2d 1286, 1298 (5th Cir. 1971); *see also DeLoach v. Phillip Morris Cos., Inc.*, 2001 WL 1301221 at *44 (M.D.N.C. 2001) (immunity applies to all conduct designed to genuinely influence “the policy-making process”).¹¹

By departing sharply from established precedent, the Commission embraced an approach that offers only “a certain superficial certainty but no real ‘intelligible guidance’ to courts or litigants.” *Allied Tube*, 486 U.S. at 507 n.10. The failure of this approach manifested in the

¹¹ Indeed, the Commission has taken the position that *Noerr* immunity reaches even proceedings with “adjudicatory” qualities if the proceedings are imbued with policymaking components. Brief for the United States and Federal Trade Commission as Amici Curiae in *Armstrong Surgical Center, Inc. v. Armstrong County Mem’l Hosp.*, No. 99-905 (Filed June 2000) at 19 (hereinafter cited as “U.S./FTC *Armstrong Br.*”). In *Armstrong*, according to the Commission, the fact that the government agency had “to consider all relevant factors prior to authorizing construction of additional health care facilities” rendered its activities “political in the *Noerr* sense” and mandated immunity for participants in its proceeding – even participants accused of misrepresentations. *Id.*

unintelligible way in which the opinion attempts to distinguish between protected “political” petitioning and supposedly unprotected petitioning in “policy-making” settings. *See* Op. at 33 n.73. The opinion criticizes Unocal for addressing the issue in terms of “‘policy questions,’ ‘policy considerations,’ ‘policy judgments,’ and ‘political judgments,’” asserting that “[f]raming the inquiry in that fashion begs the questions of what is ‘policy’ and what is ‘political.’” *Id.* But the very same opinion recognizes, albeit inadvertently, that the distinction between “policy” and “political” is meaningless for purposes of *Noerr*; the Commission characterizes the *DeLoach* case as holding that the “submission of false purchase intentions to a government agency to affect administrative determination of a tobacco production quota *involved no policy-making process* and fell outside *Noerr-Pennington* protections.” *Id.* at 25 n. 50 (emphasis added).

The Commission’s error in misstating the distinction between political and adjudicative proceedings is compounded by its failure to consider the implications of basic administrative law principles in characterizing government action. According to the Commission, “a much broader view than just administrative law distinctions” is required to analyze the scope of *Noerr* immunity. Op. at 30. But the Commission offers no support for its counterintuitive conclusion that a body of law developed to prescribe substantive and procedural constraints for different forms of administrative action based on the degree of discretion exercised by agencies has no role at all in assessing the “context of the proceeding” for *Noerr* purposes. *Id.* This surprising omission undercuts the very core of the Commission’s analysis. The courts distinguish between political and adjudicative proceedings in the administrative law context and uniformly hold that rule-making is on the “political” side of the ledger. The underpinning of their reasoning and that of courts applying the political-adjudicative distinction in the *Noerr* context is one and the same.

The Supreme Court has characterized notice-and-comment rulemakings such as CARB’s Phase 2 RFG proceeding as “significantly political” in nature and “quasi-legislative.” *United States v. Mistretta*, 488 U.S. 361, 393 (1989). The Court’s analysis in *Mistretta* emphasized the “significant discretion” granted to the Judicial Sentencing Commission by Congress to formulate sentencing guidelines, notwithstanding that Congress had provided “detailed guidance” for the Commission. *Id.* at 377. The Court focused specifically on the distinction between adjudicative functions and rulemaking in upholding the constitutionality of the delegation of “significantly political” rulemaking responsibilities to the Commission. *Id.* at 393-94.

The Court similarly recognized the political character of rulemaking in *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984). In *Chevron*, the EPA conducted an APA notice-and-comment rulemaking to reinterpret a portion of its statutory mandate under the Clean Air Act following a change in administrations. In reviewing a challenge to the EPA’s rule, the Court described the EPA’s reinterpretation as “entirely appropriate for *this political branch of the Government* to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency” *Id.* at 865-66 (emphasis added). The Court emphasized that the EPA, in adopting its regulations, was engaged in a complex process of reconciling competing interests in reducing pollution and fostering economic growth. That task, which the Court repeatedly describes as “political” in *Chevron*, is identical to CARB’s function in the Phase 2 RFG rulemaking. This characterization of rulemakings is particularly significant because the California Supreme Court relied heavily on *Chevron* in describing the broad discretion exercised by CARB in its rulemakings. *Western States Petroleum Ass’n v. Superior Court*, 9 Cal. 4th 559, 572-73 (1995).

Characterization of rulemakings as “political,” moreover, is not limited to the context of APA notice-and-comment procedures. The Court of Appeals for the D.C. Circuit reached the same conclusion in the context of an FTC rulemaking pursuant to the Magnuson-Moss Act, which subjects the agency to far more elaborate evidentiary constraints than CARB was required to, or did, observe. *Ass’n of Nat’l Advertisers, Inc. v. FTC*, 627 F.2d 1151 (D.C. Cir. 1979). The court recognized that lobbying and other political interaction was an accepted part of the policy dialogue relating to rulemaking: “The legitimate functions of a policymaker, unlike an adjudicator, demand interchange and discussion about important issues. We must not impose judicial roles upon administrators when they perform functions very different from those of judges.” *Id.* at 1168. Rejecting a role as “arbiters of the political process” of rulemaking, the Court adopted a legal standard that permitted administrators to lobby and engage in political advocacy in the course of rulemaking. *Id.* at 1174.¹²

These cases discuss rulemaking using exactly the same contrast between “political” and “adjudicative” proceedings applied by courts analyzing *Noerr* immunity. Other administrative law cases use the terms “quasi-legislative” and “quasi-adjudicative” to draw the identical distinction. *See, e.g., Portland Audobon Soc’y v. Endangered Species*, 984 F.2d 1534, 1540 (9th Cir. 1993); *Utility Solid Waste Activities Group v. EPA*, 236 F.3d 749, 753 (D.C. Cir. 2001). The same distinction is repeated by many other authoritative sources. *See, e.g.,* U.S. Department of Justice, ATTORNEY GENERAL’S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 14 (1947)

¹² This decision also underscores why the existence of procedural constraints on the agency’s decisionmaking does not render its process “non-political.” This also is made clear by the Ninth Circuit’s decision in *Boone v. Redevelopment Agency of City of San Jose*, 841 F.2d 886 (9th Cir. 1988), which held that misrepresentations in the context of zoning proceedings were immune under *Noerr*. The court expressly rejected the claim that the presence of “some of the trappings normally associated with adjudicatory procedures” changes the nature of a fundamentally quasi-legislative proceeding for purposes of *Noerr* immunity. *Id.* at 896.

(“Rule making . . . is essentially legislative in nature Conversely, adjudication is concerned with the determination of past and present rights and liabilities.”); 1 Richard J. Pierce, Jr., ADMINISTRATIVE LAW TREATISE § 6.8 (4th ed. 2002) (rulemaking “resembles the process of statutory enactment” by a legislature and “closely resembles a statute in its form and effect”).

Thus, the Commission’s decision disregarded settled law in drawing an artificial distinction between quasi-legislative rulemakings and the political sphere. Nevertheless, even the Commission’s erroneous legal standard cannot eviscerate the *Noerr* immunity in this case.

B. Examination of the Context of the Phase 2 RFG Rulemaking and the Nature of Unocal’s Communications with CARB Shows That Unocal’s Conduct Is Protected under *Noerr*

Although the Commission’s decision is fundamentally at war with the case law, Unocal’s petitioning of CARB is protected by *Noerr* immunity even under the Commission’s erroneous test. The Commission’s analysis emphasizes seven factors relating to the “context of the proceeding” and “nature of the communication” to evaluate the application of the immunity to misrepresentations. The factors identified by the Commission as relevant to the context of the proceeding are: (1) government expectations of truthful representations, (2) the degree of discretion possessed by the agency, (3) the extent of necessary reliance of the agency on factual assertions, and (4) the ability to determine causation. *Op.* at 32-35. With respect to the challenged communications, the Commission identified as relevant factors: (1) the deliberateness of the misrepresentation or omission, (2) factual verifiability of the misrepresentation, and (3) the centrality of the misrepresentation to the legitimacy of the proceeding. *Id.* at 36. Application of these factors compels the conclusion that Unocal’s petitioning conduct is immune from antitrust liability.

1. Context of the Phase 2 RFG Rulemaking

a. Government Expectations of Truthful Representations

The Commission’s opinion emphasizes that “the nature of politics places government on its guard.” Op. at 32. The political arena is recognized as “often a rough and tumble affair” in which misrepresentations are condoned. *Id.* Adjudicative proceedings, on the other hand, operate pursuant to a very different set of expectations. In adjudicative proceedings, “there are well developed and highly elaborated definitions of what is or is not proper behavior.” I Areeda & Hovenkamp, ANTITRUST LAW ¶ 203 at 169. Similarly, the opinion defines the political arena in contrast to proceedings in which “there [are] more formal, constrained procedures for the establishment of certain types of facts and the application of particular policies.” Op. at 38 (citing Robert Bork, THE ANTITRUST PARADOX 360 (1978)). Accordingly, CARB’s “expectations of truthful representation” must be evaluated with respect to the norms of conduct established for the Phase 2 RFG rulemaking.

CARB had no formalized procedures for the development of facts in its rulemaking and took no steps to define the parameters of “proper behavior.” CARB did not require information to be submitted under oath, establish procedures governing the submission of factual information, limit *ex parte* contacts between regulated parties and regulators, or otherwise restrict participation and argument in the Phase 2 RFG rulemaking. To the contrary, political lobbying, selective disclosure of information, and one-sided presentations were recognized by all as legitimate and expected in the context of a highly politicized proceeding involving the interests of major industries and consumer and environmental groups. The absence of any “well developed and highly elaborated” norms of conduct in CARB’s rulemaking places the Phase 2 RFG proceeding squarely within “the political arena” for *Noerr* purposes.

i. Political Elements

CARB was consistently “on its guard” in its dealings with private parties throughout the Phase 2 RFG rulemaking. CARB Chairwoman Jananne Sharpless testified that companies that petition CARB “are not always forthcoming with all information” and that companies selectively choose the information to be disclosed to CARB because they are “looking very well after their own self-interest.” Sharpless Dep. (CARB), 8/6/03, at 167:13-22. CARB Executive Officer James Boyd testified that CARB did not credit industry estimates of the likely cost of the Phase 2 RFG regulations, believing that “industry always had a high estimate” of costs and that regulations “never cost[] as much as industry said it would.” Boyd Dep. (CARB), 8/22/03, at 60:12-62:3.

Industry representatives involved in the Phase 2 RFG rulemaking were open about the political nature of the process. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Following the initiation of CARB's rulemaking, political lobbying efforts intensified in an attempt to counter ARCO's extensive lobbying in favor of regulations that favored its commercial interests. [REDACTED]

[REDACTED]

[REDACTED]

Following the adoption of the Phase 2 regulations, major oil companies explicitly framed CARB's decision as a politically influenced outcome. [REDACTED]

[REDACTED]

13

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

ii. No Norms of Conduct

Government expectations of truthfulness are communicated most directly through the “norms of conduct” that government establishes for its proceedings. By this measure, CARB’s Phase 2 RFG rulemaking was unmistakably a wide-open political process. Like a legislature, CARB placed no restrictions on who was eligible to participate in the Phase 2 RFG rulemaking. Kenny Dep. (CARB), 5/15/03, at 90:24-91:11 (“Staff are encouraged to meet with all parties during the pre-notice period”). CARB did not require persons presenting information to testify under oath, or to provide any other form of certification of accuracy regarding the information being provided. *Id.* at 88:17-24.¹⁵ CARB permitted *ex parte* contacts with staff and Board members. *Id.* at 90:10-23. Of course, CARB could have adopted procedures that it deemed necessary to improve the factual accuracy and reliability of information that it received. *See, e.g.,* CAL. GOV’T CODE § 11346.8(b) (1991) (“In any hearing under this section, the state agency . . . shall have authority to administer oaths or affirmations.”). It chose not to do so.

The quality of the information that CARB used for its decisionmaking was affected by this choice. Although CARB requested all 30 California refineries to provide cost information, only six refineries provided any information. [REDACTED]

[REDACTED]

¹⁵ With respect to testimony, CARB placed *fewer* constraints than do elected legislative bodies, which frequently require testimony at legislative hearings to be made under oath. For example, California legislative committees have the power to compel oral testimony to be submitted under oath. CAL. GOV’T CODE § 9404.

[REDACTED]

[REDACTED]

The absence of “highly elaborated definitions of what is or is not proper behavior” in CARB rulemakings is consistent with other proceedings that have been termed “political” for the purposes of the *Noerr* doctrine. For example, in *Boone v. Redevelopment Agency*, 841 F.2d at 897, proceedings to amend an urban redevelopment plan were termed “essentially legislative” by the Court. In determining that the agency and council had acted “in the political sphere” (*id.* at 894), the *Boone* Court cited the existence of lobbying (*id.*), *ex parte* contacts (*id.* at 895), and the fact that the redevelopment agency and city council “were carrying out essentially legislative tasks” (*id.* at 896) .

The Fifth Circuit has specifically distinguished administrative rulemakings as “political” in contrast to other proceedings in which the agency has established higher norms of conduct, thus signaling government expectations of truthful representations. *Woods Exploration & Producing Co. v. Aluminum Co. of Am.*, 438 F.2d 1286 (5th Cir. 1971). *Woods* involved a claim that certain oil and gas companies had filed false “nomination forecasts” with the Texas Railroad Commission relating to expected purchases of the output of particular fields. Under the Commission’s rules, these forecasts were “sworn statements,” upon which the agency was entitled to rely. See Kenneth Culp Davis and York Y. Willbern, *Administrative Control of Oil Production in Texas*, 22 TEX. L. REV. 149, 167 (1943-44). The court withheld *Noerr* immunity from misrepresentations made in the nomination process, in which the agency applied established rules to the facts. The court also concluded, however, that “[t]he germination of the allowable formula was political in the *Noerr* sense, and thus participation in those rulemaking proceedings

would have been protected.” 438 F.2d at 1297. The different norms of conduct applicable to the rulemaking placed it squarely in the political arena.

Proceedings in which misrepresentations to governmental agencies have been recognized as a basis for antitrust liability have involved established “norms of conduct” that are more circumscribed and well defined than the unconstrained environment of CARB’s rulemaking. *Walker Process*, the only Supreme Court decision to recognize a theory of antitrust liability based on a misrepresentation, involved fraud upon the Patent and Trademark Office. *Walker Process Equip., Inc. v. Food Mach. & Chem. Corp.*, 382 U.S. 172 (1965). In contrast to participants in CARB’s rulemaking, applicants before the PTO must sign an oath acknowledging their duty to disclose information material to the examination of their applications. See 37 C.F.R. 1.56(a). A duty of good faith and candor has been recognized since at least 1945. See, e.g., *Precision Instrument Mfg. Co. v. Automotive Maintenance Mach. Co.*, 324 U.S. 806, 818 (1945).

Many of the other cases discussing a misrepresentation exception to *Noerr* immunity involved administrative or judicial litigation—the purest example of adjudicative proceedings. See, e.g. *Baltimore Scrap Corp. v. David J. Joseph Co.*, 237 F.3d 394 (4th Cir. 2001) (judicial litigation); *Porous Media v. Pall Corp.*, 186 F.3d 1077 (8th Cir. 1999) (judicial litigation); *Liberty Lake Invs. v. Magnuson*, 12 F.3d 155 (9th Cir. 1993) (judicial litigation); *Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau*, 690 F.2d 1240 (9th Cir. 1982) (administrative litigation). Most of the other misrepresentation cases fall within the same set of narrow circumstances analogous to *Walker Process* or *Woods Exploration*—in which specific information is being supplied to an administrative body in an *ex parte* context pursuant to a formalized set of procedures. *Israel v. Baxter Labs.*, 466 F.2d 272 (D.C. Cir. 1972); *DeLoach*, 2001 WL 1301221

(mandatory filing of purchase intentions for tobacco).¹⁶ Those circumstances have little, if any, in common with the wide-open political process of CARB's rulemaking, in which the agency accepted information from all sources on any topic that the submitter deemed to be relevant. Nor were any of the participants in CARB's process required to submit any information at all; CARB collected only that information that was voluntarily disclosed to the agency.

CARB's procedures in the Phase 2 RFG rulemaking were also less formalized than the procedures commonly applied in Certificate of Need ("CON") proceedings, as to which the courts have split over whether misrepresentations can remove *Noerr* immunity. The Commission's opinion relied on *Kottle v. Northwest Kidney Centers*, 146 F.3d 1056 (9th Cir. 1988), in support of a misrepresentation exception. The CON proceeding in *Kottle*, however, employed procedures more formal than those used in CARB's rulemaking in several significant respects. Witnesses appearing at the CON hearing could be represented by counsel and were subject to cross-examination. Written evidence was supplied in the form of comments and rebuttal comments, similar to briefing in litigation. *Ex parte* contacts were prohibited after the public hearing. Finally, the state agency issuing the CON decision in *Kottle* was required by statute to publish written findings explaining its decision in terms of specific statutory factors.

In all of these respects, CON proceedings are more constrained, and therefore more compatible with a governmental expectation of truthfulness, than the open process utilized by CARB. Even so, the most recent appellate authority to address CON proceedings rejected the claim that

¹⁶ Another possible exception to *Noerr* may be recognized in cases in which ministerial filings by private parties compel the government to take particular action based on such filings. See, e.g., *In re Buspirone Patent Litig.*, 185 F. Supp. 2d 363 (S.D.N.Y. 2002) (FDA required to list patents in Orange Book following filing by patentholder); *Litton Sys., Inc. v. American Tel. & Tel. Co.*, 700 F.2d 785 (2d Cir. 1983) (tariff rate filing required by FCC). In these cases, the government has no discretionary authority. These cases are plainly irrelevant here and Complaint Counsel have not purported to rely on them.

misrepresentations could serve as a basis for antitrust liability. *Armstrong Surgical Center, Inc. v. Armstrong County Mem'l Hosp.*, 185 F.3d 154 (3d Cir. 1999). The court in *Armstrong* recognized that the federalism concerns expressed by the Supreme Court in *Omni* counseled against using the antitrust laws as a means of policing wrongful conduct in the political process. “The remedy for such conduct rests with laws addressed to it and not with courts looking behind sovereign state action at the behest of antitrust plaintiffs.” *Id.* at 162. The Commission’s amicus brief to the Supreme Court in *Armstrong* emphasized that “[t]he CON process is administrative, and in some respects adjudicatory, but it also has aspects that are ‘political in the *Noerr* sense.’” U.S./FTC *Armstrong* Br. at 19.

CARB’s rulemaking was an open process with none of the procedural constraints that have led other courts to characterize proceedings as adjudicative. CARB could have established regulations governing input into the rulemaking, could have required submissions to be made under oath, and could have adopted adversarial fact-finding procedures similar to those used in litigation. But CARB did nothing to specify “criteria of impropriety” that identify non-political proceedings. *See* I Areeda & Hovenkamp, ANTITRUST LAW ¶ 203f at 174. CARB emphasized frequent and informal interaction with interested parties, recognizing that oil companies and other interest groups would act self-interestedly in their advocacy and in supplying information. Under the first test set forth in the Commission’s opinion, this absence of constraints characterizes the Phase 2 RFG rulemaking as political rather than adjudicative.

Significantly, even the very modest procedural constraints that California law placed on the Phase 2 RFG rulemaking were not applicable when Unocal allegedly made its “misrepresentations” to CARB. Unocal sent its letter to CARB regarding the confidentiality of its research data before CARB initiated the Phase 2 RFG rulemaking on October 4, 1991. This date estab-

lishes a significant demarcation line under the Commission’s opinion, in light of its emphasis on the constraints created by the rulemaking process. As CARB’s General Counsel testified, “[t]he rulemaking process begins with the release of the notice.” Kenny Dep. (CARB), 5/15/03, at 67:4-68:15; *see also* CAL. GOV’T CODE § 11346.4 (1991). The pre-notice process, including Unocal’s communications, “is not part of the rulemaking record.” Kenny Dep. (CARB), 5/15/03, at 71:8-18. The requirements of the California Administrative Procedure Act—which the Commission characterizes as imposing significant limits on CARB’s discretion—were simply not applicable to and did not inform any of CARB’s dealings with Unocal (or anyone else) prior to CARB’s initiation of the rulemaking in October 1991.¹⁷

b. Degree of Government Discretion

CARB was granted a remarkable degree of discretion by the California legislature to determine how best to tackle air pollution problems throughout the state. The agency has essentially unlimited freedom to research and solicit input relevant to its mission of cleaning up California’s air. When CARB chooses to address those problems through rulemaking, as it ultimately did in formulating the Phase 2 RFG regulations, those proceedings are similarly “in the political arena” for *Noerr* purposes, as defined by existing case law. Conversely, it is equally clear that CARB’s rulemaking bore no resemblance to adjudicative action by administrative agencies, in which the scope of *Noerr* protection has been limited.

The legal framework in which CARB was operating actually confirms the broad discretion that had been granted to the agency. It is undisputed that the Phase 2 RFG rulemaking was a “quasi-legislative” proceeding under California law. Kenny Dep. (CARB), 5/15/03, at

¹⁷ As noted earlier, even a Federal Trade Commission rulemaking under the Magnuson-Moss Act procedures, which include evidentiary hearings with sworn testimony, did not deprive the rulemaking of its political character under the D.C. Circuit’s holding in *Ass’n of National Advertisers v. FTC*.

23:25-24:6. The California Supreme Court has held that agencies acting through quasi-legislative rulemaking are engaged in “an authentic form of substantive lawmaking.” *Yamaha Corp. v. State Bd. of Equalization*, 19 Cal. 4th 1, 6 (1998). “Because agencies granted such substantive rulemaking power are truly ‘making law,’ their quasi-legislative rules have the dignity of statutes.” *Id.* Because “substantive lawmaking” is the paradigmatic example of legislative action, there can be no doubt that the express delegation of quasi-legislative power to CARB placed the agency squarely in the “political arena” for *Noerr* purposes. Indeed, the California Supreme Court cited the U.S. Supreme Court’s *Chevron* decision in describing the deference owed to CARB’s rulemakings. *Western States Petroleum Ass’n v. Superior Court*, 9 Cal. 4th at 572-73. *Chevron* mandates, of course, deference to the administrative agency as part of the “political branch of government.” 467 U.S. at 865-66. Likewise, the California Supreme Court held that “excessive judicial interference with the ARB’s quasi-legislative actions would conflict with the well-settled principle that the legislative branch is entitled to deference from the courts because of the constitutional separation of powers.” 9 Cal. 4th at 572.

The exceptional breadth of CARB’s discretion is equally evident in the terms of the agency’s mandate. The California legislature directed CARB to consider multiple, and often conflicting, policy goals in regulating air quality. CARB was instructed to adopt control measures that were “necessary, cost-effective, and technologically feasible.” CAL. HEALTH & SAFETY CODE § 43018(b). CARB was also required to achieve “the maximum degree of emission reduction possible” as soon as possible. *Id.* § 43018(a). The legislature defined none of these terms. Nor did the legislature provide CARB with any specific guidance on how its directive to achieve a “maximum degree of emission reduction” should be balanced against the contrary instruction to

adopt only those measures that are “cost-effective,” or “necessary.” Instead, it delegated the discretion to define and balance these competing mandates to CARB’s independent judgment.

Complaint Counsel’s argument that CARB’s discretion under the statute extended only to “technical decisions” to implement the policies set by the legislature cannot be reconciled with either the statute or the evidence developed in this proceeding. CARB’s General Counsel conceded that “[i]t’s been determined by courts in the state of California that ARB has broad discretion with regard to its mandate, which is improvement of air quality in the state of California.” Kenny Dep. (CARB), 5/15/03, at 150:14-21. The extent of CARB’s discretion is evident from the fact that among the options under consideration by CARB prior to enacting the Phase 2 RFG regulations was whether to phase out gasoline altogether in favor of alternative fuels. RX 5 at CARB0000868. [REDACTED]

[REDACTED] CARB rejected the option of requiring the use of alternative fuels not because it believed that it lacked the power to do so nor because it believed that such a decision lacked technical support but because it believed that mandating alternative fuels “could not be wisely done on the basis of only emissions.” RX 5 at CARB0000869.¹⁸ The discretion to decide whether it was “wise” to ban gasoline altogether cannot possibly be characterized as a mere “technical decision.”¹⁹

¹⁸ The agency clearly believed that it possessed the statutory authority to ban gasoline as on the very same page it rejected the alternative of regulating stationary sources based on the lack of authority to do so. RX 5 at CARB0000869.

¹⁹ Yet another example is CARB’s consideration of a vehicle scrappage program, advocated by Unocal and other refiners as a means of removing high-polluting cars from the road. CARB’s Chairwoman Sharpless testified that such programs raise important “social equity issues” for CARB to consider in its decisionmaking. Sharpless Dep. (CARB), 8/6/03, at 101:15-21. Nothing in CARB’s statutory mandate speaks to “social equity,” and the issue cannot be characterized as a “technical decision” in any event.

The Final Statement of Reasons issued by CARB in connection with the Phase 2 RFG rulemaking further illustrates the substantial breadth of CARB's discretion. Among the hotly-contested political issues in the rulemaking was whether small refiners should receive differential treatment under the regulations. Large refiners argued that CARB "lack[ed] the statutory authority to adopt the small refiner exemption." RX 10 at CARB0000462. CARB's response to this criticism emphasized the breadth of discretion granted to the agency by the legislature:

The statutes do not mandate what specific fuel characteristics must be controlled, how stringent those controls should be, what the compliance dates should be, to whom the controls should apply, whether the limits should be statewide or limited to areas with substantial air pollution problems, whether the limits should apply year-round or only during seasons with bad air quality, whether all batches of fuel should be subject to the same limit or an "averaging" program of some sort should be instituted, how the controls should be enforced, and whether there should be provisions granting temporary "variances" based on unforeseen unique events. *The ARB does not need explicit statutory language to implement any of these approaches.*

RX 10 at CARB0000468 (emphasis added). In other words, the scope of CARB's discretionary authority included what should be regulated, how it should be regulated, when the regulations should go into effect, who should be subject to the regulation, and what exceptions to allow. Further, CARB's authority embraced the power to exempt a class of businesses from regulatory requirements without express statutory authorization. It is difficult to imagine a broader delegation of authority by the legislature to an agency to engage in "substantive lawmaking" through the issuance of rules.

The fact that CARB was subject to some procedural constraints does not undercut the extent of its political discretion. The Ninth Circuit in *Boone* found that a redevelopment agency and city council that were subject to even greater constraints than CARB were "carrying out essentially legislative tasks" and acting as "political" bodies for *Noerr* purposes. 841 F.2d at 896. Like CARB rules, a redevelopment plan must be supported by an evidentiary basis. CAL.

HEALTH & SAFETY CODE § 33352, 33367. The city council is required to make written findings responding to any objections. CAL. HEALTH & SAFETY CODE § 33364. Judicial review of redevelopment plans is available in California courts under the very same legal standard that is applicable to CARB. *See, e.g., San Franciscans Upholding the Downtown Plan v. City and County of San Francisco*, 102 Cal. App. 4th 656, 675 (2002) (“[I]n reviewing an agency’s adoption of a redevelopment plan or amendment under the Community Redevelopment Law, we must determine whether substantial evidence in the administrative record supports the agency’s specific findings of urbanization and blight.”). Finally, the list of specific, substantive findings required by the California legislature in connection with redevelopment plans far surpasses the highly generalized guidance given to CARB in connection with improving air quality. CAL. HEALTH & SAFETY CODE § 33352, 33367.

None of these characteristics of the agency and city council in *Boone* detracted from the political nature of their decisionmaking. The agency and city council were political entities for *Noerr* purposes because they possessed “broad discretion” to adopt and amend redevelopment plans that “obviously involve a large area and affect[] virtually every member of the community.” *Id.* at 896. By contrast, adjudicative proceedings consist of “governmental conduct, affecting the relatively few, [that] is ‘determined by facts peculiar to the individual case’” *Id.* Under *Boone*, CARB was plainly acting in the political arena when it established rules concerning allowable gasoline that could be sold throughout California. *See also Woods Exploration*, 438 F.2d at 1297 (“The germination of the allowable formula was political in the *Noerr* sense, and thus participation in those rulemaking proceedings would have been protected.”).

Conversely, CARB's proceedings bear little if any resemblance to agency procedures that have been characterized as adjudicative for *Noerr* purposes, such as the Louisiana Racing Commission's denial of an application for a racing license in *Livingston Downs Racing Ass'n v. Jefferson Downs Corp.*, 192 F. Supp. 2d 519 (M.D. La. 2002). That characterization accurately reflected the fundamentally adjudicative nature of the agency's proceedings. Applicants for a racing license are required to submit an oath "stating that the information contained in the application is true." LA. REV. STAT. ANN. § 4:147.5. The Commission's proceedings are defined as adjudication under the Louisiana code and conducted pursuant to the adjudication provisions of the Louisiana APA. LA. REV. STAT. ANN. § 4:154, 49:961. Those provisions call for a formal hearing with the presentation of evidence and opportunity for cross-examination, preparation of an adjudicative record, and findings of fact "based exclusively on the evidence and on matters officially noticed." LA. REV. STAT. ANN. § 49:955(G). A final decision, to include "findings of fact and conclusions of law," is required. LA. REV. STAT. ANN. § 49:958. CARB's Phase 2 RFG rulemaking had no analogue for any of these procedures. It did "not involve the individualized application of established principles" and had no "enforceable standards subject to review" by an antitrust court. 192 F. Supp. 2d at 534 n.14 (citing *Manistee Town Ctr. v. City of Glendale*, 227 F.3d 1090, 1094 (9th Cir. 2000)).

CARB does have procedures comparable to those used in *Livingston Downs*, which are applicable to its adjudicative proceedings. In explaining the legal background of that adjudicative proceeding to the Board, CARB's General Counsel contrasted CARB's ordinary rulemaking procedures, which it employed in Phase 2, with its adjudication of disputes as follows:

Typically, the Board makes policy decisions in adopting regulations; this is called quasi-legislative process because it is similar to the process used by the Legislature in adopting laws.

At today's hearing the Board will be exercising quasi-judicial authority, and that is deciding a dispute between two parties.

RX 70 at 012.

c. CARB Did Not Have the Requisite Reliance on Unocal's Alleged Factual Misrepresentations

In determining whether an administrative proceeding is "political" for purposes of applying *Noerr* protection, the third factor set out by the Commission's opinion is the extent of necessary governmental reliance on a petitioner's factual assertions. Op. at 31-32, 34. It is impossible for Complaint Counsel to show that CARB was necessarily reliant on Unocal for the accuracy of its factual representations.

The nature of the CARB Phase 2 rulemaking is substantially different from proceedings in which it can clearly be determined that the government necessarily relied on outcome determinative factual assertions made by petitioner. Significantly, the official rulemaking record does not contain any statement that even hints that CARB relied upon Unocal's alleged misrepresentations. Further, there is no written embodiment of the reasons why CARB's board members exercised their broad discretion to promulgate the Phase 2 RFG regulations, which makes it impossible to show that the agency relied on Unocal's alleged factual assertions. To the extent that evidence of CARB's reliance exists, all of which resides outside the rulemaking record, it strongly shows that Unocal's alleged factual misrepresentations were not relied upon by CARB.

Each case in which the Commission concluded that government was necessarily reliant on a party's factual submissions (Op. at 34 & n.74) involved proceedings in which private parties were required to provide specific information in prescribed forms, which necessarily triggered a

specific governmental action. In *Woods Exploration*, for example, applicable rules required oil and gas producers to submit sworn statements quantifying the volume of gas that they expected to be able to market from their wells. *Davis & Willbern, supra*, 22 TEX. L. REV. at 167. Based on this information, the Texas Railroad Commission determined each producer's allowable production pursuant to an *established formula*. 438 F.2d at 1292. In *DeLoach*, Agriculture Department regulations *required* purchasers to provide accurate statements quantifying their intended purchases of tobacco pursuant to a quota system imposed by law. *See* 7 C.F.R. § 723.504. The Department used these amounts to calculate production quotas pursuant to a "statutory formula" that gave it "no discretion." *DeLoach*, 2001 WL 1301221 at *2. The Orange Book listings at issue in *In re Buspirone Patent Litig.*, 185 F. Supp. 2d 363 (S.D.N.Y. 2002), automatically triggered a ministerial action by the FDA as to which the agency had no discretion.

In all of these proceedings, government action flowed directly and inevitably from the submission of information by private parties. In each case, the government required participants in its regulatory proceedings to submit accurate information. The context of these proceedings placed no "emphasis on debate," which the Commission's opinion ascribes to political decisions. *Op.* at 34 (citation omitted). To the contrary, the data provided by private parties was either fed into some preexisting formula that determined government action or automatically triggered government action. Because the agency was acting in a mechanical manner, the private parties' data on which the agencies relied was necessarily outcome determinative.

The CARB Phase 2 RFG rulemaking bears little or no resemblance to these proceedings. CARB had no requirement that anyone submit information in the course of its rulemaking. CARB also had no predetermined formula into which private parties' data submissions were fed

to determine the governmental action, and its role in the rulemaking cannot possibly be described as ministerial. The agency enjoyed exceptionally broad discretion and sought information and ideas from different stakeholders in an effort to find an effective and politically acceptable means of controlling pollution. *See, e.g., Fletcher Dep. (CARB), 7/8/03, at 179:1-6; Kenny Dep. (CARB), 5/15/03, at 90:10-91:11.*

The written record also makes it impossible to show that CARB relied upon Unocal's alleged factual misrepresentations. This in complete contrast to the governmental action in the cases cited by the Commission, in which necessary government reliance could be determined without onerous deconstruction of government decisionmaking. The difficulty in establishing reliance clearly marks CARB's rulemaking as part of the political arena.

CARB adopted the Phase 2 RFG regulations pursuant to a vote of its nine Board members after a public hearing. The transcript of the hearing does not include an explanation by any member of the reason for his or her vote, and no other written record exists. RX 60. The Final Statement of Reasons for Rulemaking prepared by CARB staff about a year after the Board's vote, does not provide a means to establish reliance. It contains no hint of any reliance on the supposed Unocal misrepresentations at issue here; it does not refer to intellectual property rights or their absence. The Board members, moreover, had no input into the preparation of the Final Statement. *Boyd Dep. (CARB), 8/22/03, at 120:3-6.* There is literally no means by which to determine "what combination of fact, arguments, politics, or other factors" was responsible for each Board member's vote to adopt the regulations apart from the deconstruction process specifically condemned by the Supreme Court in *Omni*, 499 U.S. at 377.

The problem is compounded by the inherently uncertain nature of the information alleged to have been withheld from CARB. Had Unocal disclosed to CARB that it had a pending patent

application, that information would not have provided CARB members with any reliable basis for evaluating the proposed Phase 2 RFG regulation or alternative regulatory approaches. All that could have been known at the time of CARB's board hearing on the regulations, which took place on November 21 and 22, 1991, was that the patent examiner had denied all of Unocal's patent claims one week earlier.²⁰ RX 852 at UFTC 004810. No one could have known whether any patent would ultimately issue from the Unocal application;²¹ when any patent would issue; if any such patent were to issue; what gasoline compositions would be covered; whether any overlap would exist between the compositions proposed to be mandated by CARB's Phase 2 RFG regulations and compositions covered by any patents ultimately issued to Unocal; whether Unocal would pursue or abandon claims allowed by the Patent Office; what the cost to refiners would be to avoid infringement while complying with the proposed CARB regulations; whether the patents (the scope of which could not be known) would be perceived by CARB and the industry to likely be valid or invalid; and what Unocal's licensing policy and royalties on patents of unknown scope might be. No one could answer any of these critical questions in the fall of 1991, leaving only after-the-fact speculation as the basis for any conclusion that CARB would have changed its regulations based on the existence of the patent application.

The evidence also shows that CARB was not concerned about the factual information that Unocal allegedly misrepresented, that it did not rely upon such information, and that the regulatory outcome was not impacted by such information. The Commission's opinion highlights the importance of the "specific information allegedly misrepresented." Op. at 41. This factor is highly relevant here, as the evidence overwhelmingly shows that CARB (i) never

²⁰ CARB was required by law to promulgate its regulations no later than January 1, 1992. CAL. HEALTH & SAFETY CODE § 43018(b).

²¹ A significant percentage of patent applications never result in issued patents.

inquired about patent rights of Unocal or anyone else (let alone patent applications), (ii) did not understand Unocal's August 1991 letter to refer to patent rights, and (iii) did not take Unocal's patent into account in its regulatory process even after Unocal won an infringement judgment because, according to the agency's Rule 3.33(c) testimony, CARB believed the patent to be "still in a state of flux" during the pendency of an appeal of that judgment. Venturini Dep. (CARB), 5/14/03, at 402:25-403:19.

CARB has never asked any participant in any rulemaking to disclose the existence of patents or patent applications. RFA Resps. 11; Venturini Dep. (CARB), 5/13/03, 108:2-109:9. Further, in the earlier Phase 1 rulemaking, CARB ignored information provided by Unocal at a July 1989 meeting about a "Unique Unocal patent-pending development." RX 165 at CARB-FTC 0060533.²² Complaint Counsel admit that, after being so informed, "CARB did not seek information regarding the patent application" and promulgated its regulation without ever inquiring about that application. RFA Resps. 10; Simeroth (CARB) Dep., 7/9/03, at 21:12-22:21.

Neither at the time of the Phase 2 RFG rulemaking nor at any time since has CARB had any written or formal policy requiring rulemaking participants to disclose patent applications. Boyd Dep. (CARB), 8/22/03, at 251:17-252:21. At no time was anyone in CARB responsible for determining whether the agency's regulations would be affected by existing or potential patents.²³ Venturini Dep. (CARB), 5/13/03, at 141:9-142:12. Even today, CARB does not ask

²² This statement was not made for the purpose of disclosing a patented invention but, rather, for the purpose of taking credit for an important scientific innovation.

²³ CARB's Executive Director, James Boyd, testified that he never issued a directive that patented technologies could not be used in CARB regulations. Boyd Dep. (CARB), 8/22/03, at 252:2-21. [REDACTED]

persons who comment on its proposed regulations whether they have any patent application that may relate to those regulations. *Id.* at 144:25-148:22.

In connection with the Phase 2 rulemaking, CARB never asked Unocal whether it had patents or patent applications. RFA Resps. 8, 10-12; Simeroth (CARB) Dep., 7/9/03, at 21:12-22:21. CARB did not take into consideration during the Phase 2 regulatory process the possibility of patents that may affect its regulations. Boyd Dep. (CARB), 8/22/03, at 115:3-4. Thus, CARB did not ask ARCO whether it had patents relating to MTBE even though the Phase 2 regulations being considered required the use of oxygenates in gasoline. *Id.* at 220:2-16; Courtis Dep. (CARB), 8/28/03, at 133:10-134:20. More broadly, although CARB modeled Phase 2 RFG after ARCO's EC-X gasoline, CARB did not consider whether ARCO had any patents or pending patents related to RFG in promulgating its Phase 2 regulations. Venturini Dep. (CARB), 5/13/03, at 159:1-160:13. Nor did CARB ask any other refiner about existing patents or pending patent applications during any phase (official or unofficial) of its adoption of Phase 1, 2, or 3 RFG regulations. RFA Resps. 11; Venturini Dep. (CARB), 5/13/03, at 108:2-109:9, 144:25-148:22.²⁴

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The fact that CARB has never requested rulemaking participants to disclose patents or patent applications and did not consider patent rights in promulgating its regulations strongly evidences that CARB did not rely on the absence of a Unocal patent application relevant to its regulations.²⁵ In fact, CARB's Rule 3.33(c) witness testified that at the time that CARB received the August 1991 letter that is the linchpin of Complaint Counsel's misrepresentation case, the thought did not occur to CARB that it had anything to do with patent rights. Venturini Dep. (CARB), 5/13/03, at 69:7-22; *see also* Simeroth (CARB) Dep., 7/9/03, at 123:6-124:7. CARB could not have acted in reliance on any Unocal misrepresentation about which it did not even think.

[REDACTED]

[REDACTED]

²⁵ [REDACTED]

[REDACTED]

[REDACTED]

Given CARB's refusal to act in the face of an adjudicated infringement of Unocal's '393 patent, it cannot be seriously argued that CARB would necessarily have enacted different regulations based on knowledge that Unocal had merely applied for a patent. It strains credulity to believe that CARB would have accorded the patent a greater chance of being valid when it was in the form of an application than it did after the patent had issued.²⁶ That credulity must be stretched far beyond the breaking point when it is understood that all of Unocal's patent claims had been rejected at the time of adoption of the Phase 2 RFG regulations. RX 852 at UFTC 004810.

d. The Requisite Ability to Determine Causation Is Not Present

The Commission's opinion cites "[d]ifferences in the ability to establish a causal link between petitioning conduct and an ensuing governmental action" as a distinguishing factor between political and "non-political" environments. Op. at 35. The opinion also recognizes that "any rule regarding petitioning based on misrepresentation must be fashioned and applied with care, so as not to undermine principles of federalism and effective government decision making." *Id.* at 21. In particular, the ability to determine causation cannot rely on "deconstruction of the

²⁶

[REDACTED]

governmental process and probing of the official intent.” *City of Columbia v. Omni*, 499 U.S. at 377.

The difference between the CARB rulemaking and adjudicative proceedings in which causation can be traced from the misrepresentation to the subsequent governmental action is apparent from a comparison with the cases cited in the Commission’s opinion. The Certificate of Need (“CON”) determination in *Kottle*, for example, was based on written findings prepared by the administrative hearing officers. 146 F.3d at 156 (written findings “must issue following the hearing”). In CON proceedings, certain facts are outcome determinative. The misrepresentation at issue in *Kottle* went directly to an outcome-determinative fact—the need for additional kidney dialysis services in the location. In *Cheminor*, the court reviewed the written opinions of the Commissioners of the International Trade Commission for evidence concerning the factors that led individual Commissioners to vote as they did. *See* 168 F.3d 119, 126-27 (3d Cir. 1999).

Walker Process and *Nobelpharma AB v. Implant Innovations*, 141 F.3d. 1059 (Fed. Cir. 1998), also cited by the Commission, involved proceedings before the Patent and Trademark Office, which compiles an extensive written record culminating with a notice of allowance of claims. The misrepresentations in each case went to an unambiguously outcome-determinative fact. In *Walker Process*, it was whether the patented technology had been incorporated into product sold commercially more than one year before the patent application. In *Nobelpharma*, it was the failure to disclose the best method of practicing the invention. Both the existence of sales more than a year prior to the application (35 U.S.C. § 102(b)) and the failure to disclose the best method (35 U.S.C. § 112) are absolute bars to patentability.

These situations are a far cry from the circumstances of the CARB Phase 2 RFG rulemaking. As previously discussed, CARB board members had substantial political and

policy-making discretion to adopt Phase 2 regulations. Their substantive decisions did not automatically or predictably flow from certain factual information required to be submitted by rule-making participants. In fact, Unocal and other refiner-participants were not required to submit *any* particular information, and, specifically, were not asked by CARB or CARB staff to disclose the existence of patents or patent applications that might have a bearing on the regulations. There is also no written record establishing why CARB members voted for the Phase 2 regulations and the factors they considered in reaching their respective decisions. *Cf. Cheminor*, 168 F.3d at 126-27. Moreover, the Final Statement of Reasons for Rulemaking prepared by CARB staff contains not even a hint that CARB considered patent rights to be relevant to its rulemaking.

2. Nature of the Communication: Unocal’s Alleged Misrepresentations Do Not Meet the Criteria for a Non-Protected Communication

The “political” character of the Phase 2 rulemaking under the Commission’s test is sufficient by itself to establish Unocal’s immunity. Under the Commission’s test, moreover, several additional showings must be made regarding the nature of the challenged communications before *Noerr* protection can be lost. First, a misrepresentation or omission must be deliberate, knowing and willful; second, it must relate to specific, verifiable facts; and, third, it must be “central to the legitimacy of the affected governmental proceeding” in the sense that it must have caused or affected the outcome of the proceeding. *Op.* at 36, 42, 43. None of these conditions as to the nature of the challenged communication can be shown to exist here.

a. The Alleged Misrepresentations Are Not Deliberate, Knowing and Willful

The Commission recognized that “[t]here is no policy ground to impose antitrust punishments on those who make innocent errors in their dealings with governments. Without knowing

falsity, moreover, there would not be the ‘abuse’ of government process that is the key to ousting *Noerr . . .*” Op. at 36 (citing I Areeda & Hovenkamp, ANTITRUST LAW ¶ 203f1 at 174). Even if the existence of misrepresentations could be shown, and it cannot, there is no factual basis to conclude that Unocal’s alleged misrepresentations were deliberate, knowing and willful, as the Commission’s standard requires.

i. There Is No Evidentiary Basis to Conclude That Unocal Willfully and Deliberately Attempted to Mislead CARB.

The Complaint alleges that Unocal made materially false and misleading statements to CARB that led CARB to believe that Unocal either did not have or did not intend to assert any patent rights related to reformulated gasoline. *E.g.*, Compl. ¶¶ 48, 78. The Complaint does not allege, however, and there is no evidence to show, that Unocal at any time directly stated to CARB or anyone else that it did not have a pending patent application relating to RFG or that it would not assert its patent rights if a patent were to issue. As noted earlier, no duty to disclose pending patent applications to CARB existed, and CARB never asked Unocal or any other refiner to disclose patents or patent applications that might bear on its regulations.

The failure of Unocal to disclose its patent application was not a deliberate, knowing and willful misrepresentation by omission. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] For its part,

CARB was aware that the industry practice was not to disclose patents or patent applications. Simeroth Dep. (CARB), 7/9/03, at 229:3-230:1.

The Complaint alleges that Unocal's misrepresentation occurred through Unocal's use of the term "nonproprietary." *E.g.*, Compl. ¶¶ 2, 41, 58, 78. Unocal used the term once, in the August 1991 letter to CARB (RX 3), which was never referred to again by either Unocal or CARB during the entire course of the Phase 2 rulemaking. Moreover, as discussed earlier, CARB understood the letter to relate to specific data that Unocal provided to CARB on a specific disk in the summer of 1991.

There is no evidence that Dennis Lamb, the Unocal executive who wrote the letter to CARB, used the term "non-proprietary" in a deliberate and calculated attempt to mislead CARB about Unocal's pending patent application or its willingness to relinquish its patent rights. Unocal's statement that it was making the data "non-proprietary" was and remains true.²⁷ Public disclosure of data and research results frequently takes place *after* a patent application is filed without any indication that a patent has been applied for on inventions related to such research results or data.

²⁷ The letter refers only to Unocal 10-car test "data" as being made non-proprietary. RX 3 at U0073023; Lamb IH Dep. (Unocal), 1/16/02, at 136:5-137:10, 142:1-143:18. There is a difference between data, equations derived from an analysis of the data, and inventions derived from data and equations. Venturini (CARB) Dep., 5/13/03, at 31:25-32:24; Lamb IH Dep., 1/16/02, at 143:21-145:5. Data and equations in themselves cannot be patented. *Id.*; Linck Rpt. at 4.

(a) The Undisputed Evidence That Unocal Opposed a T50 Specification in the Phase 2 Regulations Clearly Demonstrates That It Was Not Willfully, Knowingly, and Deliberately Seeking to Mislead CARB

If Unocal were willfully, knowingly, and deliberately concealing information to induce CARB to enact a Phase 2 regulation with a T50 specification, logic dictates that Unocal would have been a proponent of regulations prescribing gasoline properties, including T50. It was not. Unocal never advocated to CARB any specific set of gasoline compositions, much less formulations that fell within any of its patent claims. To the contrary, Unocal opposed Phase 2 regulations containing gasoline property specifications before and after they were adopted and lobbied for an alternative predictive model that, if adopted, would have made it easier for refiners to avoiding infringing the Unocal patents that ultimately issued.

Throughout the Phase 2 regulatory process, Unocal opposed any emissions regulations, arguing instead that a program to remove higher polluting vehicles from California roadways would be less expensive and more effective in controlling emissions. Beach IH Dep., 1/23/02, at 41:4-43:2. Unocal in particular sought to avoid a regulation with a specific oxygenate requirement, which would have forced it to blend gasoline with the oxygenate MTBE. Stegemeier Dep. (Unocal), 6/5/02, at 43:1-7; RX 157. This was because Unocal did not have access to a supply of MTBE. Lamb IH Dep. (Unocal), 1/16/02, at 27:16-30:2. Unocal believed that adoption of Phase 2 regulations with an oxygenate specification would force it either to construct expensive facilities to produce MTBE or to buy MTBE on the open market at a disadvantageous cost. Lamb IH Dep. (Unocal), 1/16/02, at 27:16-30:2.

Unocal's research showed, moreover, that the emissions effects commonly associated with MTBE were not directly caused by MTBE, but were attributable to MTBE's effect of lowering the T50 distillation point. *Id.* Knowing this, Unocal sought to preserve its regulatory

flexibility by advocating the adoption of a pure predictive model that would look at the emission-reducing performance of gasoline instead of prescribing its components. Unocal believed that such an approach would allow it to formulate low-emission gasoline that did not contain oxygenates. Lamb IH Dep. (Unocal), 1/16/02, at 27:16-30:2; 39:2-44:1; Beach IH Dep. (Unocal), 1/23/02, at 41:4-43:2, 62:6-63:22; Beach Dep. (Unocal), at 23:3-25:4; CX 240.²⁸ Unocal sought to persuade CARB on two points that had a direct effect on Unocal refineries: (1) to avoid an oxygenate requirement; and (2) to adopt a pure predictive model. RX 24.

At the November 1991 hearing at which CARB adopted the Phase 2 regulations, Unocal publicly opposed the adoption of regulations containing rigid specifications for gasoline properties, including T50. *See, e.g.*, RX 10 at CARB0000299-300, 308-09, 315, 338-41; *see also* Sharpless 1996 Dep. (CARB), 6/20/1996, 42:24-45:3 (recalling Unocal's strong opposition to the Phase 2 regulations). Unocal argued instead for a more flexible regulatory approach employing a predictive model that did not prescribe limits for specific properties such as T50. As CARB's Final Statement of Reasons for the Rulemaking states, Unocal argued: "we don't see the specification for T50 as necessary." RX 10 at CARB0000315 (cmt. 63). [REDACTED]

[REDACTED]

[REDACTED]

On November 22, 1991, CARB adopted its Phase 2 regulations, which prescribed specifications for eight gasoline properties, including T50 and oxygenates. CARB indicated that it would continue to work on an alternative predictive model that would be available in the

²⁸ Under the purely predictive model, CARB would have established the level of emissions reductions required and refiners would have determined the formulations to achieve the reductions based on the model's equations. This would have allowed Unocal "to vary the properties of gasoline that were economical for [Unocal] to vary" in order to produce "a low emissions gasoline." Jessup IH Dep. (Unocal), 1/25/02, at 40:24-43:5.

Spring of 1992.²⁹ RX 39 at CARB 0003235. Unocal, however, continued to advocate against implementation of the regulations. Unocal continued to urge delaying implementation of the Phase 2 rigid gasoline property specification rules until CARB adopted a predictive model. Unocal urged such a delay in June 1992 (RX 39 at CARB 0003235-36), in August 1992 (RX 575 at U 069224-25), and again in September 1992 (RX 42 at CARB 0004779-80). Unocal also continued to argue in a January 1994 meeting with CARB Chairwoman Sharpless—after many of its ‘393 patent claims had been allowed—that “RFG2 is not needed in Ca. to achieve air quality standards” and that a pure predictive model (with no caps on fuel properties) was the desirable regulatory approach. RX 200; RX 159 at WSPA_FTC004946. As CARB’s Dean Simeroth testified, Unocal’s “whole action through this time period was that they did not like the RFG2 regulations.” Simeroth Dep. (CARB), 7/9/03, at 158:8-159:10.

CARB adopted a predictive model-based regulation in June 1994, but deviated from the performance-based approach advocated by Unocal by imposing limits on various gasoline properties. Even with this CARB-imposed limitation, this approach gave refiners greater flexibility to produce compliant gasoline that did not infringe the numerical limitations of Unocal patents. The pure predictive model approach that Unocal continued to advocate even after the ‘393 patent issued, which would have imposed no caps or limits on any fuel properties, [REDACTED]

[REDACTED]

[REDACTED]

The fact that for several years Unocal consistently advocated positions with respect to the content of Phase 2 regulations that would have minimized its ability to exploit its pending

²⁹ CARB viewed a predictive model as being as difficult to enforce and requiring extensive test data results and research to create. *E.g.*, RX 10 at CARB0000296; RX 181; [REDACTED].

patents is persuasive evidence that Unocal did not willfully, knowingly, and deliberately seek to mislead CARB.

(b) The Context in Which Unocal Used the Term “Non-Proprietary” Provides Strong Evidence of The Absence of Willful, Knowing and Deliberate Misrepresentation

There is no evidence that Unocal’s use of the term “non-proprietary” was a “willful,” “knowing,” and “deliberate” attempt to mislead CARB about Unocal’s patent application.

The context in which the communication occurred demonstrates no intent to mislead. The communication occurred in the aftermath of a meeting on June 20, 1991, during which Unocal disclosed to CARB on a confidential basis some of the results of its research about fuel properties and their predictive effect on lower emissions. Pursuant to CARB’s request, following that meeting Unocal provided the equations it had developed based on a 10-car test. RX 2. Unocal asked CARB to treat this information as “confidential.” *Id.*; Kulakowski Dep. (Unocal/Texaco), 6/26/03, at 26:8-28:7. In the same communication, Unocal also stated that it would consider making the equations public if CARB were to pursue a meaningful dialogue on a predictive model approach to Phase 2 gasoline. RX 2.

CARB staff subsequently expressed an interest in a predictive model approach and sought to use Unocal’s data for that purpose. Venturini Dep. (CARB), 5/13/03, at 49:21-52:2; Lamb IH Dep. (Unocal), 1/16/02, at 136:5-137:10.³⁰ Thereafter, on or about July 25, 1991, Unocal sent to CARB a disk containing raw emissions data from its 10-car test, from which a printout is reproduced above, for CARB to use in the development of a predictive model.

³⁰ CARB at that time was in the process of developing a mass database of scientific emissions data to conduct its own analysis of the impact of various gasoline properties on emissions. Cleary Dep. (CARB), 8/7/03, at 43:23-44:10; Fletcher Dep. (CARB), 7/8/03, at 190:25-192:16.

Venturini Dep. (CARB), 5/13/03, at 49:21-52:2; RX 327. CARB understood that the emissions data on this disk was to be treated as confidential. Simeroth Dep. (CARB), 7/9/03, at 115:3-10.

CARB then requested that Unocal remove the confidential designation of the data but not of the equations or slides that Unocal had presented at the June meeting. Simeroth Dep. (CARB), 7/9/03, at 122:24-125:17. Without the right to use Unocal's data publicly, CARB had no ability to use or rely on the data. *Id.* at 124:12-125:18; Boyd Dep. (CARB), 8/22/03, at 146:19-147:10. On August 27, 1991, Dennis Lamb of Unocal sent a letter directed to CARB's Executive Officer, James Boyd, responding to CARB's request. RX 3. The subject line of Mr. Lamb's letter stated "PUBLIC AVAILABILITY OF UNOCAL RESEARCH DATA." *Id.* The letter went on to state:

On June 20, 1991, certain Unocal representatives met with Peter Venturini and other members of his staff. During that meeting, we presented the results of three phases in Unocal's Vehicle/Fuels testing program. We subsequently made the *data base* available to staff and agreed to make the *data* public if necessary in the development of a predictive model for use in the certification of reformulated gasoline.

The staff has now proposed to develop such a predictive model and requested that we make the data public.

Please be advised that Unocal now considers *this data* to be non-proprietary and available to CARB, environmental interest groups, other members of the petroleum industry, and the general public upon request.

Id. (emphasis added).

This letter serves as the centerpiece of Complaint Counsel's affirmative misrepresentation claim. But everything that Unocal stated in this letter was and remains absolutely true. Unocal made a presentation to CARB on June 21, 1999—just as the letter states. It subsequently provided CARB with a database containing its emissions testing data—again, just as the letter states. Unocal told CARB that it would consider making its data public if it was necessary for the development of CARB's predictive model. CARB then announced that it was going to

consider a predictive model, and asked Unocal to make its data public. And—just as the letter states—in response to this request, Unocal agreed to make its data public and available to anyone who asked.

To support the claim of willful and intentional fraud, the Complaint alleges that this letter created “the materially false and misleading impression that Unocal agreed to give up any ‘competitive advantage’ it may have had relating to its purported invention and arising from its emissions research results.” Compl. ¶ 42. But the letter itself says nothing about any inventions. It does not speak to competitive advantage, royalties, licenses, patents, or patent applications. Just as the topic sentence heralds, each line of this letter speaks to one topic and one topic only: the “PUBLIC AVAILABILITY OF UNOCAL’S DATA.” RX 3.

Nothing in the letter represents that Unocal did not have any patent applications or, that it would never seek license revenues from any patents that it might receive some day. To read such a representation into it is to give the letter a tortured interpretation that is belied not only by its explicit language but also by the context in which it was written and by the interpretations the author and the recipients themselves placed on this letter.

CARB has made it clear, as Unocal has contended all along, that the *data* referred to in the last paragraph of the letter is the *data base* specifically identified in the letter as having previously been made available to CARB staff. CARB has represented that a specific disk, of which it has produced a copy in this litigation, “is the original diskette containing the database referred to in Dennis Lamb’s August 27, 1991 letter.” RX 327. This is the same database that is reproduced on page 8 above. This database does not speak to, or disclose, any invention.

The context in which CARB requested Unocal’s letter and in which Unocal supplied it confirms that the term “non-proprietary” was simply intended as a synonym for “non-

confidential” and that it was meant to apply solely to Unocal’s 10-car test data. That “non-proprietary” in context meant simply that Unocal was removing the “confidential” limitation on use of the data is confirmed by CARB’s Peter Venturini, who testified:

A. This letter refreshes my – my memory that around August 27 Unocal agreed to release the data.

Q. Okay. And what did you understand was the permission that Unocal was giving you at that time?

[Objection noted]

A. Well I can just reiterate the letter indicates *that they’re releasing the data to be publicly available because we have proposed to develop a predictive model.*

Venturini 1996 Dep. (CARB), 6/18/96 136-37 (emphasis added); *see also* Venturini Dep. (CARB), 5/13/03, at 115:6-116:20. As CARB’s Rule 3.33(c) witness in the current case, Mr. Venturini testified that had Unocal used the term “non-confidential” instead of “non-proprietary,” CARB would have interpreted Unocal’s letter exactly as it did. Venturini Dep. (CARB), 5/14/03, at 503:6-10.

Dean Simeroth (the CARB representative who received the August 27 letter directed to James Boyd) similarly testified:

Q. And you understood that through this Exhibit 656 Unocal was making its data previously which had been marked confidential, it was now making it public?

[Objection noted]

A. Reading the letter, it would indicate or indicates that *they were making the previously submitted data available.*

Simeroth 1996 Dep. (CARB), 6/20/96, at 56:21-57:3 (emphasis added). Bob Fletcher, another CARB staff member, also testified:

A. I don’t recall who asked Unocal to make the date non-confidential. I can’t remember whether I did or – or one of my staff did or Dean did or Peter

did, but we did ask Unocal to make the data available so that we could include it in the predictive model and felt that it was a data set that was very important in the development of the – the predictive model, which again at that point was – was still considered as part of the Phase 2 regulation. So in order – I think it’s consistent with what I said earlier, that we were getting the data, we were evaluating it, and it wasn’t until a certain point in time that we needed to consolidate it in which the other data. In order to do that, we had to make it non-confidential. If they would have kept it as confidential data, we would not have been able to include it into the—the mega-database of all the vehicle tests.

Fletcher Dep. (CARB), 7/8/03, at 203:21-204:25 (emphasis added).

CARB’s Executive Director, James Boyd, who did not recall the August 27 letter directed to him testified in general that the term “proprietary” is often used as a synonym for confidential. Boyd Dep. (CARB), 8/22/03, at 209:21-213:9.³¹ Mr. Boyd further testified that he understood Unocal’s August 1991 letter to signify that Unocal’s data could be “made public and utilized in – in trying to come up with a – a – regulation.” *Id.* at 183:7-21. This understanding was consistent with the longstanding practice of California refiners, in their dealings with CARB, to use the term “proprietary” as a synonym for “confidential.” [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

As if this evidence were not enough, two internal Unocal communications prepared shortly before and after the August 27 letter make the company’s intent in the letter crystal clear.

³¹ Further, after learning of Unocal’s first RFG patent in 1995, Mr. Boyd wrote Unocal requesting that it not “assert any patent infringement claim in connection with [a] test program” through which CARB distributed 600,000 gallons of reformulated gasoline. RX 50. This request, which Unocal granted, is consistent with CARB’s understanding in 1991 that Unocal had previously agreed only to make certain data non-confidential and did not in so doing waive its intellectual property rights. RX 49. It would have been unthinkable for CARB to ask Unocal for a dispensation to use its patents if CARB believed that Unocal had either promised to forego its patent rights or represented that it had no such rights to induce CARB to adopt Phase 2 regulations that overlapped any of its patents.

The first is a summary of an internal strategy meeting that took place five days before the date of the letter, which makes clear that Unocal intended simply to release the confidentiality of its data in order to persuade CARB to adopt a flexible predictive model: “In order to insure that the predictive model is as well-founded as possible, Unocal will send CARB a waiver to release the 514 Project emissions data.” RX 155 at U 0083539. The memorandum further underscores that the purpose of the waiver solely to lift confidentiality restrictions: “Unocal will notify CARB that it will waive its rights to confidentiality of the 514 Project data.” *Id.*

The second communication is a memorandum prepared by Denny Lamb on August 28, 1991, the day after Mr. Lamb sent his letter to CARB. In that memorandum, Mr. Lamb stated:

CARB has advanced from agreeing to “consider” a predictive model to proposing that a model be included as a certification alternative along with a recipe fuel and vehicle testing.

CARB has not yet developed a specific proposal to define the model but Unocal has been invited to participate in a workshop for that purpose. *We have agreed to make our 5/14 data public* in order for CARB to use it at the workshop and in technical justification for the model. . . .

At this point in time all activity is concentrated with CARB staff with the next step the actual development of a useful model.

RX 157 (emphasis added). Mr. Lamb’s intent is unmistakable: to make the data public so that CARB, which may not rely on confidential information, could rely on it.

Nothing about the context of the August 27 letter, the letter’s text, Unocal’s contemporaneous explanation of the letter, CARB’s understanding of the letter, or industry use of the term “proprietary” suggests that Unocal’s use of “non-proprietary” was intended to convey anything other than Unocal was treating specific data that it had supplied to CARB on a disk on July 25, 1991, as non-confidential. There is not a shred of circumstantial evidence to suggest that Unocal was relinquishing any future patent rights it might obtain related to the data.

(c) A Willingness to Make Proprietary Data Public Does Not Imply That No Pending Patent Application Exists

In determining whether Unocal willfully and deliberately misled CARB, it is important to understand that public disclosure of patent or research results is frequently made *after* a patent application has been filed without any indication that a patent has been applied for on inventions relating to such research. Linck Rpt. at 10. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

In other words, the public disclosure of data or research results says nothing about whether the researcher has applied for a patent on any inventions relating to that research. There is nothing misleading about a truthful statement by Unocal that data has been made publicly available. And, as noted above, no one from CARB understood Unocal’s statement to mean anything other than that Unocal was making specific data public so that it could be used by CARB for the development of a predictive model. There is thus no basis to reasonably conclude that Unocal’s statement that it was making this data publicly available was a “willful,” “knowing,” and “deliberate” attempt to mislead CARB about Unocal’s patent application.

ii. The Alleged Misrepresentations That a Predictive Model Would Be “Flexible” and “Cost-Effective” Were Not “Willful,” “Knowing,” and “Deliberate”

The Complaint asserts that Unocal misled CARB as to the “flexibility” and “cost-effectiveness” of the predictive model because it failed to disclose “that Unocal’s assertion of its proprietary interests would undermine the cost-effectiveness and flexibility of such a model.” Compl. ¶ 2(b). Before it can be established that the failure to disclose Unocal’s patent application was “willful,” “knowing” and “deliberate,” the context of the alleged omission must be examined.

As an initial matter, statements about the likely cost-effectiveness of a proposed regulation are paradigmatic of *Noerr*-protected statements to the government. Whether a particular regulatory approach is cost-effective is every bit as political a statement as whether a particular tax policy stimulates or fails to stimulate economic growth. As Professor Elhauge observes, statements “that environmental regulation imposes either high or low economic costs” are fundamentally “political statements.” Einer Elhauge, *Making Sense of Antitrust Petitioning Immunity*, 80 CAL. L. REV. 1177, 1224 (1992). As CARB’s own Final Statement of Reasons for its Phase 3 RFG rulemaking—conducted pursuant to the same statute—states, the economic feasibility of regulations “is more of a policy or political question than a scientific one.” RX 64 at 009 (internal page 6). And, as Professors Areeda and Hovenkamp observe in this regard, antitrust courts “should not review the ‘truth’ of arguments or general statements about the world[,]” such as assertions about “the economic effects” of a regulatory program. I Areeda & Hovenkamp, ANTITRUST LAW ¶203f2 at 175.

Even if it were proper to pass on the truthfulness of a statement that a particular regulatory approach would be cost-effective or flexible, it is clear in this case that the statement was absolutely true and correct. Unocal argued that a “pure predictive model” was more

“flexible” and “cost-effective” than the gasoline property specification approach CARB adopted on November 22, 1991. The “pure predictive model” with *no* caps on specific fuel properties that Unocal championed was different from the predictive model *with* caps that CARB enacted in June 1994; the Unocal model provided greater flexibility to produce complaint gasoline without infringing Unocal patents. The predictive model proposed by Unocal was a pure performance-based rule, which would not have mandated specific levels for particular fuel properties. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

There is no real dispute that both predictive models were more flexible and cost-effective than CARB’s original specification-based approach. CARB and others in the refining industry shared Unocal’s opinion that a predictive model would be cost-effective and flexible.³² CARB concluded that a predictive model was necessarily superior to fuel specifications because [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Virtually all California refiners have

³² See, e.g., RX 54 at 007, 022 (CARB analysis stating that the purpose of the regulatory amendments incorporating the predictive model was “to provide additional flexibility to gasoline producers” and concluding that “the California Predictive Model will reduce production costs and minimize the potential for supply disruptions.”); RX 53 at 053 (“The proposed predictive model is expected to lower producers’ and gasoline suppliers’ costs to comply with the Phase 2 RFG regulations.”); Boyd Dep. (CARB), 8/22/03, at 177:15-179:4, 221:12-22 (predictive model provided cost savings and flexibility to refiners). [REDACTED]

[REDACTED]

elected to use the predictive models, which demonstrates the superior flexibility and cost-effectiveness of the predictive model. *See, e.g.*, Cleary Dep. (CARB), 8/7/03, at 192:21-93:1.

Unocal used “cost-effective” and “flexible” in a comparative context with respect to the predictive model contrasted with the original Phase 2 regulations. There is no basis to find that Unocal’s alleged failure to disclose its patent application was false and misleading, much less that it was knowing, deliberate and willful.

b. The Alleged Misrepresentations Do Not Involve “Sharply Defined Facts” and Are Not “Clear and Apparent”

The Commission next requires the challenged misrepresentation to be “subject to factual verification.” *Op.* at 36. To be actionable, the Commission makes clear that “the falsity must be clear and apparent with respect to *particular* and *sharply defined* facts.” *Id.*, citing I Areeda & Hovenkamp, ANTITRUST LAW ¶ 203f2 at 175 (emphasis added). If the misrepresentation is not “clear and apparent” or involves opinion, argument or generalized statements, there is no basis for depriving a petitioner of *Noerr* protection. Again, such is the case here.

The Complaint alleges that by representing that certain data was “non-proprietary,” Unocal implied that it did not have, or did not intend to assert, any patent rights. *Compl.* ¶¶ 2, 41, 48, 58, 78, 84. But the August 27, 1991 letter, which Complaint Counsel claims gives rise to the alleged misrepresentation, refers only to a specific, tangible item—a computer disk containing data from one of Unocal’s emissions projects which Unocal had previously given to CARB. Because Unocal had previously told CARB that this disk was confidential, Unocal was now lifting the confidentiality of data on that disk so that CARB could incorporate the data in a large database it was compiling in conjunction with its development of the predictive model. That is all the letter says, that is all Unocal intended, and that is all CARB understood it to mean.

To turn this letter into a fraudulent misrepresentation about the status of patent rights requires that Complaint Counsel completely ignore the plain language of the letter, the context in which it was written and received, and the common and well understood use of non-proprietary to mean non-confidential. Moreover, it requires that Complaint Counsel interpret the words “data” and “data base” (which the letter says was provided to CARB subsequent to the June 20 meeting) to mean any and all of Unocal’s inventions relating to its emissions research—inventions which were never disclosed to or even ever discussed with CARB.

On these facts, Complaint Counsel cannot establish actionable misrepresentation. They certainly cannot show the requisite “clear and apparent” fraud with respect to a “clear and sharply defined fact” necessary to vitiate Unocal’s *Noerr* protection.

The Complaint also asserts that Unocal’s contention that a “predictive model” is “cost-effective” and “flexible” is false because of the failure to disclose that Unocal would charge a royalty if a patent issued. Compl. ¶ 2(b), 2(c), 37, 46, 48, 57, 79. But Unocal’s statements about the comparative cost-effectiveness and flexibility of a pure predictive model are unquestionably opinions or arguments as well as incontestably true and correct. They are not misstatements regarding “particular and sharply defined facts,” as the Commission’s opinion requires.

c. The Alleged Unocal Misrepresentation Was Not Central to the Legitimacy of the Phase 2 Regulations

The final element relating to the nature of the relevant communication is described by the Commission as its centrality to the very legitimacy of the governmental action involved. Op. at 36. By this, the Commission makes clear that the misrepresentation or omission must be a material cause of the governmental action—the impropriety must affect the outcome before the agency. Op. at 36, 42-43.

Courts recognizing a misrepresentation exception in the adjudicative context similarly hold that only deliberate fraud which is so significant and material that it deprives the adjudicative proceeding of its legitimacy gives rise to an exception to *Noerr's* protection. See *Kottle*, 146 F.3d at 1063 (holding that vague allegations of misrepresentation to an administrative agency insufficient to overcome *Noerr* immunity); *Baltimore Scrap Corp. v. David Joseph Co., Inc.*, 237 F.3d 394, 402 (4th Cir. 2000) (noting that the Supreme Court has not approved a fraud exception to *Noerr* immunity, but any such fraud exception could extend only to the type of fraud that deprives the governmental action of its legitimacy) Alleged frauds that “do not infect the core” of a case will receive *Noerr* immunity because, regardless of the alleged fraud, the outcome would be the same. *Cheminor Drugs*, 168 F.3d at 123-24.

As an initial matter, it is difficult to argue that Unocal’s August 1991 letter infected the core of the proceeding when the addressee of the letter does not even recall it. James Boyd, CARB’s Executive Director, to whom the letter was addressed, testified that nothing about the letter was memorable:

I don’t recall the letter. Undoubtedly I saw it, but I don’t – I no longer recall it. And like I said, in the context of debates back and forth among who will and who will not make data and formulations public, I think this – I just received it in the context. If – if certainly I’m unlikely – undoubtedly I probably saw this, but I frankly don’t recall that far back.

Boyd Dep. (CARB), 8/22/03, at 185:4-12 (quoting from 1996 deposition). This testimony speaks volumes to whether this letter contained misrepresentations that infected the core of CARB’s rulemaking. And Dean Simeorth, Chief of CARB’s Criteria Pollutants Branch, to whom Unocal faxed the August 1991 letter, testified with respect to Unocal’s conduct that “I personally don't feel that I was deceived. It would not be a word I would use,” and that “as I would not use the word ‘deceive,’ I would not use the word ‘mislead.’” Simeroth 1996 Dep. (CARB), 6/21/96, at 220:19-221:1, 222:14-223:9.

Other testimony by Executive Director Boyd similarly undermines any claim that Unocal's alleged misrepresentation infected the core of the proceeding. Mr. Boyd understood Unocal's letter to signify that Unocal's data could be "made public and utilized in – in trying to come up with a – a – regulation." Boyd Dep. (CARB), 8/22/03, at 183:7-21. And upon learning of the issuance of Unocal's '393 patent, Mr. Boyd did not protest that Unocal had duped CARB. Instead, he asked Unocal for assurances that it would "not raise patent infringement issues" as to a reformulated gasoline test program that was then being conducted by CARB. RX 50. It is unthinkable that Mr. Boyd would have requested this dispensation had he believed that Unocal had represented that it had no intellectual property rights bearing on RFG and had CARB relied on that representation.

There is no evidence that Unocal's alleged misrepresentation was "material" to CARB's action and affected the outcome of the Phase 2 rulemaking as the Commission's decision requires, let alone that it infected the rulemaking's core.

i. Cost-Effectiveness Was Not A Critical Determinant of CARB's Phase 2 Regulations

The Complaint alleges only that Unocal's purported misrepresentation affected CARB's assessment of "cost-effectiveness." Cost-effectiveness is only one, and not an outcome-determinative, factor that CARB was required to consider in promulgating Phase 2 regulations. The California Clean Air Act, CAL. HEALTH & SAFETY CODE § 43018(a), required CARB "to achieve the *maximum degree of emission reduction possible* from vehicular and other mobile sources . . . *at the earliest practicable date.*" *Id.* (emphasis added). The focus on "maximum" emissions reduction at the "earliest practicable" date reflected California's immediate and pressing emissions and air quality problem (RX 10 at CARB0000449; Boyd Dep. (CARB), 8/22/03, at 265:7-266:1), and the primary mandate of the Act.

CARB operated under a statutory mandate to enact, not later than January 1, 1992, Phase 2 regulations for reducing emissions from mobile and vehicular sources. CAL. HEALTH & SAFETY CODE § 43018(b). The Act directed CARB to “take whatever actions are necessary, cost-effective and technologically feasible in order to achieve” by December 31, 2000 various percentage reductions in specific emissions.

CARB’s understanding of the term “cost-effectiveness” is reflected in a document entitled “Cost-Effectiveness Guidance.” RX 195. This was the same document from which CARB’s Jim Aguila learned about the subject of cost-effectiveness and relied upon in performing the cost-effectiveness analysis for purposes of CARB’s Phase 2 RFG regulations. Aguila Dep. (CARB), 7/24/03, at 7:21-8:1, 14:3-18:6. This document makes clear that CARB has interpreted its statutory mandate to emphasize the need to achieve maximum emissions reductions at the earliest possible date over cost considerations:

[W]hile cost-effectiveness is given great emphasis in the California Clean Air Act, it is neither the sole nor the dominant criterion for decisionmaking. The primary mandate is to achieve the state air quality standards by the earliest practicable date.

RX 195 at CARB-FTC 0039609.

The Cost-Effectiveness Guidance document makes clear that CARB may reject cost-effective means of reducing emissions based on essentially political considerations. Thus, even highly cost-effective measures, such as no-drive days, may be “unacceptable to the public” and rejected on that basis.³³ *Id.* at CARB-FTC 0039620. Accordingly, CARB believes that “there is no requirement that control measures be adopted in the precise order of their respective cost-effectiveness.” RX 10 at CARB0000379; RX 195 at CARB-FTC 0039621. In CARB’s view,

³³



“Cost-effectiveness is just one of several criteria that must be considered in the planning process. RX 195 at CARB-FTC 0039620. There is no basis for concluding that, contrary to both CARB’s guidelines and the Final Statement of Reasons for the Phase 2 rulemaking, CARB elevated cost-effectiveness above all other considerations in its rulemaking.

The relative lack of importance assigned to cost-effectiveness in the Phase 2 rulemaking process is demonstrated by CARB’s actions. CARB assigned the task of conducting the cost-effectiveness analysis to a junior engineer who had no prior experience with cost-effectiveness analysis and provided him with no training; his sole guidance came from the Cost-Effectiveness Guidance document. *Aguila Dep. (CARB), 7/24/03, at 7:21-8:1, 14:3-18:6.* CARB subjected the engineer’s work to no supervision or review for methodological soundness. *Id.* at 16:10-18:22. In conducting this minimal cost analysis, CARB never sent specific questionnaires to refiners to obtain cost information in a structured manner and did not require any refiner to provide it with cost information. *Id.* at 49:24-52:19. The agency sought cost data from refiners on a voluntary basis almost as an afterthought. *Id.* at 89:11-91:12. CARB made this request on August 14, 1991—only four months before the statutory deadline for promulgating Phase 2 regulations and *after* CARB had already prepared a regulation that prescribed specific limits for various fuel properties, including T50.³⁴

Having only belatedly sought cost information on a voluntary basis, CARB ended up relying on limited investment and operating cost data from only two out of the 30 refineries. *Simeroth Dep. (CARB), 7/9/03, at 234:23-236:1; Aguila Dep. (CARB), 7/24/03, at 160:13-165:10, 176:8-177:7, 203:20-206:9.* Nevertheless, CARB proclaimed in its Final Statement of

³⁴ CARB had previously announced it would determine cost-effectiveness through a sophisticated computerized analysis known as linear programming, but it *never* used this announced approach. *See, e.g., Aguila Dep. (CARB), 7/24/03, at 30:20-31:10, 81:23-83:1, 88:10-89:10; RX 5 at CARB0000855; RX 268.*

Reasons that “[b]ecause the cost data were received from a diverse group of refiners, staff had the ability to assess the impacts of the regulation on all segments of the industry.” RX 10 at CARB0000364.

The seriousness of purpose that CARB committed to its cost-effectiveness “analysis” is demonstrated by the way in which it projected the operating costs of compliance with the regulation. Mr. Aguila determined that operating costs would amount to 50 percent of the capital costs of compliance with the Phase 2 regulations, and CARB included this estimate in CARB’s Final Statement of Reasons for Rulemaking. Indeed, CARB proclaimed in its Final Statement that “[t]he staff analyzed the operating costs provided by the six refiners and determined that 50 percent represented an appropriate value.” RX 10 at CARB0000357. CARB made this representation even though Mr. Aguila made this determination on the basis of data from *only two refiners*, one of which had estimated operating costs at 25 percent and the other at 40 percent. Aguila Dep. (CARB), 7/24/03, at 167:3-16, 203:20-206:9. In spite of the hurried and haphazard quality of its cost “study,” CARB rejected proposals to delay promulgating its regulations to allow time to complete more rigorous cost studies. Boyd Dep. (CARB), 8/22/03, at 170:12-171:21.

CARB also rejected proposals by various refiners to conduct an incremental analysis of the cost-effectiveness of individual parameter of its fuel regulation, such as an analysis focused on the incremental cost and benefit of a T50 specification. RX 10 at CARB0000362; [REDACTED]; [REDACTED]; see also RX 60 at CARB0001097 (Fletcher) and CARB0001309 (Sharpless). There is no basis to believe that had CARB known of Unocal’s pending patent application, it would have delayed promulgating the regulations to conduct an incremental analysis of the cost-effectiveness of a T50 specification in the event a patent issued.

As CARB stated, “we do not feel it is appropriate to consider the incremental cost-effectiveness of individual properties such as T90.” RX 10 at CARB0000374; *see also id.* at CARB0000373. This was because CARB believed that “all properties are interrelated . . . [and] need[] to be considered together in order to optimize the overall emissions performance of the fuel.” RX 10 at CARB0000373; RX 60 at CARB0001309 (Sharpless) (“we’re looking at the fuel properties as an integrated system”)

In short, CARB did not treat the issue of cost-effectiveness with any seriousness of purpose or rigor. It failed to conduct a meaningful analysis of costs, assigned the cost-effectiveness analysis to an inexperienced junior staffer to whom it gave no training and whose work it did not supervise. Instead, it relied on the shoddy analysis of its junior staff member in its Final Statement of Reasons for Rulemaking. CARB simply did not view cost as a critical factor in its rulemaking.

ii. CARB Would Not Have Changed Its Analysis of Cost-Effectiveness Had It Known of Unocal’s Pending Patent Application

Unless disclosure of the Unocal patent application would have materially changed CARB’s assessment of cost-effectiveness, the failure to disclose the pending patent would have not been material or affected the substantive provisions of the Phase 2 regulations.

The evidence clearly shows CARB was not interested in existing or pending patents and any effects their enforcement might have on cost-effectiveness. As discussed earlier, CARB has never sought information regarding patents or patent applications from any rulemaking participant in its Phase 2 RFG rulemaking nor in any other rulemaking before or since. No refiner that participated in CARB’s rulemakings has disclosed any patent to CARB in connection with its rulemakings, even though several refiners possessed patents that were potentially

relevant to CARB's RFG rulemakings. Moreover, in connection with its Phase 1 RFG rulemaking, CARB made no inquiry about a Unocal patent application upon learning about it.

It also strains credulity to assert that CARB would have changed its regulations in response to a patent application when CARB turned down refiner requests to alter its regulations in response to the actual patents that resulted from that application. During the relevant period, CARB staff believed gasoline formulations could not be patented. *See, e.g.,* Boyd Dep. (CARB), 8/22/03, at 115:3-14, 198:2-199:11; [REDACTED]

[REDACTED]. CARB did not even consider the possibility that there could be patents related to RFG that could bear on the regulations. Boyd Dep. (CARB), 8/22/03, at 115. Indeed, even after Unocal's '393 patent issued, CARB believed that the patent was invalid. Curtis Dep. (CARB), 8/28/03, at 13:10-15:20. Even after Unocal won a judgment for infringement of that patent, CARB continued to believe that the patent was invalid and that it was, in any event, too much "in a state of flux" to be taken into account in its regulatory amendment process. Venturini Dep. (CARB), 5/14/03, at 403:5-19. There is no basis for arguing that CARB would have accorded the patent a greater chance of being valid when it was in the form of an application than it did after the patent had issued.³⁵

In developing the Phase 3 RFG regulations, which it adopted in December 1999, CARB did not alter the existing regulations to ease patent avoidance despite of its awareness of the Unocal patent and [REDACTED]

[REDACTED]

[REDACTED]

³⁵ The implausibility of such an argument is heightened by the fact that any Unocal disclosure regarding its patent application during the Phase 2 rulemaking would have included the examiner's rejection of all of the patent claims, which could only have reinforced CARB staff's view that the patent was unlikely to be granted.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

The fact that CARB has not changed the regulations in response to Unocal’s patent in the nine years since it has known of the patent is fatal to any claim that but for Unocal’s alleged misrepresentation, CARB would have enacted different regulations.³⁷

Finally, even if it had considered Unocal’s pending patent application in determining cost-effectiveness, there is no basis for concluding that CARB would have changed its assessment of cost-effectiveness. Cost-effectiveness under the California Clean Air Act is measured as dollars per ton of pollutants reduced for purposes of CARB staff’s cost-effectiveness analysis. RX 195 at 0039609. For CARB, cost-effectiveness is a relative concept. “A measure is deemed cost-effective if it reduces emissions at a cost comparable to other measures” on a “per ton basis.” *Id.* at 0039611. These other measures would include the “upper cost bounds” of previously adopted or proposed regulations. Under this approach, the “going rate” that defined the upper bound of cost-effectiveness was \$32,000 per ton. Sharpless Dep. (CARB), 8/6/03, at 203:13-206:5; *see also* RX 60 at CARB 0001357 (\$50,000 upper bound). In its Final Statement of Reasons for the Phase 2 RFG rulemaking, CARB estimated the cost of the Phase 2 RFG regulations at \$7,000-11,000 per ton of pollution avoided. RX 10 at CARB0000360.

³⁷ It would have been considerably more difficult—indeed, impossible—for CARB to formulate alternative regulations in November 1991 to avoid potential infringement when the scope of the patent claims that would ultimately issue were unknown.

CARB's own Statement of Reasons for the Phase 2 RFG rulemaking belies any notion that Unocal's patent royalties would have affected the agency's cost-effectiveness analysis. In response to Unocal's objection that the regulation would impose a compliance cost of 23 cents per gallon, as compared to CARB's estimate of 12 to 17 cents per gallon, CARB asserted that, "even if the cost-effectiveness of Phase 2 RFG is changed by 25 percent as suggested by Unocal, the Phase 2 RFG cost-effectiveness would still be comparable to recently adopted regulations." *Id.* at CARB0000456. CARB thus deemed an increase of 6 to 11 cents per gallon over its estimate to be within the acceptable range. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

iii. CARB Would Have Regulated T50 Regardless of Unocal's Submissions Because Doing So Was Critical to Attaining Necessary Emission Reductions

CARB's primary mandate in promulgating Phase 2 regulations was to maximize emissions reductions. If CARB believed that setting a T50 parameter was critical to emission reduction, it is unlikely that it would have removed or significantly altered the T50 specification in the face of a pending patent application the likelihood of issuance of which was highly uncertain.

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[REDACTED] CARB staff stated at the agency's hearing on the Phase 2 RFG rulemaking that a \$1,000 per ton change in cost-effectiveness was not significant. RX 60 at CARB0001097 (Fletcher). Of course, at the time of this hearing, the only thing known to Unocal about its patent application was that all of its claims had been rejected by the Patent and Trademark Office. Thus, it would have been rank speculation to suggest that the resulting patents would impose any cost on refiners.

To the extent that Complaint Counsel are contending that CARB would not have adopted its T50 specification but for Unocal's alleged misrepresentation to CARB that it had no patent rights, the evidence overwhelmingly refutes this contention. The evidence shows that several companies (but not Unocal) lobbied for a T50 specification, that CARB developed an interest in T50 months before Unocal ever met with CARB, and that CARB based its regulations primarily upon ARCO's EC-X fuel, and not upon any information provided by Unocal.

Well before having any substantive interaction with Unocal, CARB had become interested in T50. [REDACTED]

[REDACTED]

[REDACTED] And in November 1990, Unocal's Michael Croudace reported to his management that CARB had been told by GM and Toyota that T50 was a key variable for emissions. RX 764. CARB, in fact, told WSPA by mid-January 1991 that "it is critical for the purposes of the study [a proposed pre-regulation study of emission effects of fuel properties] and regulation to have lower T50." RX 113. [REDACTED]

[REDACTED]

[REDACTED]

In proposed draft regulations that CARB published on August 1, 1991—before Unocal gave CARB permission to make public use of its data and thus before CARB legally could have relied on that information—CARB proposed to set a T50 value of 200° F. RX 184 at CARB 1003057. [REDACTED]

[REDACTED]

At a CARB workshop held on August 14 1991, two weeks before Unocal's letter authorizing the public use of its data, GM supported a 200° F limit for T50. RX 185 at CARB-FTC 0058586; Fletcher Dep. (CARB), 7/8/03, at 209:7-15. [REDACTED]

[REDACTED]

The CARB Phase 2 regulations that the agency ultimately promulgated mandated gasoline specifications that were substantially similar to the properties of ARCO's EC-X gasoline. ARCO's EC-X gasoline met all of the Phase 2 specifications with the exception of the oxygenate requirement. RX 330 at CARB-FTC 0049739; Boyd Dep. (CARB), 8/22/03, at 241:24-244:1. [REDACTED]

[REDACTED]

[REDACTED]

CARB executive officer James Boyd acknowledged that ARCO's formulation was a foundation for the Phase 2 regulations. Boyd Dep. (CARB), 8/22/03, at 217:9-219:9, 241:24-244:1. As a result, adoption of the Phase 2 regulations was seen by the industry as a victory for ARCO.³⁹ See RX 503 at 004-005; 008; RX 504.

The inclusion of T50 as a regulatory parameter was not entirely the result of successful lobbying by ARCO. It is a scientific truth that T50 is a very important determinant of emissions. But CARB did not have to prescribe a T50 limit. It could have, as Unocal urged, adopted a pure predictive model that allowed refiners to blend gasoline in the most efficient manner consistent with CARB's emission reduction goals. Instead, CARB chose to prescribe a fuel that mimicked ARCO's EC-X.

Once CARB learned of the potential significance of T50, it performed its own analysis to verify the significance of this property. CARB's statistical analysis showed that T50 was one of the largest, if not largest, determinants of hydrocarbon emissions. The Technical Support Document prepared by CARB's staff for the Phase 2 RFG rulemaking justified the T50 (and related T90) specification on the basis of various studies. These included the work conducted jointly by General Motors, WSPA, and CARB, as well as work by Chevron and Toyota. See RX 5 at CARB0000720, 727.⁴⁰

³⁹ At the November 21 hearing, ARCO, Toyota, and Nissan also argued in favor of a tight control of T50. RX 10 at CARB0000317.

⁴⁰ CARB's Final Statement of Reasons identified Unocal's study as "the only study that evaluated T50 and provided a statistical analysis" and asserts that it is "the results of Unocal's study that form the basis for the T50 specification." RX 10 at CARB0000344. At other places, however, the Final Statement refers to the agency's reliance on Toyota data in support of the T50 specification. See *id.* at CARB0000316, 317. As noted earlier, moreover, CARB drafted regulations incorporating T50 limitations before it ever received Unocal's data and published a proposed regulation containing a specified T50 limitation of 200° F

Thus, the evidence clearly shows that CARB viewed a T50 specification as critical, adopting it over Unocal's objection that it was "not necessary." RX 10 at CARB0000315. There is no basis to believe that disclosure of Unocal's patent application would have led CARB to alter its view that a Phase 2 regulation containing a T50 specification was needed.

iv. CARB Had No Viable Alternative to the Phase 2 Gasoline Regulations That Would Have Resulted in Lower Infringement Rates

CARB was charged by the California Clean Air Act to promulgate regulations to achieve the maximum degree of emissions reduction from vehicular and other possible sources expeditiously. Although CARB had enormous discretion in how it went about reducing emissions, it was constrained by statutory mandates to achieve emissions reductions by specified deadlines. As a result, CARB rejected various forms of alternatives to the Phase 2 RFG regulations. While the nature of the rejected alternatives underscores the broad discretion that CARB enjoyed as a matter of law, CARB's basis for rejecting the alternatives also underscores the paucity of *practical* alternatives to the Phase 2 RFG regulations.

The Technical Support Document prepared by CARB staff for the Phase 2 RFG rulemaking set out the following alternatives that CARB had the legal authority to implement and explained the basis for their rejection:⁴¹ First, CARB rejected the concept of tighter regulations on vehicles because of the time it would take to develop such technology and the fact

before CARB staff had access to Unocal's data through California's Teale Data Center. Indeed, there is no evidence that CARB ever considered the Unocal data before the conclusion of the Phase 2 rulemaking on November 22, 1991. [REDACTED]

[REDACTED] In addition, Unocal's data did not have a significant effect on the results of a subsequent computer run of CARB's database in which the agency included Unocal's data. Cleary Dep. (CARB), 8/7/03, at 10:17-11:23.

⁴¹ See also RX 60 at CARB0001240 (Chairwoman Sharpless recognizing the limited options available to CARB as a practical matter).

that it would take approximately ten years to replace enough older vehicles before such regulations would attain their full impact. RX 5 at CARB0000868-69. Second, CARB rejected the concept of requiring fuels other than gasoline because existing vehicles use gasoline because “such a specification could not be wisely done on the basis of only emissions.” *Id.* Further, because existing cars use gasoline, such a regulation would not produce any significant effect until well after 2000. Third, CARB rejected the concept of adopting an emission standard based on toxics because such a regulation would take at least ten years to reach full effect. *Id.*⁴²

There is no evidence suggesting that any of the foregoing could have been adopted in place of the Phase 2 regulations to avoid Unocal’s patents. Nor is there any evidence suggesting that CARB had the alternative of adopting a rule that regulated gasoline properties with a substantially different T50 specification. Significantly, Complaint Counsel’s economic expert, Professor Carl Shapiro, did not identify a single regulatory option that was available to CARB at the time of the Phase 2 RFG rulemaking that ceased to be available to CARB after it learned of Unocal’s patents. This absence of a “lock-in” is significant. It shows that CARB’s failure to act after learning of Unocal’s patents is the most likely indicator of what it would have done had it learned of the patent application during the Phase 2 RFG rulemaking.

Yet Complaint Counsel have for all practical purposes abandoned the Complaint’s claim of a “lock-in.” This is evident in Professor Shapiro’s testimony. Professor Shapiro correctly defined lock-in as “the notion that one had choices *ex ante*. You made a choice, and now it’s kind of – you’re sort of stuck with that in some sense in the sense of stranded costs, in the sense of it’s hard to switch, in the sense of your options are reduced in comparison to what they were earlier, reduced or less attractive in some way.” Shapiro Dep. (Expert), 10/18/03, at 340:20-

⁴² CARB also rejected scrapping older, more heavily polluting vehicles, as publicly unacceptable. RX 195 at CARB-FTC 0039620; *see also* RX 10 at CARB 0000380.

341:2. Yet Professor Shapiro was unable to identify at his deposition a single less costly regulatory alternative that was available at the time of the Phase 2 RFG rulemaking but ceased to be available by the time CARB learned of Unocal's patents, for reasons of stranded costs or otherwise. *Id.*, 10/17/03, at 204:20-206:25. This failure is grounded in the irrefutable fact that nothing that Unocal allegedly did or omitted to do dictated CARB's regulatory choices or deprived CARB of regulatory choices.

One other alternative that was suggested by CARB's Rule 3.33(c) witness would have been for CARB not to promulgate any Phase 2 regulations and rely instead on EPA regulations. Venturini Dep. (CARB), 5/14/03, at 503:11-509:5. This was no choice at all. CARB was statutorily required to enact Phase 2 regulations by January 1, 1992. CAL. HEALTH & SAFETY CODE § 43018(b). It adopted its regulations less than 40 days before this deadline. Moreover, the Final Statement of Reasons for the Phase 2 regulations repeatedly rejected the EPA alternative as insufficient to achieve the necessary emissions reductions. *See* RX 10 at CARB0000359, 392, 398, 447-48. It emphasized that "[i]mplementation of only the federal gasoline standards would leave the State *far short of obtaining the emissions reductions needed to meet either the federal or state ambient air quality standards.*" *Id.* at CARB0000447 (emphasis added).

After CARB learned of Unocal's patents in 1996, CARB reaffirmed the view that reliance on the EPA's regulations would have been insufficient to meet California's Clean Air Act requirements. RX 202 at 004. It is little wonder that it did. Failure to adopt the Phase 2 regulations would have resulted in the imposition of a draconian Federal Implementation Plan ("FIP") that would have been needed to bring the state into compliance with the Federal Clean Air Act. Pedersen Rpt. at 5-6. A study performed by California's Governor office found that the

imposition of a FIP would have cost the state at least \$8.4 billion in direct costs and \$17.2 billion in lost output, and would have resulted in the loss of 165,000 jobs. RX 334.

In short, there is no evidence of any alternative that was available to CARB at the time of the Phase 2 rulemaking and that subsequently ceased to be available to CARB that would have reduced the overlap of the regulations with Unocal's patents. CARB's failure to ease refiners' avoidance of the patents after (1) the PTO issued the patents, (2) the precise scope of the patents became clear, (3) Unocal's instituted a licensing program with specified royalty rates, and (4) the cost of avoiding the patents became understood is strong evidence that CARB would not have done anything different in its rulemaking had Unocal disclosed its application at a time when (1) the PTO had preliminarily rejected the patent application, (2) there was no basis for understanding the scope of the patents, (3) no licensing program was in place, and (4) avoidance costs could not be understood in light of the absence of any issued patent.

C. Unocal's Petitioning Activities in Industry Groups Are *Noerr*-Protected

The Complaint make two types of allegations regarding Unocal's conduct vis-à-vis other refiners. The first is that Unocal's alleged misconduct caused the refiners to refrain from advocating from advocating against the Phase 2 RFG regulations. This allegation suffers from several defects.

First, as shown earlier in this brief, the refining industry, with the exception of ARCO, lobbied intensively *against* the Phase 2 RFG regulations. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Second, inducing trade organizations and their members to alter their advocacy efforts, if it could be established, would be paradigmatic *Noerr*-protected lobbying. In *Noerr* itself, the challenged conduct was a deceptive publicity campaign aimed at third parties, and the Supreme Court held that these efforts were immune, even when deceptive. *See also Manistee Town Center v. City of Glendale*, 227 F.3d 1090, 1092 (9th Cir. 2000); *Livingston Downs Racing Ass'n, Inc. v. Jefferson Downs Corp.*, 192 F. Supp. 2d 519, 531-32 (M.D. La. 2001). The fact that the cause of the refiners' alleged injury is *CARB's* adoption of the rules and not Unocal's private conduct is the end of the matter under the case law.

Third, the notion that by altering the manner in which other companies lobbied *CARB* Unocal actually changed the outcome of the Phase 2 regulations cannot be reconciled with the claim that the rulemaking was not a political proceeding. If the rulemaking were the quest for scientific truth that Complaint Counsel make it out to be, a change in the lobbying position of any party should not have made a shred of difference in the outcome.

As to the claim that Unocal's participation in *WSPA* and *Auto/Oil* led refiners to make investment decisions that they would have altered had they known about Unocal's patent application, there are several answers as well. *First*, there is no evidence that Unocal had any duty to inform anyone of its patent application. Participation in joint lobbying activities has never been thought to trigger an obligation to disclose patent applications, let alone give away intellectual property rights. *Second*, the evidence that refiners refused to alter their refinery configurations in the face of an issued patent—in one case at a total cost of merely \$1,000—because they believed the patent to be invalid flies in the face of any claim that they would have altered their refineries upon mere knowledge that a patent application had been lodged. *Third*, *Noerr* itself held that petitioning conduct was immune from antitrust liability not only insofar as

it affected governmental actions but also with respect to its marketplace impact. The Court held that “direct injury [incurred] as an incidental effect of the railroads’ campaign to influence governmental action” was outside the reach of the antitrust laws. 365 U.S. at 143.

III. Conclusion

As the foregoing analysis, even the Commission’s erroneous legal standard cannot be satisfied by Complaint Counsel. Accordingly, this action is barred by the *Noerr* doctrine under both the legal standard articulated by the Supreme Court and the erroneous legal standard set forth in the Commission’s decision.

Dated: September 27 2004.

Respectfully submitted,

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

By *Signature on File with Commission*

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ATTORNEYS FOR UNION OIL COMPANY OF
CALIFORNIA

CERTIFICATE OF SERVICE

I hereby certify that on September 27, 2004, I caused the original and two paper copies to be delivered for filing via overnight delivery (Federal Express), and caused an electronic copy to be delivered for filing via e-mail of the Public version of the Memorandum of the Union Oil Company of California Regarding Applicability of Noerr Immunity Following Remand to:

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 September 27, 2004, I also caused two paper copies of the Public version of the Memorandum of the Union Oil Company of California Regarding Applicability of Noerr Immunity Following Remand to be delivered via U.S. Mail to:

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

I hereby certify that on September 27, 2004, I also caused one paper copy of the Public version of the Memorandum of the Union Oil Company of California Regarding Applicability of Noerr Immunity Following Remand to be served upon each person listed below via overnight delivery (Federal Express):

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