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

| In the Matter of<br><br>**UNION OIL COMPANY OF CALIFORNIA,**<br>a corporation, | Docket No.<br>9305<br><br>PUBLIC |
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BRIEF OF THE STATES OF CALIFORNIA, ARIZONA, CONNECTICUT, HAWAII, IDAHO, ILLINOIS, KENTUCKY, LOUISIANA, MAINE, MARYLAND, MINNESOTA, MISSISSIPPI, NEVADA, NEW YORK, OREGON, VIRGINIA, WASHINGTON, WEST VIRGINIA, WISCONSIN, THE COMMONWEALTHS OF PENNSYLVANIA, VIRGINIA AND MASSACHUSETTS, AND THE CALIFORNIA AIR RESOURCES BOARD AS AMICI CURIAE IN SUPPORT OF THE COMPLAINT

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January 13, 2004

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The Attorneys General of the States of California, Arizona, Connecticut, Hawaii, Idaho, Illinois, Kentucky, Louisiana, Maine, Mississippi, Maryland, Minnesota, Nevada, New York, Oregon, Virginia, Washington, West Virginia, Wisconsin, the Commonwealths of Massachusetts, Pennsylvania, Virginia (State Attorneys General), and the California Air Resources Board (Amici) respectfully submit this brief as amici curiae urging the Commission reverse the decision of the Administrative Law Judge as follows:

## INTEREST OF AMICI

The Air Resources Board (ARB) is the California state agency charged with the promulgation and enforcement of regulations for cleaner burning gasoline pursuant to statutes enacted by the state legislature. (California Health & Safety Code §§ 39003, 43013.) The litigation at issue in this matter arose out of conduct by Unocal, during the course of the development by ARB of fuel specifications for California gasoline required for compliance with the California Clean Air Act. ARB has an interest in the integrity of its administrative processes, to insure that the regulatory process is not misused to give any participant market power and to protect the factual record in administrative rule-making from fraudulent misrepresentations.

The State Attorneys General are the chief legal officers of their respective states and commonwealths. As such, they are responsible for the enforcement of state consumer protection and antitrust laws. They also represent various administrative agencies who enact regulations under the laws of their respective jurisdictions. In this regard, State Attorneys General advise administrative agencies on administrative procedures and litigate issues relating to regulations and administrative procedures on behalf of such agencies.

The State Attorneys General have an interest in this matter, because the administrative

law judge's decision has the potential to affect conduct before state administrative agencies, as well as antitrust enforcement.[1] The impact of this decision may be wide-ranging. Almost every area of business and technology is touched by some form of governmental regulation, and frequently these regulations influence competitive conditions in the marketplace. Defining the extent to which conduct before such administrative agencies is immunized by the *Noerr Pennington* Doctrine is of significant importance to state agencies such as California's ARB and to State Attorneys General. Furthermore, the credibility of administrative processes in the eyes of the public is a valuable asset and must be protected. The administrative process must be beyond reproach because it is ultimately accountable to the needs and interests of the citizenry.

Additionally, the State Attorneys General have filed this brief because of the potential for the Unocal patent to increase gasoline prices. In 1997, a jury awarded Unocal royalties of 5-3/4 cents per gallon. ("*Unocal's Reformulated Gasoline (RFG) Patents: Frequently Asked Questions", www.unocal.com/rfgpatent/faq3.htm; last assessed January 7, 2004*). This problem extends beyond California. In 2001, the Federal Trade Commission's Final Report on Midwest Gasoline Prices recognized that royalties asserted by Unocal for its patents may have contributed to the spike in prices during the spring and summer of 2000.

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1. Several of the Attorney General amici have been concerned about the conduct of Unocal for several years. The Attorneys General of California, Alabama, Arizona, Arkansas, Colorado, Delaware, Georgia, Illinois, Indiana, Kansas, Kentucky, Maine, Massachusetts, Michigan, Minnesota, Missouri, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Texas, Utah, Virginia, Washington, West Virginia, Wisconsin and the District of Columbia, jointly filed an amicus brief before the U.S. Supreme Court in the matter of *Union Oil Company of California v. Atlantic Richfield Company*, et al., challenging the validity of the Unocal patent. (*See, Union Oil Company of California* v. *Atlantic Richfield Company, et al.*, 34 F. Supp. 2d 1208 (1998); *id.,* 208 F.3d 989 (Fed Cir. 2000), *cert denied*, 531 U.S. 1183, 148 L. Ed. 2d 1025, 121 S. Ct. 1167 (2001). The Amici, herein, are concerned that if Unocal is allowed to succeed in enforcing its patent, gasoline prices to consumers in many areas will rise.

ARB and the State Attorneys General have also filed this amicus brief because of the importance of the issues presented in this matter. The administrative law judge (ALJ) dismissed the Federal Trade Commission's complaint on the ground that Unocal was entitled to complete immunity for misrepresentations before the state administrative agency under the *Noerr Pennington* Doctrine, because the rule-making proceedings in which the misrepresentations were made were quasi-legislative or political. The ALJ reached this conclusion by confusing the concepts of "quasi-legislative" and "quasi-judicial" as they are applied in administrative law with similar concepts of "political" and "adjudicatory" that are used in determining the scope of the *Noerr Pennington* Doctrine. As a result of this confusion, the ALJ failed to recognize the line of cases that indicate administrative rule making is considered non political or adjudicatory for the purpose of determining whether an exception to the *Noerr Pennington* Doctrine applies. Under the reasoning of the ALJ, virtually all fraudulent conduct before an administrative rule-making body will be immune from the antitrust laws. If this error is allowed to stand, state agencies are likely to see more deceptive and fraudulent conduct in their proceedings, and one of the important tools for remedying such wrongful conduct will be unavailable.

The amici submit that classifications of conduct for purposes of the *Noerr Pennington* Doctrine are unrelated to classifications of quasi-legislative and quasi-judicial for purposes of state administrative law issues. While antitrust cases have used similar nomenclature[2/] in

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2. Cases classifying governmental activity have used the terminology "political" and "adjudicative." (See, for example, *California Motor Transport v. Trucking Unlimited* 404 U.S. 508 (1972). This terminology can be confusing, because administrative law uses similar terms ("quasi-legislative" and "quasi-adjudicatory" or "quasi-judicial") to distinguish between different types of administrative law activity. Unless otherwise noted, for purposes of this amicus brief, amici will use the terms "political" and "non political" for purposes of *Noerr Pennington* immunity and will use "quasi-legislative" and "quasi-judicial" for purposes of administrative law.

discussing immunity under this doctrine, it is clear that the underlying antitrust principles focus on different characteristics in distinguishing different types of governmental "petitioning." Immunity is more extensive for political activity than for non political (sometimes called "adjudicative") activity. As will be shown in more detail below, administrative rule-making is non political activity, and *Noerr Pennington* Doctrine should not apply to fraudulent misrepresentations made in such proceedings.

## ISSUE PRESENTED

Is administrative rule-making considered "non political" activity, so that fraudulent conduct and misrepresentations in such proceedings are not entitled to *Noerr Pennington* antitrust immunity?

## ARGUMENT

### I.

### THE *NOERR PENNINGTON* DOCTRINE DOES NOT CONDONE FRAUDULENT CONDUCT IN ADMINISTRATIVE RULE MAKING

### A. Context And Nature Of Governmental Proceedings Determine Scope Of *Noerr Pennington* Immunity

The *Noerr Pennington* Doctrine provides antitrust immunity to activities directed to influencing the government to take certain action. (*Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.* 365 U.S. 127 (1961); see also, *United Mine Workers v. Pennington* 381 U.S. 657 (1965), applying the *Noerr Pennington* Doctrine to administrative agencies.) However, there are limits on the doctrine's reach. In *California Motor Transport v. Trucking Unlimited* 404 U.S. 508 (1972)(*California Motor Transport*), the Supreme Court refused to grant antitrust immunity to a group of highway carriers who initiated sham judicial and administrative actions to interfere with competitors, who were seeking access to those

tribunals to obtain certain rights. The court, in reaching this conclusion, distinguished between conduct before legislative bodies and conduct in adjudicatory proceedings. Similarly, in *Allied Tube & Conduit Corp. v. Indian Head, Inc.* 486 U.S. 492, 499 (1988), the court was faced with a challenge to action by the National Fire Protection Association to exclude a product from the National Electric Code, which set standards and was routinely adopted by state and local governments. The court held the conduct was not entitled to immunity under the *Noerr Pennington* Doctrine and noted that "a publicity campaign directed at the general public, seeking legislation or executive action, enjoys antitrust immunity even when the campaign employs unethical and deceptive methods. [citations omitted.] But in less political arenas, unethical and deceptive practices can constitute abuses of administrative or judicial processes that may result in antitrust violations." It stated, "We thus conclude that the Noerr immunity of anticompetitive activity intended to influence the government depends not only on its impact, but also on the context and nature of the activity." (*Id.*, p. 504.)

Courts have applied the rationale of these Supreme Court cases to determine that abuses of the administrative process can give rise to antitrust liability, unprotected by the *Noerr Pennington* Doctrine. In *Clipper Exxpress v. Rocky Mountain Motor Tariff* 690 F.2d 1240 (9th Cir. 1982), plaintiff, a freight forwarder, sued trucking companies and a rate bureau for antitrust violations, alleging that the defendants engaged in various conduct to prevent plaintiff from lowering its rates. Plaintiff, relying on the *Walker Process* Doctrine,[3] claimed

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3. Under *Walker Process* a patentee may be subject to antitrust liability if the alleged infringer proves that the asserted patent was obtained through knowing and willful fraud.

that the defendants' attempts to influence the Interstate Commerce Commission by providing fraudulent information, were not immune from antitrust liability. The court held that defendants were not entitled to summary judgement based on *Noerr Pennington* immunity and stated, "We hold that the fraudulent furnishing of information to an agency in connection with an adjudicatory proceeding can be the basis for antitrust liability, if the requisite predatory intent is present and the other elements of an antitrust claim are proven." (*Id.*, p. 1261.)

Courts have recognized that governmental action may be considered "political" or "adjudicatory", i.e. "non political", for purposes of determining the scope of the *Noerr Pennington* Doctrine. They have also analyzed the factors to consider in whether the context of petitioning is political or not. In *Kottle v. Northwest Kidney Centers* 146 F.3d 1056 (9th Cir. 1998), the Ninth Circuit again analyzed the scope of immunity under the *Noerr Pennington* Doctrine for conduct related to administrative proceedings. In that case, plaintiff had sought a certificate of need to operate two kidney dialysis centers. Defendants opposed the application. After plaintiff's application was denied, defendants sought their own certificate of need, presenting data contrary to the statements they made in opposition to plaintiff's application. The court, recognizing that the governmental body reviewing the certificate of need applications was neither a court nor a legislature, undertook to determine the scope of immunity in administrative proceedings and concluded:

> "the scope of immunity depends on the degree of political discretion exercised by the governmental agency. [citations omitted.] ...executive entities are treated like judicial entities only to the extent that their actions are guided by enforceable standards subject to review...Similarly, our concern about intentional misrepresentations to government officials is much greater outside the political realm." (Id., p. 1062.)

In *Boone v. Redevelopment Agency of City of San Jose* 841 F.2d 886, 896 (9th Cir. 1988), the court was faced with a challenge to a decision by a city council and a municipal corporation not to construct a multi-storied parking garage. The court looked to the broad discretion accorded the agency and whether relief from the agency's action could be had through the city council or other legislative body and found that the petitioning took place in a political context. In *Metro Cable Co. v. CATV of Rockford, Inc.* 516 F.2d 220, 228 (7th Cir. 1975), a cable television franchise had been awarded by the mayor and city council. The court considered whether the agency was required to compile an evidentiary record through a formal process, whether the agency is free to consider information from any source and finally, whether the members of the agency operate in a political setting. It held the petitioning took place in a political context. Interestingly, the court noted that if the decision-making process had been assigned to an administrative body, the process would have been considered adjudicative or non political. (*Id.*, p. 228.) It is significant that, contrary to the assumption of the ALJ, the description of the administrative action as "quasi-legislative" or "quasi-judicial" is not determinative for purposes of immunity. In *Clipper Exxpress*, *supra*, the court treated the administrative proceedings related to rate-making as non political or adjudicatory. The fact that rate-making is generally defined as quasi-legislative under California administrative law (see e.g., *Consumer Lobby against Monopolies v. Public Utilities Commission* (1979) 25 Cal. 3d 891, 897, 603 P.2d 41, 44, 160 Cal. Rptr. 124, 127), was irrelevant to the analysis; the court based its conclusion on the nature of rate-making proceedings.

**B. ARB Administrative Rule-making Is An Intensely Factual Process, That Does Not Establish Policy, And Is Subject To Review By The Courts.**

Administrative agencies generally, and the Air Resources Board specifically in this case, are generally limited by the delegation of authority in the enabling statute. They are bound to effectuate the policies set in the statute by the legislature and must engage in specific fact-finding to establish an evidentiary basis for the regulations. Such regulations are subject to review by the courts to ensure both compliance with procedural requirements and statutory specifications, as well as adequate substantive fact-finding. A brief description of the Air Resources Board's authority and rule-making in this case which follows will illustrate the context of administrative rule-making.

The California Legislature has designated the ARB as the state agency "charged with coordinating efforts to attain and maintain ambient air quality standards, to conduct research into the causes of and solution to air pollution, and to systematically attack the serious problem caused by motor vehicles, which is the major source of air pollution in many areas of the state." (*California Health & Safety Code, (Health & Safety Code)* § 39003.) As a creature of statute, the ARB is headed by a board whose members are selected on the basis of "their demonstrated interest and proven ability in the field of air pollution control and their understanding of the needs of the general public in connection with air pollution problems. (*Health & Safety Code* § 39510.)[4]

The governing statute also prohibits ARB Board members from taking actions based on any given political agenda. Instead, ARB Board members are required to "exercise their independent judgment as officers of the state and on behalf of the interests of the entire state

4. In the current board, three of the members are required to have specific forms of technical expertise, a fourth member is to have similar technical expertise or to have experience in "air pollution control," two members are required to be "public members," and the remaining five members are to be members of the various regional air pollution control districts within the state. (*Health & Safety Code* § 39510)

in furthering the purposes of [the statute establishing the ARB]." (*Health & Safety Code*, § 39510(e).)

The substantive constraints imposed on the ARB derive from the California Legislature's establishment both of general policy directives and specific air quality goals that the ARB is charged with implementing. The Legislature's findings led to a general policy directive for the "control and elimination of those air pollutants [from motor vehicles]." (*Health & Safety Code* § 43000.) This general directive is followed by the more specific statutory delegation to the ARB to "adopt and implement motor vehicle emission standards, in-use performance standards, and motor vehicle fuel specifications . . . which the [ARB] board has found to be necessary, cost-effective, and technologically feasible, to carry out the purposes of [the statute establishing the ARB], unless preempted by federal law." (*Health & Safety Code* § 43013(a).) The range of the ARB's authority to adopt regulatory standards is further constrained by the statutory provision that expressly states the Legislature's goals and directions to the ARB.[5]

In addition to the substantive constraints imposed upon the ARB by the statutory scheme by which the Legislature created the ARB and defined its regulatory tasks,

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5. Specifically, the ARB is directed to "achieve the maximum degree of emission reduction possible from vehicular and other mobile sources . . . at the earliest practicable date." (*Health & Safety Code* § 43018(a).) The ARB is further directed as to the time-frame and specific quantitative standards for the regulations promulgated pursuant to the Legislature's delegation: "Not later than January 1, 1992, the [ARB] board shall take whatever actions are necessary, cost-effective, and technologically feasible in order to achieve, not later than December 31, 2000, a reduction in the actual emissions of reactive organic gases of at least 55 percent, a reduction in emissions of oxides of nitrogen of at least 15 percent from motor vehicles. . . . The [ARB] board also shall take action to achieve the maximum feasible reductions in particulates, carbon monoxide, and toxic air contaminants from vehicular sources."*Health & Safety Code* § 43018(b).)

procedural constraints imposed by other provisions of California law further demonstrate that the ARB is a regulatory body that does not have the broad discretion afforded to political bodies. Specifically, the rule-making portion of the California Administrative Procedure Act governs the ARB's procedures for promulgating rules and regulations. (*California Government Code (Gov. Code)* § 11340 et seq.) The procedures require notice and an opportunity to comment and also dictate that an extensive record be developed.

Each regulation promulgated by the ARB is reviewed by the California Office of Administrative Law ("OAL") to determine whether the regulation meets the statutory standards of necessity, authority, clarity, consistency, reference and nonduplication. (*Gov. Code* § 11349.1.). To determine whether a new regulation meets the standard for "necessity," OAL considers whether the agency's decision to promulgate a new regulation is supported by substantial evidence in the rule-making record:

> "Necessity" means the record of the rulemaking proceeding demonstrates by substantial evidence the need for a regulation to effectuate the purpose of the statute, court decision, or other provision of law that the regulation implements, interprets, or makes specific, taking into account the totality of the record. For purposes of this standard, evidence includes, but is not limited to, facts, studies and expert opinion.

(*Gov. Code* § 11349(a).)[6]

OAL's standard of review is very similar to the standard for judicial review, which is also available. Judicial review is by the courts, not through a political process. A court can declare a new regulation invalid if

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6. This, and the version of *Gov. Code* § 11350 quoted below, are the most recent versions, however, as noted in the Law Revision Commission Comments - these are nonsubstantive changes.

> The agency's determination that the regulation is reasonably necessary to effectuate the purpose of the statute, court decision, or other provision of law that is being implemented, interpreted, or made specific by the regulation is not supported by substantial evidence.

(*Gov. Code* § 11350(b)(1).)

Both OAL's and the courts' legal authority to scrutinize the evidence in the administrative rule-making record in order to determine whether a new regulation meets the "substantial evidence" test for "necessity," reflects the fact that the ARB's administrative rule-making procedure is not a "political" process.

It is apparent that, like many other administrative agencies who engage in rule-making, ARB, in promulgating the gasoline regulations, was performing an adjudicatory or non political function. First, the agency is not a political body that sets policy. (*Health & Safety Code* § 39510.) The agency is charged with responsibility for "furthering the purposes" of the legislative policies set forth in statutes (*Health & Safety Code* § 39510(e).) It enforces the policies set by the legislature through the statutes under which authority is delegated to the agency. Second, the agency was required to follow specific procedures intended to create a <u>factual</u> administrative record that justifies the regulation. The ARB regulations were not promulgated through a legislative process, in which much information is provided off-the-record through the lobbying activities of interested parties. Third, the discretion of the agency is limited because the regulation must have an evidentiary, as well as a legal, basis. In fact, the validity of the regulation depends on whether the agency had developed an adequate evidentiary basis. Fourth, the process for challenging the validity of a regulation is not by appeal to a political body, such as a city council or board of supervisors, but rather by judicial review. These elements of rule-making under the California

Administrative Procedure Act, as well as specific requirements relating to ARB's fuels authority, clearly indicate that ARB's enactment of regulations setting California Phase 2 reformulated gasoline standards must be considered non political for purposes of analyzing the scope of immunity under the *Noerr Pennington* Doctrine.

The ALJ apparently ignored this analysis and instead relied significantly upon the California Supreme Court case of *Western States Petroleum Assn. v. Superior Court*, (1995) 9 Cal. 4th 559, 888 P.2d 1268, 38 Cal.Rptr.2d 139. In this case, the California Supreme Court characterized the administrative agency's rule-making activity as "quasi-legislative." While the classification of the agency's activity as "quasi-legislative" is appropriate within an administrative law context, a deeper analysis of the case shows why it is not appropriate for application of the *Noerr Pennington* Doctrine. First, in the case itself, the court recognized that such administrative proceedings have some attributes in common with judicial proceedings. The issue decided in the *Western States Petroleum* case was whether the type of hearing required by the California Environmental Quality Act ("CEQA"), either under Public Resources Code section 21168 or Public Resources Code section 21168.5, determined the standard for admitting post-hearing evidence in court. Significantly, however, in examining this issue, the California Supreme Court, recognized the importance of fact finding in a rule-making context, stating:

> "we are persuaded that the <u>factual bases of quasi-legislative administrative decisions are entitled to the same deference as the factual determinations of trial courts,</u> that the substantiality of the evidence supporting such administrative decisions is a question of law, and that both types of substantial evidence review are governed by similar evidentiary rules." (*Western*

*Petroleum*, supra, at 573.) (emphasis added.)

Second, in clarifying the responsibilities of the ARB, the legislature amended California Health & Safety Code section 43013, to specifically require it to hold public hearings, admit certain parties to the proceedings, and also make specific factual findings based upon the evidence obtained during the hearings as to the significant impacts of the proposed standard or specification on affected segments of the state's economy, cost-effectiveness and technological feasibility. Nevertheless, the ARB was already performing such duties before the amendments which were deemed to not be changes in existing law. Because of the nature of the administrative hearing and the significance of the determination of factual issues in the rule-making context, the administrative agency in this case was more like an adjudicative than political entity in terms of the criteria applied in analyzing the scope of the *Noerr Pennington* Doctrine. Accordingly, petitioning in this situation should have the same immunity as judicial and quasi-judicial bodies.

## C. Fraudulent Misrepresentations Corrupt Administrative Rule Making Proceedings And Therefore Are Not Afforded *Noerr Pennington* Immunity

Sham proceedings can be characterized as one of two types: (1) "misrepresentations . . . in the adjudicatory process" or (2) the pursuit of "'a pattern of baseless, repetitive claims'" instituted "'without probable cause, and regardless of the merits.'" *Columbia Pictures Industries, Inc.* v. *Professional Real Estate Investors*, 944 F.2d 1525, 1529 (9th Cir.1991)(quoting California Motor Transport Co.). The latter requires findings that the claims are objectively meritless or baseless, and that the wrong-doer attempted to interfere directly with the business relationships of a competitor through the use of the governmental

process--as opposed to the outcome of that process--as an anticompetitive weapon. *Professional Real Estate Investors*, *v. Columbia Pictures Industries, Inc,* 408 U.S. 49, 60-61 (1993). The former type of abuse to require "proof that a party's knowing fraud upon, or its intentional misrepresentations to, the court deprives the [prior] litigation of its legitimacy." *Liberty Lake Investments, Inc. v. Magnuson, 12 F.3d 155, 159 (9th Cir. 1993) ("Liberty Lake Investments, Inc.")* This construction requires that misrepresentations effect the core of the proceeding. The focus is upon the deliberate misrepresentations and blatant deceptions made during the proceedings.

Amici submit that Unocal's wrongful or deceitful conduct corrupted and compromised the administrative rule-making process to the point that the administrative body was prejudiced in its ability to make impartial findings of fact which the Legislature had directed, and therefore such conduct should not be subject to First Amendment protections. Here, the ARB action was dependent upon the misrepresented information, which was material and went to the core of the reasons for the administrative rule-making. The ARB was required to consider cost effectiveness, and the misrepresentation resulted in an additional $69 million being added to the cost of gasoline sold in California as of July 31, 1996. ("*Unocal's Reformulated Gasoline (RFG) Patents: Frequently Asked Questions", www.unocal.com/rfgpatent/faq3.htm; last assessed January 7, 2004*). Unocal is seeking an accounting for royalties subsequent to such date. (id.) Therefore the deliberate misrepresentations about the patents had an substantial impact on the finding of cost effectiveness. Thus, material misrepresentation, that affect the very core of the proceeding will preclude *Noerr Pennington* immunity. See *Kottle* v. *Northwest Kidney Ctrs*., 146 F.3d 1056 (9th Cir. 1998) (citing *Clipper Exxpress* v. *Rocky Mountain Motor Tariff*, 690 F.2d

1240, 1260 (9th Cir. 1980)).

Although the U.S. Supreme Court has not addressed the question of "whether and, if so, to what extent *Noerr* permits the imposition of antitrust liability for a litigant's fraud or other misrepresentations" (See, *Professional Real Estate Investors, Inc.*, v. *Columbia Pictures Industries, Inc*. 508 U.S. 49, 61 (1993); 113 S. Ct. 1920; 123 L. Ed. 2d 611 (1993), many other courts have found that there is a misrepresentation exception to *Noerr Pennington* immunity. For example, in *Federal Prescription Serv., Inc*. v. *American Pharmaceutical Ass'n*, 214 U.S. App. D.C. 76, 663 F.2d 253, 263 (D.C. Cir. 1981), the court said: "Attempts to influence governmental action through overtly corrupt conduct, such as bribes (in any context) and misrepresentation (in the adjudicatory process), are not normal and legitimate exercises of the right to petition, and activities of this sort have been held

beyond the protection of *Noerr*." See also, *Nobelpharma AB*, v. *Implant Innovations, Inc.*, 141 F.3d 1059 (Fed Circuit 1998).

The Unocal situation is similar to *Walker Process Equipment, Inc., v. Food Machinery and Chemical Corp.*, 382 U.S. 172, 174 (1965) (*Walker Process*). In *Walker Process*, the U.S. Supreme Court determined that a patentee can be stripped of its exemption from antitrust liability if the patentee obtained the patent "by knowingly and willfully misrepresenting facts to the [Patent Trademark Office] (*Walker Process*, supra, at 177). Unocal claimed that its information was in the public domain when it knew that it had a patent application pending. The *Walker Process* Doctrine has been extended to other areas of law beyond patents (See, e.g., *Murray Israel, M.D.*, v. *Baxter Laboratories, Inc*., 151 U.S. App. D.C. 101; 466 F.2d 272 (D.C. Cir. 1972) [applied to proceedings before the Federal

Food & Drug Administration]. That same reasoning should also apply here, because in the context of this case, the misrepresentations damage the integrity of the factual findings and ultimately the agency's proceedings. (See, e.g., *Norton* v. *Curtiss*, 433 F.2d 779, 796 (C.C.P.A. 1970) ("Where fraud is committed, injury to the public through a weakening of the Patent System is manifest."). Moreover, Unocal's deceitful conduct included the use of knowledge obtained in those administrative rule-making proceedings to craft its patent claims to be coextensive with the developing standards, all the while misleading competing refiners as to its intentions.[7] Since Unocal obtained the regulatory benefits for its patents by fraud, it can not enjoy the limited exception to the prohibitions of the antitrust laws.

Good reason exists for applying the same to the administrative rule-making context. The integrity of the administrative process is best protected if false and fraudulent misrepresentations and omissions are not shielded from antitrust liability, and therefore the Commission should affirmatively determine that fraudulent misrepresentations and omissions by Unocal are not shielded from antitrust liability in administrative rule-making proceedings.

## II.

## FRAUDULENT MISREPRESENTATIONS ARE NOT LEGITIMATE PETITIONING PROTECTED BY FIRST AMENDMENT

The basis for antitrust immunity under the *Noerr Pennington* Doctrine is to protect the First Amendment rights of citizens to petition their government. The U. S. Supreme Court

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7. The Air Resources Board would have been unable to determine whether Unocal's processes were patented or not because at the time of representations the patent applications were just pending and until an article is marked with notice that it is patented, there is no actual notice to the public that the article is protected by patent laws. *Steinthal* v. *Arlington Sample Book Co.* (CA 3 Pa) 94 F2d 748 (1938), cert. denied, 305 US 613, 83 L Ed 390, 59 S Ct. 72 (1930).

has reasoned that the Sherman Act does not punish "political activity" through which "the people . . . freely inform the government of their wishes." *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137, 5 L.Ed. 2d 464, 81 S.Ct. 523 (1961). The First Amendment "enshrines political expression as a core value. However, courts analyze the nature of the proceedings and the impact of fraudulent misrepresentations and omissions on those proceedings to evaluate the need for protection of First Amendment rights to petition government and to determine whether *Noerr Pennington* immunity should apply. In *California Motor Transport Co.*, *supra*, the U.S. Supreme Court reaffirmed the broad proposition that the right to petition is not absolute. "First Amendment rights may not be used as the means or the pretext for achieving "substantive evils' (citation omitted) which the legislature has the power to control." *(Id*, p. 515) The Court indicated that the scope of the permissible restrictions on that right depends in part on the nature of the government forum being petitioned.

Following this reasoning, courts have recognized abuses of the administrative rule-making process can give rise to antitrust liability, unprotected by the *Noerr-Pennington* Doctrine. In *Clipper Exxpress*, *supra*, the Ninth Circuit stated that “[t]here is no First Amendment protection for furnishing, with predatory intent false information to an administrative or adjudicatory body.”(*Id*, at 1262.) The court also noted that, under the *Walker Process* Doctrine, fraudulently supplying information to a governmental body can result in antitrust liability and concluded: “the fraudulent furnishing of information to an agency in connection with an adjudicatory proceeding can be the basis for antitrust liability, if the requisite predatory intent is present and the other elements of an antitrust claim are proven.” (*Clipper Exxpress*, supra, at 1261).

There are cogent reasons why fraudulent misrepresentations to administrative agencies should not be entitled to extensive First Amendment protections. Limiting the scope of antitrust immunity will not have a chilling effect on First Amendment rights. Citizens who submit written comments or make statements at public hearings are providing information for the evidentiary record regarding the proposed regulation. Administrative agencies, such as ARB, do not have the resources to independently verify the information provided or the implications of the information provided. There is a legitimate governmental interest in insuring that citizens, who participate in administrative processes, do not make misrepresentations or fraudulently withhold important facts that would corrupt the evidentiary record for the regulation. There is no First Amendment right to engage in such conduct. (*California Motor Transport Co.*, *supra,* at 515; *Clipper Exxpress*, *supra,* at 1261.)

The First Amendment considerations that led to the development of the *Noerr Pennington* Doctrine do not arise in relation to the conduct that occurred in the context of administrative rule-making, such as occurred with the development of California Phase 2 reformulated gas standards.

## III.

## *NOERR PENNINGTON* IMMUNITY SHOULD BE LIMITED WHEN THERE ARE LIMITED REMEDIES FOR CORRUPTING ADMINISTRATIVE PROCESS

Governmental administrative agencies want to promulgate regulations based on complete and accurate information. Yet, as was noted by the court in *Clipper Exxpress, supra,* administrative agencies do not have the resources to verify independently the information provided or its implications. Further, if an administrative agency enacts a

regulation based upon false information, there are limited remedies to correct the problem.

It will not always be possible to correct the situation simply by repealing the regulation that was based on false information. Affected persons and businesses may have taken action in reliance on the regulation that cannot easily be undone. This is exactly what happened in the present case, because of the "lock-in" effects of the California Phase 2 reformulated gasoline standards. Refiners relied on these regulations and incurred significant costs in modifying their refineries and refining processes to comply with the regulations

before Unocal revealed its patents and sought royalties. Repeal of the regulations would not undo the economic commitment to them.

Because of the limited ability of agencies to confirm information provided to them and because of the limited after-the-fact remedies when agencies rely on false information, there is a legitimate governmental interest in insuring that citizens who participate in administrative rule-making processes do not make misrepresentations or fraudulently withhold important facts. Limiting the immunity provided by the *Noerr Pennington* Doctrine helps to protect the integrity of these administrative proceedings.

## CONCLUSION

Amici recognize the importance of protecting citizens' rights to petition their government in other non political contexts. The state Attorneys General are devoted to maintaining accuracy, integrity and fairness of the administrative rulemaking process, as ARB is for its own processes. The Amici submit that misrepresentations made in the context of administrative rule making, such as occurred in the present case, did <u>not</u> occur in a political context. The *Noerr Pennington* Doctrine should not shield fraudulent conduct before

administrative agencies from antitrust liability.

Dated: January 14, 2004

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