EXTENDING THE *NOERR-PENNINGTON* DOCTRINE TO REGIONAL TRANSMISSION ORGANIZATION PETITIONERS ON A CASE-BY-CASE BASIS

Steven Lavender[*]

INTRODUCTION

To many Americans, light switches work the same way as they always have: flick on the switch, and electricity flows to the bulb. Over the last decade and a half, however, the journey electricity takes before reaching American homes has undergone historic change.[1] Strict regulation, rather than competition, governed the electricity market for much of the last century.[2] This changed as lawmakers began to think that a deregulated, competitive electricity market would better serve the public.[3] Much of the deregulation occurred by introducing competition into the wholesale electricity market through Regional Transmission Organizations ("RTO").[4] RTOs are privately owned entities that operate wholesale electricity markets and transmission grids that connect electricity generators to retail distributors.[5]

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[*] George Mason University School of Law, J.D. Candidate, May 2013; Northwestern University, B.A., Economics, June 2004. I would like to thank Professor Joshua Wright, Professor Lynne Kiesling, Emily Harp, and Jessica Lavender for helping me to write this Comment.

[1] *See* Regional Transmission Organizations, Order No. 2000, 65 Fed. Reg. 810 (Jan. 6, 2000) [hereinafter Order No. 2000] (to be codified at 18 C.F.R. pt. 35); Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Order No. 888, 61 Fed. Reg. 21,540 (May 10, 1996) [hereinafter Order No. 888] (to be codified at 18 C.F.R. pts. 35 & 385).

[2] Ray S. Bolze et al., *Antitrust Law Regulation: A New Focus for a Competitive Energy Industry*, 21 ENERGY L.J. 79, 79 (2000) ("In the energy industry, regulation largely took the place of competition in the markets for natural gas and electricity. Regulation by administrative agencies (such as state public utility commissions and the Federal Energy Regulatory Commission (FERC)) rather than competition served to ensure fairness to consumers.").

[3] *See* ELECTRICITY RESTRUCTURING: THE TEXAS STORY 1 (L. Lynne Kiesling & Andrew N. Kleit eds., 2009); Bolze et al., *supra* note 2, at 80 ("Congress, and many states, have determined that competition may be the better method to ensure fairness to consumers in the form of lower costs and higher quality (i.e., more reliable) service.").

[4] *See generally* ELECTRIC ENERGY MKT. COMPETITION TASK FORCE, REPORT TO CONGRESS ON COMPETITION IN WHOLESALE AND RETAIL MARKETS FOR ELECTRIC ENERGY 2 (2007) [hereinafter TASK FORCE REPORT] (explaining that policymakers desired to replace traditional regulation of the electricity industry with competitive electricity markets).

[5] *See generally* AM. BAR ASS'N SECTION OF ANTITRUST LAW, ENERGY ANTITRUST HANDBOOK 4-5 (2d ed. 2009) [hereinafter ENERGY ANTITRUST HANDBOOK].

As competition in the electricity market increases, antitrust laws will play a more important role in governing the electricity market and RTOs.[6] An important aspect of applying antitrust laws to the electricity industry is clarifying the scope of the antitrust immunities that are potentially applicable to it.[7] The *Noerr-Pennington* doctrine is one such immunity.[8]

The *Noerr-Pennington* doctrine protects the right to petition the government, as guaranteed by the First Amendment, even if the effect of the petitioning is anticompetitive and would typically be condemned by antitrust laws.[9] The doctrine allows a person to petition any branch of the government[10] and can provide immunity to persons who petition a quasi-governmental organization.[11] *Allied Tube & Conduit Corp. v. Indian Head, Inc.*[12] offers guidance to determine if a private entity is a quasi-governmental organization that affords petitioners immunity from antitrust liability under the *Noerr-Pennington* doctrine.[13] The *Allied Tube* Court stated that "source, context, and nature of the anticompetitive restraint at issue"[14] must be examined by determining if the private entity has been conferred with official government authority and if the entity has an economic interest in the decision.[15]

Courts have not yet decided if RTOs are quasi-governmental organizations that would give *Noerr-Pennington* immunity to RTO market participants[16] that suggest anticompetitive changes to RTOs.[17] This Comment ar-

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6 *See id.* at 45 (explaining that businesses must take antitrust laws into account as the industry becomes more deregulated); Bolze et al., *supra* note 2, at 79 ("Traditionally, the antitrust laws have played a small role in the evolution of the energy industry. The basic purpose of the antitrust laws is to protect competition and, thereby, to increase the welfare of, and ensure fairness to, consumers . . . . With the deregulation of both the electric and natural gas markets, however, the antitrust laws are rapidly gaining importance. Thus, avoiding violations must become part of future business planning.").

7 *See generally* ENERGY ANTITRUST HANDBOOK , *supra* note 5, at 45.

8 *See* United Mine Workers of Am. v. Pennington, 381 U.S. 657 (1965); E. R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961).

9 *See Noerr*, 365 U.S. at 136 (stating that "where a restraint upon trade or monopolization is the result of valid governmental action, as opposed to private action, no violation of the [Sherman] Act can be made out"); *see also* Borough of Duryea, Pa. v. Guarnieri, 131 S. Ct. 2488, 2498-99 (2011) (tracing the right to petition the government as guaranteed in the First Amendment back to the Magna Carta).

10 Cal. Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 510-11 (1972).

11 *See* Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 506 (1988) (holding that the *Noerr-Pennington* doctrine did not apply because the entity was not a quasi-governmental organization in this case, but allowed for future organizations to be classified as quasi-governmental organizations). A quasi-governmental agency is "[a] government-sponsored enterprise or corporation . . . ." BLACK'S LAW DICTIONARY 72 (9th ed. 2009).

12 486 U.S. 492 (1988).

13 *Id.* at 502.

14 *Id.* at 499.

15 *Id.* at 501-02.

16 FERC defines an RTO market participant as "[a]ny entity that, either directly or through an affiliate, sells or brokers electric energy, or provides transmission or ancillary services to the Regional Transmission Organization" or "[a]ny other entity that the Commission finds has economic or commer-

gues that RTOs may be considered quasi-governmental organizations that protect petitioners from antitrust liability under the *Noerr-Pennington* doctrine, but only in limited circumstances.

Because the Federal Energy Regulatory Commission ("FERC") encourages RTO market participants to suggest changes directly to RTOs, FERC created a situation that will likely cause market participants to petition an RTO for a modification that impairs rival market participants and potentially harms competition.[18] Consider a hypothetical scenario where a group of electricity generators lobbies an RTO to conduct transmission line maintenance more often. Increased maintenance could result in upward price pressure at the wholesale electricity market because less electricity is delivered when the lines are down for maintenance. The electricity generators may benefit from higher prices at the wholesale market and, therefore, would have an incentive for the RTO to conduct maintenance more often. Retail distributors, who have to pay a higher price at the wholesale market, could file a lawsuit that claims the electricity generators violated the Sherman Act by lobbying the RTO to increase the frequency of transmission line maintenance.[19] The electricity generators would likely claim that the *Noerr-Pennington* doctrine protects them from liability because the RTO is a quasi-governmental organization. This Comment proposes a three-step framework for determining if the *Noerr-Pennington* doctrine should protect RTO petitioners, such as the electricity generators, from antitrust liability.

Part I first describes the origin and development of the *Noerr-Pennington* doctrine. Part I next describes how the electricity industry is regulated and FERC's influence on RTO formation and governance. Based on *Allied Tube*, Part II suggests a three-step framework that should be applied to petitioning on a case-by-case basis.[20] The first step determines if the petitioning is clearly commercial in nature.[21] The second step asks if the RTO has been conferred with official governmental authority. The third

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cial interests that would be significantly affected by the Regional Transmission Organization's actions or decisions." Order No. 2000, *supra* note 1, at 850.

17 ENERGY ANTITRUST HANDBOOK, *supra* note 5, at 125.

18 Order No. 2000, *supra* note 1, at 912 (stating that FERC wants "the RTO and its members [to] have the flexibility to improve their organizations in the future in terms of structure, geographic scope, market support and operations to meet market needs"). FERC refers to the flexibility of each RTO to make individualized changes as an "open architecture" scheme. *Id.* at 911-13.

19 *See* 15 U.S.C. § 1 (2006) ("Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.").

20 *See Allied Tube*, 486 U.S. at 501-02 (stating that whether or not an entity has been conferred with official governmental authority and if the entity has an incentive to restrain trade are factors in the "source, context, and nature" analysis).

21 *See, e.g.*, E. R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 137-41 (1961).

step determines if the RTO's governing board has an economic incentive to restrain trade.

Finally, Part III suggests that it is difficult for RTO market participants to determine whether the *Noerr-Pennington* doctrine will protect them from antitrust liability if they petition an RTO under FERC's open architecture design. By increasing the likelihood that the *Noerr-Pennington* doctrine applies, FERC could encourage more market participants to recommend potentially beneficial changes to RTOs. Part III proposes several modifications FERC could enact to make it easier for RTO market participants to determine if the *Noerr-Pennington* doctrine will protect them from antitrust liability.

I. THE *NOERR-PENNINGTON* DOCTRINE AND ELECTRICITY INDUSTRY REGULATION

A. *The* Noerr-Pennington *Doctrine*

The *Noerr-Pennington* doctrine is a judicially created antitrust immunity.[22] The Supreme Court established the *Noerr-Pennington* doctrine in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*[23] and *United Mine Workers of America v. Pennington*.[24] The *Noerr-Pennington* doctrine protects individuals who petition the government to enact anticompetitive laws from antitrust liability.[25] The rationale behind the doctrine is that the Sherman Act regulates commercial activity, not political activity.[26] Because petitioning the government to enact an anticompetitive law is a political activity, rather than a commercial activity, it is not condemned under the Sherman Act.[27]

The rationale behind the *Noerr-Pennington* doctrine can also be explained in terms of proximate cause. A defendant who petitions the government for an anticompetitive law avoids liability because "the injury of which the antitrust plaintiff complains was proximately 'caused' by the government itself."[28] Thus, a private party can petition the government to act, "but the government's decision to act reflects an independent govern-

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22 *See* United Mine Workers of Am. v. Pennington, 381 U.S. 657, 670 (1965); *Noerr*, 365 U.S. at 137-38.

23 365 U.S. 127 (1961).

24 381 U.S. 657 (1965).

25 *Id.* at 670; *Noerr*, 365 U.S. at 137-38.

26 *Noerr*, 365 U.S. at 140-41.

27 *See id.*

28 1 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 202(c) (3d ed. 2006).

mental choice, constituting a supervening 'cause' that breaks the link between a private party's request and the plaintiff's injury."[29]

The *Noerr-Pennington* doctrine extends to all branches of the government, including administrative agencies.[30] The doctrine may even protect petitioners if they address a quasi-governmental organization.[31] The doctrine's central principle—that petitioning the government is protected—is now well established. It is not, however, always clear when a quasi-governmental organization is sufficiently part of the government.[32]

The Supreme Court first illustrated the *Noerr-Pennington* doctrine's central principle in *Noerr*.[33] In *Noerr*, a group of Pennsylvania trucking companies alleged that a group of railroad companies conducted a publicity campaign that intended to harm the trucking business and violated Sections 1[34] and 2[35] of the Sherman Act.[36] The trucking companies charged that the railroad companies' publicity campaign caused the Governor of Pennsylvania to veto a bill that would have allowed trucks to carry heavier loads.[37]

The Supreme Court held that the Sherman Act did not apply because the "activities comprised mere solicitation of governmental action with respect to the passage and enforcement of laws."[38] The Sherman Act did not intend to influence this type of activity because

> [t]o hold that the government retains the power to act in this representative capacity and yet hold, at the same time, that the people cannot freely inform the government of their wishes would impute to the Sherman Act a purpose to regulate, not business activity, but political activity, a purpose which would have no basis whatever in the legislative history of that Act. . . . [S]uch a construction of the Sherman Act would raise important constitutional questions. The right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms.[39]

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29 *Id.*

30 Cal. Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 510 (1972).

31 *See, e.g.*, Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 509-10 (1988).

32 *See generally* AM. BAR ASS'N SECTION OF ANTITRUST LAW, MONOGRAPH 25: THE *NOERR-PENNINGTON* DOCTRINE 77 (2009) [hereinafter MONOGRAPH 25] ("While the case law is clear that petitioning immunity applies to any branch of government, the line between governmental and quasi-governmental entities can be blurry.").

33 E. R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 137-38 (1961).

34 15 U.S.C. § 1 (2006) ("Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.").

35 *Id.* § 2 ("Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . . .").

36 *Noerr*, 365 U.S. at 129.

37 *Id.* at 130.

38 *Id.* at 138.

39 *Id.* at 137-38.

The Court emphasized the general principle that the Sherman Act applies to commercial activity but not political activity by examining the context in which the publicity campaign occurred.[40] Even though the railroad companies did not directly petition the government and the railroad companies' purpose may have been to enact anticompetitive laws, the Court decided that the activity was political.[41]

Pennington reinforced *Noerr's* principle that petitioning the government is not subject to Sherman Act liability.[42] In *Pennington*, the Supreme Court held that coal companies that successfully petitioned the Secretary of Labor to establish a minimum wage were not liable for damages under the Sherman Act.[43] Again, the Court stressed that a petitioner may intend to eliminate competition as long as the effort is directed at a public official.[44]

The Supreme Court continued to develop the *Noerr-Pennington* doctrine in *California Motor Transport Co. v. Trucking Unlimited*.[45] The Court reasoned that

> [t]he same philosophy [as in *Noerr*] governs the approach of citizens or groups of them to administrative agencies (which are both creatures of the legislature, and arms of the executive) and to courts, the third branch of Government. Certainly the right to petition extends to all departments of the Government.[46]

Although the Court was certain that the *Noerr-Pennington* doctrine applied to the government, determining which entities constitute the government is a harder question.[47]

In *Allied Tube*, the Supreme Court established that the *Noerr-Pennington* doctrine could protect people who petition a quasi-governmental organization from antitrust liability.[48] *Allied Tube* also provided guidance on determining if a private entity is a quasi-governmental organization.[49] In order to determine if a private entity is a quasi-governmental organization, and thus should protect petitioners under the *Noerr-Pennington* doctrine, the Court explained that "[t]he scope of [the]

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40 *Id.* at 138-43.

41 *Id.* at 140-44; *see also* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 914 (1982) (stating that the *Noerr-Pennington* doctrine can provide protection even if the petitioner intends to injure someone or can reasonably foresee that the petitioning will injure someone).

42 United Mine Workers of Am. v. Pennington, 381 U.S. 657, 670 (1965).

43 *Id.* at 671.

44 *Id.* at 670.

45 404 U.S. 508 (1972).

46 *Id.* at 510.

47 *See, e.g.*, Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 498-99, 501-02 (1988).

48 *See id.* at 504.

49 *Id.* at 502.

protection depends . . . on the source, context, and nature of the anticompetitive restraint at issue."[50]

The issue in *Allied Tube* was whether the National Fire Protection Association, a private association made up of over 31,500 members that published the National Electrical Code, was a quasi-legislative body.[51] The National Electrical Code sets product standards used in electrical wiring systems and is frequently adopted by state and local legislatures into their building codes.[52] Many businesses will not use a product if it is not approved by the association and included in the National Electrical Code.[53]

In *Allied Tube*, a company that manufactured polyvinyl chloride conduit attempted to have its electrical conduit approved in the National Electrical Code.[54] The largest steel conduit manufacturer, however, feared that the new polyvinyl chloride conduit would threaten its business.[55] In response, the steel conduit manufacturer organized with other steel business stakeholders to block the polyvinyl chloride conduit's approval by voting against it at an association meeting.[56] To block the approval, the steel conduit manufacturer paid for new members to join the association for the sole purpose of voting against the proposal.[57] The steel conduit manufacturer successfully blocked the polyvinyl chloride conduit's approval for entry into the National Electrical Code.[58]

In response, the polyvinyl chloride conduit manufacturer alleged that the steel conduit manufacturer unreasonably restrained trade under Section 1 of the Sherman Act.[59] The steel manufacturer argued that the *Noerr-Pennington* doctrine shielded it from liability under the Sherman Act.[60] It argued that because state and local legislatures adopted the National Electrical Code with so few changes, the most efficient way to influence government legislation was by petitioning the association.[61]

The Court rejected the claim that the National Fire Protection Association was a quasi-governmental organization by examining several relevant factors that impacted the "source, context, and nature of the anticompetitive restraint at issue."[62] The Court explained that "[w]hatever *de facto* authority the Association enjoys, no official authority has been conferred on it by any

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50 *Id.* at 499.
51 *Id.* at 495.
52 *Id.*
53 *Allied Tube*, 486 U.S. at 495-96.
54 *Id.* at 496.
55 *Id.*
56 *Id.*
57 *Id.* at 496-97.
58 *Id.* at 497.
59 *Allied Tube*, 486 U.S. at 497.
60 *Id.* at 502.
61 *Id.* at 502-03.
62 *Id.* at 499.

government, and the decisionmaking body of the Association is composed, at least in part, of persons with economic incentives to restrain trade."[63] For these reasons, the steel conduit manufacturer's conduct was more commercial than political and, therefore, the *Noerr-Pennington* doctrine did not shield the steel conduit manufacturer from liability.[64]

Although the *Allied Tube* Court declined to extend immunity based on the specific facts before it, the case's "source, context, and nature" analysis set a broad standard for when the *Noerr-Pennington* doctrine could provide immunity in future cases.[65] The Court emphasized the possibility of future protection by crafting a narrow holding.[66] Additionally, the dissent pointed out that the majority left room to apply the *Noerr-Pennington* doctrine to quasi-governmental organizations as long as no one charged with making a decision has an economic interest in the outcome.[67]

Despite the possibility of immunity in future cases related to quasi-governmental organizations, the *Allied Tube* Court limited the Court's prior language[68] that had broadly immunized conduct intending to influence government action.[69] The Court explained that "the context and nature of the activity" could block *Noerr-Pennington* immunity even if the petitioning intended to influence the government.[70] Thus, the Court said that "[t]he ultimate aim is not dispositive."[71] The Court reasoned that the *Noerr-Pennington* doctrine would produce negative effects in practice if it immunized all activity intended to influence the government.[72] For instance, "competitors would be free to enter into horizontal price agreements as long as they wished to propose that price as an appropriate level for governmental ratemaking or price supports."[73]

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63 *Id.* at 501.

64 *Id.* at 506 ("In *Noerr*, then, the political context and nature of the activity precluded inquiry into its antitrust validity. Here the context and nature of the activity do not counsel against inquiry into its validity. Unlike the publicity campaign in *Noerr*, the activity at issue here did not take place in the open political arena, where partisanship is the hallmark of decisionmaking, but within the confines of a private standard-setting process." (footnote omitted)).

65 *See Allied Tube*, 486 U.S. at 509-10.

66 *See id.* ("Although we do not here set forth the rules of antitrust liability governing the private standard-setting process, we hold that at least where, as here, an economically interested party exercises decisionmaking authority in formulating a product standard for a private association that comprises market participants, that party enjoys no *Noerr* immunity from any antitrust liability flowing from the effect the standard has of its own force in the marketplace.").

67 *Id.* at 515 (White, J., dissenting).

68 *See* United Mine Workers of Am. v. Pennington, 381 U.S. 657, 671 (1965) (immunizing conduct if it was an effort to influence a public official).

69 *Allied Tube*, 486 U.S. at 504 (stating that "[t]he ultimate aim is not dispositive").

70 *Id.*

71 *Id.*

72 *Id.* at 503.

73 *Id.*

Allied Tube demonstrates that the core of the *Noerr-Pennington* doctrine is settled, but courts are still establishing its contours.[74] The opinion's broad "source, context, and nature" analysis leaves lower courts much discretion when establishing these contours.[75] Due to the opinion's ambiguity, the dissent opined that "[o]ne unfortunate consequence of today's decision, therefore, is that district courts and courts of appeals will be obliged to puzzle over claims raised under the doctrine without any intelligible guidance about when and why to apply it."[76] Thus, it can be difficult to predict how a court will apply the *Noerr-Pennington* doctrine in future cases.[77]

For example, in *Eurotech, Inc. v. Cosmos European Travels Aktiengesellschaft*,[78] a court broadly applied the *Noerr-Pennington* doctrine by holding that the World Intellectual Property Organization ("WIPO") was a "quasi–public" entity that a party can petition in an arbitration proceeding without incurring antitrust liability.[79] In a dispute between a U.S. company and a Greek company, the *Eurotech* court rejected the argument that the WIPO was exclusively a private entity because the United Nations mandated it to administer intellectual property treaties between member countries, including the United States.[80] The court stressed that the U.S. Department of Commerce helped to develop the WIPO's arbitration procedures as an inexpensive alternative to traditional judicial adjudication.[81] Given these circumstances, the *Eurotech* court did not hesitate to apply *Noerr-Pennington* immunity even though a higher court had not previously held that the WIPO was a quasi-governmental organization.[82]

In contrast, a court in *Waddell & Reed Financial, Inc. v. Torchmark Corp.*[83] did not extend *Noerr-Pennington* immunity to a party that petitioned the National Association of Securities Dealers ("NASD").[84] Even though the court recognized that a governmental agency, the Securities and

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74 *See id.* at 509-10.

75 *Allied Tube*, 486 U.S. at 499.

76 *Id.* at 513 (White, J., dissenting).

77 *Compare* Eurotech, Inc. v. Cosmos European Travels Aktiengesellschaft, 189 F. Supp. 2d 385, 392-93 (E.D. Va. 2002) (extending *Noerr-Pennington* protection), *with* Waddell & Reed Fin., Inc. v. Torchmark Corp., 223 F.R.D. 566, 624 (D. Kan. 2004) (declining to extend immunity even though public reasons may justify the extension); *see also* Einer Elhauge, *Making Sense of Antitrust Petitioning Immunity*, 80 CALIF. L. REV. 1177, 1179-80 (1992) ("The Court's new focus on the 'source, context, and nature' of restraints has been roundly criticized for compounding instead of clarifying the doctrinal confusion. And it cannot be denied that this new formulation is not by itself terribly informative. Which sources, contexts, and natures provide immunity, and which do not?" (footnote omitted)).

78 189 F. Supp. 2d 385 (E.D. Va. 2002).

79 *Id.* at 392-93.

80 *Id.* at 392.

81 *Id.* at 392-93.

82 *Id.* at 392 (explaining that, since the *Noerr-Pennington* doctrine was established, "courts have extended this judicial doctrine well beyond its original boundaries").

83 223 F.R.D. 566 (D. Kan. 2004).

84 *Id.* at 624.

Exchange Commission, closely supervised the NASD and that the NASD performed some quasi-governmental functions, it was reluctant to extend immunity without "controlling authority on the issue."[85] The court held that the NASD was a private trade organization because it did not receive any federal or state funding, it was not created by statute, and the government did not appoint the NASD board members.[86]

Although it may be difficult to predict how courts will rule following *Allied Tube*, one commentator states the general rule as this:

> antitrust immunity does not apply—and the restraint at issue must be subjected to a competitive process regulated by antitrust ground rules—if the decisionmaker who imposed the restraint has an objective financial interest in the restraint's anticompetitive consequences, unless the activity producing the restraint neither involves market behavior nor is separable from otherwise valid input into the governmental process.[87]

B. *Electricity Industry Regulation*

FERC is an administrative agency within the U.S. Department of Energy.[88] Congress created FERC in 1977 to replace the Federal Power Commission ("FPC").[89] The Federal Power Act ("FPA") gives FERC jurisdiction to regulate electricity in interstate commerce.[90] FERC regulates wholesale electricity in interstate markets.[91] FERC's stated goal is to: "promote efficiency in wholesale electricity markets and to ensure that electricity consumers pay the lowest price possible for reliable service."[92] To achieve this goal, FERC aggressively shaped the wholesale electricity market by encouraging utilities to create RTOs with competitive markets.[93]

The wholesale electricity market consists of the sale of "electric energy to any person for resale."[94] Today, the wholesale electricity market comprises part of the entire electricity market structure.[95] The electricity market is roughly divided into three segments: generation, transmission, and retail distribution.[96] Electricity generators operate power plants that produce elec-

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85 *Id.*

86 *Id.* at 623-24.

87 Elhauge, *supra* note 77, at 1180.

88 42 U.S.C. § 7134 (2006); *see also* Cal. Indep. Sys. Operator Corp. v. FERC, 372 F.3d 395, 398 (D.C. Cir. 2004) (stating that FERC is an administrative agency).

89 JAMES H. MCGREW, FERC: FEDERAL ENERGY REGULATORY COMMISSION 5 (2d ed. 2009).

90 16 U.S.C. § 824(a)-(c) (2006).

91 *Id.*

92 Order No. 2000, *supra* note 1, at 810.

93 *See id.* at 811-12 (explaining how RTOs should be created and operated).

94 16 U.S.C. § 824(d).

95 ENERGY ANTITRUST HANDBOOK, *supra* note 5, at 3.

96 *See generally id.* at 29.

tricity that is sold to retail distributors at wholesale electricity markets.[97] Retail distributors then sell the electricity to consumers.[98]

The electricity industry that FERC regulates today is much different than the industry the FPC originally regulated in 1935.[99] Early in the twentieth century, most utilities were lawful monopolies subject to government regulation that used a vertically integrated scheme to provide electricity.[100] A vertically integrated electric utility performs all functions required to ultimately deliver electricity to the end user.[101] It operates power plants that generate the electricity and manages the transmission system connecting power plants to local distribution systems.[102] It also manages the local distribution systems connected to the end user.[103] A vertically integrated firm conducted all these functions within a smaller geographic region than firms typically operate in today.[104] As a result of the limited geographic regions, the FPC controlled a smaller portion of the industry than FERC does today because less electricity crossed interstate lines.[105] Rather than the wholesale market-based rates they enjoy today, vertically integrated firms received rates based on cost of service.[106] In a cost-of-service regulatory scheme, rates were based on the cost of providing service to a customer.[107] First, a regulator determined the "rate base" by calculating the cost of the firm's equipment used to produce and deliver the electricity.[108] Then, a regulator added a reasonable rate of return to the "rate base" depending on the projected demand of electricity.[109]

By the end of the twentieth century, the electricity industry, and FERC's role in it, was very different.[110] The geographic scope in which electricity was generated, transmitted, and eventually sold greatly expanded.[111] The wholesale electricity[112] business increased as firms began to oper-

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97 *Id.* at 28-30.

98 *Id.* at 3.

99 MCGREW, *supra* note 89, at 151.

100 Walter R. Hall II et al., *History, Objectives, and Mechanics of Competitive Electricity Markets*, *in* AM. BAR ASS'N SECTION OF STATE & LOCAL GOV'T LAW ET AL., CAPTURING THE POWER OF ELECTRIC RESTRUCTURING 1 (Joey Lee Miranda ed., 2009).

101 ENERGY ANTITRUST HANDBOOK, *supra* note 5, at 2.

102 *Id.*

103 *Id.*

104 Hall et al., *supra* note 100, at 1.

105 *See, e.g.*, Pub. Utils. Comm'n of R.I. v. Attleboro Steam & Elec. Co., 273 U.S. 83, 90 (1927) (holding that regulation of electricity that crosses state boundaries is national in character).

106 TASK FORCE REPORT, *supra* note 4, at 2.

107 ENERGY ANTITRUST HANDBOOK, *supra* note 5, at 22.

108 *Id.* at 22-23.

109 *Id.* at 23.

110 *See generally* Hall et al., *supra* note 100, at 1-2.

111 *Id.* (explaining that coal and nuclear power plants became more efficient, making it cost effective to transmit electricity over greater distances). For example, because electricity can be transmitted

ate standalone electricity generating power plants and to sell electricity to traditional vertically integrated utilities.[113] Furthermore, the Energy Policy Act of 1992 caused many additional wholesale generators to enter the market by exempting them from certain regulations, and it gave FERC the authority to order transmission service for the electricity that the wholesale generators produced.[114]

Acting on the authority that the Energy Policy Act of 1992 gave to it, FERC issued Order Number 888 ("Order No. 888") to remedy monopoly power in electricity transmission used against electricity generators.[115] The order required all utilities that operate interstate transmission facilities to "file open access non-discriminatory transmission tariffs that contain minimum terms and conditions of non-discriminatory service."[116] Order No. 888 encouraged the industry to create Independent System Operators ("ISO") to assist in complying with the order.[117] An ISO independently administers "open nondiscriminatory access to an electric transmission system."[118] By mandating open access to transmission, Order No. 888 attempted to separate generation, transmission, and distribution services traditionally controlled by one vertically integrated firm into services controlled by different firms.[119]

Following Order No. 888, FERC issued Order Number 2000 ("Order No. 2000") in order to further encourage competitive wholesale electricity markets.[120] Order No. 2000 describes RTOs as the method for administering the markets and ensuring transmission access.[121] As of 2009, seven RTOs provided electricity to 67 percent of the U.S. economy.[122] RTOs must have the following minimum characteristics: independence, scope and regional configuration, operational authority, and short-term reliability.[123] And,

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over greater distances and across state lines, as of 2009, FERC had jurisdiction over at least 67 percent of electricity provided to the United States by RTOs. *See id.* at 2.

112 The wholesale electricity market consists of the selling of "electric energy to any person for resale." 16 U.S.C. § 824(d) (2006).

113 TASK FORCE REPORT, *supra* note 4, at 20 (explaining that the Public Utility Regulatory Policies Act required the vertically integrated utilities to interconnect with the generators as part of Congress's response to the 1970s energy crises).

114 *Id.* at 23-24.

115 Order No. 888, *supra* note 1, at 21,541.

116 *Id.* at 21,540.

117 *Id.* at 21,542.

118 ENERGY ANTITRUST HANDBOOK, *supra* note 5, at 245.

119 *See* Order No. 888, *supra* note 1, at 21,568; s*ee also* Bolze et al., *supra* note 2, at 80 ("As a result of ongoing deregulation, the industry no longer consists only of vertically integrated utilities and their customers. There are now multiple entities . . . performing many functions that were previously performed solely by the vertically integrated utilities.").

120 Order No. 2000, *supra* note 1, at 810-11.

121 *Id.* at 836.

122 Hall et al., *supra* note 100, at 2.

123 Order No. 2000, *supra* note 1, at 810.

RTOs must have the following minimum functions: tariff administration and design, congestion management, parallel path flow, ancillary services, OASIS and total transmission capability and available transmission capability, market monitoring, planning and expansion, and interregional coordination.[124]

Although FERC set the general parameters for RTOs in Order No. 2000, FERC allowed market participants[125] significant leeway to shape the organization.[126] In fact, Order No. 2000 specifically calls for an open architecture in order to ensure that market participants can voice their suggestions to improve the RTO directly to the RTO, rather than FERC itself.[127] In calling for an open architecture that invites petitioning, FERC created a scenario in which a market participant may be able to use the *Noerr-Pennington* doctrine as a defense for antitrust liability.[128]

II. THE *NOERR-PENNINGTON* DOCTRINE CAN SHIELD RTO PETITIONERS

This Comment argues that the *Noerr-Pennington* doctrine can shield RTO petitioners from antitrust liability. A case-by-case analysis, however, is required in every instance, and that analysis will likely reveal that most RTO petitioners should not be protected. A case-by-case analysis is necessary because *Allied Tube* requires a fact specific inquiry,[129] RTOs have various configurations,[130] and RTO market participants could petition in many different situations.

This Comment proposes a three-step framework that courts should use in each case to determine if the *Noerr-Pennington* doctrine protects RTO petitioners from antitrust liability under the theory that RTOs are quasi-

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124 *Id.*

125 FERC defines an RTO market participant as "[a]ny entity that, either directly or through an affiliate, sells or brokers electric energy, or provides transmission or ancillary services to the Regional Transmission Organization" or "[a]ny other entity that the Commission finds has economic or commercial interests that would be significantly affected by the Regional Transmission Organization's actions or decisions." Order No. 2000, *supra* note 1, at 850.

126 *See* Order No. 2000, *supra* note 1 (giving market participants many options throughout the order to decide what structure works best for their particular circumstances).

127 *Id.* at 912-13; *see also supra* note 18 and accompanying text.

128 *See, e.g.*, E. R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 136 (1961).

129 *See* Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 509-10 (1988).

130 *See* Order No. 2000, *supra* note 1, at 904 (stating that each RTO will be different due to varying regional needs); *see also* Michael H. Dworkin & Rachel Aslin Goldwasser, *Ensuring Consideration of the Public Interest in the Governance and Accountability of Regional Transmission Organizations*, 28 ENERGY L.J. 543, 561 (2007) (stating that the scope of their article is primarily limited to one RTO because "it would require a different paper (or perhaps a book) to consider the governance structures of each of the RTOs individually. This is particularly true because each RTO and ISO has its own power and governance structure and each relies on its own particular language and terminology.").

governmental organizations.[131] The first step is to make an initial inquiry to determine if the petitioning clearly falls into *Noerr's* commercial category.[132] The initial inquiry functions as a low-cost screen to avoid the more costly thorough analysis explained in steps two and three. The inquiry ends if the petitioning is clearly commercial in nature. The *Noerr-Pennington* doctrine should not protect the petitioner.[133] If the petitioning is not clearly commercial in nature, the analysis should continue to steps two and three in order to examine the "source, context, and nature of the anticompetitive restraint at issue."[134] The second step asks if FERC has conferred the RTO with any official authority that relates to the petitioning at issue.[135] The third step inquires whether the RTO's governing board has an economic interest in the board's decisions.[136] This is accomplished by assessing if the board is independent enough from the operation of the RTO.[137] In cases where all three steps are satisfied, the *Noerr-Pennington* doctrine should protect the RTO petitioner because the RTO is a quasi-governmental organization.

This Part of the Comment uses two hypothetical situations to demonstrate the proposed three-step framework.

A. *Step One: Determine if the Petitioning Is Clearly Commercial in Nature*

Suppose two electricity generators wanted to petition an RTO to increase the price of electricity because their businesses were not profitable. Because prices are set in a market, they decided to petition the RTO by agreeing with each other to limit their output in order to obtain a higher price. If faced with an antitrust lawsuit, they would claim that they should be protected by the *Noerr-Pennington* doctrine because they were merely petitioning the RTO, a quasi-governmental organization, to increase the electricity price.

Even at step one, general principles of applying the *Noerr-Pennington* doctrine show that the petitioners in this hypothetical case should not be protected. The *Noerr* court explained that petitioning must fall into the category of political activity rather than commercial activity in order to be

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131 *See Allied Tube*, 486 U.S. at 501 (denying quasi-governmental status because the entity was not conferred with any official authority by the government and because members of the entity had some economic incentive to restrain trade); *Noerr*, 365 U.S. at 137-38 (stating that petitioning must be political in nature, rather than commercial in nature, to be protected).

132 *See Noerr*, 365 U.S. at 137-41; *see also supra* Part I.A.

133 *See Noerr*, 365 U.S. at 145. Making this initial determination could save much time and effort because it will prevent having to look at the specific make-up of the RTO.

134 *See Allied Tube*, 486 U.S. at 499.

135 *See id.* at 501-02.

136 *See id.*

137 *See id.*

protected.[138] Here, because the thrust of the agreement was to restrain trade, and it was an agreement between two private entities, this should be classified as "commercial activity with a political impact."[139] Moreover, the agreement between the two private parties proximately caused the restraint on trade, rather than any decision by the RTO.[140]

Even though the petitioning here addressed an organization that could potentially be classified as a quasi-governmental organization, petitioning in this manner would likely fail even if the RTO were an "official" government entity.[141] In a situation such as this, application of *Allied Tube*'s reasoning suggests that the *Noerr-Pennington* doctrine cannot immunize "every concerted effort that is genuinely intended to influence governmental action."[142]

As this result is easily predictable because the electricity generators blatantly attempted to increase the price of electricity by restraining trade, few market participants are likely to petition in this manner. Realistically, petitioners attempting to raise the price of electricity will suggest what is hoped to be viewed as a legitimate system improvement, but would have the incidental effect of raising electricity prices.

For example, suppose that a generator petitioned an RTO to conduct transmission line maintenance more frequently. This maintenance, however, would require the transmission lines to be out of service for a longer period of time than before. As a result, generators would not be able to provide as much electricity to the market, causing the price to increase. Even assuming an anticompetitive effect, it is harder to determine if the petitioning in this case should be classified as political or commercial. On one hand, the generator may have been attempting to petition the government by making a legitimate suggestion to the RTO through FERC's open architecture[143] scheme that addressed a long-term reliability issue. On the other hand, the generator and the RTO may have simply made the agreement in order to limit capacity, and subsequently raise the price of electricity.

Because the petitioning in this case is not clearly commercial, the analysis should proceed to steps two and three of the proposed framework.[144]

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138 *Noerr*, 365 U.S. at 140-41.

139 *See Allied Tube*, 486 U.S. at 507.

140 *See supra* text accompanying notes 28-29.

141 *See Allied Tube*, 486 U.S. at 503 (explaining that petitioning such as this would result in immunizing "horizontal price agreements as long as they wished to propose that price as an appropriate level for governmental ratemaking").

142 *See id.* at 503.

143 Order No. 2000, *supra* note 1, at 912-13; *see also supra* note 18 and accompanying text.

144 *See, e.g.*, E. R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 137-41 (1961).

B. *Step Two: Determine if the Regional Transmission Organization Has Been Conferred with Official Governmental Authority*

After finding that petitioning is not clearly commercial in nature, the next step is to examine the "source, context, and nature" of the petitioning by determining if the RTO has official governmental authority.[145] This step is required because *Allied Tube* ruled out immunity if a petitioner attempts to influence a private entity in a private setting.[146] Therefore, as RTOs are private entities, they must be conferred with some degree of official authority to afford petitioners *Noerr-Pennington* immunity.[147]

This Part shows that although RTOs are private entities, they can have official authority because the FPA charges FERC with duties that it carries out by utilizing RTOs. Before a court finds that an RTO has official authority in a specific case, however, it should confirm that the petitioning falls within FERC's statutory authority and FERC has relayed this authority to the RTO.

1. FERC's Mandate Under the Federal Power Act

The FPA illustrates the depth and breadth of FERC's responsibility to regulate electricity in interstate commerce.[148] The FPA declares that there is a public interest in all electricity that is generated, transmitted, sold, and distributed to the public.[149] Thus, FERC's jurisdiction extends to "transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce . . . all facilities for such transmission or sale of electric energy . . . ."[150]

The FPA then directs FERC to encourage and promote facilities that generate, transmit, and sell electricity in the same region to interconnect their facilities.[151] FERC's guiding purpose is to assure "an abundant supply of electric energy throughout the United States with the greatest possible economy."[152] To assist FERC in carrying out the FPA's regional transmis-

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145 *See Allied Tube*, 486 U.S. at 499-502 (explaining that the "source, context, and nature" of the petitioning must be examined to determine if a private entity is quasi-governmental).

146 *See id.* at 504 ("Having concluded that the Association is not a 'quasi-legislative' body, we reject petitioner's argument that any efforts to influence the Association must be treated as efforts to influence a 'quasi-legislature' and given the same wide berth accorded legislative lobbying."); *cf. Noerr*, 365 U.S. at 140-41 (applying immunity when petitioning was directed at private parties because it was in a public setting).

147 *See, e.g.*, *Allied Tube*, 486 U.S. at 501.

148 *See* 16 U.S.C. § 824 (2006).

149 *Id.* § 824(a).

150 *Id.* § 824(b).

151 *Id.* § 824a(a).

152 *Id.*

sion goal, the FPA empowers FERC to require a facility to create a physical connection of its system with a requesting facility's system.[153] The FPA uses language that forcefully asserts that FERC carry out its statutory mandates.[154]

Section 205 of the FPA provides guidance to FERC regarding electricity rate setting.[155] Instead of creating a bright-line rule, the FPA leaves FERC considerable leeway by only requiring that "all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful."[156] In this regard, the FPA is consistent with many statutes that provide an administrative agency with an objective and general guidance, but allow the agency to determine the best way to achieve that objective.[157] Although the FPA leaves FERC some discretion in how it regulates the wholesale electricity market,[158] the FPA makes clear that FERC has jurisdiction over the wholesale electricity market and must play an active role in its regulation.[159]

2. FERC Utilizes RTOs to Comply with Its Federal Power Act Mandate

Although RTOs are privately owned, FERC was instrumental in their creation,[160] and FERC actively regulates RTOs in carrying out its mandate

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153 *Id.* § 824a(b).

154 *See* 16 U.S.C. § 824a(a) (using phrases such as "empowered and directed" and "shall be the duty").

155 *Id.* § 824d(a).

156 *Id.*

157 *See* Mistretta v. United States, 488 U.S. 361, 379 (1989) (holding that Congress only has to set out an "intelligible principle," not a detailed method, to guide the agency's conformity with the statute's purpose); *see also* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3168-69 (2010) (Breyer, J., dissenting) (explaining that "vast numbers of statutes governing vast numbers of subjects, concerned with vast numbers of different problems, provide for, or foresee, their execution or administration through the work of administrators organized within many different kinds of administrative structures, exercising different kinds of administrative authority, to achieve their legislatively mandated objectives").

158 The wholesale electricity market consists of the selling of "electric energy to any person for resale." 16 U.S.C. § 824(d).

159 *See* Fed. Power Comm'n v. S. Cal. Edison Co., 376 U.S. 205, 210 (1964) (holding that the FPC has "jurisdiction of all sales of electric energy at wholesale in interstate commerce not expressly exempted by the Act"). *But see* Cal. Indep. Sys. Operator Corp. v. FERC, 372 F.3d 395, 398 (D.C. Cir. 2004) (holding that FERC did not have the power to replace an ISO's board because FERC is a "creature of statute" and therefore does not possess any powers which have not been "conferred upon it by Congress" (quoting Atl. City Elec. Co. v. FERC, 295 F.3d 1, 8 (D.C. Cir. 2002))).

160 *See* Order No. 2000, *supra* note 1; MCGREW, *supra* note 89, at 2. However, in Order No. 2000, FERC allowed industry participants to have flexibility in forming an RTO as long as it complied with the minimum characteristics and functions. Order No. 2000, *supra* note 1, at 811-12.

under the FPA.[161] In fact, the FPA even mandates that FERC "divide the country into regional districts for the voluntary interconnection and coordination of facilities for the generation, transmission, and sale of electric energy."[162] Even though RTOs are a fundamental part of "deregulating" the vertically integrated electricity infrastructure, they are not truly independent due to the many provisions they must comply with in Order No. 2000.[163] "FERC is not just a spectator or passive referee in the industries it regulates. Much of what is colloquially called 'deregulation' has been initiated by FERC. In actuality, deregulation may be more accurately characterized as 'restructuring.'"[164] Furthermore, "deregulation" in the electricity industry contrasts significantly with other industries where the government reduced regulation substantially more.[165]

In carrying out its mandate from the FPA, FERC is "not bound to the use of any single formula or combination of formulae in determining rates."[166] FERC may make "pragmatic adjustments"[167] according to the circumstances that "may favor the use of one ratemaking procedure over another."[168] Therefore, as FERC began to see the traditional cost-based regulation as inadequate to meet its mandate under the FPA, FERC desired to create a competitive market in the electric power industry.[169] The theory was that market-based rates would align "the price of electricity with the value customers place on electricity, leading to a more efficient allocation of electrical resources and lower overall prices than would be the case in the ab-

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161 *See generally* FED. ENERGY REGULATORY COMM'N, WHOLESALE POWER MARKET PLATFORM (2003).

162 16 U.S.C. § 824a(a).

163 *See* Order No. 2000, *supra* note 1; MCGREW, *supra* note 89, at 2-3.

164 MCGREW, *supra* note 89, at 2; *see also* David B. Spence, *Can Law Manage Competitive Energy Markets?*, 93 CORNELL L. REV. 765, 765 n.1 (2008) (discussing that many scholars use the term "restructuring" rather than "deregulation" because there is still much regulation in the electric energy markets).

165 *See* MCGREW, *supra* note 89, at 2-3 ("FERC's restructuring of the electric utility industry sought first to require utilities to provide open access transmission of electricity and now seeks to establish regional transmission organizations. There has been some deregulation involved in this restructuring, when FERC has lightened regulations on sellers of natural gas and electricity that do business in competitive markets. However, unlike the Civil Aeronautics Board, which was eliminated, FERC will be around for the foreseeable future, exercising substantial control over the industries it regulates.").

166 Duquesne Light Co. v. Barasch, 488 U.S. 299, 315 (1989) (quoting Fed. Power Comm'n v. Hope Natural Gas Co., 320 U.S. 591, 602 (1944)); *see also* Wisconsin v. Fed. Power Comm'n, 373 U.S. 294, 309 (1963) ("It has repeatedly been stated that no single method need be followed by the Commission in considering the justness and reasonableness of rates.").

167 *Hope Natural Gas*, 320 U.S. at 602 (quoting Fed. Power Comm'n v. Natural Gas Pipeline Co., 315 U.S. 575, 586 (1942)).

168 *Duquesne Light*, 488 U.S. at 316.

169 TASK FORCE REPORT, *supra* note 4, at 2.

sence of market-based prices."[170] This required separating electricity generators from transmission and retail entities.[171]

FERC created the necessary foundation for competitive wholesale power markets by issuing Order No. 888 that required utilities with transmission lines to give electricity generators open access to use the transmission lines.[172] As a result, many electric utilities separated generation facilities from their transmission infrastructure, ISOs started to manage the transmission system, and many independent electricity generators entered the wholesale market.[173]

FERC continued to mold the electricity industry as it determined that Order No. 888 was insufficient to yield fully competitive wholesale markets.[174] FERC identified discrimination in transmission services by vertically integrated electric utilities as the primary impediment to competitive wholesale markets.[175] FERC affirmed its motivation as guided by the FPA in Order No. 2000: "Competition in wholesale electricity markets is the best way to protect the public interest and ensure that electricity consumers pay the lowest price possible for reliable service."[176] FERC concluded that establishing RTOs was the best way to achieve this goal.[177] In fact, their objective was for "all transmission-owning entities in the Nation . . . to place their transmission facilities under the control of appropriate RTOs in a timely manner."[178] Although FERC technically made joining an RTO voluntary, its language in Order No. 2000 demonstrates its commitment to changing the industry.[179] For instance, FERC explained that:

> The alternative to a voluntary process is likely to be a lengthy process that is more likely to result in greater standardization of the Commission's RTO requirements among regions. Although the Commission has specific authorities and responsibilities under the FPA to protect against undue discrimination and remove impediments to wholesale competition, we find it appropriate in this instance to adopt an open collaborative process that relies on voluntary regional participation to design RTOs that can be tailored to specific needs of each region.[180]

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170 *Id.*

171 Susan Kelly & Elise Caplan, *Time for a Day 1.5 Market: A Proposal to Reform RTO-Run Centralized Wholesale Electricity Markets*, 29 ENERGY L.J. 491, 493 (2008).

172 Order No. 2000, *supra* note 1, at 810-11 & n.1.

173 *Id.*

174 *Id.*

175 *Id.*

176 *Id.*

177 *Id.* at 811 ("[W]e believe that appropriate RTOs could successfully address the existing impediments to efficient grid operation and competition and could consequently benefit consumers through lower electricity rates resulting from a wider choice of services and service providers. In addition, substantial cost savings are likely to result from the formation of RTOs.").

178 Order No. 2000, *supra* note 1, at 811.

179 *See id.* at 812.

180 *Id.*

FERC's specific reliance on the FPA in Order No. 2000 further supports that FERC is merely using RTOs to carry out its mandate. Additionally, it shows that FERC is not limited in the manner that it regulates the industry. Order No. 2000 states that:

> [S]ection 202(a) of the FPA authorizes and directs the Commission "to divide the country into regional districts for the voluntary interconnection and coordination of facilities for the generation, transmission, and sale of electric energy." The purpose of this division into regional districts is for "assuring an abundant supply of electric energy throughout the United States with the greatest possible economy and with regard to the proper utilization and conservation of natural resources." Section 202(a) states that it is "the duty of the Commission to promote and encourage such interconnection and coordination within each such district and between such districts."[181]

Thus, setting rates through RTOs in a competitive market is a substitute for cost-based regulation that FERC directly implemented in carrying out its duties under the FPA.[182]

Even though FERC changed the manner of regulating, FERC continued to actively regulate the electricity industry in compliance with its mandate.[183] For instance, in 2002, FERC ordered a study to investigate if its RTO policy was more effective than the previous vertically integrated scheme.[184]

Furthermore, industry opposition suggests that RTOs may not exist at all today, or would be dramatically different, without FERC involvement.[185] In fact, there have been many challenges and suggestions for improvement[186] to FERC's RTO policy.[187] As evidenced in Order No. 2000, however, FERC is deeply committed to its RTO policy.[188] Order No. 2000 stated:

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181 *Id.* at 837 (quoting the Notice of Proposed Rulemaking).

182 The fact that Congress closely monitors how FERC regulates the electricity industry provides further support that FERC uses RTOs to carry out its duties under the FPA. *See generally* FED. ENERGY REGULATORY COMM'N, PERFORMANCE METRICS FOR INDEPENDENT SYSTEM OPERATORS AND REGIONAL TRANSMISSION ORGANIZATIONS (2011).

183 Order No. 2000, *supra* note 1, at 831 ("[W]e note that some of the innovative ratemaking policies discussed later in this Final Rule are consistent with light-handed regulation, since we expect that these policies may result in reduced levels of regulatory scrutiny. We emphasize, however, that we will not delegate or fail to exercise our regulatory responsibilities.").

184 ICF CONSULTING, ECONOMIC ASSESSMENT OF RTO POLICY 1 (2002).

185 Hall et al., *supra* note 100, at 4 ("A number of market participants, however, including state regulators, public power systems, industrial customers, and consumer advocates (indeed, much of the spectrum of customer interest groups), have challenged FERC's belief that substantial cost savings or other benefits arise from current market structures.").

186 *See generally* Kelly & Caplan, *supra* note 171 (suggesting changes RTOs could enact to become more efficient).

187 Hall et al., *supra* note 100, at 4 n.11 ("Indeed, this debate has been so vigorous that the U.S. Government Accountability Office was asked to weigh in . . . by New England senators to review concerns with then rising RTO expenses and investments . . . .").

188 Order No. 2000, *supra* note 1, at 811.

"If the industry fails to form RTOs under this [voluntary] approach, the Commission will reconsider what further regulatory steps are in the public interest."[189] Order No. 2000 and Order No. 888 effectively leave utilities little choice but to join an RTO.[190] Although utilities technically formed RTOs voluntarily and RTOs are not government owned, FERC utilizes them to carry out its mission.[191]

3. The Difficulty in Determining if Petitioning Falls Within FERC's Statutory Authority

Logically, an RTO cannot stand in the shoes of FERC for a function FERC itself does not have the authority to carry out. Therefore, the petitioning must relate to a power that the FPA, or another statute, grants to FERC.[192] If FERC does not have the authority to carry out the function to which the petitioning relates, the *Noerr-Pennington* doctrine should not apply because the source of the alleged restraint emanates from private action.[193]

California Independent System Operator Corp. v. FERC[194] applies the test from *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*[195] to decide if the FPA grants FERC a specific power.[196] The first step is to determine if Congress has addressed the exact point at issue.[197] "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."[198] This step utilizes a plain language interpretation of the text that assumes the statute's purpose is conveyed through the words' ordinary meanings.[199]

If Congress has not addressed the exact point at issue, the analysis moves to the second step.[200] Here, if "the agency has acted pursuant to an express or implicit delegation of authority, the agency's interpretation of

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189 *Id.*

190 *See generally id.*; Order No. 888, *supra* note 1.

191 *See* TASK FORCE REPORT, *supra* note 4, at 31 (stating that "RTOs are entities set up in response to FERC Order Nos. 888 and 2000 encouraging utilities to voluntarily enter into arrangements to operate and plan regional transmission systems on a nondiscriminatory open access basis").

192 *See* Cal. Indep. Sys. Operator Corp. v. FERC, 372 F.3d 395, 398 (D.C. Cir. 2004) (explaining that, because FERC is a creature of statute, it only has authority that Congress confers upon it and therefore must demonstrate that a statute in fact confers that power in order to act legitimately).

193 *See, e.g.*, Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 499 (1988).

194 372 F.3d 395 (D.C. Cir. 2004).

195 467 U.S. 837 (1984).

196 *Cal. Indep. Sys. Operator*, 372 F.3d at 399.

197 *Id.*

198 *Chevron*, 467 U.S. at 842-43 (quoted in *Cal. Indep. Sys. Operator*, 372 F.3d at 399).

199 *Cal. Indep. Sys. Operator*, 372 F.3d at 400.

200 *Id.* at 399.

the statute is entitled to deference so long as it is 'reasonable' and not otherwise 'arbitrary, capricious, or manifestly contrary to the statute.'"[201] Regardless of whether the delegation of authority is express or implicit, a court must ensure that Congress has in fact delegated the authority to FERC.[202]

Because statutory interpretations may vary, a party claiming *Noerr-Pennington* immunity could have a difficult time showing that FERC indeed has authority.[203] A party claiming immunity will have to either point to statutory language giving FERC clear authority or, in the event that the statute is ambiguous, show that FERC's interpretation of the delegation is reasonable.[204] Accordingly, even if FERC addresses an issue in Order No. 2000 that does not mean that a court will accept that FERC has statutory authority over that issue.[205]

4. FERC Must Relay this Authority to the RTO

In addition to FERC's statutory authority to regulate the issue that the petitioning addresses, that authority must be conferred to the RTO.[206] Thus, one would expect to see a FERC order that gives that authority to the RTO.[207]

One way to determine whether the FERC order conferred the authority to the RTO that relates to the specific antitrust injury is to find the injury's proximate cause.[208] *Massachusetts School of Law at Andover, Inc. v. American Bar Ass'n*[209] illustrated this proximate cause analysis.[210] There, the court asked if the government must take an additional step before an entity's actions have the force of the government.[211] Accordingly, the *Noerr-Pennington* doctrine may protect an RTO petitioner if an RTO, by its action alone, exercises a power given to FERC by the FPA.

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201 Motion Picture Ass'n of Am., Inc. v. FCC, 309 F.3d 796, 801 (D.C. Cir. 2002) (quoting *Chevron*, 467 U.S. at 843-44).

202 *See id.*

203 *See* Cal. Indep. Sys. Operator Corp. v. FERC, 372 F.3d 395, 398-99 (D.C. Cir. 2004).

204 *See id.* at 399-400.

205 *See id.* at 404 (disagreeing with FERC that the FPA's mandate for FERC to determine just and reasonable rates gave FERC authority to replace an RTO's governing board).

206 *See* Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 502 (1988).

207 The authority could be in Order No. 2000 or another order issued by FERC.

208 *See generally* MONOGRAPH 25, *supra* note 32, at 75-76.

209 107 F.3d 1026 (3d Cir. 1997).

210 *See id.* at 1036 & n.8.

211 *See id.* at 1036 n.9 (explaining that the "crucial point" in triggering the *Noerr-Pennington* doctrine is that "the direct action of the states" causes an injury and not where "private conduct caused the alleged antitrust injury").

In the hypothetical described in Part II.A, for example, because an additional government action is not needed to carry the force of the government, the petitioning is more likely protected than if an additional step was required. But, petitioning is less likely to be protected in a situation where the RTO must subsequently receive permission from FERC to carry out an action because a court is more likely to characterize this as two private entities conducting business matters that are commercial in nature.[212] However, as *Noerr* itself demonstrates, even indirect petitioning can be protected given the proper context.[213]

5. Case Comparison

If a court determines that the four factors discussed in this Part are satisfied in a particular case, it should hold that FERC conferred official authority on the RTO relating to the petitioning at issue. Comparing the "context" of the petitioning of an RTO to the petitioning of the National Fire Protection Association in *Allied Tube* and the WIPO in *Eurotech* supports such a holding.

In *Allied Tube*, the government did not create or influence the private National Fire Protection Association.[214] The government only adopted the National Electric Code *after* the petitioning occurred.[215] Due to the lack of government interaction with the National Fire Protection Association in *Allied Tube*, the Court found that the association did not have official governmental authority.[216] In contrast, the U.S. Department of Commerce contributed to creating the WIPO in *Eurotech* as an alternative to petitioning the government.[217] Eurotech is distinguished from *Allied Tube* because the government interacted with the WIPO before the petitioning occurred.[218] As a result, *Noerr-Pennington* immunity applied in *Eurotech.*[219]

FERC's interaction with RTOs is more similar to the interaction between the Department of Commerce and the WIPO than the interaction between the government and the National Fire Protection Association in *Allied Tube*. The relationship in *Eurotech* is more similar because FERC

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212 *See* Waddell & Reed Fin., Inc. v. Torchmark Corp., 223 F.R.D. 566, 624 (D. Kan. 2004) (declining to extend immunity even though public reasons may justify the extension).

213 *See* E. R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 140-41 (1961) (discussing that even though the petitioning was directed toward a party other than the government, it was protected because it was political activity).

214 Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 495 (1988).

215 *See id.* at 495-96.

216 *Id.* at 501.

217 *See* Eurotech, Inc. v. Cosmos European Travels Aktiengesellschaft, 189 F. Supp. 2d 385, 392-93 (E.D. Va. 2002).

218 *See id.*; *supra* text accompanying notes 80-81.

219 *Eurotech*, 189 F. Supp. 2d at 393.

interacted with RTOs *before* the petitioning occurred. Moreover, much like the Department of Commerce created the WIPO as an alternate means for hearing petitioning in *Eurotech*,[220] FERC designed the open architecture scheme in RTOs as the avenue for market participants to redress grievances directly to the RTO rather than the petitioning FERC itself. [221] For these reasons, RTOs can meet *Allied Tube*'s requirement that private entities must be conferred with official authority in order for the *Noerr-Pennington* doctrine to protect RTO petitioners.[222]

C. *Step Three: Determine if the RTO Governing Board Has an Incentive to Restrain Trade*

The final step in the framework is to ask if the RTO's governing board has an economic incentive to restrain trade.[223] This should be accomplished by determining if the RTO's governing board is independent enough from market participants for the governing board not to have an economic interest when making decisions. This step is required because *Allied Tube* dictates that much of the independence of an RTO's governing board is determined by assessing if anyone charged with making a decision has an economic interest in the outcome.[224] Despite FERC making governing board independence a mandatory RTO characteristic,[225] an RTO's governing board may not be independent enough to ensure antitrust liability protection from the *Noerr-Pennington* doctrine.[226] Additionally, it is important to note that RTO governing boards are not all alike, and they must be examined individually.[227]

Similar to many aspects in Order No. 2000, FERC declines to mandate a specific form for an RTO's governing board. FERC only requires that the board's "decisionmaking process should be independent of any market participant or class of participants."[228] However, FERC does not prohibit all market participants from being members of the governing board.[229] A mar-

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220 *Id.* at 392-93.

221 *See supra* note 18 and accompanying text.

222 *See* Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 502 (1988) (stating that defendant's lack of official government authority was one of the reasons the defendant was a private actor).

223 *See id.* at 500-01.

224 *Id.* at 500; *see also id.* at 513 (White, J., dissenting).

225 Order No. 2000, *supra* note 1, at 850.

226 *See generally* Dworkin & Goldwasser, *supra* note 130, at 567-68 (expressing the challenge of finding qualified RTO governing board members who are also financially independent from the RTO).

227 *Id.* at 561.

228 Order No. 2000, *supra* note 1, at 857.

229 *Id.* at 850 ("[T]he fact that a particular participant is defined as a market participant does not preclude it from having . . . passive [non-voting] ownership interest in an RTO."). FERC approved of

ket participant can be on the board as long as it does not have an active ownership in the RTO.[230]

An active ownership interest means "ownership of voting securities that give the owner the ability to influence or control an RTO's operating and investment decisions."[231] For example, a market participant who operated an electricity generation plant could not be on the board. FERC's decision to prohibit RTO market participants from having an active ownership interest[232] increases the likelihood that the governing board does not have an economic interest in a decision.[233]

Although FERC prohibited market participants with an active ownership from governing board membership, it potentially threatened RTO governing board independence by deciding that RTO market participants with a passive ownership could be on the governing board.[234] While FERC does not specifically define the requirements for passive ownership, the key is that the owner has a "purely financial" relationship," rather than an operational relationship, with the RTO.[235] For example, a utility owner who leases a generation plant for a period of fifteen years or more and does not gain or lose anything as a result of the operation of the utility, could qualify as a passive owner of the RTO.[236]

FERC recognizes that discerning if a relationship is "purely financial" is difficult and could create concerns that the RTO is not independent.[237] Some market participants echoed these concerns and asserted that "passive ownership is only a subtle mechanism to allow existing transmission owners to continue to control use of transmission assets and ultimately deny equal access to competitors."[238] To mitigate concerns that the passive owners could affect an RTO governing board's independence, all potential passive owners had to submit detailed information to FERC that verified that

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existing ISO governing boards that had two tiers. *Id.* at 857. The top tier did not have market participants, while the lower tier did. *Id.* The lower tier makes recommendations to the top tier, which makes final decisions. *Id.*

230 *Id.* at 852-53.

231 *Id.* at 854.

232 *Id.* at 855. However, FERC also allowed active owners to be market participants for the five years following the order's issuance. *Id.*

233 *See, e.g.*, Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 501-02 (1988).

234 *See* Order No. 2000, *supra* note 1, at 852-53. FERC decided this sacrifice in independence was worth the benefit of eliminating "impediments to the creation of transmission companies." *Id.* at 852.

235 *Id.* at 854.

236 *See id.*

237 *Id.* at 853 ("[P]assive ownership arrangements for RTOs (*e.g.*, two-tier LLCs, synthetic leases and leveraged partnerships) may be complicated and multi-layered. Even those commenters who urge that we accept passive ownership as a necessary transition mechanism admit that such arrangements 'will prove troublesome for both utilities and FERC' because they create the 'need to constantly police supposedly passive ownership positions to make sure that they remain passive in all respects.'" (quoting Salomon Smith Barney Reply Comments at 15)).

238 *Id.* at 852.

they were "truly independent."[239] FERC, however, concedes that their mitigation efforts do not eliminate independence concerns.[240] For instance, passive owners could have control over board member appointments, transmission rates, terms and conditions, and control of new membership.[241]

Even though FERC must certify every passive RTO owner on the governing board as truly independent,[242] a court should not automatically accept FERC's initial determination for several reasons. First, a court, and not FERC, should determine if an RTO's governing board is independent enough to trigger the standard needed for the *Noerr-Pennington* doctrine. *Allied Tube* provided that standard by stating that an organization is not quasi-governmental if "the decisionmaking body . . . is composed, at least in part, of persons with economic incentives to restrain trade."[243] FERC's threshold for independence differs from the *Allied Tube* standard partly because FERC was willing to sacrifice some of the governing board's independence in order to incentivize RTO formation.[244] Thus, in contrast to *Allied Tube's* standard, FERC decided that a party was independent enough to be on the RTO's governing board if it had a "purely financial" relationship with the RTO, but not an "operational" relationship.[245] Given that FERC allows passive owners with a purely financial interest in the RTO to be governing board members, a court could determine that members of the RTO's governing board with a financial investment in the RTO have an economic incentive to restrain trade.[246] Because a party could meet FERC's threshold for sufficient independence, while not meet a court's threshold based on *Allied Tube*, a court should not accept FERC's initial determination that an RTO's governing board is independent.

The second reason a court should not accept FERC's determination that an RTO's governing board is independent is that FERC must only make an initial certification of the governing board.[247] Following the initial certification, FERC requires an independent audit of the governing board after two years, and then only every three years afterward.[248] A party's ownership status and subsequent independence could change during the period between audits. Although FERC requires immediate notification if any of the facts upon which the initial decision was made change,[249] it is conceivable that a party trying to engage in anticompetitive behavior may

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239 *Id.* at 853.

240 Order No. 2000, *supra* note 1, at 853.

241 *Id.*

242 *Id.*

243 Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 501 (1988).

244 Order No. 2000, *supra* note 1, at 852.

245 *Id.* at 853-54.

246 *See Allied Tube*, 486 U.S. at 501.

247 *See* Order No. 2000, *supra* note 1, at 853-54.

248 *Id.* at 854.

249 *Id.* at 853.

not reveal the complete set of facts to FERC. Additionally, FERC acknowledges a passive owner's incentive to conceal information because it "will typically own other assets . . . that could reap major economic benefits if an RTO's decisions can be influenced to [its] advantage . . . . [T]he passive owners in RTOs may have a direct economic incentive to influence the RTO's operating and investment decisions to favor other economic interests."[250] Third, even though FERC requires an independent audit, a court should verify the quality of the audit rather than trusting it on its face.[251]

It is unclear whether FERC's "purely financial" criteria will convince a court that a board's decision was independent enough for the RTO to function as an agent of the government with the public interest as its main concern. Even though the hurdle is high, a court may find that an RTO's governing board is independent enough not to have an incentive to restrain trade and that FERC has conferred an RTO with official governmental authority. If a court makes both of these findings, it should hold that an RTO is a quasi-governmental organization that affords a petitioner immunity from antitrust liability via the *Noerr-Pennington* doctrine.

III. INCREASING PREDICTABILITY OF *NOERR-PENNINGTON* PROTECTION

The combined effect of *Allied Tube* and Order No. 2000 places market participants in a vulnerable situation where they could face antitrust liability for suggesting changes to an RTO. The combined effect of *Allied Tube* and Order No. 2000 occurs for two reasons. First, following *Allied Tube*, anticipating if courts will apply the *Noerr-Pennington* doctrine to protect RTO petitioners from antitrust liability is very unpredictable.[252] Second, Order No. 2000 requires market participants to use the open architecture scheme to suggest changes to an RTO,[253] but does not make RTO governing boards completely independent.[254] This lack of independence could result in a court denying a market participant *Noerr-Pennington* protection.[255] Therefore, market participants presumably have to weigh the benefits of suggesting a change to the RTO against the potential antitrust liability that suggesting that change may bring.

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250 *Id.*

251 *See id.* at 853-54.

252 *See supra* text accompanying notes 76-87; *see also* Stephen Calkins, *Developments in Antitrust and the First Amendment: The Disaggregation of* Noerr, 57 ANTITRUST L.J. 327, 345 (1988) (stating that cases following *Allied Tube* will not "prove so easy").

253 *See* Order No. 2000, *supra* note 1, at 911-13.

254 *See supra* Part II.C.

255 *See* Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 501-02 (1988) (denying that an organization was quasi-governmental because "the decisionmaking body of the Association is composed, at least in part, of persons with economic incentives to restrain trade").

Keeping *Allied Tube*'s precedent in mind, FERC could alter its rules in two ways to provide more predictability for market participants to petition RTOs.[256] One suggestion is for market participants to directly petition FERC rather than the RTO.[257] Under the current RTO structure outlined in Order No. 2000, market participants are unlikely to directly petition FERC because the channel for market participants to suggest changes to the RTO is directly to the RTO through the open architecture scheme.[258] When market participants directly petition the RTO, a court should use the framework set out in Part II to conduct a case specific analysis that determines if the RTO is a quasi-governmental organization.[259]

Unfortunately, the outcome of a case specific analysis can be unpredictable. If a market participant directly petitions FERC, however, *California Motor Transport* protects the petitioning.[260] Because *California Motor Transport* applies when a market participant directly petitions FERC, a court can avoid determining if an RTO is a quasi-governmental organization.[261] This in turn would allow RTO market participants to easily predict that changes they suggest to the RTO would not subject them to antitrust liability.

Second, FERC could provide more predictability to *Noerr-Pennington* protection by strengthening the rules regarding an RTO governing board's independence. Currently, FERC allows a market participant with passive ownership in an RTO to serve on the RTO's governing board.[262] Additionally, FERC defines passive ownership as someone with a "purely financial" relationship with an RTO.[263] Because a governing board member who has a financial relationship with the RTO could have an economic incentive to restrain trade in the eyes of a court,[264] FERC could make RTO governing boards more independent by prohibiting market participants with passive ownerships in the RTO from determining board membership.[265]

By implementing these two suggestions to increase the predictability of whether the *Noerr-Pennington* doctrine applies to potential RTO petitioners, FERC could receive more suggestions for improvements to RTOs

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256 This Comment specifically declines to state as a matter of policy whether FERC should adjust the rules to make the application of the *Noerr-Pennington* doctrine more predictable.

257 *See* Cal. Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 510 (1972) (extending *Noerr-Pennington* protection to administrative agencies).

258 *See* Order No. 2000, *supra* note 1, at 912-13.

259 *See supra* Part II.

260 *See Cal. Motor Transp.*, 404 U.S. at 510-11 (holding that petitioning an administrative agency is protected by the *Noerr-Pennington* doctrine).

261 *See id.*

262 Order No. 2000, *supra* note 1, at 852.

263 *Id.* at 854.

264 *See, e.g.*, Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 501-02 (1988).

265 *See id.* at 500.

through its open architecture scheme.[266] As FERC stressed in Order No. 2000, having market participants provide feedback was very important to successfully establishing RTOs.[267] Implementing these changes will help move market participants out of *Allied Tube*'s gray area[268] and squarely into the territory protected by *Noerr-Pennington*.[269]

CONCLUSION

As RTOs manage an increasing amount of electricity as part of efforts to introduce more competition into the electricity industry, the *Noerr-Pennington* doctrine provides an important defense for antitrust liability.[270] The *Noerr-Pennington* doctrine should only apply to RTO market participants after a court uses the proposed three-step framework in each case to determine that an RTO is a quasi-governmental organization.

The first step of the framework is designed as a quick-look that asks if the petitioning is clearly commercial, rather than political, in nature. If the petitioning is clearly commercial, the *Noerr-Pennington* doctrine should not protect it. The second step of the framework is to determine if an RTO has been conferred with official governmental authority. This Comment argues that FERC can confer official governmental authority on RTOs because FERC uses RTOs to carry out its duties under the FPA. The third step of the framework is to determine if the RTO's governing board has economic incentives to restrain trade because the RTO's governing board is not independent enough from market participants. This Comment argues that RTO governing boards may not be independent enough from market participants to not have an economic incentive in a decision. If all three steps are satisfied, however, the *Noerr-Pennington* doctrine should protect an RTO petitioner.

Determining if an RTO in fact satisfies all three steps will likely prove a difficult task. For this reason, many courts may decline to apply the *Noerr-Pennington* doctrine to market participants who petition RTOs. Because a court may not use the *Noerr-Pennington* doctrine to protect market participants who suggest changes to an RTO from antitrust liability, market participants may be reluctant to suggest improvements to an RTO as FERC desired in the open architecture scheme. FERC may be able to induce more market participants to suggest potentially beneficial changes to RTOs by providing a mechanism for market participants to petition FERC directly

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266 *See* Order No. 2000, *supra* note 1, at 912-13.

267 *See id.*

268 *See Allied Tube*, 486 U.S. at 501-02.

269 *See id.*; Cal. Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 510-11 (1972).

270 *See generally* ENERGY ANTITRUST HANDBOOK, *supra* note 5, at 45 (discussing higher risks for antitrust liability in a deregulated market).

and by eliminating passive RTO owners from governing board membership to ensure that the RTO governing boards are truly independent.