COMMISSION
APPROVED

86-7734
86-7758

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 86-7734, 86-7758

INDIAN HEAD, INC.,

Plaintiff-Appellant,
Cross-Appellee,

v.

ALLIED TUBE & CONDUIT CORPORATION,

Defendant-Appellee.
Cross-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF THE UNITED STATES AND THE FEDERAL TRADE COMMISSION
AMICUS CURIAE

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IN THE UNITED STATES COURT OF APPEALS
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Docket Nos. 86-7734, 86-7758

INDIAN HEAD, INC.,

Plaintiff-Appellant,
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v.

ALLIED TUBE & CONDUIT CORPORATION,

Defendant-Appellee.
Cross-Appellant.

On Appeal from the United States District Court
for the Southern District of New York

BRIEF OF THE UNITED STATES AND THE FEDERAL TRADE COMMISSION
AMICUS CURIAE

STATEMENT OF THE ISSUE

Whether an agreement among commercial members of a private standards-setting organization to exclude a competitor's product from an industry standard constitutes petitioning of government protected by the Noerr-Pennington doctrine merely because governments incorporate the standard in their codes by reference.

INTEREST OF THE UNITED STATES AND THE FEDERAL TRADE COMMISSION

The United States and the Federal Trade Commission ("Commission") file this brief pursuant to Rule 29 of the Federal Rules of Appellate Procedure in support of the position of appellant Indian Head that the Noerr-Pennington[1] doctrine does not apply to participation in private standards-setting organizations.[2]

The Department of Justice and the Commission enforce the federal antitrust laws. 15 U.S.C. 1, 2, 4, 26; 15 U.S.C. 41 et seq. The courts traditionally have applied the antitrust laws to private standards organizations and their members,[3] and the Commission and the Department have engaged in enforcement actions against such organizations.[4] The Commission also has studied the standards industry extensively in connection with a proposed rulemaking. 43 Fed. Reg. 57,269 (1978).

The standard involved in this case is only one of 32,000

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1 See Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961); United Mine Workers of America v. Pennington, 381 U.S. 657 (1965).

2 The United States and the Commission express no view on the merits of the antitrust claim in this dispute and do not address whether Allied's conduct is within the "sham" exception to Noerr-Pennington or the issues raised by Allied's cross-appeal.

3 See, e.g., American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp., 456 U.S. 556 (1982); Radiant Burners, Inc. v. Peoples Gas Light & Coke Co., 364 U.S. 656 (1961).

4 See, e.g., American Society of Sanitary Engineering, C-3169 (F.T.C., Oct. 3, 1985)(consent decree); United States v. American Society of Mechanical Engineers, Inc., 1972 Trade Cas. (CCH) ¶¶74,028, 74,029 (S.D.N.Y. 1972) (consent decree).

standards promulgated by over 420 private organizations.[5] Industry relies heavily on these standards, and government regulations incorporate many of them by reference. Although private standards can promote competition and consumer welfare, standards also can erect barriers to entry for innovative products and otherwise restrict competition. Government efforts to preserve competition in the many industries that rely upon privately developed standards would be impeded significantly if the Noerr-Pennington doctrine is interpreted to exempt private standards-setting from antitrust scrutiny.

STATEMENT OF THE CASE

Plaintiff Indian Head ("Carlon") sells a flexible plastic conduit ("ENMT") that competes with metallic conduit sold by defendant Allied Tube & Conduit Corporation ("Allied") (Undisputed Fact ("U.F.") No. 4, J.A. 1554).[6] In 1978, Carlon proposed to the National Fire Protection Association ("NFPA") that ENMT be listed as a permissible type of electrical conduit in NFPA's National Electrical Code ("NEC") (U.F. No. 48, J.A. 1560).

The NEC, which is revised by NFPA every three years, establishes product and performance requirements for the design and installation of electrical wiring systems, including electrical conduit (U.F. Nos. 10, 19, J.A. 1555, 1556). NFPA is

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[5] See National Bureau of Standards, Special Pub. No. 681, Standards Activities of Organizations in the United States 1 (Aug. 1984).

[6] "J.A." refers to the Joint Appendix filed with this appeal.

a private, non-governmental, voluntary membership organization (U.F. No. 15, J.A. 1555). Among the NFPA members who develop the NEC are numerous groups and business organizations in the electrical industry, including manufacturers, the electrical workers union, electrical contractors, electrical utilities, users of electrical equipment such as builders and hospitals, and testing laboratories. These groups serve on various code-making panels and attend NFPA meetings to consider adoption of NEC provisions (1984 NEC, at 70-i to xiv, Plaintiff's Exhibit ("PX") 595).

The NEC is the primary code for the electrical industry in the United States and is also accepted world-wide (U.F. No. 25, J.A. 1556). Private certification laboratories use the NEC as a basis for labeling electrical products as meeting their safety requirements (U.F. No. 31, J.A. 1558). Many state and local statutes and ordinances also routinely incorporate the NEC by reference in their electrical or building codes (U.F. No. 28, J.A. 1557).

In December 1979, the NEC code-making panel responsible for reviewing ENMT approved the use of the product (U.F. No. 59, J.A. 1561). This decision was then subject to approval by the members of NFPA attending NFPA's 1980 annual meeting. To prevent NFPA approval of the product, Allied agreed with other steel companies to sign up new NFPA members just prior to the annual meeting so these members could attend the meeting and outvote those favoring approval of ENMT. Allied itself paid the membership dues and expenses for 155 persons, including employees and sales agents

(U.F. Nos. 95-112, J.A. 1566-67). This effort was successful; Carlon's proposal to include ENMT in the NEC was defeated by a margin of four votes (U.F. No. 112, J.A. 1567).

Carlon filed a complaint on October 9, 1981, in the United States District Court for the Southern District of New York, alleging that Allied and others had violated Section 1 of the Sherman Act and seeking damages.[7] The jury found in Carlon's favor and awarded damages of $3.8 million (J.A. 474-O). The jury also answered specific questions as instructed by the court. The jury found that Allied's "meeting-packing" was a substantial or material factor in excluding ENMT from the NEC and that this conduct "subverted" the consensus-making process of NFPA, adversely affected competition, and unreasonably restrained trade in violation of the antitrust laws (Answer to jury question nos. 5, 9, 11, and 12, J.A. 474G, K, M, N).

The district court did not disturb the jury's findings. However, in response to Allied's motion for judgment notwithstanding the verdict, the court in a lengthy oral opinion from the bench dismissed the complaint on the ground that Allied's conduct was a form of petitioning protected by the Noerr-Pennington doctrine. See Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961)("Noerr"); United Mine Workers of America v. Pennington, 381 U.S. 657 (1965)("Pennington"). Relying on its finding that governments routinely adopt the NEC, the court characterized NFPA

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[7] Carlon also named NFPA as a defendant, but voluntarily dismissed its claims against NFPA before trial.

as "akin to a legislature" and described Allied's conduct as an "attempt to influence a legislative body" (Transcript of district court's opinion, June 27, 1986 ("Tr.") 61-62, J.A. 462-462A). The court further concluded that Allied's conduct at NFPA should be protected as a petition to state and local legislatures because Allied intended to "influence legislative action through the NFPA" (Tr. 58, 64-65, J.A. 459, 463-64)..

ARGUMENT

As the district court recognized (Tr. 57-58, J.A. 458-59), NFPA wields substantial economic power. Codes and standards promulgated by organizations like NFPA influence the policies of numerous states and cities, and their guidelines "'may result in economic prosperity or economic failure, for a number of businesses of all sizes throughout the country,' as well as entire segments of an industry." American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp., 456 U.S. 556, 570 (1982) (quoting H.R. Rep. No. 1981, 90th Cong., 2d Sess. 75 (1968))("Hydrolevel").[8]

The activities of private standards-setting groups are not inherently anticompetitive; indeed, they may be substantially procompetitive. Influencing the decisions of such groups by

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[8] In Hydrolevel, the Supreme Court held that the American Society of Mechanical Engineers (ASME) was liable as principal under the Sherman Act for the anticompetitive acts of commercial members acting with ASME's apparent authority. ASME, like NFPA, is a broad-based, nonprofit membership corporation that publishes hundreds of technical standards. The standard in Hydrolevel, like the NEC, was adopted by at least 45 states. 456 U.S. at 558-59.

presenting accurate technical information concerning safety problems of a competitor's product generally would not be subject to antitrust condemnation under the rule of reason. See Board of Trade of the City of Chicago v. United States, 246 U.S. 231 (1918). However, private standards-setting organizations like NFPA "can be rife with opportunities for anticompetitive activity" because the "less altruistic [members] * * * have an opportunity to harm their employers' competitors through manipulation of [the organization's] codes." Hydrolevel, 456 U.S. at 571. The activities of private standards-setting organizations like NFPA therefore should be carefully scrutinized.

The district court has improperly expanded the Noerr-Pennington doctrine to exempt from the antitrust laws attempts to influence what is conceded to be a private, non-governmental standards-setting body (U.F. No. 15, J.A. 1555). Its decision rests on a fundamental misunderstanding of the doctrine. The Noerr-Pennington doctrine is designed to avoid conflict between the antitrust laws and the governmental process; it does not afford an exemption for attempts to influence private conduct. Accordingly, the judgment must be reversed.

I. THE NOERR-PENNINGTON DOCTRINE DOES NOT PROTECT "PETITIONING" OF PRIVATE ORGANIZATIONS

The district court erred in concluding that influencing NFPA is the equivalent of influencing a legislative body for purposes of the Noerr-Pennington doctrine (Tr. 61-62, J.A. 462-462A). In Noerr, the Supreme Court held that the antitrust laws, properly

construed, do not apply to private solicitation of government action, including anticompetitive government action. The Court observed that it had earlier held, in Parker v. Brown, 317 U.S. 341 (1943), that the Sherman Act was not intended to apply to anticompetitive state action. The Court reasoned that a representative government "depends upon the ability of the people to make their wishes known to their representatives" and it would not "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." Noerr, 365 U.S. at 137. Moreover, application of the Sherman Act in such circumstances would have raised serious issues under the First Amendment: "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." Id. at 138.[9] See also Pennington, 381 U.S. at 669, 671; California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 510-11 (1972)("California Motor Transport")(Noerr-Pennington doctrine based explicitly on First Amendment); Litton Systems, Inc. v. American Telephone & Telegraph Co., 700 F.2d 785, 804-09 (2d Cir. 1983), cert. denied, 464 U.S. 1073 (1984)("Litton").

Thus, the right protected by the Noerr-Pennington doctrine is the right to attempt to persuade the government -- not private organizations -- to take actions that may have the effect of

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9 The First Amendment provides in relevant part: "Congress shall make no law * * * abridging * * * the right of the people * * * to petition the Government for a redress of grievances." U.S. Const. amend. I.

restraining trade. Protected collective action must involve petitioning a governmental entity; it must be "an agreement jointly to seek legislation or law enforcement" and to "solicit[] * * * governmental action with respect to the passage and enforcement of laws." Noerr, 365 U.S. at 136, 138.

The Noerr-Pennington doctrine does not protect solicitation of private organizations to impose restraints on trade, because these organizations are not part of our representative form of government, and the constitutional right to petition the government does not protect access to such groups.[10] See generally McDonald v. Smith, 105 S. Ct. 2787, 2789-90 (1985)(discussing the origin and scope of the right to petition). There is no reason to think that Congress excluded from the Sherman Act attempts to influence the standards adopted by private standards-setting organizations, since such exclusion is unnecessary to avoid regulation of political activities "in the halls of legislative bodies," Noerr, 365 U.S. at 144, or to meet constitutional concerns.[11]

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10 As the Supreme Court stated:

> We may presume, absent a showing to the contrary, that the municipality [i.e. government] acts in the public interest. A private party, on the other hand, may be presumed to be acting primarily on his or its own behalf.

Town of Hallie v. City of Eau Claire, 105 S. Ct. 1713, 1720 (1985)(footnote omitted). See also Hurwitz, Abuse of Governmental Processes, the First Amendment, and the Boundaries of Noerr, 74 Geo. L.J. 65, 90-93 (1985) (Noerr-Pennington doctrine should not apply to private self-regulatory groups).

11 Professor Areeda has stated that where a "'governmental
(Footnote continued)

Indeed, the Supreme Court in Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962)("Continental Ore"), held that Noerr was inapposite where the entity solicited was not a governmental unit. The Canadian Government had appointed Union Carbide's subsidiary, Electro Met, as its wartime agent for purchasing and allocating vanadium for Canadian industry. The plaintiff alleged that Union Carbide had directed Electro Met to exclude the plaintiff from the Canadian market, as part of a conspiracy to restrain and monopolize the vanadium industry. The Court rejected Union Carbide's Noerr-Pennington defense, finding that its conduct was "wholly dissimilar to that of the defendants in Noerr." Id. at 707. The Court stated that subjecting Union Carbide to liability "for eliminating a competitor from the Canadian market by exercise of the discretionary power conferred upon Electro Met of Canada by the Canadian Government would effectuate the purposes of the Sherman Act and would not remotely infringe upon any of the constitutionally protected freedoms spoken of in Noerr." Id. at 707-08.

Subsequently, in Pennington, the Court reaffirmed that its holding in Continental Ore was based on the fact that Electro Met was a private entity; the Court in Pennington distinguished Continental Ore, remarking that in the earlier case the purchasing agent "was not a public official" and there was no indication that any Canadian official "approved or would have

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agency' is composed wholly of industry members, it will be treated as the private repository of unsupervised power that is subject to the usual antitrust principles governing industry rule-making." P. Areeda, Antitrust Law ¶203.3c at 17 (Supp. 1982).

approved" of the monopolistic practices. 381 U.S. at 671 n.4.

Continental Ore's teaching is that the Noerr-Pennington doctrine does not reach attempts to influence private parties to take actions that restrain trade -- even where that private party is a government agent. A fortiori, the antitrust laws are applicable to attempts to influence an entirely private standards-setting organization. See also Feminist Women's Health Center, Inc. v. Mohammad, 586 F.2d 530, 544-45 (5th Cir. 1978), cert. denied, 444 U.S. 924 (1979)(medical review organizations whose recommendations were followed by statutory board are not governmental bodies for purposes of Noerr-Pennington).[12]

NFPA is not a governmental entity. Indeed, Allied conceded in the "Undisputed Facts" filed with the district court that "NFPA is a private, non-governmental, independent, voluntary membership organization * * * incorporated * * * under the not-for-profit laws of the Commonwealth of Massachusetts" (emphasis added) (U.F. No. 15, J.A. 1555). The NEC was begun not at the behest of government, but rather "as a result of the united efforts of various insurance, electrical, architectural, and

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12 See generally MCI Communications Corp. v. American Telephone & Telegraph Co., 708 F.2d 1081, 1159-60 (7th Cir.)(Noerr "immunizes only those actions directed toward governmental agencies or officials"), cert. denied, 464 U.S. 891 (1983); Mid-Texas Communications Systems, Inc. v. American Telephone & Telegraph Co., 615 F.2d 1372, 1382 (5th Cir.)("[t]he crux of the Noerr-Pennington immunity is the need to protect efforts directed at governmental officials for the purpose of seeking redress"), cert. denied, 449 U.S. 912 (1980); Welch v. American Psychoanalytic Association, 1986-1 Trade Cas. (CCH) ¶67,037 at 62,373 (S.D.N.Y. 1986)(quoting Mid-Texas); Ashley Meadows Farm, Inc. v. American Horse Shows Association, 1983-2 Trade Cas. (CCH) ¶65,653, at 69,352-53 (S.D.N.Y. 1983)(Noerr-Pennington does not extend to internal procedures of private associations).

allied interests" (1984 NEC, at 70-i, PX 595). A private standards organization like NFPA is "in reality an extra-governmental agency, which prescribes rules for the regulation and restraint of interstate commerce." Hydrolevel, 456 U.S. at 570 (quoting Fashion Originators' Guild of America, Inc. v. FTC, 312 U.S. 457, 465 (1941))(emphasis added).

Significantly, Allied has made no claim that NFPA's standards-setting activities would constitute state action exempt from the antitrust laws. Any such claim plainly would have been unsuccessful, since NFPA's activities were neither specifically authorized by nor subject to on-going supervision by any government. See Southern Motor Carriers Rate Conference, Inc. v. United States, 105 S. Ct. 1721, 1727 (1985)("Southern Motor Carriers").[13] There is, therefore, no reason to fear that subjecting attempts to lobby NFPA to Sherman Act scrutiny would interfere with the flow of information to the government. See City of Lafayette v. Louisiana Power and Light Co., 435 U.S. 389,

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[13] The state action doctrine is "premised on the assumption that Congress, in enacting the Sherman Act, did not intend to compromise the States' ability to regulate their domestic commerce," and is intended to permit a state to utilize the powers reserved to it by the Constitution to impose restraints on competition either through its officers or agents. Southern Motor Carriers, 105 S. Ct. at 1726. However, the doctrine does not permit a state to "cast[] * * * a gauzy cloak of state involvement over what is essentially a private * * * arrangement." California Retail Liquor Dealers Association v. Midcal Aluminum, Inc., 445 U.S. 97, 106 (1980). Thus, if the actions of a private organization are not taken pursuant to a clearly articulated state policy to restrain competition and are not actively supervised by the state, the organization can properly be regulated by the Sherman Act without undue interference with a state's exercise of its legislative powers. Southern Motor Carriers, 105 S. Ct. at 1727.

399-400 (1978)(state action and Noerr-Pennington exclusions are based on common concern of avoiding "conflict with policies of signal importance in our national traditions and governmental structure of federalism").[14]

Thus, attempting to influence NFPA is not the equivalent of attempting to influence the government. The policies of the Noerr-Pennington doctrine -- avoiding interference with the functioning of a representative government and protecting constitutional rights -- are not served by exempting Allied's conduct from antitrust scrutiny. The district court's expansion of the doctrine is unwarranted and conflicts with the fundamental principle that "exemptions from the antitrust laws must be construed narrowly." Union Labor Life Insurance Co. v. Pireno, 458 U.S. 119, 126 (1982); accord Litton, 700 F.2d at 807.[15]

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[14] There may be some limited circumstances in which it is appropriate to afford Noerr protection to solicitation of governmental action that does not satisfy all of the requirements of the state action doctrine. For example, private parties might petition a city council to take action of a governmental nature. Such municipal action would not constitute state action if the state had not authorized it (Town of Hallie v. City of Eau Claire, 105 S. Ct. 1713 (1985)), yet Noerr-Pennington protection might be appropriate. This case presents no such issue, however.

[15] In Wheeling-Pittsburgh Steel Corp. v. Allied Tube & Conduit Corp., 573 F. Supp. 833 (N.D. Ill. 1983), Allied took a position opposite to its position in this case, arguing in support of an antitrust counterclaim that the NFPA was not entitled to a Noerr-Pennington exemption. That court ultimately held that NFPA was a "stand-in[] for * * * municipal and state bodies," and applied the exemption. Id. at 841. For the reasons just discussed, we believe that Allied was correct the first time, and that the record shows that NFPA is not a governmental body for purposes of Noerr-Pennington.

II. ALLIED'S CONDUCT OUTSIDE THE POLITICAL ARENA CANNOT BE PROTECTED AS PETITIONING STATE AND LOCAL GOVERNMENTS

The district court also treated Allied's conduct at NFPA as an indirect petition to state and local governments that utilize the NEC, concluding that Noerr-Pennington protects not only direct government petitioning, but also conduct "outside or removed from the legislative halls" that is intended to influence government policy (Tr. 56, J.A. 457). The court emphasized that, in Noerr, the Supreme Court protected not only the railroads' direct petitioning of government, but also their general publicity campaign designed to garner public support for the railroads' legislative position. The district court's ruling, however, misconstrues Noerr.

In Noerr, the Court construed the Sherman Act not to apply to activities in the "political arena" designed to convince legislatures and executive branches to adopt a specific course of action. 365 U.S. at 141. In that case it was clear that the advertising campaign was merely one part of a general campaign to solicit public support for the railroads' direct lobbying efforts. By contrast, Allied's actions at NFPA were entirely outside the political arena, involving no contacts with government or appeals to the public to supplement direct lobbying efforts. Nor can Allied's conduct be construed as an effort to mobilize NFPA to join in a lobbying campaign to government.[16]

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[16] In support of its indirect petitioning argument, Allied has cited Federal Prescription Service, Inc. v. American Pharmaceutical Association, 471 F. Supp. 126 (D.D.C. 1979), aff'd in part and rev'd in part, 663 F.2d 253 (D.C. Cir. 1981), cert. denied, 455 U.S. 928 (1982). (Allied's Memorandum In Support Of (Footnote continued)

NFPA did not lobby government and, indeed, could not engage in any substantial efforts to lobby the government without jeopardizing its status as a charitable organization under the federal tax laws.[17]

The district court considered it significant that, by influencing NFPA, Allied also was ultimately "influenc[ing] the various state and local bodies that adopt the NEC" (Tr. 64, J.A. 463). But the widespread use of the NEC by governments as a technical resource (see Tr. 57-58, J.A. 458-59) does not convert actions before the NFPA into "indirect" but protected lobbying of government.

Indeed, this Court has recognized that not every private decision that is ultimately adopted by, or even presented to, a government entity is protected by Noerr-Pennington. In Litton,

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Its Motion For Judgment, July 3, 1985, at 10). In Federal Prescription Service, the district court, relying on Noerr's discussion of the railroads' publicity campaign, found that the Noerr-Pennington doctrine applied to an effort by one organization to solicit other organizations to rally in a joint campaign to induce governmental action. 471 F. Supp. at 130. Allied's conduct, however, in no way resembles a joint publicity campaign. Moreover, the district court recognized the distinction between mere petitioning and anticompetitive agreements in industry codes, noting that the case did not involve an attempt to exclude a competitor through adoption of a code of ethics. 471 F. Supp. at 129.

[17] NFPA is a charitable organization under §170(c) of the Internal Revenue Code, 26 U.S.C. 170(c). See Internal Revenue Service, Pub. No. 78, Cumulative List of Organizations described in Section 170(c) of the Internal Revenue Code of 1954 790 (1985). NFPA cannot maintain its status as a charitable organization under this section if it is disqualified under 501(c)(3) for "attempting to influence legislation." 26 U.S.C. 170(c)(2)(D), 501(c)(3). An organization is charitable under 501(c)(3) only if "no substantial part" of its activities comprises attempts to influence legislation. 26 U.S.C. 501(c)(3); see also Treas. Reg. 1.501(c)(3)-1(c)(3)(ii) (1986).

700 F.2d at 804-809, AT&T argued that its tariffs, which required AT&T customers to use an interface device if they employed equipment supplied by AT&T's competitors, were Noerr-Pennington protected because AT&T filed the tariffs with the Federal Communications Commission. This Court rejected that claim, holding that the tariff filing did not amount "to a request for governmental action" because the decision to impose and maintain the interface tariff "was made in the AT&T boardroom, not at the FCC." Id. at 807. The possibility of ultimate government review and adoption, pursuant to a private complaint or upon the FCC's initiative, did not exempt from the antitrust laws a decision that was basically private. See also, e.g., Cantor v. Detroit Edison Co., 428 U.S. 579, 601-02 (1976)(plurality opinion)(privately developed utility marketing program that was approved by state public service commission without investigation was not Noerr-Pennington protected); Mid-Texas Communications Systems, Inc. v. American Telephone & Telegraph Co., 615 F.2d 1372, 1382-83 (5th Cir.), cert. denied, 449 U.S. 912 (1980)(AT&T's refusal to interconnect, made prior to FCC involvement, not covered by Noerr-Pennington); City of Kirkwood v. Union Electric Co., 671 F.2d 1173, 1180-81 (8th Cir. 1982), cert. denied, 459 U.S. 1170 (1983)(filing of rate request not entitled to Noerr-Pennington exemption).

Accordingly, on the basis of Litton, the district court should have concluded that Allied's actions in the private forum of NFPA meetings were not entitled to Noerr-Pennington protection even if the NFPA standards arrived at in this private context

were ultimately adopted in some form by various State and local governments. A private decision made in the equivalent of the NFPA "boardroom" is not Noerr-protected merely because it is later adopted by a governmental entity.

To the extent that the district court was concerned about the equity of applying the antitrust laws to Allied's efforts to influence NFPA (Tr. 57-58, J.A. 458-59), it need not have been. As we have discussed (see supra, 6-7), the antitrust laws do not prevent Allied from presenting accurate information to NFPA regarding its competitor's product. Nor do the antitrust laws restrict Allied's right directly to petition state or local government. The right to petition, however, does not encompass the right to engage in any activity intended to get the message across. Cf. United States v. O'Brien, 391 U.S. 367, 376 (1968)(First Amendment guarantee does not include all modes of communication of ideas.) An antitrust exemption designed to avoid interference with citizens' conveyance to the government of their views and desires for government action does not extend to other forms of conduct merely because the other conduct might be an effective means of producing government action. Superior Court Trial Lawyers Association, No. 9171 at 62 (F.T.C. 1986), reprinted in 51 Antitrust & Trade Reg. Rep. No. 1272, 28, 41 (BNA, July 3, 1986), appeal filed, No. 86-1465 (D.C. Cir.). Such an expansion of the Noerr doctrine would "make it practically impossible ever to enforce the laws against agreements in restraint of trade" in the standards-setting area. See California Motor Transport, 404 U.S. at 514 (quoting Giboney v.

Empire Storage & Ice Co., 336 U.S. 490, 502 (1949)).[18]

In sum, the district court's ruling improperly expands the scope of Noerr-Pennington protection. Lobbying NFPA is not the equivalent of lobbying government for purposes of Noerr-Pennington. Allied's conduct also cannot be construed as an indirect petition to state and local legislatures protected from Sherman Act scrutiny. Allied's actions at NFPA, conducted outside the political arena, were not petitioning. Accordingly, this court should reject the district court's ruling to the extent it is based on the Noerr-Pennington doctrine.

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[18] In Giboney, the Court held that the First Amendment right of free speech does not prohibit government regulation of anticompetitive agreements. 336 U.S. at 499. See also National Society of Professional Engineers v. United States, 435 U.S. 679, 697-98 n.27 (1978)(First Amendment right of free speech and petition did not prohibit enforcement of injunction prohibiting anticompetitive provisions in an industry code).

CONCLUSION

The district court's decision that the Noerr-Pennington doctrine exempted Allied's activities from antitrust scrutiny should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that two (2) copies of the Brief of the United States and of the Federal Trade Commission Amicus Curiae were served by air courier on October 24, 1986, to:

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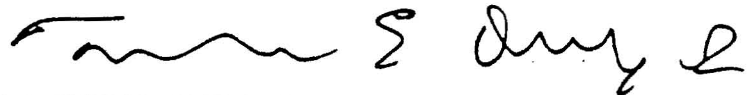

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