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# Sham Petitioning As a Threat to the Integrity of the Regulatory Process

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# SHAM PETITIONING AS A THREAT TO THE INTEGRITY OF THE REGULATORY PROCESS

LARS NOAH\*

*In this Article, Professor Noah examines the problem of “sham petitioning,” the improper use of administrative procedures by firms in various industries seeking to delay or prevent entry into the market by would-be competitors. Noting that the Federal Trade Commission is investigating this problem, the author argues that a strategy relying upon federal antitrust laws is ineffective in the face of the broad constitutional right to petition invoked by firms making manipulative regulatory submissions. Instead, the author proposes modifications of agency procedures to effect direct curtailment of unfair delaying tactics. Professor Noah concludes that only when agencies take greater responsibility for controlling abuses of administrative proceedings will incumbent firms be stymied in their efforts to misuse administrative processes to inhibit lawful market entry by their rivals.*

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## INTRODUCTION

The Federal Trade Commission (FTC) recently announced plans to investigate the petitioning activities of companies in the pharmaceutical and medical device industries.<sup>1</sup> Agency officials expressed concerns that firms were using frivolous patent litigation and petitions to the Food and Drug Administration (FDA) to limit competition and market entry.<sup>2</sup> The financial stakes in these industries are often enormous, and even relatively short delays in FDA approval of competing products could prove extremely valuable to a company with an approved product already on the market.<sup>3</sup> Mark Whitener, Acting Director of the FTC's Bureau of Competition, noted in 1994 that "there is a trend in this market for increasing intervention by pharmaceutical firms in judicial or regulatory proceedings,"<sup>4</sup> and he

1. See Mark D. Whitener, *Competition and Antitrust Enforcement in the Changing Pharmaceutical Marketplace*, 50 *FOOD & DRUG L.J.* 301, 307 (1995); F-D-C REPORTS ("The Pink Sheet"), June 20, 1994, at 11; F-D-C REPORTS ("The Pink Sheet"), Nov. 22, 1993, at 3; FTC: WATCH, Feb. 22, 1993, at 1.

2. See *Pharmaceutical Marketplace Reform: Is Competition the Right Prescription? Hearing Before the Senate Special Comm. on Aging*, 103d Cong., 1st Sess. 102 (1993) (statement of Mark D. Whitener, Acting Deputy Director, FTC Bureau of Competition) ("Another ongoing investigation involves the possible abuse of regulatory processes by an incumbent firm in order to defeat or retard market entry by a competitor. Judicial and regulatory proceedings can be the principal hurdles faced by new entrants into pharmaceutical markets . . ."); see also *supra* note 1.

3. See *User Fees for Prescription Drugs: Hearing Before the Subcomm. on Health and the Environment of the House Comm. on Energy and Commerce*, 102d Cong., 2d Sess. 10 (1992) (statement of David A. Kessler, Commissioner of Food and Drugs) ("For a drug that raises \$200 million a year in annual sales, assuming an 80 percent gross margin, every additional month of delay the Agency takes to review an application would cost the company about \$10 million in lost opportunity."); see also Joseph A. DiMasi, *The Cost of Innovation in the Pharmaceutical Industry*, 10 *J. HEALTH ECON.* 107, 125-26 (1991) (estimating that, on average, drug research and development costs \$231 million and requires 12 years before a new chemical may be introduced in the United States market).

4. F-D-C REPORTS ("The Pink Sheet"), June 20, 1994, at 12.

added that some of these efforts may violate the federal antitrust laws.<sup>5</sup>

The FTC's current investigation prompts a number of important questions. Initially, one might ask whether there is any foundation to fears that firms in these or other industries are manipulating regulatory processes. In theory, at least, it seems that pharmaceutical manufacturers could make use of a variety of administrative procedures to delay or perhaps completely prevent market entry by potential competitors. As this Article will illustrate in a detailed hypothetical derived from a number of actual cases, a company with an approved drug on the market could fend off competition by filing various objections and petitions with the FDA and other regulatory bodies.<sup>6</sup> It is difficult, of course, to gauge the prevalence of such behavior, and obvious differences exist among various agencies and regulated industries. Nonetheless, as this Article will explain in Part I, real opportunities exist for sham petitioning in administrative proceedings, especially when market entry requires some sort of agency licensing as in the pharmaceutical, transportation, communications, and energy industries.

In light of the potential for abuse of the regulatory process, the next question is how best to minimize the risk of anticompetitive manipulation. By default rather than by design, application of the federal antitrust laws has become the preferred method of response by public and private litigants. Nevertheless, one might wonder whether the confidence expressed by the FTC in using the antitrust laws for these purposes is justified. Because the First Amendment protects persons' right to petition the government for redress of grievances, the Supreme Court has conferred broad immunity from antitrust scrutiny to businesses engaged in legislative lobbying, regulatory proceedings, and litigation. Although "sham petitioning" is excluded from this immunity, serious limitations exist with a remedial approach dependent on the proscriptions of the Sherman Act.<sup>7</sup> For example, as this Article will explain in Part II, it is extremely difficult to establish that a regulatory petition is both objectively baseless and born of a subjective predatory intent, a two-part inquiry which raises some of the same difficulties that courts have

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5. *Id.*; see also Whitener, *supra* note 1, at 307.

6. See *infra* notes 9-30 and accompanying text.

7. Sherman Antitrust Act, ch. 647, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. §§ 1-7 (1988)). The statute prohibits contracts, combinations, and conspiracies in restraint of trade as well as efforts to monopolize trade. See 15 U.S.C. §§ 1, 2 (1988).

faced in attempting to police the conduct of litigants. Objective baselessness may be particularly difficult to demonstrate in the administrative context because agencies enjoy greater policymaking discretion than do the courts. Indeed, where the standards for approval of licenses and applications make reference to undefined considerations of public interest, it may be impossible to show that a competitor's objections were objectively baseless.

A number of commentators have recognized these and other limitations to reliance on the sham exception as a means of addressing abuses of the regulatory process, yet they have apparently lost little enthusiasm for the potential utility of the antitrust laws in this area.<sup>8</sup> A properly reconfigured sham exception, they contend, will prevent the anticompetitive manipulation of agency procedures. Whether one shares these commentators' optimism about the possibility for achieving doctrinal reform, their underlying assumption that antitrust provides the best available tool for protecting the integrity of the regulatory process remains questionable. The antitrust laws, while perhaps a useful adjunct for combatting the most blatant abuses of regulatory procedure, can never substitute for active policing by agencies to maintain the integrity of their own processes.

Thus, although sham petitioning has received a good deal of attention in the literature, scholars have focused almost exclusively on how best to modify antitrust doctrine to combat the problem more effectively. Remarkably, there is almost a total absence of any discussion about more directly targeted controls, whether through rules governing attorney conduct or other general reforms in administrative procedure. This Article strives to bridge that gap.

Because the antitrust laws cannot adequately deter anticompetitive abuses of the regulatory process, agency procedures must be modified to address these concerns. Indeed, even if antitrust scrutiny provided some meaningful deterrent, procedural reforms could respond to sham petitioning more directly and effectively. Just as courts have developed special standards of conduct, such as Rule 11 of the Federal Rules of Civil Procedure, to address real or perceived abuses in the context of litigation, agencies need to assume greater responsibility for controlling the behavior of participants in administrative proceedings. Part III discusses the possible utility of professional responsibility and certification rules to deter improper petitioning, but it concludes that direct limitations on opportunities to

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8. See *infra* note 163.

trigger delay will be necessary. In particular, agencies should impose greater restrictions on the rights of intervention by third parties. Although agencies permit and even encourage participation by persons with financial interests in licensing and other decisions, neither the constitutional right to petition nor guarantees of due process require that incumbent firms be given opportunities to block market entry by competitors.

The decisionmaking activities of administrative agencies and courts differ, of course, in a variety of respects, and commentators properly have criticized the tendency to overlay the adversarial model on regulatory processes. In fact, legislators may intend that administrative agencies be more responsive to lobbying by interested persons even if that makes their procedures more vulnerable to anticompetitive manipulation. Nonetheless, legislators and agency officials must guard against sham petitioning when it threatens to undermine the integrity of the regulatory process. Opportunities for participation should not become invitations for fraudulent submissions or other misuse of administrative procedures.

## I. THE NATURE OF ADMINISTRATIVE SHAM PETITIONING

As already mentioned, the Federal Trade Commission recently expressed concerns that competitors in the pharmaceutical and medical device industries are misusing the regulatory process.<sup>9</sup> This Part describes some of the opportunities that may exist for manipulating administrative procedures in the pursuit of anticompetitive ends, first with respect to the drug approval process, and then in a number of related licensing contexts. Although it is difficult to assess the frequency of such conduct, there are clear opportunities for sham petitioning before federal regulatory agencies.

### A. *Opportunities to Manipulate the Drug Approval Process*

The FTC's investigation of petitioning activities in the pharmaceutical industry suggests that the drug approval process may be subject to manipulation by "incumbent firms," namely those companies with approved products already on the market. Although the following hypothetical is only a caricature, it represents a composite derived from a number of actual examples.<sup>10</sup> For the sake of clarity, the illustration proceeds chronologically, first describing the drug

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9. See *supra* note 1 and accompanying text.

10. The names used in this hypothetical are, however, entirely fictional.

approval process, and then identifying how one incumbent firm could try to repel potential competition at different time intervals after it has received all necessary approvals for its own product.

The Food and Drug Administration extensively regulates the development and marketing of pharmaceutical products. A firm may not introduce a "new drug" into interstate commerce until the Agency approves an application for new drug approval (NDA), an action which affirms that the product is safe and effective for its intended use.<sup>11</sup> On average, more than a decade elapses between the initial discovery of a new chemical entity and final drug approval.<sup>12</sup> To encourage the development of pharmaceutical products intended for the treatment of rare diseases or conditions, certain investigational drugs may be designated as "orphan" drug products and entitled to special approval rules.<sup>13</sup> Orphan designation for an investigational drug does not ensure ultimate NDA approval, but it does provide special exclusive marketing rights for the first company to receive such approval. There is no limit on how many companies may receive orphan designation for the same investigational drug, and each may conduct clinical trials. Once clinical testing has been completed, however, the Agency can approve only one of these products.

Imagine that Alpha Pharmaceutical Company, the incumbent firm, requests orphan drug designation for a combination product ("Rx") for possible use in the treatment of a rare form of cancer. After evaluating the company's evidence that the expected patient population would not exceed 200,000, the FDA grants Alpha's request for orphan designation.<sup>14</sup> Assume also that Rx includes two active

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11. See 21 U.S.C. § 355 (1988); 21 C.F.R. pt. 314 (1995). See generally Lars Noah, *The Imperative to Warn: Disentangling the "Right to Know" from the "Need to Know" About Consumer Product Hazards*, 11 YALE J. ON REG. 293, 320-32 (1994) (discussing labeling requirements for prescription and over-the-counter drugs); Lars Noah, *Constraints on the Off-Label Uses of Prescription Drug Products*, 16 J. PROD. & TOXICS LIAB. 139, 142-45 (1994) (summarizing the FDA's new drug approval procedures).

12. See DiMasi, *supra* note 3, at 125-26.

13. See 21 U.S.C. §§ 360aa-360dd (1988); 21 C.F.R. pt. 316 (1995). For background on the orphan drug approval process, see Stephan E. Lawton, *Controversy Under the Orphan Drug Act: Is Resolution on the Way?*, 46 FOOD DRUG COSM. L.J. 327, 328-31 (1991); Sheila R. Shulman et al., *Implementation of the Orphan Drug Act: 1983-1991*, 47 FOOD & DRUG L.J. 363 (1992); Li-Hsien Rin-Laures & Diane Janofsky, Note, *Recent Developments Concerning the Orphan Drug Act*, 4 HARV. J.L. & TECH. 269 (1991).

14. The FDA may designate one or more investigational new drugs as orphan drugs if persuaded that such drugs are intended for the treatment of a rare disease or condition. 21 U.S.C. § 360aa(a)(1) (1988); 21 C.F.R. pt. 316(C) (1995). The statute defines "rare disease or condition" as one which "affects less than 200,000 persons in the United States," or one "for which there is no reasonable expectation that the cost of developing and

ingredients, one of which happens to be regulated as a Schedule II controlled substance. Authority over controlled substances resides with a separate agency, the Drug Enforcement Administration (DEA) of the United States Department of Justice.<sup>15</sup> Before clinical testing of Rx may proceed, Alpha must register as a manufacturer of controlled substances and receive an annual production quota from the DEA for the Schedule II component of the product.<sup>16</sup>

Once it has satisfied both FDA and DEA requirements, Alpha undertakes clinical trials to evaluate the safety and effectiveness of Rx. The statute requires adequate and well-controlled studies, generally defined as independent, double-blind clinical trials.<sup>17</sup> Because the results of its studies are favorable, Alpha prepares and submits an NDA application for the product. After a comprehensive scientific review of the company's chemistry and clinical data, the FDA approves the application. Under the statute, Alpha then is entitled to the seven-year period of market exclusivity reserved as a special incentive for the development of orphan drugs.<sup>18</sup>

One year after Rx is approved, Alpha's competitor "Medica" seeks approval of an apparently similar orphan drug for the same intended use. Both companies had received orphan drug designations for their respective investigational products in the same year. Medica secured a limited DEA registration and procurement quota in order to conduct its own clinical trials in preparation of an NDA application, but Alpha was the first to receive final product approval from the FDA. Although Medica submits evidence that its product would be clinically superior to Rx, Alpha lodges its objection that approval of Medica's product would violate Alpha's statutory right to market exclusivity because the drugs are the same as defined under

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making available in the United States a drug for such disease or condition will be recovered from sales in the United States of such drug." 21 U.S.C. § 360bb(a)(2) (1988).

15. See Controlled Substances Act, Pub. L. No. 91-513, Title II, 84 Stat. 1242 (1970) (codified as amended at 21 U.S.C. §§ 801-904 (1988)).

16. See 21 U.S.C. § 823(a) (1988) (listing registration requirements for manufacturers of Schedule II narcotics); *id.* § 826 (listing aggregate and individual production quota requirements for Schedule II narcotics); *Western Fher Lab. v. Levi*, 529 F.2d 325, 330-32 (1st Cir. 1976) (affirming challenged production quotas for phenmetrazine).

17. See 21 U.S.C. § 355(d) (1988); 21 C.F.R. § 314.126(b)(2)(i) (1995) ("A placebo-controlled study . . . usually includes randomization and blinding of patients or investigators, or both.").

18. See 21 U.S.C. § 360cc(a) (1988); 21 C.F.R. § 316.31(a) (1995).



the FDA's implementing regulations.<sup>19</sup> The Agency thereupon rejects Medica's application.

Alpha's own orphan designation is, however, subsequently revoked because of a misrepresentation about the expected size of the patient population,<sup>20</sup> a misrepresentation brought to the Agency's attention by Medica.<sup>21</sup> Alpha therefore loses its seven-year period of market exclusivity for Rx because the product is no longer regarded as an orphan drug. Even so, the NDA for the product is unaffected,<sup>22</sup> leaving Alpha with the more limited form of exclusivity afforded approved new drugs that do not qualify as orphan products—namely, three years of market exclusivity against makers of generic versions of the drug seeking abbreviated approval.<sup>23</sup> Another company could submit a complete NDA application for the same drug during the exclusivity period if it had performed the necessary preclinical and clinical testing. Thus, Medica resubmits its

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19. 21 C.F.R. § 316.3(b)(3), (13) (1995) (defining the terms "clinically superior" and "same drug"). When it promulgated these regulations, the FDA rejected suggestions that it create a preapproval challenge procedure because it feared that incumbents might try thereby "to delay the marketing of competitors' approvable" orphan drugs. 57 Fed. Reg. 62,076, 62,083 (1992). The Agency explained that, in any case, incumbents could file citizen petitions to challenge approvals that allegedly impinged on their own exclusivity rights, *id.*, as some had done previously. See, e.g., *Genentech, Inc. v. Bowen*, 676 F. Supp. 301, 307 (D.D.C. 1987).

20. See 21 C.F.R. § 316.29(a)(1) (1995).

21. Companies sometimes inform agency officials of alleged regulatory infractions by existing or potential competitors. See *Sandoz Pharmaceuticals Corp. v. Richardson-Vicks, Inc.*, 902 F.2d 222, 231 n.10 (3d Cir. 1990) ("Sandoz is free to petition the FDA to investigate these alleged labeling violations."); Lars Noah, *Death of a Salesman: To What Extent Can the FDA Regulate the Promotional Statements of Pharmaceutical Sales Representatives?*, 47 FOOD & DRUG L.J. 309, 327 (1992) (describing use of FDA hotline to report unlawful promotional practices by competitors); F-D-C REPORTS ("The Pink Sheet"), July 20, 1992, at 7 (describing FDA policy of delaying final approval of pending applications until certain compliance issues are resolved).

22. 21 C.F.R. § 316.29(b) (1995).

23. See 21 U.S.C. § 355(j)(4)(D)(iii) (1988). The illustration assumes that at least one of the active ingredients in Rx had been approved previously. Otherwise, Alpha might have been able to take advantage of a five-year period of market exclusivity. *Id.* § 355(j)(4)(D)(ii). For additional background concerning these complicated provisions, see Ellen J. Flannery & Peter Barton Hutt, *Balancing Competition and Patent Protection in the Drug Industry: The Drug Price Competition and Patent Term Restoration Act of 1984*, 40 FOOD DRUG COSM. L.J. 269 (1985); James J. Wheaton, *Generic Competition and Pharmaceutical Innovation: The Drug Price Competition and Patent Term Restoration Act of 1984*, 35 CATH. U. L. REV. 433 (1986). Companies may receive additional periods of market exclusivity for certain modifications of the product. See 59 Fed. Reg. 50,338, 50,357 (1994). Although generic companies could still market copies of the original version, they might face difficulties in trying to compete against the modified product until the latter's period of market exclusivity expires.

application, and, after another lengthy review, the FDA approves the product. Medica is not initially able to market its product, however, because Alpha temporarily blocks Medica's full manufacturer registration and quota applications by filing objections with DEA.<sup>24</sup>

Finally, when the limited exclusivity period for Rx lapses, Alpha faces the prospect of abbreviated NDA (ANDA) submissions by competitors seeking to market generic versions of this product. The FDA may approve an ANDA if the applicant demonstrates that its generic product is "bioequivalent" to (meaning that it has essentially the same rate and extent of absorption as) the innovator drug,<sup>25</sup> a showing that substitutes for the much costlier clinical trials demanded as part of an NDA to demonstrate safety and effectiveness of the innovator drug. Alpha, however, attempts to forestall agency approval of generics by filing a citizen petition asserting general bioequivalence problems that must be resolved before the FDA can evaluate any ANDA applications for this class of products.<sup>26</sup> Even when the Agency is prepared to approve generic versions of Rx, perhaps after a significant delay while it has grappled with these

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24. Until 1995, DEA regulations invited existing firms to object to the applications filed by new entrants. See 21 C.F.R. §§ 1301.43(a), 1303.32(b) (1995) (amended in part by 60 Fed. Reg. 32,101 (1995)). Some incumbents have delayed entry by competitors through the use of these procedures. See 58 Fed. Reg. 52,246, 52,247 (1993) ("[C]urrently registered manufacturers use the regulatory hearing requirement to deter others from applying or to delay entry of competitors into their marketplace."); 50 Fed. Reg. 28,045 (1985) (rejecting, after nearly two years of proceedings, the objections filed by Knoll Pharmaceutical Co., which for 50 years had been the sole manufacturer of bulk hydromorphone, to another company's application for registration, and noting that Knoll failed to raise these same objections in a prior proceeding involving the same drug manufactured by an allied generic company); F-D-C REPORTS ("The Pink Sheet"), June 14, 1993, at 12 ("Although Houba obtained a recommendation for DEA registration as a result of the hearing, MD's request for a hearing to challenge Houba's application effectively has delayed development of another generic methylphenidate by at least two years.").

25. See 21 U.S.C. § 355(j) (1988); 21 C.F.R. pts. 314(C), 320 (1995).

26. See, e.g., Schering Corp. v. Shalala, 995 F.2d 1103, 1104 (D.C. Cir. 1993) (per curiam) (describing drug company's efforts to challenge the FDA's bioequivalence criteria for non-systemic drugs); Fisons Corp. v. Shalala, 860 F. Supp. 859, 861 (D.D.C. 1994) (same); F-D-C REPORTS ("The Pink Sheet"), Feb. 6, 1995, at T&G-12 (describing incumbent firm's petition to the FDA asserting bioequivalence problems with generic version of arthritis drug); F-D-C REPORTS ("The Pink Sheet"), May 16, 1994, at T&G-6 (describing petitions submitted by two companies with approved albuterol metered dose inhalers (MDIs) challenging the FDA's guidelines for bioequivalence testing and arguing that generic albuterol MDIs should not be approved without more stringent testing); F-D-C REPORTS ("The Pink Sheet"), Mar. 4, 1991, at 9 (describing Wyeth-Ayerst's success in persuading the FDA to establish more stringent bioequivalence requirements for conjugated estrogens); Sari Horwitz, *New Law Stimulating Generic-Drug Market*, WASH. POST, June 28, 1985, at B1, B2 (characterizing petition by brandname manufacturer of Valium as a delaying tactic).

bioequivalence issues, Alpha may raise specific objections to the ANDA filings of individual companies.<sup>27</sup>

If these efforts to prevent FDA approval of generic products ultimately prove unsuccessful, even though the company did manage to delay such approvals, Alpha might again attempt to use DEA processes to preserve its market position.<sup>28</sup> Alpha also might file patent infringement lawsuits against the companies marketing generic versions of Rx.<sup>29</sup> Finally, even after these competitors have received the necessary FDA approvals and DEA licenses, Alpha might try to convince state formulary committees not to include the generic products on the list of drugs reimbursable under Medicaid and other health insurance programs, again in hopes of retaining its existing market share.<sup>30</sup>

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27. See, e.g., *Upjohn Mfg. Co. v. Schweiker*, 681 F.2d 480, 482-83 (6th Cir. 1982) (upholding the FDA's decision to reject Upjohn's citizen petition challenging the Agency's authority to approve a generic version of ibuprofen). The court commented that "Upjohn does not contend that the drug is not safe and effective. Instead, it has mounted a technical assault on FDA's approval of the Boots application, in an effort to preserve its monopoly." *Id.* at 484; see also Peter O. Safir, *Current Issues in the Pioneer Versus Generic Drug Wars*, 50 FOOD & DRUG L.J. 335 *passim* (1995) (discussing recent efforts to block generic competition); F-D-C REPORTS ("The Pink Sheet"), Aug. 10, 1992, at 6 (describing incumbent firm's petition to the FDA five days after the FDA approved a generic substitute).

28. See *supra* note 24; F-D-C REPORTS ("The Pink Sheet"), Sept. 20, 1993, at T&G-9 ("The [generic] company needs a DEA license and quota before it can begin producing drug for bioequivalence studies to support an ANDA."); F-D-C REPORTS ("The Pink Sheet"), Jan. 27, 1986, at 4 (describing DEA's difficulties in trying to reallocate aggregate production quotas to account for new market entrants); cf. 50 Fed. Reg. 28,046 (1985) (providing that when "a new firm takes sales from those of an existing manufacturer, then DEA decreases the latter's quota by the amount of such sales").

29. See, e.g., *Burroughs Wellcome Co. v. Barr Lab., Inc.*, 40 F.3d 1223, 1226-27 (Fed. Cir. 1994), *cert. denied*, 115 S. Ct. 2553 (1995); *Merck & Co. v. Biocraft Lab., Inc.*, 874 F.2d 804, 805-06 (Fed. Cir.), *cert. denied*, 493 U.S. 975 (1989); *Glaxo, Inc. v. Novopharm Ltd.*, 830 F. Supp. 869, 870 (E.D.N.C. 1993), *aff'd*, 52 F.3d 1043 (Fed. Cir. 1995); Lawrence M. Fisher, *Drug Makers Will Settle Patent Fight*, N.Y. TIMES, Jan. 6, 1995, at C3.

30. See *Barr Lab., Inc. v. Abbott Lab.*, 867 F.2d 743, 744 (2d Cir. 1989) (discussing allegations in subsequently dismissed complaint filed by the manufacturer of a generic antibiotic that the manufacturer of the original product had engaged in a campaign of disparagement that included communications with state agencies); F-D-C REPORTS ("The Pink Sheet"), Feb. 6, 1995, at T&G-12 (describing incumbent firm's submissions to Illinois and New Jersey formulary committees alleging bioequivalence problems with generic versions of arthritis drug); F-D-C REPORTS ("The Pink Sheet"), Dec. 19, 1994, at T&G-14 (quoting FTC official's reference to "the possible sham use of state formulary processes to block approval of competing drugs"); F-D-C REPORTS ("The Pink Sheet"), Apr. 5, 1993, at T&G-8 (discussing allegations by the manufacturer of a generic antihypertensive drug that the manufacturer of the brandname product had engaged in a campaign of disparagement that included attempts to convince state officials not to list the generic version on drug formularies); see also *Competitive Problems in the Pharmaceutical Industry*:

Thus, an incumbent drug manufacturer may be able to utilize the regulatory processes of the FDA and DEA, as well as the states, in a variety of ways to delay and perhaps completely prevent market entry by competitors. It is precisely this sort of conduct in the pharmaceutical industry that the Federal Trade Commission recently identified as potentially abusive and worthy of closer investigation.<sup>31</sup> This illustration prompts two important questions, namely, whether such conduct should be regarded as objectionable and, if so, whether the antitrust laws provide a meaningful response. To the extent that courts have restricted antitrust scrutiny in such cases, partly in recognition of the First Amendment right to petition, this Article suggests that greater attention should be paid to the procedural mechanisms available to administrative agencies for protecting the integrity of the regulatory process.

### B. Sham Petitioning Before Other Agencies

Plaintiffs in antitrust lawsuits have accused incumbent firms of anticompetitive petitioning before several different agencies. Petitions or objections before licensing agencies are the most common type to receive antitrust scrutiny. For example, the motor carrier licensing procedures of the Interstate Commerce Commission (ICC)—specifically the procedures for registering certificates of public convenience and necessity—were at issue in *California Motor Transport v. Trucking Unlimited*,<sup>32</sup> the first Supreme Court decision to explicate the sham exception. In addition to the ICC,<sup>33</sup> plaintiffs

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*Hearing Before the Subcomm. on Antitrust, Monopolies and Business Rights of the Senate Comm. on the Judiciary*, 100th Cong., 1st Sess. 2 (1987) (statement of Senator Metzenbaum).

31. See F-D-C REPORTS ("The Pink Sheet"), Dec. 19, 1994, at T&G-14; F-D-C REPORTS ("The Pink Sheet"), June 20, 1994, at 11; F-D-C REPORTS ("The Pink Sheet"), Nov. 22, 1993, at 3; see also FTC: WATCH, Feb. 22, 1993, at 1 (describing FTC investigation of alleged sham petitioning by medical device manufacturers).

32. 404 U.S. 508, 513-16 (1972), *aff'g* 432 F.2d 755, 762 (9th Cir. 1970) (describing allegations that defendants conspired to deter plaintiffs from filing or pursuing applications with the ICC and the California Public Utilities Commission (PUC) by threatening to oppose every such application regardless of merit).

33. See *id.*; *Clipper Express v. Rocky Mountain Motor Tariff Bureau, Inc.*, 690 F.2d 1240, 1246-47 (9th Cir. 1982) (describing allegations that defendants filed protests with the ICC against each of plaintiff's tariff amendments solely for purpose of delay), *cert. denied*, 459 U.S. 1227 (1983); *Transkentucky Transp. R.R. v. Louisville & N.R.R.*, 581 F. Supp. 759, 763 (E.D. Ky. 1983) (describing allegations that defendants instituted sham proceedings before the ICC and other bodies to harass plaintiffs); *Assigned Container Ship Claims, Inc. v. American President Lines, Ltd.*, 784 F.2d 1420, 1421-24 (9th Cir.) (Federal Maritime Administration), *cert. denied*, 479 U.S. 915 (1986).

have alleged that sham petitioning or other misconduct worthy of antitrust scrutiny has occurred before the following agencies: the Federal Communications Commission (FCC),<sup>34</sup> the Federal Energy Regulatory Commission (FERC),<sup>35</sup> the Nuclear Regulatory Commission (NRC),<sup>36</sup> the Food and Drug Administration (FDA),<sup>37</sup> the United States Department of Agriculture (USDA),<sup>38</sup> the old Civil

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34. See *Litton Sys., Inc. v. American Tel. & Tel. Co.*, 700 F.2d 785, 809 (2d Cir. 1983) (describing allegations that defendant's opposition to the development of FCC certification standards was improper), *cert. denied*, 464 U.S. 1073 (1984); *Mid-Texas Communications Sys., Inc. v. American Tel. & Tel. Co.*, 615 F.2d 1372, 1383-84 (5th Cir.) (describing allegations that defendant's opposition to plaintiff's complaint before the FCC was merely a delaying tactic), *cert. denied*, 449 U.S. 912 (1980); *United States v. American Tel. & Tel. Co.*, 524 F. Supp. 1336, 1361 (D.D.C. 1981) (describing government's allegations that defendants pressed groundless claims before the FCC in order to frustrate entry of competitors); *WIXT Television, Inc. v. Meredith Corp.*, 506 F. Supp. 1003, 1025-26 (N.D.N.Y. 1980) (describing allegations that defendant improperly opposed plaintiff's application requesting FCC approval of a planned relocation of its transmission facility).

35. See *City of Kirkwood v. Union Elec. Co.*, 671 F.2d 1173, 1180-81 (8th Cir. 1982) (describing allegations that defendant's rate filings before the FERC were improper), *cert. denied*, 459 U.S. 1170 (1983); *City of Mishawaka v. American Elec. Power Co.*, 616 F.2d 976, 981-83 (7th Cir. 1980) (describing allegations that defendants' wholesale rate filings before the FERC were used improperly to "price squeeze" the plaintiffs), *cert. denied*, 449 U.S. 1096 (1981); *Illinois ex rel. Hartigan v. Panhandle E. Pipe Line Co.*, 730 F. Supp. 826, 937-38 (C.D. Ill. 1990) (describing allegations that defendant improperly opposed plaintiff's FERC requests seeking another source of natural gas and the modification of a tariff), *aff'd*, 935 F.2d 1469 (7th Cir. 1991), *cert. denied*, 502 U.S. 1094 (1992); *Consolidated Gas Co. v. City Gas Co.*, 665 F. Supp. 1493, 1509-10 (S.D. Fla. 1987) (describing allegations that defendant intervened before the FERC in order to delay consideration of plaintiff's application for natural gas), *aff'd*, 880 F.2d 297 (11th Cir. 1989), *vacated as moot*, 499 U.S. 915 (1991); *Borough of Lansdale v. Philadelphia Elec. Co.*, 517 F. Supp. 218, 219-20 (E.D. Pa. 1981) (describing allegations that defendant's application to the FERC for an auxiliary service provision was improper); see also *Oahu Gas Serv., Inc. v. Pacific Resources, Inc.*, 460 F. Supp. 1359, 1363-64 (D. Haw. 1978) (involving proceedings before the Federal Energy Administration).

36. See, e.g., *County of Suffolk v. Long Island Lighting Co.*, 710 F. Supp. 1387, 1390 (E.D.N.Y. 1989), *aff'd*, 907 F.2d 1295 (2d Cir. 1990); see also *Greenwood Utils. Comm'n v. Mississippi Power Co.*, 751 F.2d 1484, 1498-99 (5th Cir. 1985) (involving proceedings before the Department of Energy's Southeastern Power Administration).

37. See *Israel v. Baxter Lab., Inc.*, 466 F.2d 272, 274 (D.C. Cir. 1972) (describing allegations that incumbent firm made misrepresentations to and conspired with FDA officials to prevent agency approval of plaintiff's competing drug); *Mylan Lab., Inc. v. Akzo, N.V.*, 770 F. Supp. 1053, 1064 (D. Md. 1991) (describing allegations that defendants bribed FDA officials to approve their generic drugs in advance of plaintiff's drug); F-D-C REPORTS ("The Pink Sheet"), Nov. 28, 1994, at T&G-12 (describing recent antitrust lawsuit alleging that pioneer drug manufacturer manipulated FDA regulations to block approval of generic competitor); see also *supra* notes 1-2 (describing FTC investigations).

38. See *Alexander v. National Farmers Org.*, 687 F.2d 1173, 1195 (8th Cir. 1982) (describing allegations that three milk marketing cooperatives improperly attempted to block plaintiff's effort to become "qualified" by USDA on various federal market orders), *cert. denied*, 461 U.S. 937 (1983); *Cow Palace, Ltd. v. Associated Milk Producers, Inc.*, 390

Aeronautics Board (CAB),<sup>39</sup> the United States Department of Commerce,<sup>40</sup> and the Federal Reserve Board.<sup>41</sup>

Competitors also have challenged the petitioning activities of incumbent firms before various state and local agencies, including public utility commissions,<sup>42</sup> hospital construction review boards,<sup>43</sup> licensing and franchising authorities,<sup>44</sup> building permit agencies,<sup>45</sup>

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F. Supp. 696, 699 (D. Colo. 1975) (describing allegations that defendant bribed USDA officials).

39. See, e.g., *Aloha Airlines, Inc. v. Hawaiian Airlines, Inc.*, 349 F. Supp. 1064, 1065 (D. Haw. 1972) (describing allegation that competitor opposed plaintiff's application before the CAB with predatory intent), *aff'd*, 489 F.2d 203 (9th Cir. 1973), *cert. denied*, 427 U.S. 913 (1974); *Beltz Travel Serv., Inc. v. Air Transp. Ass'n*, 1974-2 Trade Cas. (CCH) ¶ 75,223 (N.D. Cal. 1974) (describing allegations of anticompetitive efforts to influence the CAB). The CAB was dissolved in 1978 and its functions transferred to the Department of Transportation (DOT). See *Airline Deregulation Act*, Pub. L. No. 95-504, § 40(a), 92 Stat. 1744 (1978).

40. See *Music Ctr. S.N.C. Di Luciano Pisoni & C. v. Prestini Musical Instruments Corp.*, 874 F. Supp. 543, 547-48 (E.D.N.Y. 1995) (describing allegations that antidumping petitions filed with agency by American company inappropriately sought to exclude Italian manufacturer from United States market); see also *Outboard Marine Corp. v. Pezetel*, 474 F. Supp. 168, 174 (D. Del. 1979) (describing allegations that defendant submitted false information to the Customs Service respecting the prices of golf carts built in Canada in the hope that dumping duties then would be assessed against plaintiff).

41. See *Association of Data Processing Serv. Orgs., Inc. v. Citibank, N.A.*, 508 F. Supp. 91, 93 & n.1 (S.D.N.Y. 1980) (describing allegation that defendant improperly challenged plaintiff's application to the Board to transfer data processing activities to a non-banking subsidiary).

42. See *MCI Communications Corp. v. American Tel. & Tel. Co.*, 708 F.2d 1081, 1156-58 (7th Cir.) (describing allegations that defendant improperly filed interconnection tariffs with state utility commissions throughout the country to delay plaintiff's entry into telecommunications market), *cert. denied*, 464 U.S. 891 (1983); *Woods Exploration & Producing Co. v. Aluminum Co. of Am.*, 438 F.2d 1286, 1292 (5th Cir. 1971) (Texas Railroad Commission), *cert. denied*, 404 U.S. 1047 (1972); *Transkentucky Transp. R.R. v. Louisville & N.R.R.*, 581 F. Supp. 759, 763 (E.D. Ky. 1983) (Kentucky Railroad Commission); *Borough of Lansdale v. Philadelphia Elec. Co.*, 517 F. Supp. 218, 219-20 (E.D. Pa. 1981) (Pennsylvania Public Utilities Commission).

43. See *Potters Medical Ctr. v. City Hosp. Ass'n*, 800 F.2d 568, 577-78 (6th Cir. 1986); *St. Joseph's Hosp., Inc. v. Hospital Corp. of Am.*, 795 F.2d 948, 955 (11th Cir. 1986); *Hospital Bldg. Co. v. Trustees of Rex Hosp.*, 691 F.2d 678, 683 (4th Cir. 1982), *cert. denied*, 464 U.S. 890, 904 (1983); *Huron Valley Hosp., Inc. v. City of Pontiac*, 650 F. Supp. 1325, 1340-41 (E.D. Mich. 1986), *aff'd*, 849 F.2d 262 (6th Cir.) (per curiam), *cert. denied*, 488 U.S. 942 (1988). For background on hospital construction reviews, see Frances H. Miller, *Antitrust and Certificate of Need: Health Systems Agencies, the Planning Act, and Regulatory Capture*, 68 GEO. L.J. 873 (1980); James B. Simpson, *Full Circle: The Return of Certificate of Need Regulation of Health Facilities to State Control*, 19 IND. L. REV. 1025 (1986).

44. See *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 439 U.S. 96, 109-10 & n.15 (1978) (describing allegations that procedure allowing automobile dealers to protest the establishment of new franchises violated federal antitrust law); *Central Telecommunications, Inc. v. TCI Cablevision, Inc.*, 800 F.2d 711, 718-19 (8th Cir. 1986) (describing

and zoning boards.<sup>46</sup> In many of these cases, of course, the courts rejected the plaintiffs' allegations as either factually unsupported or insufficient to entitle them to any relief under the antitrust laws.

A few of these cases merit somewhat more detailed description to illustrate the variety of agency procedural devices available if incumbent firms wish to delay or prevent market entry by com-

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allegations that incumbent firm subverted bidding process for cable television franchise), *cert. denied*, 480 U.S. 910 (1987); *In re Airport Car Rental Antitrust Litig.*, 693 F.2d 84, 85 (9th Cir. 1982) (describing allegations that incumbents lobbied airport officials to lease space to car rental companies on restrictive conditions), *cert. denied*, 462 U.S. 1133 (1983); *Mark Aero, Inc. v. Trans World Airlines, Inc.*, 580 F.2d 288, 297 (8th Cir. 1978) (plaintiff's allegations included claim that defendants induced the city's aviation department to refuse to file an application with FAA for approval of a master security plan); *Kurek v. Pleasure Driveway & Park Dist.*, 557 F.2d 580, 585-86 (7th Cir. 1977) (describing allegations that defendant conspired with Park District officials in awarding concessions to operate pro shops at local golf courses), *vacated*, 435 U.S. 992, *reinstated*, 583 F.2d 378 (7th Cir. 1978); *Metro Cable Co. v. CATV of Rockford, Inc.*, 516 F.2d 220, 228-29 (7th Cir. 1975) (describing allegations that defendant conspired with city council to ensure award of cable television franchise and deny plaintiff's request); *United States v. Central State Bank*, 564 F. Supp. 1478, 1482 (W.D. Mich. 1983) (describing allegation that defendant improperly filed objection with state banking authority against plaintiff's application to open a new branch).

45. *See Juster Assocs. v. City of Rutland*, 901 F.2d 266, 268-69 (2d Cir. 1990) (describing allegations that developers conspired with city officials in seeking necessary permits for proposed new shopping mall that would compete with plaintiff's existing mall); *Miracle Mile Assocs. v. City of Rochester*, 617 F.2d 18, 20 (2d Cir. 1980) (describing allegations that city, as owner of commercial property that would compete with plaintiff's proposed new shopping center, improperly petitioned state environmental commission and U.S. Army Corps of Engineers to apply their permitting and other requirements); *Franchise Realty Interstate Corp. v. San Francisco Local Joint Executive Bd. of Culinary Workers*, 542 F.2d 1076, 1078-79 (9th Cir. 1976) (describing allegations that defendants improperly opposed plaintiff's applications for building permits to construct new restaurants), *cert. denied*, 430 U.S. 940 (1977); *Rush-Hampton Indus., Inc. v. Home Ventilating Inst.*, 419 F. Supp. 19, 22-23 (M.D. Fla. 1976) (describing allegations that defendants improperly opposed plaintiff's applications to regional building code organizations and the Federal Housing Administration for approval of its ductless bathroom fans).

46. *See Liberty Lake Invs., Inc. v. Magnuson*, 12 F.3d 155, 156 (9th Cir. 1993) (describing allegations that defendant pressed improper administrative and judicial appeals of permits granted to competing shopping center), *cert. denied*, 115 S. Ct. 77 (1994); *Oberndorf v. City of Denver*, 900 F.2d 1434, 1436-37 (10th Cir.) (describing antitrust challenge to activities associated with urban renewal project), *cert. denied*, 498 U.S. 845 (1990); *Video Int'l Prod., Inc. v. Warner-Amex Cable Communications, Inc.*, 858 F.2d 1075, 1082-83 (5th Cir. 1988) (describing allegations that defendant improperly petitioned city officials to interpret zoning code as preventing cables from crossing private property lines), *cert. denied*, 490 U.S. 1047 (1989); *Landmarks Holding Corp. v. Bermant*, 664 F.2d 891, 892-95 (2d Cir. 1981) (describing allegations that defendants conspired to prevent plaintiff from opening a competing shopping center by organizing protracted opposition before the local zoning commission); *WIXT Television, Inc. v. Meredith Corp.*, 506 F. Supp. 1003, 1026-29 (N.D.N.Y. 1980) (describing allegations that defendants improperly opposed plaintiff's application for a zoning variance).

petitors. In *City of Mishawaka v. American Electric Power Co.*,<sup>47</sup> for example, ten municipalities sued a utility for alleged violations of federal antitrust law. Plaintiffs in that case claimed that the utility had engaged in unlawful “price squeezing” by charging the municipalities a wholesale rate for electricity that exceeded the utility’s retail rate, allegedly in an effort to prevent the plaintiffs themselves from continuing to compete for retail customers.<sup>48</sup> Federal law prohibits such rate discrimination.<sup>49</sup> However, the FERC generally reviews rate filings only after the fact—rates filed by a utility do not require any preapproval, though the Agency may subsequently review them and order a refund if it finds that the rates are unlawful.<sup>50</sup> Evidently, in *City of Mishawaka*, the utility had filed a series of excessive wholesale rates with the FERC, managing to file a new and even higher rate to supersede an existing rate that the Commission was about to find unjust and unreasonable.<sup>51</sup> The FERC ordered a number of refunds to the municipalities over the years, but these proceedings cost the municipalities time and money, and the Commission’s refund orders had no effect on subsequent rate filings.<sup>52</sup> On appeal, the United States Court of Appeals for the Seventh Circuit characterized these “maneuverings” as “an abuse of the administrative process.”<sup>53</sup>

In contrast to the relatively passive role assigned the FERC in reviewing the wholesale rate filings at issue in *City of Mishawaka*, the Commission is directly involved when asked to approve an allocation request under the Natural Gas Act.<sup>54</sup> In one dispute that resulted in antitrust litigation, the Consolidated Gas Company of Florida

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47. 465 F. Supp. 1320 (N.D. Ind. 1979), *aff'd in part*, 616 F.2d 976 (7th Cir. 1980), *cert. denied*, 449 U.S. 1096 (1981).

48. *Id.* at 1324.

49. See 16 U.S.C. § 824d(b) (1988); *Federal Power Comm'n v. Conway Corp.*, 426 U.S. 271, 277-79 (1976); see also Keith A. Rowley, Note, *Immunity from Regulatory Price Squeeze Claims: From Keogh, Parker, and Noerr to Town of Concord and Beyond*, 70 TEX. L. REV. 399, 405-12 (1991) (explaining price squeeze technique).

50. See 18 C.F.R. § 35 (1995).

51. *City of Mishawaka*, 465 F. Supp. at 1328. Defendants asserted that they also had sought increases in their retail rates but were unable to put them into effect without first securing approval from the Public Service Commissions of Indiana and Michigan. *Id.* at 1337-38.

52. *Id.* at 1328-29.

53. *City of Mishawaka v. American Elec. Power Co.*, 616 F.2d 976, 982-83 (7th Cir. 1980). The court found that “[t]he dual regulatory process is being taken undue advantage of by the utility, thwarting the intended balance of federal and state regulation.” *Id.* at 983.

54. See 15 U.S.C. § 717f (1988); 18 C.F.R. § 156 (1995).



applied for such an allocation so that it could resell natural gas to its existing customers.<sup>55</sup> One month later, City Gas Company of Florida filed a petition requesting leave to intervene and object to Consolidated's submission on a number of different grounds. The FERC eventually granted Consolidated's allocation request, rejecting all but one of the objections raised by City Gas.<sup>56</sup> The court noted, however, that City Gas's intervention had prevented Consolidated from receiving a temporary certificate for natural gas within ninety days of filing its allocation request and had delayed final agency action by more than one year, delays which allowed City Gas to begin providing service to most of Consolidated's customers.<sup>57</sup>

In *City of Mishawaka*, the electric utility allegedly had manipulated the FERC's rate filing procedures in a manner that allowed it to maintain clearly unlawful wholesale rates, subject only to later refunds. By contrast, incumbent firms in other industries may succeed in deterring competitors by objecting to apparently lawful rate filings. For instance, new rates published by freight forwarders (moving companies) automatically take effect after thirty days unless someone lodges a protest with the ICC, in which case the rate may be suspended pending agency review.<sup>58</sup> In one case, a freight forwarder published successively lower tariffs, as recommended by the ICC, in an effort to compete with the rates of unregulated shipper associations.<sup>59</sup> One association protested every one of these tariff amendments, without regard to the merits; although the freight forwarder prevailed before the ICC in each proceeding, it claimed that the shippers who were its customers would not use a rate which was under investigation.<sup>60</sup> The freight forwarder alleged that the association's intent "was not to induce favorable administrative action from the ICC, but rather to saddle [it] with such onerous regulatory

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55. See *Consolidated Gas Co. v. City Gas Co.*, 665 F. Supp. 1493, 1509 (S.D. Fla. 1987), *aff'd*, 880 F.2d 297 (11th Cir. 1989), *vacated as moot*, 499 U.S. 915 (1991).

56. *Id.*

57. *Id.* at 1509-10. According to the court, "two facts are clear: first, Consolidated was severely damaged by the delay which occurred as a direct result of City Gas' intervention; and, second, City Gas' reason for opposing Consolidated's application was to protect its own domain." *Id.* at 1542.

58. See 49 U.S.C. §§ 10,725, 10,762(c)(3) (1988); 49 C.F.R. § 1312 (1995).

59. See *Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc.*, 690 F.2d 1240, 1246 (9th Cir. 1982), *cert. denied*, 459 U.S. 1227 (1983).

60. *Id.* at 1246-47, 1253. Plaintiff also alleged that defendants had submitted fraudulent information to the ICC in connection with their rate protests. *Id.* at 1259-60.

and administrative burdens that it would be forced to withdraw the rates."<sup>61</sup>

The American Telephone & Telegraph Company (AT&T), a frequent target of antitrust litigation, has been challenged on a number of occasions for its conduct before the FCC and state regulatory agencies. In one case, government prosecutors alleged that AT&T had pressed several false and groundless claims in opposition to applications filed with the FCC in order to frustrate market entry by competitors.<sup>62</sup> Internal documents revealed that AT&T's opposition to one particular application was baseless and sought only to delay FCC consideration of this threat to the company's monopoly in network transmission.<sup>63</sup> In fact, although the applicant ultimately prevailed before the Commission, it was forced to declare bankruptcy, in part because it had been "financially weakened by the delay" in administrative review.<sup>64</sup>

In another case, a private plaintiff successfully alleged that AT&T's filing of certain interface tariffs had been intended solely to delay competition.<sup>65</sup> As the United States Court of Appeals for the Second Circuit explained in affirming judgment for the plaintiff:

AT&T had no realistic hope that the FCC would approve the interface device; its own people thought that the device was a redundant "artificial barrier" to competition. It nevertheless consciously pursued a policy of delaying the time when the FCC would strike down the PCA requirement. It implemented this policy by making baseless claims relative to potential harms to the network while opposing certification standards in every way possible.<sup>66</sup>

In a third reported case, MCI Communications alleged that AT&T had filed tariffs for interconnection charges with forty-nine state commissions, knowing that these agencies lacked jurisdiction over

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61. *Id.* at 1254.

62. *See* United States v. American Tel. & Tel. Co., 524 F. Supp. 1336, 1361, 1363 (D.D.C. 1981).

63. *Id.* at 1364.

64. *Id.* at 1364 n.116.

65. *See* Litton Sys., Inc. v. American Tel. & Tel. Co., 700 F.2d 785, 810-11 (2d Cir. 1983), *cert. denied*, 464 U.S. 1073 (1984).

66. *Id.* at 811; *see also* Jack Faucett Assocs. v. American Tel. & Tel. Co., 744 F.2d 118, 123-24 (D.C. Cir. 1984) (describing efforts by a different company to collaterally estop AT&T on issues decided in *Litton*); Mid-Texas Communications v. American Tel. & Tel. Co., 615 F.2d 1372, 1383-84 (5th Cir.) (describing allegations that defendant's opposition to plaintiff's complaint before the FCC was merely a delaying tactic), *cert. denied*, 449 U.S. 912 (1980).

long distance communications but hoping that this tactic would delay MCI's market entry by forcing the company first to resolve the issue with each state commission and then with the FCC.<sup>67</sup>

### C. *Estimating the Prevalence of Sham Petitioning*

Thus, plaintiffs in antitrust cases have alleged sham petitioning in a wide variety of administrative contexts.<sup>68</sup> These cases provide only a limited sense for the variety of procedural mechanisms that incumbent firms may use to deter competition, and they can offer no real insight into the actual prevalence of such behavior. On occasion, agencies candidly acknowledge that a problem may exist.<sup>69</sup> An informal survey conducted by the author uncovered a range of opinions about the prevalence of sham petitioning.<sup>70</sup> Although this survey lacks any statistical value and can serve only as a very rough indicator of the views of persons closely associated with the administrative process, the results suggest, consistent with the record of antitrust litigation described above, that administrative licensing

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67. See *MCI Communications v. American Tel. & Tel. Co.*, 708 F.2d 1081, 1155-57 & n.114 (7th Cir.), cert. denied, 464 U.S. 891 (1983).

68. See Milton Handler & Richard A. De Sevo, *The Noerr Doctrine and Its Sham Exception*, 6 CARDOZO L. REV. 1, 14-15 (1984). In fact, these authors found that "[t]he largest number of suits raising [these] issues [have] concerned the petitioning of administrative bodies." *Id.* at 20. Although no systematic effort has been made to determine whether this trend has continued over the last decade, questions concerning the proper application of the sham exception to proceedings before federal and state agencies continue to arise with some frequency even though one might expect the number to decrease as the futility of bringing these antitrust claims becomes more apparent to litigants.

69. See *Clipper Express v. Rocky Mountain Motor Tariff Bureau*, 690 F.2d 1240, 1262 n.34 (9th Cir. 1982) (describing ICC amicus brief urging the court to impose treble damages against defendant in private antitrust litigation for alleged sham petitioning before the agency), cert. denied, 459 U.S. 1227 (1983); 60 Fed. Reg. 32,099, 32,100 (1995) (to be codified at 21 C.F.R. § 1301) (noting that, although it was aware of only a couple of specific past instances, DEA was concerned about incumbents' use of regulatory hearings to deter or delay market entry by competitors).

70. The author sent a short questionnaire to the general counsels of several federal agencies and to a number of private attorneys in Washington, D.C., who once served in and continue to practice before many of these same agencies. Twenty-two questionnaires were returned (some of which requested confidential treatment), and copies are on file with the author. Roughly half of the thirteen responses received from agency officials indicated that sham petitioning occurs "rarely" or "never," and that the participation by parties with economic interests delayed the agency's resolution of a pending matter only "insignificantly." The remaining responses suggested that sham petitioning occurs at least "occasionally" and may "moderately" increase delays. Of the nine responses received from the private attorneys, half indicated that sham petitioning occurs at least "occasionally," and all but one felt that participation by third parties increased agency delays "moderately" or "substantially."

procedures may be more susceptible to anticompetitive abuse than other types of agency proceedings.

Sham petitioning in the regulatory arena is not an unexpected phenomenon. Many commentators have recognized the strategic opportunities available to incumbent firms.<sup>71</sup> As one scholar recently observed: "Entering a market nowadays can require approvals from a myriad of licensing boards, zoning commissions, and environmental regulators. A firm that is repeatedly opposed in such proceedings without regard to the legal merits can have its entry to the market delayed for a long time."<sup>72</sup> In its 1988 enforcement guidelines, the Antitrust Division of the U.S. Department of Justice noted that the "use of governmental processes to disadvantage a competitor and thus to increase market power is in general a more plausible anticompetitive strategy than is pricing below cost because a firm may be able to trigger significant litigation costs and other administrative burdens at little cost to itself."<sup>73</sup> Indeed, such opportunities for deterring market entry may have been part of the political bargain struck

71. See, e.g., ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* 364 (1978) ("Predation through the misuse of governmental processes appears to be a common but little-noticed phenomenon."); BRUCE M. OWEN & RONALD BRAEUTIGAM, *THE REGULATION GAME: STRATEGIC USE OF THE ADMINISTRATIVE PROCESS* 2-5 (1978) (identifying opportunities for strategic use of the administrative process); Thomas A. Balmer, *Sham Litigation and the Antitrust Laws*, 29 *BUFF. L. REV.* 39, 39 (1980) (noting that companies may intervene in administrative proceedings to "tie up smaller businesses in uncertain and expensive proceedings, thereby increasing the cost of doing business and preventing or delaying new entries into a particular market"); Ralph Winter, *The Use of Adjudicative Processes to Injure Competitors*, in *THE POLITICAL ECONOMY OF REGULATION: PRIVATE INTERESTS IN THE REGULATORY PROCESS* 278 (FTC Law & Econ. Conf., Mar. 1984) (noting that regulatory requirements are "subject to strategic manipulation," and that often "the very pendency of ongoing administrative or judicial proceedings, whether in licensing, environmental safeguards, public health, building safety, zoning, or whatever, will halt the development of a new business").

72. Einer Elhauge, *Making Sense of Antitrust Petitioning Immunity*, 80 *CAL. L. REV.* 1177, 1229 (1992); see also James D. Hurwitz, *Abuse of Governmental Processes, the First Amendment, and the Boundaries of Noerr*, 74 *GEO. L.J.* 65, 69 (1985) ("Manipulating governmental processes to secure advantages over existing and potential rivals can be an attractive competitive strategy. A predator's conduct can be far more potent, and its impact more permanent, when bolstered by the powers of government."); Richard A. Manso, Comment, *Licensing of Nuclear Power Plants: Abuse of the Intervention Right*, 21 *U.S.F. L. REV.* 121, 122 (1986) (noting that "non-meritorious allegations result in unnecessary delays" in nuclear power plant licensing proceedings).

73. Antitrust Enforcement Guidelines for International Operations § 3.2, 4 Trade Reg. Rep. (CCH) ¶ 13,109.10, at 20,596 (Dep't of Justice, Nov. 10, 1988); see also Hurwitz, *supra* note 72, at 71-73 (identifying various possible asymmetries in the costs of bringing and defending against actions before government agencies).

between lawmakers and regulated entities,<sup>74</sup> a hypothesis drawn from the more general notion that agencies may become “captured” by the very firms that they were established to regulate.<sup>75</sup>

It is also profoundly difficult to distinguish legitimate petitioning from arguably improper use of administrative processes. As discussed at length in the next Part, courts have struggled in antitrust cases to define “sham” petitioning, but that effort has produced, at best, only a partial and largely unsatisfying definition.<sup>76</sup> Although the sham exception to the *Noerr-Pennington* doctrine—which is the subject of the next Part—provides a useful starting point for resolving this definitional quandary, the effort to delineate a category of abusive conduct must await a richer description of the competing interests and policies potentially affected by such an undertaking.

## II. ANTITRUST LAW AND SHAM PETITIONING

Although plaintiffs’ allegations in antitrust litigation provide some sense for the possible abuses of the regulatory process, one must remember that the federal antitrust laws were not designed as a

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74. See, e.g., Antitrust Enforcement Guidelines for International Operations § 3.2, *supra* note 73 (“Indeed, many governmental processes are designed precisely to allow firms to attempt to exclude existing or potential competitors . . .”); Frank H. Easterbrook, *Petitioning for Protection from Competition: A Comment*, in *THE POLITICAL ECONOMY OF REGULATION*, *supra* note 71, at 93, 98 (“The incumbents in an industry may have scored a political victory, the essence of which was the creation of a cumbersome administrative process that could be invoked to retard entry or price reductions by rivals.”).

75. See, e.g., William W. Bratton & Joseph A. McCahery, *Regulatory Competition, Regulatory Capture, and Corporate Self-Regulation*, 73 N.C. L. REV. 1861, 1885-88 (1995); Jonathan R. Macey, *Administrative Agency Obsolescence and Interest Group Formation: A Case Study of the SEC at Sixty*, 15 CARDOZO L. REV. 909, 913-14 (1994); Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1684-87 (1975); John Shepard Wiley, Jr., *A Capture Theory of Antitrust Federalism*, 99 HARV. L. REV. 713, 723-26 (1986); cf. Glen O. Robinson, *The Federal Communications Commission: An Essay on Regulatory Watchdogs*, 64 VA. L. REV. 169, 190-91 (1978) (“Though it cannot always explain how the agency will choose among competing industry interests, the [capture] theory does suggest how the agency will choose between industry and nonindustry interests or between regulated and unregulated interests.”). *But see* PAUL J. QUIRK, *INDUSTRY INFLUENCE IN FEDERAL REGULATORY AGENCIES* 177 (1981) (finding no empirical support for this theory).

76. See *Professional Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 113 S. Ct. 1920, 1925 (1993) (“The courts of appeals have defined ‘sham’ in inconsistent and contradictory ways.”); *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 507 n.10 (1988) (criticizing one court’s approach to the question as “render[ing] ‘sham’ no more than a label courts could apply to activity they deem unworthy of antitrust immunity (probably based on unarticulated consideration of the nature and context of the activity)”); *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 513 (1972) (conceding that this “may be a difficult line to discern and draw”).

response to this problem. On the contrary, as will be recounted in this Part, the Supreme Court initially recognized a far-reaching immunity from antitrust scrutiny for petitions to the government, which it only later qualified by a limited exception for what it called sham petitioning. Rather than designing procedures to combat any threats of anticompetitive manipulation arising from this judicial recognition of petitioning immunity, federal agencies actually increased the opportunities for interference by third parties.<sup>77</sup> In casting around for a substitute for administrative reforms, courts and lawyers seized upon the sham exception as a mechanism for using the antitrust laws to monitor and potentially control abuses of agency procedures. Thus, the existing reliance on antitrust laws to protect the integrity of the regulatory process cannot be ascribed to any conscious choice of the Sherman Act as the most effective or desirable mechanism for policing participants; it just happened that little else was available.

Because sham petitioning has been a subject addressed almost exclusively from an antitrust perspective, it is first necessary to sketch out the basic outlines of petitioning immunity and the sham exception.<sup>78</sup> The term “petition” in this context broadly refers to any formal or informal request directed to a government official or entity, ranging from lobbying legislators to filing claims before a court. After introducing the Supreme Court’s foundational decisions in the area, this Part describes some of the difficulties encountered by the lower courts in applying the sham exception. The focus here will be on those aspects of the doctrine that are most relevant in guarding against potential abuses of the regulatory process.

After reviewing the Court’s most recent guidance on these questions, this Part identifies the shortcomings that arise if one attempts to rely solely on the antitrust laws to police sham petitioning before

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77. See *infra* notes 255-72 and accompanying text.

78. This Article makes no pretense of attempting to join in the debate over these issues; instead, it hopes to move beyond that debate, at least as it relates to sham petitioning in the administrative context. For a much more detailed treatment of the antitrust issues, see PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION* ¶ 203.1 (Supp. 1994); Balmer, *supra* note 71; Elhauge, *supra* note 72; Daniel R. Fischel, *Antitrust Liability for Attempts to Influence Government Action: The Basis and Limits of the Noerr-Pennington Doctrine*, 45 U. CHI. L. REV. 80 (1977); Handler & De Sevo, *supra* note 68; Earl W. Kintner & Joseph P. Bauer, *Antitrust Exemptions for Private Requests for Governmental Action: A Critical Analysis of the Noerr-Pennington Doctrine*, 17 U.C. DAVIS L. REV. 549 (1984); Gary Minda, *Interest Groups, Political Freedom, and Antitrust: A Modern Reassessment of the Noerr-Pennington Doctrine*, 41 HASTINGS L.J. 905 (1990).

administrative agencies. A number of commentators have suggested valuable reforms in antitrust law, but an approach that focuses instead on directly limiting opportunities for abuse of agency procedures will better protect the integrity of the regulatory process, and may also advance competition policy more effectively, than would ever be possible by using the sham exception to *Noerr-Pennington* immunity.

#### A. *Origins of Petitioning Immunity and the Sham Exception*

In *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*,<sup>79</sup> the United States Supreme Court held that lobbying activities would not subject a person or group of persons to antitrust liability.<sup>80</sup> The case involved a deceptive political campaign waged as part of an economic feud between the railroad and trucking industries for control of the interstate market for heavy freight hauling. In their lawsuit, representatives of the trucking industry alleged that the railroads' publicity campaign opposing state legislation favorable to truckers violated the Sherman Act because the sole purpose of the campaign was to hamper the trucking industry's ability to compete.<sup>81</sup>

The Supreme Court decided in *Noerr* that the Sherman Act did not apply to prohibit activities comprising the "mere solicitation of governmental action with respect to the passage and enforcement of laws,"<sup>82</sup> even if those activities were fraudulent or deceptive.<sup>83</sup> The Court feared that an expansive construction of the antitrust statute would impinge upon the First Amendment right to petition and impair the government's ability to function effectively by denying it an important source of information:

The right of the people to inform their representatives in government of their desires with respect to the passage or enforcement of laws cannot properly be made to depend

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79. 365 U.S. 127 (1961).

80. *See id.* at 144-45.

81. *See id.* at 129-30. The Court characterized the dispute as arising from: a "no-holds-barred fight" between two industries both of which are seeking control of a profitable source of income. Inherent in such fights, which are commonplace in the halls of legislative bodies, is the possibility, and in many instances even the probability, that one group or the other will get hurt by the arguments that are made.

*Id.* at 144 (footnotes omitted).

82. *Id.* at 138.

83. *See id.* at 140-42 (describing a so-called "third-party technique" used in the publicity campaigns as deceptive but declining to find that this had any relevance to the antitrust inquiry). The deception of the public and public officials, "reprehensible as it is, can be of no consequence so far as the Sherman Act is concerned." *Id.* at 145.

upon their intent in doing so. It is neither unusual nor illegal for people to seek action on laws in the hope that they may bring about an advantage to themselves and a disadvantage to their competitors.<sup>84</sup>

Although it therefore decided that anticompetitive intent was irrelevant, the Court suggested that “[t]here may be situations in which a publicity campaign, ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor and the application of the Sherman Act would be justified.”<sup>85</sup> The *Noerr* Court did not provide any further elaboration of this suggested “sham” exception to its newly recognized antitrust immunity for petitioning.

Four years later, in *United Mine Workers v. Pennington*,<sup>86</sup> the Court made it clear that efforts directed at executive officials or agencies were immune from antitrust scrutiny in the same way that the publicity campaign directed to the legislature was protected in *Noerr*. In *Pennington*, an industry union and several large coal mining firms allegedly had urged the Secretary of Labor to establish minimum wage levels that would have the effect of squeezing out smaller firms that sold coal on the spot market.<sup>87</sup> The Court held such conduct immune: “Joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition.”<sup>88</sup>

In the last decision of the original trilogy, *California Motor Transport Co. v. Trucking Unlimited*,<sup>89</sup> the Court clarified several aspects of the *Noerr* and *Pennington* decisions. First, it held that the

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84. *Id.* at 139. “Indeed, it is quite probably people with just such a hope of personal advantage who provide much of the information upon which governments must act.” *Id.* Thus, injuries to competitors that result from otherwise legitimate lobbying efforts would not be cognizable under the Sherman Act. “It seems inevitable, whenever an attempt is made to influence legislation by a campaign of publicity, that an incidental effect of that campaign may be the infliction of some direct injury upon the interests of the party against whom the campaign is directed.” *Id.* at 143 (adding that “it is equally inevitable that those conducting the campaign would be aware of, and possibly even pleased by, the prospect of such injury”).

85. *Id.* at 144. The Court hastened to add that “[n]o one denies that the railroads were making a genuine [and what proved to be a “highly successful”] effort to influence legislation and law enforcement practices.” *Id.*

86. 381 U.S. 657 (1965).

87. *Id.* at 660.

88. *Id.* at 670. The Court also noted that “*Noerr* shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose.” *Id.*

89. 404 U.S. 508 (1972).



immunity was founded on the constitutional right to petition the government for redress of grievances.<sup>90</sup> Second, the Court held that this immunity extended to adjudicative proceedings before agencies and courts.<sup>91</sup> Finally, and most importantly for present purposes, it gave effect to the dictum in *Noerr* concerning sham petitioning and suggested that this exception should have an even broader application outside of the legislative context: "Misrepresentations, condoned in the political arena, are not immunized when used in the adjudicatory process."<sup>92</sup>

The plaintiffs in *California Motor Transport* alleged that a group of trucking companies had opposed, without regard to the merits, every one of their license applications to state regulatory agencies.<sup>93</sup> The Supreme Court held that such conduct would make the *Noerr-Pennington* defense inapplicable,<sup>94</sup> explaining that "a pattern of baseless, repetitive claims may emerge which leads the factfinder to conclude that the administrative and judicial processes have been abused . . . , effectively barring respondents from access to the agencies and courts."<sup>95</sup> The Court conceded that incumbent firms enjoyed a right to petition the government to oppose applications filed by competitors, but it emphasized that this right would not necessarily immunize them from antitrust liability.<sup>96</sup>

90. *Id.* at 510-11. In *Noerr*, the Court had rested its decision on an interpretation of the Sherman Act that was informed only partially by First Amendment concerns. *Eastern R.R. Presidents Conference v. Noerr Motor, Inc.*, 365 U.S. 127, 132 n.6, 137-38 (1961); see also Fischel, *supra* note 78, at 84 (explaining ambiguity about the constitutional basis of the holding in *Noerr*).

91. *California Motor Transp.*, 404 U.S. at 510 ("Certainly the right to petition extends to all departments of the Government."). The Court concluded that

it would be destructive of rights of association and of petition to hold that groups with common interests may not, without violating the antitrust laws, use the channels and procedures of state and federal agencies and courts to advocate their causes and points of view respecting resolution of their business and economic interests *vis-a-vis* their competitors.

*Id.* at 510-11.

92. *Id.* at 513. As the Court went on to explain, "unethical conduct in the setting of the adjudicatory process often results in sanctions. Perjury of witnesses is one example."

*Id.* at 512. Two Justices thought that there should be no distinction "between trying to influence executive and legislative bodies and trying to influence judicial bodies." *Id.* at 517 (Stewart, J., joined by Brennan, J., concurring in the judgment).

93. See *Trucking Unlimited v. California Motor Transp.*, 432 F.2d 755, 762 (9th Cir. 1970) (detailing the plaintiffs' allegations), *aff'd*, 404 U.S. 508 (1972).

94. *California Motor Transp.*, 404 U.S. at 516.

95. *Id.* at 513.

96. See *id.* The Court found:

the following conclusions clear: (1) that any carrier has the right of access to agencies and courts, within the limits, of course, of their prescribed procedures,

Taken together, these decisions set the essential framework for petitioning immunity and the sham exception. The year following its decision in *California Motor Transport*, the Court suggested that access-barring allegations may not be necessary to satisfy the sham exception. In *Otter Tail Power Co. v. United States*,<sup>97</sup> the government alleged antitrust violations by a utility that had pressed a number of ultimately unsuccessful lawsuits for the purpose of preventing the sale of bonds necessary for the establishment of competing municipal electric systems.<sup>98</sup> The Supreme Court vacated the decision below, remanding it for reconsideration in light of its intervening decision in *California Motor Transport*, which the Court characterized as holding that the sham exception may “apply to the use of administrative or judicial processes where the purpose to suppress competition is evidenced by repetitive lawsuits carrying the hallmark of insubstantial claims.”<sup>99</sup> On remand, the district court found that “the repetitive use of litigation by Otter Tail was timed and designed principally to prevent the establishment of municipal electric systems and thereby to preserve defendant’s monopoly,”<sup>100</sup> a decision summarily affirmed by the Supreme Court.<sup>101</sup>

### *B. Elaboration of the Sham Exception*

After the Supreme Court’s initial foray into petitioning immunity and then the sham exception, lower courts assumed the difficult task of applying and further shaping these doctrines. As one trial judge observed, “[t]he distinction between the legitimate dissemination of views and the manipulation of governmental processes for anticompetitive purposes has been difficult to draw, and in various cases the courts have come to conclusions that are not always easy to recon-

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in order to defeat applications of its competitors for certificates as highway carriers; and (2) that its purpose to eliminate an applicant as a competitor by denying him free and meaningful access to the agencies and courts may be implicit in that opposition.

*Id.* at 515.

97. 410 U.S. 366 (1973).

98. *Id.* at 379 n.9 (quoting findings of the district court). The decision was also notable for recognizing that *Noerr-Pennington* immunity and its sham exception would apply to the conduct of a single defendant; the Court’s prior three decisions had involved allegations of concerted action.

99. *Id.* at 380.

100. *United States v. Otter Tail Power Co.*, 360 F. Supp. 451, 451 (D. Minn. 1973).

101. *Otter Tail Power Co. v. United States*, 417 U.S. 901 (1974) (mem.).

cile."<sup>102</sup> As this Article will explain later, these difficulties may be unavoidable, suggesting that antitrust law is not the most appropriate mechanism for protecting the integrity of the regulatory process.

In *California Motor Transport*, the Supreme Court had alluded to a number of characteristics of sham petitioning—namely, claims that were baseless and repetitive and that had the effect of barring a competitor's access to a decisionmaking body—without specifying which of these were minimally necessary before *Noerr-Pennington* immunity would become inapplicable. Ultimately, application of the sham exception turned on whether a petition to the government was genuine. For most courts, the central inquiry became whether a petition was baseless. Only a few courts have held that allegations of either repetition or access-barring are prerequisites for invoking the sham exception.

### 1. Access-Barring and Repetition

In one of the earliest cases to discuss the application of the sham exception in the agency context, the United States Court of Appeals for the Ninth Circuit upheld the dismissal of an antitrust complaint which alleged that a group of restaurant and hotel employers had improperly opposed the plaintiffs' applications before the San Francisco Board of Permit Appeals for building permits to construct new fast-food restaurants.<sup>103</sup> The court held that, in order to invoke the sham exception, the plaintiffs would have to allege that the defendants had engaged in specific, unprotected activities that barred the plaintiffs' access to a governmental body.<sup>104</sup> The Ninth Circuit distinguished the Supreme Court's summary affirmance in *Otter Tail* by noting that the utility's goal in that case—interfering with the sale of municipal bonds—was accomplished by the mere act of filing the

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102. *United States v. American Tel. & Tel. Co.*, 524 F. Supp. 1336, 1362 (D.D.C. 1981); see also *Kintner & Bauer*, *supra* note 78, at 570 (observing that lower court decisions "have been neither uniform nor consistent in scope and analysis").

103. *Franchise Realty Interstate Corp. v. San Francisco Local Joint Executive Bd. of Culinary Workers*, 542 F.2d 1076, 1078-79 (9th Cir. 1976), *cert. denied*, 430 U.S. 940 (1977).

104. *Id.* at 1082 & n.4; see also *Razorback Ready Mix Concrete Co. v. Weaver*, 761 F.2d 484, 487-88 (8th Cir. 1985) (holding sham exception inapplicable absent evidence that plaintiff had been barred from meaningful access to tribunal); *Aurora Cable Communications, Inc. v. Jones Intercable, Inc.*, 720 F. Supp. 600, 603 (W.D. Mich. 1989) (same); *WIXT Television, Inc. v. Meredith Corp.*, 506 F. Supp. 1003, 1032-33 (N.D.N.Y. 1980) ("Plaintiff has not specifically pleaded or shown how it has been denied access to either the FCC or the Onondaga Zoning Board. . . . [On the contrary,] plaintiff has been given every opportunity to pursue its rights before the very same government agency it asserts it has been denied access to.").

various lawsuits.<sup>105</sup> The *Otter Tail* plaintiffs had not, however, actually been barred from access to the courts; instead, they alleged that the defendants had resorted to the courts solely for a purpose that was collateral to any hope of success on the merits.<sup>106</sup>

In subsequent cases, the Ninth Circuit declined to follow its earlier decision and agreed that access-barring was not a prerequisite for use of the sham exception.<sup>107</sup> In one of these decisions, for example, the court applied the sham exception in a case in which a shipper's association had automatically protested a series of tariff reductions published by a competing freight forwarder, even though the plaintiff apparently had enjoyed unfettered access to the ICC and ultimately succeeded in prevailing on each of the challenged tariff amendments.<sup>108</sup> In other cases, courts have not hesitated to apply the sham exception when plaintiffs were able to participate fully in adjudicatory proceedings.<sup>109</sup> Thus, the access-barring language of the Supreme Court's opinion in *California Motor Transport* has not been viewed by most lower courts as stating a prerequisite for invocation of the sham exception. Evidence that a defendant inhibited a plaintiff's access to a decisionmaking body could, of course, be quite persuasive as further support for allegations of sham petitioning.

Similarly, with only a few exceptions, the lower courts have not demanded that there be some repetition in the submission of baseless claims before applying the sham exception. Although a pattern of

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105. *Franchise Realty*, 542 F.2d at 1084. In dissent, Judge Browning took the majority to task for attempting to distinguish *Otter Tail* in this fashion. *Id.* at 1087-88 (Browning, J., dissenting).

106. *United States v. Otter Tail Power Co.*, 360 F. Supp. 451 (D. Minn. 1973), *aff'd mem.*, 417 U.S. 901 (1974).

107. See *Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau*, 690 F.2d 1240, 1257-59 & n.27 (9th Cir. 1982), *cert. denied*, 459 U.S. 1227 (1983); *Ernest W. Hahn, Inc. v. Coddling*, 615 F.2d 830, 841 n.14 (9th Cir. 1980).

108. See *Clipper Exxpress*, 690 F.2d at 1253-54. Courts in other jurisdictions have also rejected the suggestion that the applicability of the sham exception turns on whether a competitor is barred from access to agencies or courts. See, e.g., *Litton Sys., Inc. v. American Tel. & Tel. Co.*, 700 F.2d 785, 809 n.36 (2d Cir. 1983), *cert. denied*, 464 U.S. 1073 (1984); *Transkentucky Transp. R.R. v. Louisville & N.R.R.*, 581 F. Supp. 759, 770 (E.D. Ken. 1983). Evidence that petitioning denied a competitor meaningful access to administrative processes still may be relevant. See, e.g., *Hospital Bldg. Co. v. Trustees of Rex Hosp.*, 691 F.2d 678, 687 (4th Cir. 1982), *cert. denied*, 464 U.S. 890, 904 (1983).

109. See *MCI Communications v. American Tel. & Tel. Co.*, 708 F.2d 1081, 1158 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983); *Landmarks Holding Corp. v. Bermant*, 664 F.2d 891, 896 (2d Cir. 1981); *United States v. American Tel. & Tel. Co.*, 524 F. Supp. 1336, 1364 & n.116 (D.D.C. 1981); *Oahu Gas Serv., Inc. v. Pacific Resources, Inc.*, 460 F. Supp. 1359, 1385 (D. Haw. 1978).

frivolous filings would strengthen the inference that the defendant's conduct before an agency or court amounts to a sham,<sup>110</sup> there is general agreement among the courts that even a single petition may lose *Noerr-Pennington* immunity if the defendant's request for government action is not genuine and instead seeks to injure a competitor.<sup>111</sup>

## 2. Objective Baselessness and Bad Faith

A petition is a sham if it is not genuine. This restatement of the issue does little, however, to advance the search for a meaningful definition. As the Court explained in *California Motor Transport*, "opponents before agencies or courts often think poorly of the other's tactics, motions, or defenses and may readily call them baseless."<sup>112</sup> Thus, courts repeatedly have emphasized that application of the sham exception does not turn on a petitioner's subjective intent.<sup>113</sup> As one court put it, "[t]he intention to harm a competitor through administrative or judicial proceedings is the precise matter shielded by *Noerr-Pennington* immunity."<sup>114</sup> The test is primarily objective,

110. See, e.g., *Landmarks Holding Corp.*, 664 F.2d at 896 (holding that *Noerr-Pennington* immunity did not protect defendant's attempt to delay competitor's construction of a shopping mall by orchestrating a series of administrative and judicial actions to defeat a zoning variance); see also *USS-POSCO Indus. v. Contra Costa County Bldg. & Const.*, 31 F.3d 800, 810-11 (9th Cir. 1994); *Mid-Texas Communications v. American Tel. & Tel. Co.*, 615 F.2d 1372, 1384 & n.9 (5th Cir.), cert. denied, 449 U.S. 912 (1980). But cf. *United States v. American Tel. & Tel. Co.*, 524 F. Supp. 1336, 1364 (D.D.C. 1981) (finding only one of several petitions before the FCC to be a sham).

111. See, e.g., *MCI Communications*, 708 F.2d at 1154-55 & n.114; *Litton Systems*, 700 F.2d at 811 (finding that, though not a pattern of repetitive claims, AT&T's "unitary, ongoing claim" amounted to a sham); *Clipper Express*, 690 F.2d at 1254-57 & n.24 (recognizing split of authority on the question, but concluding that a single protest would be sufficient to invoke the sham exception).

112. *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 513 (1972).

113. See, e.g., *Video Int'l Prod., Inc. v. Warner-Amex Cable Communications, Inc.*, 858 F.2d 1075, 1082 (5th Cir. 1988) (explaining that petitions to agencies "are exempt from antitrust liability even though the parties seek ultimately to destroy their competitors through these actions"), cert. denied, 490 U.S. 1047 (1989); *Greenwood Utils. v. Mississippi Power Co.*, 751 F.2d 1484, 1499 (5th Cir. 1985) ("Nor does the possibility that the companies had selfish or anticompetitive ends in mind when seeking to influence the government deprive them of *Noerr-Pennington* protection."); *City of Gainesville v. Florida Power & Light Co.*, 488 F. Supp. 1258, 1265-66 (S.D. Fla. 1980) ("[A]nticompetitive motive is the very matter protected under *Noerr-Pennington*."). But see *Aloha Airlines, Inc. v. Hawaiian Airlines, Inc.*, 349 F. Supp. 1064, 1068 (D. Haw. 1972) (holding allegation that competitor opposed CAB application with predatory intent sufficient to invoke sham exception), aff'd, 489 F.2d 203 (9th Cir.), cert. denied, 417 U.S. 913 (1974).

114. *Illinois ex rel. Hartigan v. Panhandle E. Pipe Line Co.*, 730 F. Supp. 826, 937 (C.D. Ill. 1990), aff'd, 935 F.2d 1469 (7th Cir. 1991). The court held that the defendant's actions in opposition to plaintiff's FERC requests represented "a genuine attempt to influence

inquiring whether the petition is baseless or frivolous.<sup>115</sup> The fact that a petitioner intentionally causes delay in agency proceedings generally is not, by itself, sufficient to trigger the sham exception.<sup>116</sup> Only in cases where delay appears to be the *sole* purpose underlying petitions that have no reasonable chance of success on the merits would *Noerr-Pennington* immunity be lost.<sup>117</sup>

Objective baselessness may be difficult to prove in the administrative context, however, because agencies enjoy greater policymaking discretion than do the courts. Indeed, where the standards for approval of licenses and applications make reference to undefined considerations of public interest, it may be impossible to show that a competitor's objections were objectively baseless.<sup>118</sup>

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governmental action, and were not undertaken just to harass competitors and deter others . . . in spite of the fact that Panhandle also intended to harm competition." *Id.* at 939. Thus, for instance, courts have held that a competitor's bona fide reports to law enforcement officials are immune from antitrust attack. See *King v. Idaho Funeral Serv. Ass'n*, 862 F.2d 744, 745-46 (9th Cir. 1988); *Ottensmeyer v. Chesapeake & Potomac Tel. Co.*, 756 F.2d 986, 993-94 (4th Cir. 1985); *Forro Precision, Inc. v. International Business Machs. Corp.*, 673 F.2d 1045, 1059-61 (9th Cir. 1982), *cert. denied*, 471 U.S. 1130 (1985).

115. See, e.g., *Juster Assocs. v. City of Rutland*, 901 F.2d 266, 271 (2d Cir. 1990) (recognizing immunity only for petitions "asserting colorable claims within the jurisdiction of the particular tribunal"); *Litton Sys., Inc. v. American Tel. & Tel. Co.*, 700 F.2d 785, 810-11 (2d Cir. 1983) (finding ample evidence that AT&T's technical arguments to the FCC were frivolous), *cert. denied*, 464 U.S. 1073 (1984).

116. See *St. Joseph's Hosp. v. Hospital Corp. of Am.*, 795 F.2d 948, 955 (11th Cir. 1986) ("In spite of the damaging effect, the defendants were within their rights to use every available legal means to delay or forestall the [certificate of need] being issued and the anticompetitive purpose did not make them illegal."); *Litton Systems*, 700 F.2d at 813 (approving jury instruction that creating "delays does not constitute willful exercise of monopoly power as long as the petition . . . is based on a good faith interest in influencing the agency"); *Miracle Mile Assocs. v. City of Rochester*, 617 F.2d 18, 21 (2d Cir. 1980) ("Appellant's argument that some of these proceedings [to assess environmental impacts] could only delay and not defeat the construction of the shopping mall do not render those efforts frivolous."); *Mid-Texas Communications v. American Tel. & Tel. Co.*, 615 F.2d 1372, 1385 n.10 (5th Cir.) (concurring with requested jury instruction that "petitioning an administrative agency such as the FCC can result in certain delays because administrative procedures are often time consuming . . . [but] AT&T cannot be held responsible for [such] delays" (citation omitted)), *cert. denied*, 449 U.S. 912 (1980).

117. See, e.g., *Video Int'l Prod., Inc. v. Warner-Amex Cable Communications, Inc.*, 858 F.2d 1075, 1082 (5th Cir. 1988) ("[A] party that 'petitions' the government by engaging in administrative processes only to preclude or delay its competitor's access to those processes may be liable for antitrust damages under the 'sham' exception."), *cert. denied*, 490 U.S. 1047 (1989); *Landmarks Holding Corp. v. Bermant*, 664 F.2d 891, 896-97 (2d Cir. 1981) ("The right to petition the courts for the redress of grievances does not protect abuse of the judicial process through the institution and subsidization of baseless litigation and delay of its final resolution, solely to harass and hinder a competitor.").

118. See *Alexander v. National Farmers Org.*, 687 F.2d 1173, 1195 (8th Cir. 1982) ("[W]e cannot say that the attempts to block [plaintiff] from being deemed a qualified

Even when agencies must apply more particularized criteria in evaluating applications, such as having to consider the potential residential effects of zoning modifications requested by a new business, incumbent firms generally are free to press objections of this sort even though their only real interest in the matter is the threat of competition.<sup>119</sup> For example, referring back to our drug approval hypothetical, it would be difficult to say that Alpha's objections to Medica's applications to the FDA and DEA, or its array of maneuvers to block generic competition—filing a citizen petition to raise general bioequivalence concerns, objecting to particular ANDAs and DEA registrations, and lobbying state drug formulary committees—are objectively baseless even if the company's ulterior purposes were entirely transparent.

There may be situations when an incumbent firm's claims before an agency clearly are indefensible as a matter of law, and courts have applied the sham exception in the few cases in which this was true.<sup>120</sup> Similarly, a petition may be treated as a sham if its allegations lack any factual support (amounting to fraud), but simple

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cooperative were not genuine attempts to influence official policymaking."), *cert. denied*, 461 U.S. 937 (1983); *Franchise Realty Interstate Corp. v. San Francisco Local Joint Executive Bd. of Culinary Workers*, 542 F.2d 1076, 1079 (9th Cir. 1976) ("The relatively precise legal standards in light of which certain arguments may be characterized as 'frivolous' are simply absent from the rough and tumble of the political arena; almost any position, including the self-interested plea of one competitor . . . may be urged before such a political body."), *cert. denied*, 430 U.S. 940 (1977); *Rush-Hampton Indus. v. Home Ventilating Inst.*, 419 F. Supp. 19, 24 (M.D. Fla. 1976) ("The fact that opposition is strongly voiced in an administrative hearing carries in and of itself no implication of an intent to interfere with the competitor's business relations, even if the opposition contains misstatements of fact or incompletely researched or unjustified and argumentative conclusions.").

119. See BORK, *supra* note 71, at 362 (elaborating further this hypothetical case and suggesting that such conduct should constitute a violation of the antitrust laws); Hurwitz, *supra* note 72, at 69 ("Aggressively self-serving petitions, objections, and arguments are the norm, and the visible bounds of 'proper' conduct are faint at best."); cf. Easterbrook, *supra* note 74, at 97-98 ("A statute requiring 'certificates of public interest, convenience, and necessity' or other licenses as conditions of entry is more likely to be the handiwork of trade groups seeking to slow down or interdict competition from new entrants than it is to be a method of 'protecting the public' . . ."). Similarly, the "zone of interest" requirement of standing doctrine has not prevented competitors from pressing the interests of consumers in reviewing courts. See *infra* note 268.

120. See *MCI Communications v. American Tel. & Tel. Co.*, 708 F.2d 1081, 1156-57 (7th Cir.) (finding that, when it filed its tariffs, AT&T knew that state utility commissions lacked jurisdiction over interstate rates), *cert. denied*, 464 U.S. 891 (1983); *City of Mishawaka v. American Elec. Power Co.*, 616 F.2d 976, 982 (7th Cir. 1980) (finding that utility knew that its wholesale rate filings violated the Federal Power Act), *cert. denied*, 449 U.S. 1096 (1981).

inaccuracies or exaggerations generally would not suffice.<sup>121</sup> Thus, in lobbying state formulary committees, Alpha could reiterate the bioequivalence concerns that it raised unsuccessfully with the FDA, but it could not claim that the generic approvals were procured by bribery of FDA officials if there was no basis for making such an allegation. In general, the complete failure to prevail on the merits may provide some evidence of baselessness.<sup>122</sup> Conversely, success on the merits of the petition normally will demonstrate that the claim was not baseless and ensure *Noerr-Pennington* immunity.<sup>123</sup>

For the sham exception to apply, a petition must be brought solely for the purpose of interfering with a potential competitor. Evidence that a claim is baseless satisfies only the first prerequisite. In fact, some courts have suggested that the sham exception would apply only in those cases in which the defendant actually knew that its claims had no chance of success but proceeded simply in the hopes

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121. See *Assigned Container Ship Claims, Inc. v. American President Lines, Ltd.*, 784 F.2d 1420, 1423-24 (9th Cir.) (holding that the shipper's factual assertions in separate petitions to Federal Maritime Administration were not inconsistent with one another), *cert. denied*, 479 U.S. 915 (1986); *United States v. American Tel. & Tel. Co.*, 524 F. Supp. 1336, 1363-64 (D.D.C. 1981) (noting that a sham petition "must amount to a subversion of the integrity of the process," for instance by intending "to mislead the [administrative] body concerning central facts"); *WIXT Television, Inc. v. Meredith Corp.*, 506 F. Supp. 1003, 1032 (N.D.N.Y. 1980); *Rush-Hampton Indus. v. Home Ventilating Inst.*, 419 F. Supp. 19, 24 (M.D. Fla. 1976) ("At most, plaintiff has established that defendants might have been negligent in researching the ductless fan's effectiveness.").

122. See, e.g., *Landmarks Holding Corp. v. Bermant*, 664 F.2d 891, 896 (2d Cir. 1981); *Ernest W. Hahn, Inc. v. Coddling*, 615 F.2d 830, 841 & n.13 (9th Cir. 1980); see also *Transkentucky Transp. R.R. v. Louisville & N.R.R.*, 581 F. Supp. 759, 771 (E.D. Ken. 1983) (emphasizing that the "defendants were ultimately unsuccessful in each of the" proceedings before the ICC, a state regulatory commission, and the courts).

123. See, e.g., *Video Int'l Prod., Inc. v. Warner-Amex Cable Communications, Inc.*, 858 F.2d 1075, 1082 (5th Cir. 1988) (noting that the defendant succeeded in convincing city officials to adopt an interpretation of the zoning code that it had advocated), *cert. denied*, 490 U.S. 1047 (1989); *Greenwood Utils. v. Mississippi Power Co.*, 751 F.2d 1484, 1500 (5th Cir. 1985) ("[W]hen a defendant succeeds, as here, in persuading the government to adopt his position, his petitioning conduct should not be considered sham activity."); *Metro Cable Co. v. CATV of Rockford, Inc.*, 516 F.2d 220, 232 (7th Cir. 1975) (same); *Central Bank v. Clayton Bank*, 424 F. Supp. 163, 167 (E.D. Mo. 1976) ("[I]t does not appear that defendants' intervention and subsequent appeals in the state agencies and courts were baseless, since defendants prevailed at two stages of the appeals that followed denial of the [bank] charter."), *aff'd*, 553 F.2d 102 (8th Cir.), *cert. denied*, 433 U.S. 910 (1977). *But see In re Burlington N., Inc.*, 822 F.2d 518, 527-28 (5th Cir. 1987) (success may not foreclose application of sham exception), *cert. denied*, 484 U.S. 1007 (1988); *Outboard Marine Corp. v. Pezetel*, 474 F. Supp. 168, 179 & n.19 (D. Del. 1979) (success on the merits not dispositive if procured through misrepresentations).



of harming a competitor.<sup>124</sup> This approach reintroduces difficult problems of trying to divine subjective intent. Because the resolution of questions such as these often depends on inferences drawn from the petitioner's conduct, however, courts may hesitate when asked to resolve claims of *Noerr-Pennington* immunity in advance of trial.<sup>125</sup>

### 3. Distinguishing Legislative and Adjudicative Action

One final set of noteworthy questions has arisen from litigation about the sham exception. From the outset, the Supreme Court suggested a sharp distinction between the political arena of the legislature and the adjudicatory setting of judicial and administrative proceedings, with the latter category benefitting from a more expansive sham exception and a correspondingly lesser degree of petitioning immunity.<sup>126</sup> It is not, of course, simple to categorize agency decisionmaking as primarily legislative or adjudicatory.<sup>127</sup> For instance, the various procedural devices available to Alpha Pharmaceuticals arise in settings that may be characterized as primarily legislative (e.g., the citizen petition regarding bioequivalence problems with generics, and the lobbying of state formulary committees) or adjudicative (e.g., objections raised during FDA product approval and DEA licensing proceedings).

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124. See, e.g., *Greenwood Utils.*, 751 F.2d at 1500 ("Only where evidence shows that the defendant knew or should have known that the action he sought was improper would a court be justified in labeling his petitions a 'sham' not entitled to *Noerr-Pennington* protection."); *MCI Communications v. American Tel. & Tel. Co.*, 708 F.2d 1081, 1157 (7th Cir.) (citing evidence that AT&T knew that its interconnection tariff filings before state utility commissions were baseless), *cert. denied*, 464 U.S. 891 (1983); *United States v. American Tel. & Tel. Co.*, 524 F. Supp. 1336, 1364 (D.D.C. 1981) (applying sham exception to only one aspect of AT&T's conduct: "The Court can reasonably infer from [internal documents] that AT&T's sole purpose in opposing the Datran application was to preserve its monopoly and that it well knew that the positions it took before the FCC were baseless.").

125. See, e.g., *United States v. Central State Bank*, 564 F. Supp. 1478, 1482 (W.D. Mich. 1983); *Borough of Lansdale v. Philadelphia Elec. Co.*, 517 F. Supp. 218, 222 (E.D. Pa. 1981). *But cf.* *Huron Valley Hosp., Inc. v. City of Pontiac*, 650 F. Supp. 1325, 1342 (E.D. Mich. 1986) ("[A]fter extensive discovery plaintiff has failed to come forward with any evidence that would create a material issue of fact as to the bona fides of defendant's actions" in asking HHS to reconsider its approval of plaintiff's application.), *aff'd*, 849 F.2d 262 (6th Cir.) (per curiam), *cert. denied*, 488 U.S. 942 (1988).

126. See *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 513 (1972) ("Misrepresentations, condoned in the political arena, are not immunized when used in the adjudicatory process.").

127. See BORK, *supra* note 71, at 356 ("[T]here are many governmental bodies whose 'nature' on the representative-adjudicative continuum it would be difficult to state with confidence.").

Several lower courts have accepted the Supreme Court's view in *California Motor Transport* that agency licensing decisions resemble judicial rather than political processes.<sup>128</sup> Indeed, under the Administrative Procedure Act (APA), licensing is treated as an adjudicative process.<sup>129</sup> Other courts, however, have recognized the difficulty in trying to pigeonhole agency decisionmaking as either legislative or adjudicative.<sup>130</sup> In fact, even if agency proceedings are characterized as adjudicative, there may be a question as to whether particular submissions (such as tariff filings that initially may take effect without any prior agency action) even deserve to be treated as "petitions" entitled to any First Amendment protection.<sup>131</sup>

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128. See, e.g., *St. Joseph's Hosp. v. Hospital Corp.*, 795 F.2d 948, 955 (11th Cir. 1986) ("When a governmental agency such as SHPA is passing on specific certificate applications it is acting judicially."); *Metro Cable Co. v. CATV of Rockford, Inc.*, 516 F.2d 220, 228 (7th Cir. 1975) ("When the city council exercises its authority to franchise or refrain from franchising cable television systems, it still acts as a legislative body, since that is the only way it is organized and equipped to act."); *Mylan Lab., Inc. v. Akzo, N.V.*, 770 F. Supp. 1053, 1063 n.11 (D. Md. 1991) (noting that immunity applies to "attempts to influence agency action even where individualized decision-making (versus regulation of broader application) is involved"); *Outboard Marine Corp. v. Pezetel*, 474 F. Supp. 168, 179 (D. Del. 1979) ("[T]he action of the Treasury Department in assessing dumping duties against an importer is no more 'political' than any adjudicatory (i.e., fact-finding) proceeding."); *Oahu Gas Serv., Inc. v. Pacific Resources, Inc.*, 460 F. Supp. 1359, 1385 (D. Haw. 1978) (noting that defendant's reports and applications to the Federal Energy Administration "are subject to closer scrutiny because they occurred in an adjudicatory setting").

129. See 5 U.S.C. § 551(6)-(9) (1994); *City of West Chicago v. NRC*, 701 F.2d 632, 643 (7th Cir. 1983).

130. See, e.g., *Federal Prescription Serv. v. American Pharmaceutical Ass'n*, 663 F.2d 253, 266 (D.C. Cir. 1981) ("[W]here, as here, the activities complained of consist of traditional attempts to induce regulatory action, it ill serves the policies underlying *Noerr* to make the protection of the lobbying depend on the 'administrative' or 'legislative' nature of the lobbied government agency." (footnote omitted)), *cert. denied*, 455 U.S. 928 (1982); *Franchise Realty Interstate Corp. v. San Francisco Local Joint Executive Bd. of Culinary Workers*, 542 F.2d 1076, 1079 (9th Cir. 1976) ("The absence of more definite standards [governing the agency's exercise of discretion] suggests that the Board [of Permit Appeals] is as much a political as an adjudicatory body."), *cert. denied*, 430 U.S. 940 (1977). The court in *Federal Prescription Service* noted that a well-established distinction between legislative and administrative functions exists with respect to official immunity but thought it "unnecessary and inappropriate to import that distinction into a *Noerr* analysis." 663 F.2d at 266-67 n.15. *But see Franchise Realty*, 542 F.2d at 1087 n.1 (Browning, J., dissenting) ("The complaint alleges that the Board's function is adjudicatory. The majority suggests that it may in fact be legislative. The distinction is critical.")

131. See *Ticor Title Ins. Co. v. FTC*, 998 F.2d 1129, 1138 (3d Cir. 1993) (rejecting claim that collective rate setting efforts qualified as protected petitioning), *cert. denied*, 114 S. Ct. 1292 (1994); *Litton Sys., Inc. v. American Tel. & Tel. Co.*, 700 F.2d 785, 807 (2d Cir. 1983) ("AT & T cannot cloak its actions in *Noerr-Pennington* immunity simply because it is required, as a regulated monopoly, to disclose publicly its rates and operating procedures."), *cert. denied*, 464 U.S. 1073 (1984); *Oahu Gas Serv., Inc. v. Pacific Resources, Inc.*, 460 F. Supp. 1359, 1385 (D. Haw. 1978) ("[I]t is at best questionable that the activities

The courts have distinguished between legislative and adjudicatory decisionmaking because the standards of acceptable conduct are said to vary substantially in the two arenas. In the adjudicatory setting, it is argued, sham petitioning may be easier to identify because it often will be associated with some fairly clear violation of a rule of conduct. For instance, misrepresentations to an agency or court are condemned as inappropriate and, therefore, not entitled to immunity from antitrust scrutiny, whereas the norms of permissible conduct in the legislative setting may be less clearly defined.<sup>132</sup> As the Ninth Circuit explained:

There is an emphasis on debate in the political sphere, which could accommodate false statements and reveal their falsity. In the adjudicatory sphere, however, information supplied by the parties is relied on as accurate for decision making and dispute resolving. The supplying of fraudulent information thus threatens the fair and impartial functioning of these agencies and does not deserve immunity from the antitrust laws.<sup>133</sup>

Some conduct, such as bribery, is clearly not permissible in either arena, and such corrupt practices are therefore beyond the protection of *Noerr-Pennington* immunity.<sup>134</sup>

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therein alleged [such as reports to the Federal Energy Administration] were directed towards achieving a political result or affecting public policy.”). *But see* *Clipper Express v. Rocky Mountain Motor Tariff Bureau, Inc.*, 690 F.2d 1240, 1253-54 (9th Cir. 1982), *cert. denied*, 459 U.S. 1227 (1983); *Transphase Sys., Inc. v. Southern Cal. Edison Co.*, 839 F. Supp. 711, 716-17 (C.D. Cal. 1993).

132. *See* *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 513 (1972) (“Misrepresentations, condoned in the political arena, are not immunized when used in the adjudicatory process.”); *Hospital Bldg. Co. v. Trustees of Rex Hosp.*, 691 F.2d 678, 687 (4th Cir. 1982) (“[M]isrepresentations made with intent to abuse the administrative processes so as to deny [plaintiff] meaningful access to the [agency] would fall within the sham exception.”), *cert. denied*, 464 U.S. 890 (1983); *Woods Exploration & Producing Co. v. Aluminum Co. of Am.*, 438 F.2d 1286, 1298 (5th Cir. 1971) (same), *cert. denied*, 404 U.S. 1047 (1972); *United States v. American Tel. & Tel. Co.*, 524 F. Supp. 1336, 1362 n.108 (D.D.C. 1981) (noting that “a distinction may be made on the basis of the type of governmental body involved (legislative or administrative) and the function it exercises (rule-making or adjudicative) when the issue is whether a deliberate misrepresentation is protected”); *Outboard Marine Corp. v. Pezetel*, 474 F. Supp. 168, 179 (D. Del. 1979); *Oahu Gas*, 460 F. Supp. at 1385 n.49.

133. *Clipper Express*, 690 F.2d at 1261; *see also* *Hubbard v. United States*, 115 S. Ct. 1754, 1757-61 (1995) (discussing the application of 18 U.S.C. § 1001 (1988), a criminal statute prohibiting false statements in matters before “any department or agency of the United States,” to different branches of the federal government).

134. *See* *Central Telecommunications, Inc. v. TCI Cablevision, Inc.*, 800 F.2d 711, 722-25 (8th Cir. 1986), *cert. denied*, 480 U.S. 910 (1987); *Hospital Bldg. Co.*, 691 F.2d at 687; *see also* *Israel v. Baxter Lab., Inc.*, 466 F.2d 272, 278 (D.C. Cir. 1972) (“No actions which

Various questions remained unresolved in these cases involving alleged misrepresentations and other corrupt practices, such as whether this sort of misconduct itself may represent a violation of the antitrust laws if accompanied by some predatory intent. There may be a countervailing concern with allowing, by application of the antitrust laws against successful petitioning, a collateral attack on a final decision rendered by another governmental body, especially when that decisionmaker has not itself reopened the matter on account of the alleged misconduct.<sup>135</sup> In whatever manner these questions are resolved, it is important to keep in mind that the rules and norms governing the conduct of participants before various decisionmaking bodies may help determine whether a particular petition should be subject to scrutiny under the antitrust laws. As argued in subsequent sections, agencies should take greater responsibility for regulating the conduct of interested parties in the proceedings before them.

### C. Recent Supreme Court Guidance

Although lower courts struggled with these issues, the Supreme Court remained largely silent with regard to *Noerr-Pennington* immunity and the sham exception for nearly fifteen years. Then, beginning in 1988, the Court decided a series of cases addressing some of these questions. In the first of the series, *Allied Tube & Conduit Corp. v. Indian Head, Inc.*,<sup>136</sup> the Court held that *Noerr* immunity did not apply to a company's efforts to manipulate the standard-setting process of a private association notwithstanding the fact that these product standards were widely adopted by state and local governments.<sup>137</sup> The Court summarized its earlier decisions on petitioning immunity in the following terms:

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impair the fair and impartial functioning of an administrative agency should be able to hide behind the cloak of an antitrust exemption." (footnote omitted). *But cf.* *Bustop Shelters, Inc. v. Convenience & Safety Corp.*, 521 F. Supp. 989, 995-96 (S.D.N.Y. 1981) (holding that sham exception did not apply even if defendants had improperly pressured city officials); *Cow Palace, Ltd. v. Associated Milk Producers, Inc.*, 390 F. Supp. 696, 704 (D. Colo. 1975) ("Though bribery and illegal campaign contributions may constitute abuses of the administrative process, they do not, in the context alleged here, suggest an ulterior purpose to harm competition." (footnote omitted)).

135. See Hurwitz, *supra* note 72, at 109.

136. 486 U.S. 492 (1988).

137. See *id.* at 509-10. "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 . . . [that can] more aptly be characterized as commercial activity with a political impact." *Id.* at 506-07.

A publicity campaign directed at the general public, seeking legislation or executive action, enjoys antitrust immunity even when the campaign employs unethical and deceptive methods. . . . But in less political arenas, unethical and deceptive practices can constitute abuses of administrative or judicial processes that may result in antitrust violations. . . . Of course, in whatever forum, private action that is not genuinely aimed at procuring favorable government action is a mere sham that cannot be deemed a valid effort to influence government action.<sup>138</sup>

The Court rejected the notion that the sham exception would apply where a party genuinely seeks the governmental action requested in a petition but does so through improper means.<sup>139</sup> This discussion of the sham exception in *Allied Tube* was mere dicta, however, because the Court had held that *Noerr-Pennington* immunity would not apply in the first place to conduct that did not directly or indirectly seek to influence government action.<sup>140</sup>

In 1991, the Court squarely addressed questions concerning the proper application of the sham exception.<sup>141</sup> The case arose from a dispute between two billboard companies competing in Columbia, South Carolina: Columbia Outdoor Advertising, Inc. (COA), which controlled ninety-five per cent of the relevant market, and Omni Outdoor Advertising, Inc. (Omni), the new entrant.<sup>142</sup> Omni

138. *Id.* at 499-500 & n.4. Later in the opinion, the Court characterized *Noerr* as giving "wide latitude [to] ethically dubious efforts to influence legislative action in the political arena," but it added that this immunity would not necessarily extend to "misrepresentations made under oath at a legislative committee hearing in the hopes of spurring legislative action." *Id.* at 504.

139. *Id.* at 507 n.10 (noting that such use of the word "sham" distorts its meaning).

More importantly, the Ninth Circuit's approach renders "sham" no more than a label courts could apply to activity they deem unworthy of antitrust immunity (probably based on unarticulated consideration of the nature and context of the activity), thus providing a certain superficial certainty but no real "intelligible guidance" to courts or litigants.

*Id.* (citation omitted).

140. Indian Head had asked that its plastic conduit be recognized in the next edition of the National Electrical Code, a proposal that was placed on the agenda for the 1980 meeting of the National Fire Protection Association. *Id.* at 496. Fearing competition from Indian Head's new product, Allied Tube and others interested in the continued sales of steel conduit recruited and paid for 230 persons to join and attend the annual meeting of the Association for the sole purpose of voting against this proposal, and Indian Head's proposal was rejected by the slimmest of margins (394 to 390). *See id.* at 496-97. The Court decided that such behavior would not escape antitrust scrutiny, primarily because the challenged conduct was not directed to government decisionmakers. *Id.* at 499-500.

141. *See City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365 (1991).

142. *Id.* at 367-68.

brought an antitrust suit alleging, *inter alia*, that COA executives had met with certain city officials to seek the enactment of zoning ordinances that would severely restrict new billboard construction.<sup>143</sup> The city council eventually passed an ordinance that had the effect of seriously limiting Omni's ability to compete against COA.<sup>144</sup>

The Supreme Court held that COA's lobbying enjoyed *Noerr-Pennington* immunity, rejecting Omni's argument that the sham exception should apply in this case:

The "sham" exception to *Noerr* encompasses situations in which persons use the governmental *process*—as opposed to the *outcome* of that process—as an anticompetitive weapon. A classic example is the filing of frivolous objections to the license application of a competitor, with no expectation of achieving denial of the license but simply in order to impose expense and delay.<sup>145</sup>

Of course, a person filing frivolous objections to a competitor's application for a license still would genuinely hope, even if the actual chances of success were slim, that the agency would find some merit to the objections and deny the application.<sup>146</sup> The Court decided that the sham exception did not apply to the case before it:

Although COA indisputably set out to disrupt Omni's business relationships, it sought to do so not through the very process of lobbying, or of causing the city council to consider zoning measures, but rather through the ultimate *product* of that lobbying and consideration, viz., the zoning ordinances. . . . [T]he purpose of delaying a competitor's entry into the market does not render lobbying activity a "sham" . . . .<sup>147</sup>

143. *Id.* at 368-69. The Court added that other persons had urged a similar response to the recent increase in the number of billboards. *Id.* at 368.

144. *Id.*

145. *Id.* at 380; *see also* *New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 439 U.S. 96, 110 n.15 (1978) ("Dealers who press sham protests before the New Motor Vehicle Board for the sole purpose of delaying the establishment of competing dealerships may be vulnerable to suits under the federal antitrust laws."); *City of Kirkwood v. Union Elec. Co.*, 671 F.2d 1173, 1181 (8th Cir. 1982) ("The *Noerr-Pennington* doctrine will not protect a utility which manipulates the federal and state regulatory processes to achieve anti-competitive results."), *cert. denied*, 459 U.S. 1170 (1983).

146. *See* *Litton Sys., Inc. v. American Tel. & Tel. Co.*, 700 F.2d 785, 811-12 (2d Cir. 1983) ("AT&T argues that it actually wanted the FCC to approve the interface device and reject certification standards, but as Professor Areeda points out: '[t]o be sure, [a competitor] would always be pleased to obtain a governmental decision against his rival.'"), *cert. denied*, 464 U.S. 1073 (1984).

147. *City of Columbia*, 499 U.S. at 381 (quoting its dicta from *Allied Tube*). The Court added that "*California Motor Transport* involved a context in which the conspirators'

The Court conceded that genuine attempts to influence government action could include "defensive strategies" by an applicant "seek[ing] by procedural and other means to get his opponent ignored," but it concluded that the Sherman Act was not the proper mechanism for "[p]olicing the legitimate boundaries of such" conduct.<sup>148</sup>

Most recently, in *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*,<sup>149</sup> the Supreme Court provided some further guidance for determining whether a petition is genuine. Although it arose in the context of litigation, the Court's discussion of the sham exception should apply equally to petitions brought before agencies.<sup>150</sup> The Court held that a lawsuit brought against a competitor will lose *Noerr-Pennington* immunity only if it is "objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits."<sup>151</sup> Only if a lawsuit was objectively baseless would one proceed to the second part of the test, namely, the inquiry into the petitioner's subjective intent and possible predatory motive. Although Columbia Pictures lost on summary judgment, the Court found that the company had probable cause to bring its copyright infringement action, making inquiries into its actual motivations for asserting this claim irrelevant.<sup>152</sup> The Court

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participation in the governmental process was itself claimed to be a 'sham,' employed as a means of imposing cost and delay," and that its holding in the earlier case was "limited to that situation." *Id.* at 381-82.

148. *Id.* at 382 (noting that "there may be other remedies" if Omni was wrongfully denied meaningful access to decisionmakers). The Court also rejected the "conspiracy" exception to *Noerr-Pennington* immunity that had been suggested by a number of courts. *Id.* at 382-83.

149. 113 S. Ct. 1920 (1993).

150. See *Liberty Lake Invs., Inc. v. Magnuson*, 12 F.3d 155, 157-58 (9th Cir. 1993) (applying two-part test to administrative and judicial appeals against building and zoning permits granted to competitor), *cert. denied*, 115 S. Ct. 77 (1994); *Clipper Express v. Rocky Mountain Motor Tariff Bureau, Inc.*, 690 F.2d 1240, 1258 (9th Cir. 1982) ("The same dangers that the antitrust laws seek to prohibit flow from instituting sham administrative proceedings as flow from instituting sham judicial proceedings."), *cert. denied*, 459 U.S. 1227 (1983).

151. *Professional Real Estate Investors*, 113 S. Ct. at 1928 ("If an objective litigant could conclude that the suit is reasonably calculated to elicit a favorable outcome, the suit is immunized . . ."). The Court added that a successful "lawsuit is by definition a reasonable effort at petitioning for redress and therefore not a sham." *Id.* at 1928 n.5. Justice Stevens, concurring in the judgment, pointed out that "[i]t might not be objectively reasonable to bring a lawsuit just because some form of success on the merits—no matter how insignificant—could be expected." *Id.* at 1932 (Stevens, J., concurring in the judgment) (footnote omitted) (emphasis added). See generally Gary Myers, *Antitrust and First Amendment Implications of Professional Real Estate Investors*, 51 WASH. & LEE L. REV. 1199 (1994) (analyzing the Court's decision).

152. See *Professional Real Estate Investors*, 113 S. Ct. at 1929-31.

declined, however, to decide “to what extent *Noerr* permits the imposition of antitrust liability for a litigant’s fraud or other misrepresentations.”<sup>153</sup>

#### D. Shortcomings of the Sham Exception

Because of the First Amendment interests at stake, courts have given the sham exception a narrow construction.<sup>154</sup> Petitions to the government, therefore, are cloaked in a presumption that they have been brought in good faith.<sup>155</sup> Thus, successful invocation of the sham exception is difficult because “[p]etitioners almost always genuinely desire government action, and [they] seldom have no possibility of getting it.”<sup>156</sup> Although a number of commentators have suggested better ways of accommodating the constitutional right to petition without sacrificing the pro-competitive policies underlying the antitrust laws,<sup>157</sup> even such a reformed sham exception may fail

153. *Id.* at 1929 n.6. This statement is somewhat difficult to understand given the Court’s discussion of fraud and misrepresentation in *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 512-13 (1972) (“There are many other forms of illegal and reprehensible practice which may corrupt the administrative or judicial processes and which may result in antitrust violations.”).

154. *See MCI Communications v. American Tel. & Tel. Co.*, 708 F.2d 1081, 1155 (7th Cir.) (“The lower courts have tended to read *California Motor Transport* narrowly so as not to tread on the First Amendment freedoms underlying the *Noerr-Pennington* doctrine.”), *cert. denied*, 464 U.S. 891 (1983); *Mid-Texas Communications, Inc. v. American Tel. & Tel. Co.*, 615 F.2d 1372, 1384 (5th Cir.) (“In assessing the applicability of the ‘sham exception’ to Bell’s direct representations before the FCC, it is important to note that it should be read narrowly in order to protect the first amendment right of access to administrative proceedings.”), *cert. denied*, 449 U.S. 912 (1980).

155. *See, e.g., Handgards, Inc. v. Ethicon, Inc.*, 743 F.2d 1282, 1294 (9th Cir. 1984) (stating that the presumption can be rebutted only by clear and convincing evidence of bad faith), *cert. denied*, 469 U.S. 1190 (1985); *see also Coastal States Mktg., Inc. v. Hunt*, 694 F.2d 1358, 1371-72 (5th Cir. 1983); *Energy Conservation, Inc. v. Heliodyne, Inc.*, 698 F.2d 386, 389 (9th Cir. 1983).

156. Elhauge, *supra* note 72, at 1215; *see also Minda, supra* note 78, at 911 n.13 (“In the legislative and executive context . . . the sham exception has had little or no application even though these arenas are where the danger of business predation is likely to be the greatest.”).

157. *See, e.g., BORK, supra* note 71, at 355 (stating that, although citizens enjoy a constitutional right to petition, “there is also the correlative need that government be able to protect the integrity of its processes, that it be able to punish those who would abuse them.”); Fischel, *supra* note 78, at 100-04, 122 (“The virtue of the suggested approach is that it affords full and certain protection to first amendment freedoms while preserving the public policy favoring competition embodied in the antitrust laws wherever constitutionally permissible.”); Hurwitz, *supra* note 72, at 119-25 (proposing an immunity rule that is more closely calibrated to balance the competing values at stake); Robert J. Kaler, *The Sham Exception to the Noerr-Pennington Antitrust Immunity: Its Potential for Minimizing Anticompetitive Abuse of the Administrative Process*, 12 U. TOL. L. REV. 63, 90-93 (1980)



to promote the equally important goal of maintaining the integrity of the regulatory process. This latter goal receives frequent mention in judicial opinions and scholarly articles that discuss the sham exception,<sup>158</sup> but the expressions of concern seem little more than lip service. An approach that focuses instead on curbing abuses of agency procedures may also advance competition policy more effectively than would ever be possible with the sham exception to *Noerr-Pennington* immunity, at least in its current form.

Several shortcomings with the sham exception were suggested in the previous overview of the case law. First, there is the difficulty with an objective test of baselessness in the administrative context where license applications may be judged by vague standards of public necessity and convenience.<sup>159</sup> Because it will often be difficult to prove that submissions before an agency are completely devoid of possible merit, conduct that may be motivated by a predatory intent frequently will escape antitrust scrutiny.<sup>160</sup> Second, even if a petition appears to be frivolous under objective legal standards, the sham exception may still not apply if the petitioner honestly hoped to

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(suggesting a distinction between attempts to influence agencies with regard to their policymaking and commerce-regulating functions); Minda, *supra* note 78, at 1027 (arguing that courts "have mistakenly assumed that painful choices must be made in upholding either of two seemingly contradictory values—democratic values associated with the political freedom of citizens to petition government, and antitrust values protecting private actors from restraints of trade").

158. See, e.g., *Clipper Express v. Rocky Mountain Motor Tariff Bureau, Inc.*, 690 F.2d 1240, 1261 (9th Cir. 1982) ("The supplying of fraudulent information thus threatens the fair and impartial functioning of these agencies and does not deserve immunity from the antitrust laws."), *cert. denied*, 459 U.S. 1227 (1983); *Federal Prescription Serv., Inc. v. American Pharmaceutical Ass'n*, 663 F.2d 253, 263 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 928 (1982); BORK, *supra* note 71, at 364 ("In this area, antitrust can not only perform a valuable service to consumers but, as a by-product, can also contribute to the integrity and efficiency of administrative and judicial processes.").

159. See *supra* note 118 and accompanying text. A number of agencies use such amorphous tests. See, e.g., 47 U.S.C. § 307(a) (1988) (listing the FCC licensing standard that refers to "public convenience, interest, or necessity"); *Carstens v. NRC*, 742 F.2d 1546, 1551 (D.C. Cir. 1984) (deferring to agency's substantive licensing judgment), *cert. denied*, 471 U.S. 1136 (1985); *Refrigerated Transp. Co. v. ICC*, 709 F.2d 1430, 1432 (11th Cir. 1983) (same); 14 C.F.R. § 302.1704 (1995) (DOT certificates for scheduled airlines); 49 C.F.R. § 1150.4 (1994) (ICC certificates for railroads).

160. See *Easterbrook*, *supra* note 74, at 100 ("Non-colorable claims impose no loss on business rivals, because they may be disposed of by court or agency quickly. The only claims we need to worry about are the ones with just enough merit to linger and impose loss on one's rivals." (footnote omitted)); cf. *Liberty Lake Invs., Inc. v. Magnuson*, 12 F.3d 155, 157-58 (9th Cir. 1993) ("While not ultimately successful or of overwhelming strength, the suit [arising from building and zoning permits granted to a competitor] was not so objectively baseless that no reasonable litigant could realistically expect success on the merits."), *cert. denied*, 115 S. Ct. 77 (1994).

persuade agency officials.<sup>161</sup> Only in those rare instances where other conduct or incriminating documents inescapably point to bad faith and predatory intent will the sham exception come into play.<sup>162</sup>

### 1. The Hunt for Doctrinal Reforms

A number of commentators have recognized these and other limitations to reliance on the sham exception as a means of addressing abuses of the regulatory process, yet they have lost little apparent enthusiasm for the potential utility of the antitrust laws in this area.<sup>163</sup> A properly reconfigured sham exception, they contend, will suffice to prevent the anticompetitive manipulation of agency procedures.

Under one proposed revision, a series of “screens” would be used to dispose of the bulk of private antitrust cases that do not pose a true conflict between the values underlying the First Amendment and the Sherman Act.<sup>164</sup> First, a court would evaluate the pleadings to confirm that a colorable antitrust offense has been alleged before

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161. Indeed, “unsuccessful efforts in one governmental context may stimulate favorable responses in other contexts,” as when the hopeless pursuit of relief in agency proceedings may represent a political statement designed to prompt legislative reforms. Hurwitz, *supra* note 72, at 98 & n.148. “Civil rights, abortion, and environmental law are three areas in which unsuccessful (and arguably meritless) legal challenges apparently have stimulated legislative change.” *Id.* at 99 n.148.

162. See *supra* note 124; cf. *Hydro-Tech Corp. v. Sundstrand Corp.*, 673 F.2d 1171, 1176-77 (10th Cir. 1982) (holding that “sham” refers to the misuse or corruption of the governmental process and not merely the filing of a lawsuit without probable cause and with anticompetitive intent); *Grip-Pak, Inc. v. Illinois Tool Works, Inc.*, 694 F.2d 466, 472 (7th Cir. 1982) (inquiring into the cost-justifications of litigation against a competitor), *cert. denied*, 461 U.S. 958 (1983). The Supreme Court recently criticized this aspect of the decision in *Grip-Pak*. See *Professional Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 113 S. Ct. 1920, 1925 n.3 & 1931 (1993).

163. See, e.g., BORK, *supra* note 71, at 348-49 (“The antitrust laws can make a major contribution both to free competition and to the integrity of administrative and judicial processes by catching up with this means of monopolization.”); Elhauge, *supra* note 72, at 1250 (offering a “functional process perspective” to explain antitrust immunity for petitioning); Hurwitz, *supra* note 72, at 119-26 (suggesting a multi-layered approach for evaluating claims of petitioning immunity); Kaler, *supra* note 157, at 99 (concluding that antitrust law’s “potential for minimizing this abuse [of the regulatory process] should be fully recognized in the federal courts through an expansion and clarification of its scope and application”); Minda, *supra* note 78, at 999-1001 (urging courts to place greater antitrust limitations on the right of groups to petition legislative bodies); David L. Meyer, Note, *A Standard for Tailoring Noerr-Pennington Immunity More Closely to the First Amendment Mandate*, 95 YALE L.J. 832, 846 (1986) (arguing that under *Noerr-Pennington*, “injury to competition is tolerated in situations where a more precise immunity standard would minimize injury without endangering the ability of groups effectively to petition government to take legitimate action”).

164. See Hurwitz, *supra* note 72, at 122.

undertaking the constitutional analysis associated with *Noerr-Pennington* immunity.<sup>165</sup> Second, a court would ask whether the challenged conduct even qualified as petitioning or instead constituted unethical conduct not entitled to any protection under the First Amendment right to petition.<sup>166</sup> Subsequent screens would test whether the petitioning occurred in the legislative context (where it would be presumptively immune), whether it represented primarily political expression, and whether the petitioner genuinely sought the government action requested.<sup>167</sup> Beyond the initial screen, however, this sequential approach would do little more than clarify the different elements that courts have found relevant in applying the sham exception to *Noerr-Pennington* immunity; it would not overcome the inherent difficulties that arise when trying to apply the sham exception, particularly in the administrative context.

Under another suggested approach, the distinction between "political" and "commercial" free speech, whatever that may be,<sup>168</sup> would be overlaid on the associated right to petition, thereby "distinguish[ing] attempts to influence administrative agencies in the exercise of governmental policymaking functions from attempts to influence administrative agencies in the exercise of proprietary or commerce-regulating functions."<sup>169</sup> Unless the proponents of such

165. *See id.* at 122-23 ("If there is no antitrust offense or injury—and even a truncated analysis often will reveal this—the inquiry can end without the need for constitutional analysis. For example, when petitioning is bona fide, the predatory intent usually necessary for an antitrust violation will seldom be demonstrable.")

166. *See id.* at 123.

167. *See id.* at 124-25.

168. The suggested distinction between political and commercial speech is neither as clear nor as significant as suggested. *See, e.g.*, Ronald A. Cass, *Commercial Speech, Constitutionalism, Collective Choice*, 56 U. CIN. L. REV. 1317, 1340-45 (1988); Lars Noah & Barbara A. Noah, *Liberating Commercial Speech*, 47 U. FLA. L. REV. (forthcoming 1995). First, traditionally safeguarded speech enjoys full protection notwithstanding the fact that it pertains to some commercial activity; the mere existence of some underlying profit motive does not trigger a lesser degree of constitutional scrutiny. *See Board of Trustees v. Fox*, 492 U.S. 469, 482 (1989) ("Some of our most valued forms of fully protected speech are uttered for a profit."). Second, even purely commercial speech is entitled to some meaningful First Amendment protections. *See Rubin v. Coors Brewing Co.*, 115 S. Ct. 1585, 1589-94 (1995); *Edenfield v. Fane*, 113 S. Ct. 1792, 1798 (1993). Third, even purely political speech and petitioning rights are not absolute. *See, e.g.*, *McDonald v. Smith*, 472 U.S. 479, 483-85 (1985).

169. Kaler, *supra* note 157, at 92; *see also* BORK, *supra* note 71, at 357-64 (proposing a multi-factor analysis that would depend largely on the character of the governmental process used and the decision sought by a petitioner); Natalie Abrams, Note, *The Sham Exception to the Noerr-Pennington Doctrine: A Commercial Speech Interpretation*, 49 BROOK. L. REV. 573, 594-603 (1983) (proposing to overlay commercial free speech doctrine on the right to petition). *But see* Robert P. Faulkner, *The Foundations of Noerr-*

a distinction mean to suggest that commerce-regulating activities generally would not be entitled to any *Noerr-Pennington* immunity,<sup>170</sup> such an approach might actually prove to be even more protective of sham petitioning before agencies. As previously explained, a number of courts have lumped all agency proceedings together on the adjudicative end of the spectrum,<sup>171</sup> meaning that the sham exception may be applied more readily even in cases where agencies actually are engaged in quasi-legislative decisionmaking. By recognizing the essentially political character of petitioning in this latter variety of proceedings, the proposed reforms would serve only further to immunize potentially objectionable conduct in the administrative setting.<sup>172</sup> Moreover, although greater sensitivity to these relevant differences in agency decisionmaking should be applauded,<sup>173</sup> it is doubtful that one can so readily demarcate “governmental” and “commerce-regulating” functions or agencies.<sup>174</sup>

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*Pennington and the Burden of Proving Sham Petitioning: The Historical-Constitutional Argument in Favor of a “Clear and Convincing” Standard*, 28 U.S.F. L. REV. 681, 709-13 (1994) (favoring an even narrower sham exception).

170. Although discussing one lower court decision holding that *Noerr-Pennington* immunity was inapplicable because the agency officials were acting in a proprietary (franchising) capacity, elsewhere Kaler states only that efforts to influence commerce-regulating agencies “may” be subject to antitrust review and also that agency standards for processing applications would simplify efforts to apply the sham exception. See Kaler, *supra* note 157, at 93-95.

171. See *supra* note 128.

172. See BORK, *supra* note 71, at 362-63 (“Immunity is properly broader when the framing of general rules is the object of the governmental process than when the force of government is to be brought to bear on the specific rights of particular parties.”).

173. See Handler & De Sevo, *supra* note 68, at 15 n.63 (describing zoning modifications, tariff review, and franchising decisions as “a hybrid of legislative, judicial, and executive conduct”); *id.* at 20 (“Because of the breadth and variety of the responsibilities of [administrative] agencies, their actions can take on many of the attributes of the legislative or judicial processes.”); Hurwitz, *supra* note 72, at 82 (“Rulemaking by administrative agencies is functionally comparable to the lawmaking function of legislatures, as are the regulatory efforts of zoning commissions and similar boards at state and local levels.”).

174. For instance, the FDA’s primary mission is to safeguard consumers, *United States v. An Article of Drug . . . Bacto-Unidisk . . .*, 394 U.S. 784, 798 (1969), but its product approval systems, which are used to ensure public safety, could be characterized as “commerce-regulating.” Similarly, a distinction between legislative (rulemaking) and adjudicative (licensing and product approval) functions seems equally inapt. Just as incumbent firms may attempt to retard entry by filing objections to license applications, they may also request rules of general applicability, which will work primarily to the detriment of one or more potential competitors. See, e.g., Hurwitz, *supra* note 72, at 124 n.266 (“[I]t will not always be immediately evident whether the process invoked was legislative or administrative, such as where a firm presses for a favorable interpretation of an administrative regulation.”); *supra* note 26 (describing citizen petitions filed by drug manufacturers requesting that the FDA apply stringent bioequivalence rules to generic drug products).

In any event, because it would only further narrow the range of cases in which the sham exception might apply, drawing such a distinction would not help to advance the goals of deterring abuse of the regulatory process or promoting competition.

Under yet another approach, suggested by Professor Gary Minda, a more selective application of *Noerr-Pennington* immunity would allow increased antitrust scrutiny of petitioning in the legislative arena.<sup>175</sup> Professor Minda argues that the Supreme Court's assumptions about the political process, especially the supposed benefits of interest group pluralism, are unsupportable.<sup>176</sup> Proceeding instead from the insights of public choice theorists and other critics of the pluralist tradition, Professor Minda urges enhanced antitrust scrutiny of political lobbying pursued for anticompetitive ends and relatively less attention paid to sham litigation, in effect reversing the courts' greater willingness to apply the sham exception in the adjudicatory context.<sup>177</sup> Along similar lines, he explains that "agencies performing regulatory [as distinguished from adjudicatory] functions may . . . justify a more vigorous antitrust regulation policy."<sup>178</sup> Although this approach would represent the most radical modification of the *Noerr-Pennington* doctrine, even Professor Minda apparently remains enamored of an antitrust fix.

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175. See Minda, *supra* note 78, at 999-1028.

176. See *id.* at 933-35. He also challenges the First Amendment premises of *Noerr-Pennington*, explaining that petitioning by incumbent firms may interfere with others' right to petition. *Id.* at 1001-02.

177. *Id.* at 1022-23 ("Regulating predation through governmental process makes sense in the legislative and quasi-legislative setting, but it makes little sense in the judicial and quasi-judicial setting . . . [C]ourts would be wise to get out of the business of relying upon the antitrust laws to police bad faith litigation . . ."). Professor Minda reasons that "the Supreme Court failed to consider . . . the real possibility that it may be easier to corrupt the legislative spheres of government because, unlike the adjudicative spheres, legislative bodies may lack adequate internal controls to check the raw political power of corporate interests." *Id.* at 930. By contrast, petitioning in the adjudicatory branches of government "is already highly regulated by a[n] elaborate system of legal rules and procedures designed to monitor competing claims and interests." *Id.* at 971; see also Hurwitz, *supra* note 72, at 110 (noting "the practical reality that legislators may have fewer resources for determining the truth than do courts and agencies").

178. Minda, *supra* note 78, at 1023. Indeed, Professor Minda's proposed refocusing of the sham exception would apply in the administrative context: "Governmental agencies performing regulatory, as distinguished from adjudicatory, functions should be the subject of higher antitrust scrutiny due to the greater likelihood of producer capture." *Id.* at 1024. Frank Easterbrook drew the opposite conclusion from similar assumptions about agency capture, arguing that antitrust law has no place in handling alleged abuses of the administrative process because Congress may have given regulated firms a political victory, intending that the administrative process be used to reduce competition. See Easterbrook, *supra* note 74, at 98-99.

## 2. Alternatives to Antitrust

Whether or not one shares these commentators' optimism about the possibility for various types of doctrinal reform, the assumption that antitrust is the best mechanism for protecting the integrity of the regulatory process remains questionable. As one court recognized, "[t]he antitrust laws were never meant to be a panacea for all wrongs."<sup>179</sup> Even if agencies themselves encounter difficulties in policing their own processes, antitrust is not the only remedy available. For instance, plaintiffs instead may be able to assert common law tort claims against competitors for malicious prosecution or abuse of process.<sup>180</sup> Indeed, the Supreme Court recently compared the probable cause test of the sham exception to the tort of malicious prosecution.<sup>181</sup> Some lower courts have analogized the sham exception to tort claims for abuse of process,<sup>182</sup> and both malicious prosecution and abuse of process claims can arise from the institution of administrative proceedings.<sup>183</sup> Others have registered

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179. *Parmelee Transp. Co. v. Keeshin*, 292 F.2d 794, 804 (7th Cir.), *cert. denied*, 368 U.S. 944 (1961); *see also* Easterbrook, *supra* note 74, at 94 ("The antitrust laws are not designed for all social ills. Antitrust protects the operation of private markets, not the operation of government."); Minda, *supra* note 78, at 1000 ("Antitrust regulation of petitioning activity in the governmental sphere would transform the Sherman Act into a new ethical code for regulating political behavior as such."). Moreover, the Department of Justice and the FTC may not be well situated to proceed against alleged sham petitioning. *See* Hurwitz, *supra* note 72, at 121 ("[E]ven assuming *Noerr's* boundaries are perfectly drawn, there nonetheless remain significant policy, resource, and practical constraints on the ability of federal antitrust agencies to redress abusive invocations of governmental process.").

180. *See* Handler & De Sevo, *supra* note 68, at 14 ("The sham exception was never intended as a replacement for the[se] common law remedies . . . . Antitrust is too cumbersome an instrument to be used to monitor litigation between competitors. Nor is there any need for it to be so used."); *see also* John W. Wade, *On Frivolous Litigation: A Study of Tort Liability and Procedural Sanctions*, 14 HOFSTRA L. REV. 433, 437-56 (1986); Note, *Limiting the Antitrust Immunity for Concerted Attempts to Influence Courts and Adjudicatory Agencies: Analogies to Malicious Prosecution and Abuse of Process*, 86 HARV. L. REV. 715, 726-35 (1973).

181. *Professional Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 113 S. Ct. 1920, 1929 & n.7 (1993).

182. *See, e.g.,* Grip-Pak, Inc. v. Illinois Tool Works, Inc., 694 F.2d 466, 472 (7th Cir. 1982) ("The existence of a tort of abuse of process shows that it has long been thought that litigation could be used for improper purposes even when there is probable cause for the litigation . . . ."), *cert. denied*, 461 U.S. 958 (1983); *see also* Easterbrook, *supra* note 74, at 94 ("[T]he common law tort of abuse of process is better for the job."); *id.* at 100 ("The tort of abuse of process offers a useful way to strike the balance.").

183. *See, e.g.,* Von Brimer v. Whirlpool Corp., 536 F.2d 838, 847 (9th Cir. 1976) (Patent Office proceeding); *Melvin v. Pence*, 130 F.2d 423, 426-27 (D.C. Cir. 1942) (dealing with instigation of baseless revocation proceedings before licensing authority); *Harrison v.*

skepticism, however, about the possible utility of such tort claims as an alternative to antitrust review through the sham exception.<sup>184</sup>

One advocate for doctrinal reform simply asserts that “[t]he inability of the regulatory agencies themselves to promulgate new regulations which would effectively ‘maintain the integrity’ of their administrative processes necessitates greater reliance on the antitrust laws for this purpose.”<sup>185</sup> Another commentator speculates that “many regulatory programs apparently are too new and complex to have developed effective protections against abuse.”<sup>186</sup> Interestingly, this lack of confidence in agencies’ abilities to control participants sometimes is echoed by the agencies themselves. In one antitrust case, the ICC filed an amicus brief urging the court to find that deliberate misrepresentations to the Agency could provide the predicate for liability under the Sherman Act; the ICC explained that, because “ ‘many government agencies the size of the [ICC] have only a small staff to monitor the actions of litigants,’ ” the threat of treble damages might help deter wrongdoing.<sup>187</sup> This position was

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Howard Univ., 846 F. Supp. 1, 2 (D.D.C. 1993) (zoning); *Lewis v. Lhu*, 696 F. Supp. 723, 728 (D.D.C. 1988) (FCC lottery).

184. See, e.g., *Federal Prescription Serv., Inc. v. American Pharmaceutical Ass’n*, 663 F.2d 253, 263 n.9 (D.C. Cir. 1981) (declining to interpret the sham exception by reference to torts of malicious prosecution or abuse of process), *cert. denied*, 455 U.S. 928 (1982); Kaler, *supra* note 157, at 81-84; see also Myers, *supra* note 151, at 1242-46 (suggesting that the First Amendment basis underlying the Court’s recent decision in *Professional Real Estate Investors* would limit the scope of this tort action in a similar manner, namely by requiring both objective baselessness and subjective bad faith).

185. Kaler, *supra* note 157, at 91-92 (footnote omitted). Kaler recognizes that “the first amendment does not preclude the government from adopting reasonable rules for regulating the conduct of those who attempt to influence it.” *Id.* at 91. He also notes that “[t]he more specific the agency standards for evaluating claims and processing applications, the easier it will be for the courts to determine whether the alleged violators in sham exception cases are actually engaged in bringing baseless claims.” *Id.* at 95 (footnote omitted). Nonetheless, Kaler takes the position that administrative inertia makes it unlikely that agencies will modify their own procedures. See *id.* at 92 n.178. Of course a similar charge could be leveled against courts that adhere to existing *Noerr-Pennington* precedent, but this point would hardly prove that suggestions for doctrinal reform are misplaced.

186. Hurwitz, *supra* note 72, at 70 (“The absence of such internal protections may have aggravated both the frequency of abuse and the magnitude of its effects.”).

187. *Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau*, 690 F.2d 1240, 1262 n.34 (9th Cir. 1982) (quoting ICC Amicus Brief, *Clipper Exxpress* (No. 78-3684)), *cert. denied*, 459 U.S. 1227 (1983). More recently, an ICC official took the position that sham petitioning before the Commission was a thing of the past. See Letter from Henri F. Rush, General Counsel, ICC, to author (Nov. 8, 1994) (“In my experience, the only area that suffered from a true problem of ‘sham petitioning’ was the trucking application docket. [With the passage of the Motor Carrier Act of 1980], that problem no longer exists.”) (on file with author).

especially remarkable because the Commission long ago had adopted its own code of ethics for attorneys practicing before it.<sup>188</sup>

Others have expressed less pessimism about agencies' capabilities to police their own procedures.<sup>189</sup> As this Article discusses more fully in the next Part, agencies can impose sanctions to combat misrepresentations and other conduct that may taint the administrative process.<sup>190</sup> Instead of allowing courts in antitrust litigation to conclude, for instance, that the FDA and DEA have been unwitting pawns in competitive struggles between pharmaceutical companies, these and other agencies must, in the first instance, decide what sorts of conduct they will tolerate by parties to their administrative proceedings. Only if an agency then is unable to react effectively to abuses of its procedures should courts intercede. Otherwise, antitrust litigation would permit collateral attacks against final decisions in cases where the responsible agency found no reason to object to the parties' conduct. Even one of the commentators favoring doctrinal antitrust reforms concurred with this point, concluding that "the primary responsibility for protecting the integrity of governmental processes lies with the relevant governmental bodies themselves."<sup>191</sup> This has not, however, been the focus of recent commentary on sham petitioning in the administrative context, with scholars preferring instead to continue tinkering with *Noerr-Pennington* immunity.

The antitrust laws, while perhaps a useful adjunct for the most blatant abuses of regulatory procedure, can never substitute for active policing by agencies to maintain the integrity of their own processes. This is not to say, as other commentators have suggested, that antitrust scrutiny should have no place in cases where an abuse of

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188. See 49 C.F.R. § 1103.10-35 (1994); *Code of Ethics of Practitioners Before Interstate Commerce Commission*, 17 A.B.A. J. 73 (1931).

189. See Handler & De Sevo, *supra* note 68, at 11 (observing that "administrative bodies are [not] powerless to protect themselves against such misbehavior"); Hurwitz, *supra* note 72, at 122 ("There will be exceptions, of course, such as when an agency is derelict in protecting its own processes or lacks sufficiently stringent or comprehensive remedial authority, but these situations probably will arise infrequently.").

190. See, e.g., Hurwitz, *supra* note 72, at 122 ("The fact that an agency does not act against an alleged abuse of its procedures should raise an inference that there was no abuse. Conversely, if an agency penalizes an abuse, it presumably applies the remedy it deems most appropriate to redress the situation.").

191. *Id.* at 126. Hurwitz suggests that "[f]ines for repeated filing of frivolous claims, awards of attorneys' fees, requirements for more detailed pleading, stricter standing and summary disposition standards, peer review and malpractice liability for filing frivolous cases, and expanded use of business tort causes of action are all possibilities." *Id.* (footnote omitted).



process has been alleged.<sup>192</sup> Because of the significant potential for economic gain, ordinary penalties imposed by agencies may fail to deter abuse of process in pursuit of anticompetitive ends.<sup>193</sup> Instead, the problem is that the sham exception, because of its narrow scope, should not be relied upon as the primary mechanism for controlling sham petitioning. Administrative agencies must assume greater responsibility for policing the conduct of participants in regulatory proceedings. Apart from better minimizing the occasions for anticompetitive use, more clearly articulated limitations on the use of agency processes should significantly promote the ability of the courts to apply the sham exception, and possibly to impose antitrust sanctions, in cases of especially serious abuse.

### III. POSSIBLE REFORMS IN ADMINISTRATIVE PROCEDURES

Given the various shortcomings of antitrust law, and barring any dramatic modifications in the application of *Noerr-Pennington* immunity or the sham exception, one should pay greater attention to possible reforms in administrative procedures as a way to combat potential abuses of the regulatory process. Such efforts might fall into two broad categories: (1) controls on the conduct of petitioners and other participants in agency proceedings, and (2) direct limitations on the opportunity to participate. This Article will address each general approach in turn. The rules of professional responsibility and certification requirements modeled on Rule 11 might provide a partial solution, but ultimately more stringent restrictions on participation seem necessary to combat sham petitioning in the regulatory process.

#### A. Controls on the Conduct of Participants

If agencies wish to minimize anticompetitive manipulation of their procedures, they may attempt to regulate the conduct of entities

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192. See Stephen Calkins, *Developments in Antitrust and the First Amendment: The Disaggregation of Noerr*, 57 ANTITRUST L.J. 327, 344 n.87 (1988) ("If non-antitrust laws adequately deter lobbying abuses, the deterrence purpose of antitrust . . . does not justify applying it here. If deterrence is inadequate, something more than occasional antitrust exposure is needed."); Easterbrook, *supra* note 74, at 94, 98-99 (same); Lawrence A. Sullivan, *Developments in the Noerr Doctrine*, 56 ANTITRUST L.J. 361, 362 (1987) ("Both the political process and litigation can be and are policed through norms specifically designed to deal with corrupt practices and abuse of process."); Note, *Application of the Sherman Act to Attempts to Influence Government Action*, 81 HARV. L. REV. 847, 850 (1968) (arguing that "use of the Sherman Act as a vehicle for regulation of lobbying whose object is anticompetitive would be an irrationally piecemeal way to deal with lobbying abuses").

193. Elhauge, *supra* note 72, at 1221.

seeking to participate in administrative proceedings. Although the rules of professional responsibility generally are applicable to attorneys practicing before federal agencies, these rules do not provide sufficient protection against dilatory and misleading submissions. Thus, agencies may need to adopt and vigorously enforce certification requirements akin to Rule 11 of the Federal Rules of Civil Procedure as one method of guarding against sham petitioning.

### 1. Rules of Professional Responsibility

Attorneys representing clients before agencies are subject to the same ethical obligations that govern their conduct before courts. In most jurisdictions, these include duties of candor to the tribunal,<sup>194</sup> with correlative prohibitions against unnecessary delays or harassment of other parties. Rule 3.1 of the ABA's Model Rules of Professional Conduct directs that "a lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous."<sup>195</sup> In addition, under the Model Code of Professional Responsibility "a lawyer shall not . . . delay a trial . . . when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another."<sup>196</sup> Although these rules are framed in terms of conduct during the course of litigation before courts, they have equal application to adjudicatory proceedings before agencies.

Attorneys enjoy somewhat greater latitude in administrative proceedings that are not regarded as adjudicatory. Rule 3.9 of the Model Rules directs advocates in nonadjudicative proceedings before agencies to conform to the duties regarding candor to the tribunal, fairness to the opposing party and counsel, and the impartiality and decorum of the tribunal.<sup>197</sup> Notably missing from Rule 3.9,

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194. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3 (1983) (prohibiting, *inter alia*, the knowing submission of false information by a lawyer to a tribunal). Attorneys must also promote the impartiality and decorum of the tribunal, *id.* Rule 3.5 (prohibiting bribery and ex parte communications), and act with fairness to the opposing party and counsel, *id.* Rule 3.4 (prohibiting, *inter alia*, the destruction of evidence).

195. *Id.* Rule 3.1. The accompanying Comment explains that attorneys have "a duty not to abuse legal procedure."

196. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A)(1) (1986); see also MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.2 (1993) ("A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client."). The accompanying Comment explains that "[r]ealizing financial or other benefit from otherwise improper delay in litigation is not a legitimate interest of the client."

197. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.9 ("A lawyer representing a client before a legislative or administrative tribunal in a nonadjudicative proceeding shall

however, are cross-references to Rules 3.1 and 3.2, which respectively proscribe frivolous claims and other conduct designed to delay or harass.<sup>198</sup> Nonetheless, Rule 3.9 does not countenance conduct by lawyers in nonadjudicative proceedings that would be regarded as objectionable in adjudicative proceedings. As explained in the accompanying Comment, agencies "should be able to rely on the integrity of submissions made to it."<sup>199</sup>

Although the precise contours of these ethical duties may vary depending on whether the agency proceeding is considered adjudicative or legislative,<sup>200</sup> an attorney generally is expected to act no differently than he or she would act when representing a client in court.<sup>201</sup> In practice, however, these rules of professional responsibility may be viewed as somewhat less stringent in the administrative context than in the judicial.<sup>202</sup>

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disclose that the appearance is in a representative capacity and shall conform to the provisions of Rules 3.3(a) through (c), 3.4(a) through (c), and 3.5.").

198. See *id.*; GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, *THE LAW OF LAWYERING* 704-05 (2d ed. 1990) ("[T]he political arena countenances all manner of argumentation and appeals to emotion. Rule 3.1, proscribing frivolous argumentation, is accordingly inapplicable and was deliberately omitted from the list of cross-references.").

199. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.9 cmt. (1983) ("A lawyer appearing before such a body should deal with the tribunal honestly and in conformity with applicable rules of procedure.").

200. See Craig H. Allen, *Attorney Ethics and Agency Practice: Representing Clients in Coast Guard Marine Casualty Investigations*, 22 J. MAR. L. & COM. 225, 240-41 (1991) ("If the administrative agency is conducting an adjudication . . . the proceeding is adversarial and the attorney acts as an advocate[,] . . . [but] [p]ractices which would be appropriate in an adversarial adjudication may be wholly out of place in a nonadjudicative investigative proceeding."). As noted in connection with the distinction drawn for purposes of *Noerr-Pennington* immunity, however, agency proceedings span a wide spectrum. See *supra* notes 130-31, 173-74 and accompanying text.

201. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.9 cmt. (1983) ("[A]dministrative agencies have a right to expect lawyers to deal with them as they deal with courts."). Indeed, the ABA's predecessor Model Code, which remains in use in several jurisdictions, Geoffrey J. Ritts, *Professional Responsibility and the Conflict of Laws*, 18 J. LEGAL PROF. 17, 18-19 (1993), did not draw any clear distinction between adjudicative and nonadjudicative proceedings before agencies. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-15 (1980) ("[A lawyer] appearing before an administrative agency, regardless of the nature of the proceeding it is conducting, has the continuing duty to advance the cause of his client within the bounds of the law."); *cf. id.* EC 7-16 ("When a lawyer appears in connection with proposed legislation, he . . . should comply with applicable laws and legislative rules."); *In re Richmond*, 591 P.2d 728, 731 (Or. 1979) (per curiam) (drawing a distinction between adjudication and rulemaking in applying a disciplinary rule governing "administrative proceeding[s]").

202. See Allen, *supra* note 200, at 225 ("It is less well known that most of those same rules [of ethical conduct in litigation] apply while representing clients before administrative agencies."); Steven H. Leleiko, *Professional Responsibility and Public Policy Formation*, 49 ALB. L. REV. 403, 427 (1985); *cf.* CHARLES A. HORSKY, *THE WASHINGTON LAWYER*

Advocates before government agencies are prone to assume that a less rigorous standard of truthfulness and fair dealing is expected because they are operating within a highly politicized process. The absence of the traditional checks and atmosphere of adjudicatory tribunals contributes to this feeling. In a nonadjudicatory environment in which bias may be more important than actual facts, there is a predilection to sacrifice facts and at times to provide misleading information.<sup>203</sup>

In fact, some have suggested that Rule 3.9 might apply only to conduct during trial-type hearings in nonadjudicative proceedings before agencies,<sup>204</sup> an interpretation that would leave a large class of regulatory submissions prepared by attorneys wholly exempt from the rules of professional responsibility. Other commentators have argued that conduct during informal, nonadjudicative proceedings should be governed by stricter rather than lesser ethical standards precisely because of the absence of any opportunity for testing through an adversarial presentation of evidence and arguments.<sup>205</sup>

Whatever their precise contours, the ethical obligations of attorneys apparently will not suffice to prevent abuse of the regulatory process. Several agencies have adopted or incorporated by reference the rules of professional responsibility, at least with respect to conduct during formal administrative hearings.<sup>206</sup> A number of federal agencies prohibit participation by attorneys who have been

53-56, 104-06 (1952) (describing ambiguities in applying ABA's former Canons of Professional Ethics to the conduct of lawyers before legislative and administrative bodies).

203. Leleiko, *supra* note 202, at 422-23; *see also* Hurwitz, *supra* note 72, at 69 ("Aggressively self-serving petitions, objections, and arguments are the norm, and the visible bounds of 'proper' conduct are faint at best."); Philip J. Harter, *Negotiated Regulations: A Cure for Malaise*, 71 GEO. L.J. 1, 19 (1982) (noting that, in rulemaking, "parties tend to take extreme positions, expecting that they may be pushed toward the middle").

204. *See* CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* 750-51 (1986) (focusing on the use of the term "tribunal" in the Rules cross-referenced in Rule 3.9).

205. *See, e.g.*, Harold L. Marquis, *An Appraisal of Attorneys' Responsibilities Before Administrative Agencies*, 26 CASE W. RES. L. REV. 285, 285-86, 313-14 (1976).

206. *See, e.g.*, 7 C.F.R. § 1.26(b)(1) (1995) (USDA); 16 C.F.R. § 4.1(e)(1) (1995) ("All attorneys practicing before the [FTC] shall conform to the standards of ethical conduct required of practitioners in the courts of the United States and by the bars of which the attorneys are members."); 40 C.F.R. § 164.30 (1994) (EPA); 47 C.F.R. § 1.24(2) (1994) (FCC); 49 C.F.R. § 1103.10 (1994) (ICC); *see also* L. Harold Levinson, *Professional Responsibility Issues in Administrative Adjudication*, 2 B.Y.U. J. PUB. L. 219, 242-49 (1988) (describing enforcement of attorney codes of conduct by administrative law judges).

suspended or disbarred by a court,<sup>207</sup> and courts have upheld agency orders preventing attorneys found guilty of misconduct from further practice before the agency for a period of time.<sup>208</sup> As previously explained, however, these rules of conduct are somewhat unclear when applied in the administrative context.

In addition to the looser norms of behavior that exist, federal agencies have only limited direct powers to discipline attorneys for violations of the rules of professional responsibility.<sup>209</sup> Although agencies are free to refer disciplinary matters to state bar authorities,<sup>210</sup> Congress has expressly conferred authority to set attorney admission requirements on only a few agencies,<sup>211</sup> and the Agency Practice Act expressly prevents most federal agencies from establishing separate limitations on appearances by attorneys.<sup>212</sup> Furthermore, parties often appear before agencies without legal

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207. See, e.g., 8 C.F.R. § 292.3(a)(7) (1995) (INS); 17 C.F.R. § 201.2(e)(2) (1994) (SEC); 31 C.F.R. § 10.51(g) (1994) (IRS).

208. See, e.g., *Kingsland v. Dorsey*, 338 U.S. 318, 320 (1949) (per curiam) (upholding sanction for filing misleading information with PTO); *Jaskiewicz v. Mossinghoff*, 822 F.2d 1053, 1057-61 (Fed. Cir. 1987) (same); *Polydoroff v. ICC*, 773 F.2d 372, 374-75 (D.C. Cir. 1985) (upholding ICC's six month suspension order). For instance, agencies may disqualify attorneys from further participation in a particular proceeding in the event of misconduct. See, e.g., 7 C.F.R. § 1.141(d) (1995) (USDA); 10 C.F.R. § 2.713(c) (1995) (NRC); 16 C.F.R. § 1502.28 (1995) (CPSC); 31 C.F.R. § 10.51 (1994) (IRS); 47 C.F.R. § 1.1216(a), (d) (1994) (FCC); 49 C.F.R. § 511.76 (1994) (NHTSA); see also *Ubiotica Corp. v. FDA*, 427 F.2d 376, 382 (6th Cir. 1970) (stating that counsel was properly excluded from further participation in hearing for conduct deemed "dilatatory, recalcitrant, obstructive of orderly process, and contemptuous").

209. See Michael P. Cox, *Regulation of Attorneys Practicing before Federal Agencies*, 34 CASE W. RES. L. REV. 173, 195-205, 206-07 (1983-84). "Although extensive misconduct by attorneys before federal agencies has not been documented to date," Professor Cox argues that the Office of Government Ethics should promulgate uniform standards of conduct for attorneys participating in the regulatory process. *Id.* at 224.

210. See Allen, *supra* note 200, at 238 & n.93 (Although "a federal agency may not establish requirements for practice beyond membership in a state bar, it can disqualify an attorney from further practice before the agency and/or file a complaint with the attorney's state bar association for ethics violations."); Levinson, *supra* note 206, at 241 ("An administrative law judge who knows that an attorney has engaged in misconduct may refer the matter to state bar authorities . . .").

211. See 31 U.S.C. § 1026 (1988) (Department of Treasury); 35 U.S.C. §§ 31, 32 (1988) (Patent and Trademark Office (PTO)); 43 U.S.C. § 1464 (1988) (Department of Interior). Courts also have found implied delegations of such authority in some instances. See, e.g., *Touche Ross & Co. v. SEC*, 609 F.2d 570, 577-78, 582 (2d Cir. 1979).

212. See 5 U.S.C. § 500(b), (e) (1994) (exempting PTO); H.R. REP. NO. 1141, 89th Cong., 1st Sess. 2 (1965) ("The bill would do away with agency-established admission requirements for licensed attorneys, and thus allow persons to be represented before agencies by counsel of their choice.").

representation,<sup>213</sup> so the ethical obligations of lawyers would have no direct application to their conduct.<sup>214</sup> Finally, it must be remembered that the rules of professional responsibility only set the outer boundaries for ethical behavior where transgressions may trigger severe disciplinary sanctions. In recognition of this limitation, courts have chosen to establish more demanding rules of conduct designed to preserve the integrity of the litigation process, most notably Rule 11. A similar approach may be necessary in the agency context.

## 2. Certification Requirements

Just as courts have been forced to develop separate rules of conduct and accompanying sanctions to address real or perceived abuses in the context of litigation,<sup>215</sup> agencies may choose to establish and enforce similar controls over participants in the administrative arena. Certification rules are the most common method, typically requiring that each submission be signed by a party or its attorney, in effect as an attestation that the filing is brought in good faith. For instance, any document filed with the Consumer Product Safety Commission (CPSC) must be signed by a party or its representative, and this signature "represents that the signer has read [the document] and that to the best of the signer's knowledge, information and belief, the statements made in it are true and that it is not filed for purposes of delay."<sup>216</sup> Such a requirement of good faith in making allegations does not, however, necessarily create a duty to

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213. Several agencies explicitly authorize representation of parties by non-lawyers. See 17 C.F.R. § 201.2(a) (1994) (SEC); 18 C.F.R. § 385.210(a), (b) (1995) (FERC); 21 C.F.R. § 1316.50 (1995) (DEA); Levinson, *supra* note 206, at 252-54; Marlene M. Remmert, Note, *Representation of Clients before Administrative Agencies: Authorized or Unauthorized Practice of Law?*, 15 VAL. U. L. REV. 567, 599-602 (1981); Gregory T. Stevens, Note, *The Proper Scope of Nonlawyer Representation in State Administrative Proceedings: A State Specific Balancing Approach*, 43 VAND. L. REV. 245 (1990).

214. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.9 cmt. (1983) ("Lawyers have no exclusive right to appear before nonadjudicative bodies, as they do before a court. The requirements of this Rule therefore may subject lawyers to regulations inapplicable to advocates who are not lawyers.")

215. See, e.g., Judith R. McMorrow, *Rule 11 and the Federalization of Ethics*, 1991 B.Y.U. L. REV. 959, 981; David B. Wilkins, *Who Should Regulate Lawyers?*, 105 HARV. L. REV. 799, 803 (1992).

216. 16 C.F.R. § 1025.14(d)(2) (1995); see also 8 C.F.R. § 292.3(a)(15)(i) (1995) (INS); 10 C.F.R. § 2.708(c) (1995) (NRC); 13 C.F.R. § 134.15 (1995) (SBA); 14 C.F.R. § 302.4(b) (1995) (DOT); 16 C.F.R. § 4.2(e)(2) (1995) (FTC); 37 C.F.R. § 10.18(a) (1994) (PTO); 40 C.F.R. § 22.05(c)(3) (1994) (EPA); 49 C.F.R. § 511.14(d)(2) (1994) (NHTSA); 49 C.F.R. § 1104.4(a) (1994) (ICC).

investigate or confirm that the allegations are well-founded.<sup>217</sup> Some agencies only require certification that the contents of a document are accurate,<sup>218</sup> and others have more general directives against causing unreasonable delay.<sup>219</sup> Several agencies do not have any sort of certification rules in place.<sup>220</sup>

Agency certification requirements like the CPSC's are modeled in large part on Rule 11 of the Federal Rules of Civil Procedure. Until recently, Rule 11 provided in relevant part as follows:

The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.<sup>221</sup>

Although the Rule was substantially revised in 1993, its basic certification requirement remains intact.<sup>222</sup> The application of Rule 11 has

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217. See Manso, *supra* note 72, at 135. Indeed, it may be unrealistic to expect this of attorneys who practice before regulatory bodies, which may demand technically complex economic or scientific data in submissions.

218. See, e.g., 18 C.F.R. § 385.2005 (1995) (FERC); 21 C.F.R. § 10.30(b) (1995) (FDA). Moreover, it is a crime for any person intentionally to make a false statement or representation to a federal agency. See 18 U.S.C. § 1001 (1988); 17 C.F.R. § 200.311 (1994) (SEC); 21 C.F.R. § 10.20(i) (1995) (FDA); 37 C.F.R. § 1.68 (1994) (PTO); 47 C.F.R. § 1.743(d) (1994) (FCC); 49 C.F.R. § 1104.5(c) (1994) (ICC); 50 Fed. Reg. 11,030, 11,031 (1985) (NRC).

219. See, e.g., 31 C.F.R. § 10.23 (1994) (IRS); 37 C.F.R. § 10.85(a)(1) (1994) (PTO). Agencies sometimes also impose heightened pleading requirements for certain types of petitions; for instance, demanding that objections be set forth with specificity. See, e.g., 10 C.F.R. § 2.714(b)(2) (1995) (NRC); 16 C.F.R. § 1502.6(a)(5) (1995) (CPSC).

220. See, e.g., 9 C.F.R. §§ 1.28, 1.143 (1995) (USDA); 10 C.F.R. § 205.9(b) (1995) (DOE); 17 C.F.R. § 13.2 (1994) (CFTC); 17 C.F.R. § 202.6-7 (1994) (SEC).

221. FED. R. CIV. P. 11, *reprinted in* 97 F.R.D. 165, 167 (1983). When a violation occurred, courts were directed to impose "an appropriate sanction," such as payment of the other party's reasonable costs and attorney's fees incurred because of the filing. *Id.* "Greater attention by the district courts to pleading and motion abuses and the imposition of sanctions when appropriate should discourage dilatory or abusive tactics and help to streamline the litigation process by lessening frivolous claims or defenses." *Id.* advisory committee's note to 1983 amendment. The Supreme Court recently analogized the sham exception's baselessness criterion to the test under Rule 11, *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, 113 S. Ct. 1920, 1930-31 (1993), while some commentators have noted that Rule 11 is an alternative to antitrust scrutiny of sham litigation, see Hurwitz, *supra* note 72, at 126 n.270; Minda, *supra* note 78, at 973 n.235.

222. See FED. R. CIV. P. 11(b), *reprinted in* 146 F.R.D. 401, 421 (1993); Carl Tobias, *The 1993 Revision of Federal Rule 11*, 70 IND. L.J. 171, 192 (1994); Georgene M. Vairo,

attracted a great deal of scholarly attention in the past several years.<sup>223</sup> Many of these comments and criticisms apply less readily to agency certification requirements, but a few are cogent.

A number of commentators have complained that Rule 11, especially insofar as it prohibits claims unwarranted by existing law, inappropriately chills the efforts of litigants to protect their rights.<sup>224</sup> In a related vein, many of the difficulties encountered in attempts to define "sham" petitions in the antitrust context, such as trying to identify objective baselessness and subjective bad faith in regulatory submissions, arise when one tries to deter frivolous claims and dilatory tactics in litigation.<sup>225</sup> Arguably, for the same reasons that the First Amendment limits the permissible application of the Sherman Act, one could not sanction bad faith petitions unless they were also objectively baseless.<sup>226</sup> In any event, the resultant uncertainty may discourage persons from asserting legitimate claims.

Another frequent complaint against Rule 11, which prompted the 1993 amendments, concerned the emergence of "satellite" litigation triggered by parties seeking sanctions against one another.<sup>227</sup>

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*The New Rule 11: Past As Prologue?*, 28 LOY. L.A. L. REV. 39, 41 (1994).

223. See, e.g., GREGORY P. JOSEPH, SANCTIONS: THE FEDERAL LAW OF LITIGATION ABUSE (2d ed. 1994); GEORGENE M. VAIRO, RULE 11 SANCTIONS: CASE LAW, PERSPECTIVES AND PREVENTIVE MEASURES (2d ed. 1993).

224. See, e.g., Arthur B. LaFrance, *Federal Rule 11 and Public Interest Litigation*, 22 VAL. U. L. REV. 331, 333-34 (1988); Daniel E. Lazaroff, *Rule 11 and Federal Antitrust Litigation*, 67 TUL. L. REV. 1033, 1043-54 (1993); Lawrence C. Marshall et al., *The Use and Impact of Rule 11*, 86 NW. U. L. REV. 943, 961, 971 (1992); Melissa L. Nelken, *Has the Chancellor Shot Himself in the Foot? Looking for a Middle Ground on Rule 11 Sanctions*, 41 HASTINGS L.J. 383, 394 (1990); Melissa L. Nelken, *Sanctions Under Amended Federal Rule 11—Some "Chilling" Problems in the Struggle Between Compensation and Punishment*, 74 GEO. L.J. 1313, 1338-52 (1986); Mark S. Stein, *Of Impure Hearts and Empty Heads: A Hierarchy of Rule 11 Violations*, 31 SANTA CLARA L. REV. 393, 413-14 (1991); Carl Tobias, *Environmental Litigation and Rule 11*, 33 WM. & MARY L. REV. 429, 440 (1992); Georgene M. Vairo, *Rule 11: Where Are We and Where Are We Going*, 60 FORDHAM L. REV. 475, 483-86 (1991).

225. See, e.g., George Cochran, *Rule 11: The Road to Amendment*, 61 MISS. L.J. 5, 8-9 (1991); Byron C. Keeling, *Toward a Balanced Approach to "Frivolous" Litigation: A Critical Review of Federal Rule 11 and State Sanctions Provisions*, 21 PEPP. L. REV. 1067, 1073 (1994).

226. See Myers, *supra* note 151, at 1246-50 (arguing that the constitutional basis of the Court's decision in *Professional Real Estate Investors* should have equal application to Rule 11 sanctions); Thies Kölln, Comment, *Rule 11 and the Policing of Access to the Courts after Professional Real Estate Investors*, 61 U. CHI. L. REV. 1037, 1063-67 (1994) (same); cf. *Sussman v. Bank of Israel*, 56 F.3d 450, 456 (2d Cir. 1995) (reversing imposition of Rule 11 sanctions for the assertion of non-frivolous claims even though admittedly motivated in part by an improper purpose).

227. See, e.g., FED. R. CIV. P. 11 advisory committee's note to 1993 amendment ("The revision broadens the scope of this [certification] obligation, but places greater constraints



Although satellite litigation is less likely to pose a problem in the administrative context, especially if agency staff rather than parties are given the primary task of policing for violations of the certification rules, it still might result in a significant diversion of agency effort and scarce resources.

If Rule 11 were adapted to administrative procedures, as it already has been to a limited extent, perhaps the most important issue would concern the appropriate type of penalties to deter abuses. Certification rules will work only if violators fear sanctions for improper submissions. A few agencies' regulations provide that documents "may be stricken as a sham" in the case of a violation of the certification requirements,<sup>228</sup> and attorneys may be subject to appropriate disciplinary action for willful violations.<sup>229</sup> Even so, agency enforcement of these standards may be rare or haphazard,<sup>230</sup> and other certification rules are notable for the complete absence of any enforcement sanctions.<sup>231</sup>

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on the imposition of sanctions and should reduce the number of motions for sanctions presented to the court."); Lawrence M. Grosberg, *Illusion and Reality in Regulating Lawyer Performance: Rethinking Rule 11*, 32 VILL. L. REV. 575, 647-53 (1987) (discussing emergence of satellite litigation); William W. Schwarzer, *Rule 11 Revisited*, 101 HARV. L. REV. 1013, 1017-18 (1988) (same).

228. See, e.g., 10 C.F.R. § 2.708(c) (1995) (NRC); 16 C.F.R. § 4.3(e)(2) (1995) (FTC); 47 C.F.R. § 1.52 (1994) (FCC). Similar sanctions apply in cases of improper ex parte communications. See 5 U.S.C. § 557(d)(1)(D) (1994) (a party's claim or interest in an adjudicatory proceeding may be "dismissed, denied, disregarded, or otherwise adversely affected on account of such violation"); Professional Air Traffic Controllers Org. v. FLRA, 685 F.2d 547, 564 (D.C. Cir. 1982) (summarizing factors to consider when addressing objections about ex parte contacts); see also *Atlantic Richfield Co. v. United States Dep't of Energy*, 769 F.2d 771, 792-95 (D.C. Cir. 1984) (upholding agency order precluding assertion of affirmative defenses as sanction for noncompliance with discovery order).

229. See, e.g., 8 C.F.R. § 292.3(a)(15)(i) (1995) (INS); 37 C.F.R. § 10.18(b) (1994) (PTO); 47 C.F.R. § 1.52 (1994) (FCC).

230. See Arthur Best, *Shortcomings of Administrative Agency Lawyer Discipline*, 31 EMORY L.J. 535, 538-45, 596 (1982) (discussing examples involving the FCC and asserting that "agencies may be markedly inefficient in exercising th[eir] responsibility" to discipline lawyers for disorderly conduct during proceedings); Cox, *supra* note 209, at 213 ("Standards without effective enforcement benefit no one."); Manso, *supra* note 72, at 135 (noting that in most cases opposing parties will be disinclined to bring motions to strike or suspend). For example, in issuing its final decision withdrawing approval of an animal drug, the FDA made a passing reference to the unprecedented volume of exceptions filed by the applicants in response to the ALJ's initial decision, adding simply that "[m]any exceptions were frivolous or trivial." 56 Fed. Reg. 41,902, 41,902 n.2 (1991). There was no hint that the parties should have been sanctioned.

231. See, e.g., 16 C.F.R. § 1025.14(d) (1995) (CPSC); 18 C.F.R. § 385.2005 (1995) (FERC); 49 C.F.R. § 511.14(d) (1994) (NHTSA); 49 C.F.R. § 1104.4 (1994) (ICC). It should be noted, however, that some of these agencies nonetheless sometimes express confidence in their ability to prevent sham petitioning. See Letter from Philip R. Recht,

Instead of the piecemeal regulation of conduct by individual agencies, Congress might consider amending the Agency Practice Act to include a generally applicable certification requirement modeled on Rule 11 that would mandate the imposition of substantial penalties, including the possible forfeiture of an existing license or permit, in the event of a violation.<sup>232</sup> The possibility of serious sanctions against incumbent firms, especially the risk of forfeiting licenses, should deter sham petitioning in most cases.<sup>233</sup> The Administrative Procedure Act broadly defines the term “sanction,”<sup>234</sup> but agencies generally cannot sanction parties unless specifically authorized to do so by statute.<sup>235</sup> A broad legislative solution may, therefore, be preferable

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Chief Counsel, NHTSA, to author (Apr. 10, 1995) (“Occasionally, however, parties raise what we consider to be baseless objections to a proposed action to retard market entry of a potential competitor. We . . . believe that our current procedures effectively detect and resolve any problems we encounter.”) (on file with author).

232. See Manso, *supra* note 72, at 136-37; cf. Cox, *supra* note 209, at 225 (“Congress also should amend the Agency Practice Act to provide for a uniform disciplinary process . . . [because] allowing each agency to discipline its own practitioners perpetuates the lack of uniformity among different agencies.”); Fred C. Zacharias, *Federalizing Legal Ethics*, 73 TEX. L. REV. 335, 370-71 (1994) (recommending unification of federal agency and court rules of attorney ethics).

233. See *FCC v. WOKO, Inc.*, 329 U.S. 223, 228 (1946) (upholding FCC’s decision to refuse license renewal for radio station that had made misrepresentations to the Commission, finding it an appropriate measure “to preserve the integrity of its own system of reports”); *Sea Island Broadcasting Corp. v. FCC*, 627 F.2d 240, 241-44 (D.C. Cir.) (upholding FCC’s revocation of AM radio station’s operating license for misrepresentations made to the agency to conceal fraudulent billings), *cert. denied*, 449 U.S. 834 (1980); 10 C.F.R. § 205.203(b), (c) (1994) (providing that the DOE may impose civil or criminal penalties on parties who violate agency rules).

234. The APA defines “sanction” to include:

the whole or part of an agency—(A) prohibition, requirement, limitation, or other condition affecting the freedom of a person; (B) withholding of relief; (C) imposition of penalty or fine; (D) destruction, taking, seizure, or withholding of property; (E) assessment of damages, reimbursement, restitution, compensation, costs, charges, or fees; (F) requirement, revocation, or suspension of a license; or (G) taking other compulsory or restrictive action.

5 U.S.C. § 551(10) (1994).

235. See *id.* § 558(b) (“A sanction may not be imposed . . . except within jurisdiction delegated to the agency and as authorized by law.”); *SEC v. Sloan*, 436 U.S. 103, 111-12 (1978) (holding that statute did not authorize a series of summary suspension orders); *Gold Kist, Inc. v. USDA*, 741 F.2d 344, 348 (11th Cir. 1984) (“[T]he statute must plainly establish a penal sanction in order for the agency to have authority to impose a penalty . . . .”); *Savage v. CFTC*, 548 F.2d 192, 196-97 (7th Cir. 1977). *But cf.* *Chambers v. NASCO, Inc.*, 501 U.S. 32 (discussing federal courts’ inherent power to impose sanctions for bad faith conduct in litigation), *reh’g denied*, 501 U.S. 1269 (1991). Where Congress has delegated such authority, courts defer to agencies’ choice of sanctions. See, e.g., *Butz v. Glover Livestock Comm’n Co.*, 411 U.S. 182, 185-88 (1973) (upholding suspension of party for fraud in weighing livestock); *Garver v. United States*, 846 F.2d 1029, 1030 (6th Cir.) (upholding suspension of party for willful violation of fair trade practices and prompt

to existing controls on the conduct of participants. Although each agency should retain the authority to supplement a uniform rule with other procedural protections, and they would remain free to enforce any general certification requirement in whatever way they saw fit, the rule's deterrent effect ultimately would depend on consistent and vigorous enforcement.

### *B. Direct Limitations on the Right to Participate*

Although agencies might do well to demand closer adherence to the rules of professional responsibility or impose certification requirements akin to Rule 11, ultimately more stringent restrictions on participation may be necessary to combat abuse of the regulatory process. Sham petitioning is possible because agencies generally welcome broad public participation in regulatory activities. Unlike courts, which engage primarily in dispute resolution between private litigants, administrative bodies focus on policymaking, most noticeably when they promulgate rules of general application but also during the course of adjudication. Thus, a relatively broader range of potentially interested parties enjoys access to agencies than to courts.

As previously suggested, the largely unrestricted opportunity to participate brings with it the possibility for strategic manipulation of the regulatory process in pursuit of anticompetitive ends. Although openness and accessibility have long been considered hallmarks of good government, at some point rules favoring public participation may become counterproductive.<sup>236</sup> The central question is whether the potential harms associated with sham petitioning will ever outweigh the values that are served by an open regulatory process.

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pay mandate), *cert. denied*, 488 U.S. 820 (1988); *Chapman v. United States*, 821 F.2d 523, 526-28 (10th Cir. 1987) (upholding imposition of fines for the filing of false Medicaid claims); *Virginia Elec. & Power Co. v. NRC*, 571 F.2d 1289, 1291-92 (4th Cir. 1978) (upholding agency decision to impose only civil penalties but not revocation of license for false statement in application).

236. See 1 C.F.R. § 305.71-6 (1993) (recommendation by the Administrative Conference of the United States) ("In order that agencies may effectively exercise their powers and duties in the public interest, public participation in agency proceedings should neither frustrate an agency's control of the allocation of its resources nor unduly complicate and delay its proceedings."); *id.* § 305.86-7 ("Reducing the delay, expense and unproductive legal maneuvering found in many [agency] adjudications is recognized as a crucial factor in achieving substantive justice."); Miller, *supra* note 43, at 905 ("At some stage enhancement of the administrative process turns into harassment, and protecting the ability of competitors to petition government is outweighed by the need to ensure fairness to applicants.").

If sham petitioning before agencies poses a sufficiently serious problem, lawmakers could respond by placing direct limitations on the right to participate. At the extreme, persons could be excluded altogether from administrative proceedings unless they assert a direct and immediate interest in the subject of those proceedings. For a variety of reasons, it seems unrealistic to exclude persons altogether simply because they have a financial stake in the outcome of the proceeding, though one could imagine such a restriction in limited types of administrative proceedings. For instance, an agency might permit only the individual or firm holding a license to appear in a revocation hearing; competitors would not be allowed to intervene in the proceeding to argue in favor of the proposed revocation.

Less radical approaches might limit the procedural rights of potential intervenors, perhaps by allowing only written submissions and only with regard to certain relevant issues. Reforms of this sort might help reduce incumbent firms' opportunities to retard market entry or achieve other anticompetitive goals through the use of the regulatory process. Because agency procedures and problems are so variable, it is difficult to propose any uniform solutions. Nonetheless, one can suggest certain general improvements. Before describing these reforms in any greater detail, however, it is necessary to anticipate and respond to likely objections, including challenges based on both constitutional and existing statutory rights.

### 1. Constitutional Obstacles

At the outset, constitutional protections for the right to petition and due process may constrain wholesale reforms limiting competitors' rights to participate in agency proceedings. As explained previously, *Noerr-Pennington* antitrust immunity is founded on the First Amendment right to petition the government for redress of grievances.<sup>237</sup> As suggested in *California Motor Transport*, however, an unfettered First Amendment right to petition might implicate other persons' rights by hindering meaningful access to the organs of government.<sup>238</sup> The Supreme Court has not fully elaborated the

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237. See *supra* note 90 and accompanying text.

238. 404 U.S. 508, 513 (1972); see also *id.* at 515 (conceding that "any carrier has the right of access to agencies and courts, *within the limits, of course, of their prescribed procedures*, in order to defeat applications of its competitors" (emphasis added)); Minda, *supra* note 78, at 1001 (noting that petitioning activities by incumbent firms may interfere with the First Amendment rights of other parties).

scope of this particular right,<sup>239</sup> but the Constitution clearly does not prevent Congress from imposing some limits on citizens' access to government officials.<sup>240</sup>

Interested third parties who would be excluded from agency proceedings under the suggested reforms also might challenge them on due process grounds, but such an objection seems equally unavailing for a number of reasons. First, the Due Process Clause applies only in cases of agency adjudication.<sup>241</sup> This distinction is grounded in part on the sheer impracticality of giving every person who is potentially affected by a decision of general application a direct voice in the matter.<sup>242</sup> Licensing proceedings generally are regarded as adjudicatory,<sup>243</sup> but rulemaking and other agency actions would not trigger due process protections.

Second, even in the case of adjudicatory proceedings, the indirect beneficiaries of a government program generally lack a protectible property interest.<sup>244</sup> Although licenses issued by government are regarded as property under the due process clause,<sup>245</sup> only the person whose license or application is at issue would have a suf-

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239. See Edmund G. Brown, *The Right to Petition: Political or Legal Freedom?*, 8 UCLA L. REV. 729, 730, 733-34 (1961); Norman B. Smith, "Shall Make No Law Abridging . . .": *An Analysis of the Neglected, but Nearly Absolute, Right of Petition*, 54 U. CIN. L. REV. 1153, 1183-94 (1986); Stephen A. Higginson, Note, *A Short History of the Right to Petition for the Redress of Grievances*, 96 YALE L.J. 142, 165-66 (1986).

240. See, e.g., *United States v. Harriss*, 347 U.S. 612, 625-26 (1954) (upholding Federal Regulation of Lobbying Act against First Amendment challenge); Myers, *supra* note 151, at 1241 (explaining that the right to petition is not absolute but instead must be balanced against countervailing values); cf. *McDonald v. Smith*, 472 U.S. 479, 484-85 (1985) (stating that libelous correspondence with public officials not absolutely protected by right to petition); *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 743 (1983) ("[B]aseless litigation is not immunized by the First Amendment right to petition.").

241. See *Minnesota State Bd. for Community Colleges v. Knight*, 465 U.S. 271, 284-85 (1984); *United States v. Florida E. Coast Ry.*, 410 U.S. 224, 244-45 (1973); *Londoner v. Denver*, 210 U.S. 373, 385-86 (1908); Edward L. Rubin, *Due Process and the Administrative State*, 72 CAL. L. REV. 1044, 1116-19 (1984).

242. *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 445 (1915) ("There must be a limit to individual argument in such matters if government is to go on.").

243. See *supra* notes 128-29 and accompanying text.

244. See *O'Bannon v. Town Court Nursing Ctr.*, 447 U.S. 773, 786-89 (1980); cf. *American Farm Lines v. Black Ball Freight Serv.*, 397 U.S. 532, 538-39 (1970) (holding that ICC could ignore rule when it was not intended to confer any procedural benefits on carriers objecting to another company's application for temporary operating authority).

245. See, e.g., *Barry v. Barchi*, 443 U.S. 55, 64 (1979) (holding that occupational license constituted property); *Dixon v. Love*, 431 U.S. 105, 113 (1977) (holding that commercial driver's licenses constituted property); *Industrial Safety Equip. Ass'n v. EPA*, 837 F.2d 1115, 1122 (D.C. Cir. 1988) (holding that product certification constituted property).

ficiently direct interest in the proceeding to trigger due process rights.<sup>246</sup> For instance, in the hypothetical discussed above, Alpha Pharmaceuticals might have a constitutional right to raise objections if FDA approval of Medica's application would violate Alpha's statutory right to seven years of market exclusivity, but it would not have a similar right to object on some other basis once this period has expired.<sup>247</sup> Mutually exclusive applications may require a comparative hearing so that other applicants' hearing rights are not rendered meaningless if the first application is granted,<sup>248</sup> but otherwise a competitor would have no constitutional right to participate.<sup>249</sup>

Finally, even if a firm could identify a sufficiently direct interest in an adjudicatory proceeding, its rights to participate nonetheless might be circumscribed without running afoul of the Due Process Clause.<sup>250</sup> Under the familiar three-pronged balancing test set out in *Mathews v. Eldridge*,<sup>251</sup> the third party's attenuated interest, coupled with the minimal risk of an erroneous decision, probably will pale against the government's interest in not providing additional procedural safeguards.<sup>252</sup> In particular, courts may take into account

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246. See *United States v. Dixie Highway Express*, 389 U.S. 409, 410-11 (1967) (per curiam) (reversing lower court's decision that existing carriers enjoyed a property right against competition if they were able to provide the proposed service); *Wells Fargo Armored Serv. Corp. v. Georgia PSC*, 547 F.2d 938, 941 (5th Cir. 1977) ("The mere entry of another motor carrier into Wells Fargo's territory is too insubstantial an injury to its existing, non-exclusive certificate to constitute a deprivation in the constitutional sense.").

247. See *supra* notes 18, 23, 25-27 and accompanying text.

248. See *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327, 332-33 (1945); *Public Utils. Comm'n v. FERC*, 900 F.2d 269, 278 (D.C. Cir. 1990); *Delta Airlines, Inc. v. CAB*, 497 F.2d 608, 612-14 (D.C. Cir. 1973), *cert. denied*, 417 U.S. 930 (1974).

249. See *Reuters Ltd. v. FCC*, 781 F.2d 946, 951 (D.C. Cir. 1986) (holding that *Ashbacker* applies only to contemporaneous applications for mutually exclusive licenses and does not provide comparative hearing rights to a subsequent applicant against an existing licensee); *Radio Athens, Inc. v. FCC*, 401 F.2d 398, 401 (D.C. Cir. 1968) ("There must be some point in time when the Commission can close the door to new parties to a comparative hearing or, at least hypothetically, no licenses could ever be granted.").

250. See *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972) ("Once it is determined that due process applies, the question remains what process is due.").

251. 424 U.S. 319, 335 (1976) (explaining that courts must take account of, first, "the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including . . . fiscal and administrative burdens").

252. See, e.g., *McKesson v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 36-37 (1990); *Mackey v. Montrym*, 443 U.S. 1, 11-19 (1979) (upholding automatic temporary suspension of driver's license for refusal to take breath-analysis test after arrest for driving while intoxicated); *Moreau v. FERC*, 982 F.2d 556, 569 (D.C. Cir. 1993) (holding that land owners received adequate notice of company's plan to construct pipeline adjacent to their property).

the countervailing due process rights of existing parties to an administrative proceeding (such as a firm seeking market entry), especially where the participation by a third party (such as an incumbent firm) would delay or otherwise interfere with the agency's hearing.<sup>253</sup> Thus, just as is true with the right to petition, due process rights may cut two ways.<sup>254</sup> Neither constitutional right would appreciably limit the range of possible restrictions on participation in agency proceedings.

## 2. Statutory Obstacles

Existing statutes present a more serious obstacle to agency-initiated reforms to limit rights of participation. The Administrative Procedure Act (APA),<sup>255</sup> as well as many agencies' organic statutes, requires or encourages broad-based public input and creates rights of participation that exceed constitutionally required minima of due process. For instance, when agencies promulgate rules, the APA requires that they "give interested persons an opportunity to participate in the rulemaking through submission of written data, views,

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253. See *Brock v. Roadway Express, Inc.*, 481 U.S. 252, 267 & n.3 (1987) (plurality opinion) (rejecting employer's claim that it had right to a hearing before the Secretary of Labor could order reinstatement of an employee, in part because the added delays would adversely affect the employee's rights); *Central Freight Lines, Inc. v. United States*, 669 F.2d 1063, 1068 (5th Cir. 1982) (finding that restrictions on hearing of protests by certified motor carriers to the granting of ICC certificates to additional carriers did not violate due process); see also Todd D. Rakoff, *Brock v. Roadway Express, Inc., and the New Law of Regulatory Due Process*, 1987 SUP. CT. REV. 157, 192 ("[T]he reasoning in *Brock* highlights the choice between throwing the burden of unwieldiness of procedure on one private party or on the other."). Professor Rakoff argues that the *Brock* Court's "suggestion that the interests of the employer and employee are, in this context, comparable and commensurable represents a considerable recasting of the law." *Id.* at 167.

254. See *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 604, 609-10 (1974) (noting that both debtor and creditor had property interests at stake, the Court upheld use of sequestration statute even though it did not provide debtor with a pre-deprivation hearing); *Jim Walter Resources, Inc. v. Federal Mine Safety & Health Rev. Comm'n*, 920 F.2d 738, 746 (11th Cir. 1990) ("The government has a strong interest in ensuring that miners—who are discharged by their employers for performing important 'whistle-blowing' functions—are expeditiously reinstated to their jobs."); cf. *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 300-03 (1981) (stating that the agency may dispense with prior hearing in emergency situations); *Mathews*, 424 U.S. at 348 ("Significantly, the cost of protecting those whom the preliminary administrative process has identified as likely to be found undeserving may in the end come out of the pockets of the deserving since resources available for any particular program of social welfare are not unlimited.").

255. Pub. L. No. 404, 60 Stat. 237 (1946) (codified as amended at 5 U.S.C. §§ 551-559, 701-706 (1994)). See generally Wong Yang Sung v. McGrath, 339 U.S. 33, 36-40 (1950) (discussing the history of APA's passage).

or arguments.”<sup>256</sup> The opportunity to comment on proposed rules is not required by the Due Process Clause; instead, the statutory requirement is premised on some of the same policies that underlie the right to petition government for redress of grievances, such as ensuring that agency decisionmakers receive valuable information from the private sector.<sup>257</sup> Some organic statutes require that agencies abide by additional procedures when promulgating rules,<sup>258</sup> and other agencies voluntarily may provide even more sweeping procedural rights to protect their decisions against second-guessing by reviewing courts.<sup>259</sup>

The APA and a number of organic statutes also require that federal agencies give interested persons the right to petition for the issuance, amendment, or repeal of a rule.<sup>260</sup> Due to the lack of

256. 5 U.S.C. § 553(c) (1994); *see also* NRDC v. SEC, 606 F.2d 1031, 1046 n.18 (D.C. Cir. 1979) (“Public participation in agency decision making is increasingly recognized as a desirable objective.”); Alan B. Morrison, *The Administrative Procedure Act: A Living and Responsive Law*, 72 VA. L. REV. 253, 263 (1986) (“[P]ublic participation has deterred the agencies from straying too far from their assigned missions.”).

257. *See, e.g.*, American Hosp. Ass’n v. Bowen, 834 F.2d 1037, 1044 (D.C. Cir. 1987) (noting that rulemaking “assur[es] that the agency will have before it the facts and information relevant to a particular administrative problem, as well as suggestions for alternative solutions” (citation omitted)). The right to comment sometimes also is justified as a proxy for democratic processes when elected officials delegate power to agencies. *See* Batterton v. Marshall, 648 F.2d 694, 703 (D.C. Cir. 1980) (stating that notice-and-comment rulemaking “reintroduc[es] public participation and fairness to affected parties after governmental authority has been delegated to unrepresentative agencies”). Whether or not this is true, allowing affected parties to participate may improve the perceived legitimacy of the decisionmaking process. *See* Chamber of Commerce v. OSHA, 636 F.2d 464, 470 (D.C. Cir. 1980).

258. *See, e.g.*, 15 U.S.C. § 57a(b), (c) (1988) (giving interested parties the right to make oral arguments and conduct cross-examination at rulemaking hearings before the FTC); 15 U.S.C. § 2058(d) (1988) (CPSC); 29 U.S.C. § 655(b) (1988) (OSHA); 42 U.S.C. § 7607(d) (1988) (EPA). In rare cases, Congress has mandated formal (on-the-record) rulemaking. *See, e.g.*, 21 U.S.C. § 371(e) (1988) (FDA). For further background concerning these additional rulemaking procedures, *see* Stephen F. Williams, “Hybrid Rulemaking” under the Administrative Procedure Act: A Legal and Empirical Analysis, 42 U. CHI. L. REV. 401 (1975); Robert W. Hamilton, *Procedures for the Adoption of Rules of General Applicability: The Need for Procedural Innovation in Administrative Rulemaking*, 60 CAL. L. REV. 1276, 1283-1313 (1972).

259. *See* Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 546-47 (1978) (“[T]he agencies, operating under [a] vague injunction to employ the ‘best’ procedures and facing the threat of reversal if they did not, would undoubtedly adopt full adjudicatory procedures in every instance.”); Gardner v. FCC, 530 F.2d 1086, 1090 (D.C. Cir. 1976) (“Once having stated that it will give such notice, the Commission has created a reasonable expectation in the parties to the proceeding that such notice will be received.”).

260. *See, e.g.*, 5 U.S.C. § 553(e) (1994) (APA); 15 U.S.C. § 1410a (1988) (NHTSA, motor vehicle safety standards); 15 U.S.C. § 2620 (1988) (EPA, toxic substances); 21 U.S.C. § 348(b) (1988) (FDA, food additive petitions); 49 U.S.C. § 10,326 (1988) (ICC, rail carrier



clear procedures for responding to such submissions, the Administrative Conference of the United States (ACUS) has recommended that agencies "adopt measures that will ensure that the right to petition is a meaningful one."<sup>261</sup> A number of agencies now have detailed procedures in place for responding to these so-called citizen petitions,<sup>262</sup> and incumbent firms sometimes use such petitions in attempts to limit competition.<sup>263</sup>

The rules governing participation in adjudicatory proceedings are similarly generous. The rights of interested parties to intervene in agency hearings have steadily expanded over the last few decades. Although it provides little guidance in this respect, the APA explicitly allows an agency to admit any interested person "as a party for limited purposes."<sup>264</sup> Because organic statutes often employ vague criteria governing intervention,<sup>265</sup> federal agencies enjoy significant discretion in designing their procedures to allow participation by interested third parties.

Traditionally, persons who were likely to suffer specific economic injuries as a consequence of an agency decision were permitted to intervene in administrative proceedings and granted standing to seek

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transport).

261. 1 C.F.R. § 305.86-6 (1993) ("The existence of th[is] right to petition reflects the value Congress has placed on public participation in the agency rulemaking process."); see also William V. Luneburg, *Petitioning Federal Agencies for Rulemaking: An Overview of Administrative and Judicial Practice and Some Recommendations for Improvement*, 1988 Wis. L. REV. 1, 25-26, 55-63 (canvassing values of this type of petitioning process).

262. See, e.g., 7 C.F.R. § 1.2-.8 (1995) (USDA); 10 C.F.R. § 2.802 (1995) (NRC); 14 C.F.R. § 11.25 (1995) (FAA); 16 C.F.R. § 1051.1-.11 (1995) (CPSC); 21 C.F.R. § 10.20-.30 (1995) (FDA).

263. See *supra* notes 19, 26-27 and accompanying text (describing citizen petitions filed with the FDA by pharmaceutical companies).

264. 5 U.S.C. § 551(3) (1994) (defining a "party" as "a person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party in an agency proceeding, and a person or agency admitted by an agency as a party for limited purposes"); see also *id.* § 555(b) ("So far as the orderly conduct of public business permits, an interested person may appear before an agency . . .").

265. See, e.g., 15 U.S.C. § 45(b) (1988) (authorizing intervention before the FTC "upon good cause shown"); 42 U.S.C. § 2239(a)(1) (1988) (stating that the NRC "shall grant a hearing upon the request of any person whose interest may be affected by the [licensing] proceeding, and shall admit any such person as a party to such proceeding"); 47 U.S.C. § 309(d)(1) (1988) ("Any party in interest may file with the [FCC] a petition to deny any application."); 49 U.S.C. § 10,328(b)(1) (1988) (stating that any "interested persons" may intervene in ICC motor carrier licensing proceedings); 49 U.S.C.A. § 41,108(b) (West Supp. 1995) ("An interested person may file a response with the Secretary opposing . . . the issuance of [an air carrier] certificate."); see also *Ecee, Inc. v. FERC*, 645 F.2d 339, 350 (5th Cir. 1981) ("Administrative standing analysis must always begin with the language of the statute and regulations that provide for an administrative hearing.").

judicial review.<sup>266</sup> As the doctrine of Article III standing expanded, reviewing courts required that agencies allow other interested parties to participate in administrative proceedings.<sup>267</sup> Notably, even when the Supreme Court added the limitation that an interested party arguably be within the “zone of interests” protected by a particular statute, competitors continued to satisfy standing requirements even where legislation appeared to be geared primarily toward protecting consumers.<sup>268</sup> Whether or not attributable to judicial prompting, agencies generally permit intervention by a large class of potentially

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266. See, e.g., *Hardin v. Kentucky Utils. Co.*, 390 U.S. 1, 5-7 (1968) (holding that utility with monopoly in relevant markets had standing to challenge TVA plan to sell power at lower rates); *Chicago v. Atchison, T. & S.F. Ry.*, 357 U.S. 77, 83 (1958) (holding that incumbent firm had standing to challenge new entry inconsistent with city ordinance); *FCC v. NBC (KOA)*, 319 U.S. 239, 245-46 (1943) (broadcast interference); *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 476-77 (1940) (competing broadcaster); *Philco Corp. v. FCC*, 257 F.2d 656, 658-59 (D.C. Cir. 1958) (concerning manufacturer of electronic equipment in competition with applicant for broadcast license), *cert. denied*, 358 U.S. 946 (1959); *National Broadcasting Co. v. FCC*, 132 F.2d 545, 547-49 (D.C. Cir. 1942) (noting that existing station feared electrical interference from applicant for new radio station), *aff'd*, 319 U.S. 239 (1943); *cf.* *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129, 135 (1967) (finding that interest in market competition was sufficient to support intervention in civil litigation). *But see* *Alabama Power Co. v. Ickes*, 302 U.S. 464, 479-80 (1938) (denying standing to competitors).

267. See, e.g., *Office of Communication of United Church of Christ v. FCC*, 359 F.2d 994, 1002-05 (D.C. Cir. 1966) (finding that listening audience had sufficient interest to support intervention in FCC licensing proceeding). Strictly speaking, the Constitution’s “case or controversy” language has no applicability to administrative bodies. Nonetheless, if a party can satisfy the theoretically stricter requirements of Article III, it is not surprising that courts would expect that such persons should be able to participate in an agency proceeding, *Gardner v. FCC*, 530 F.2d 1086, 1090 (D.C. Cir. 1976) (“[A]gencies are free to hear actions brought by parties who might be without party standing if the same issues happened to be before a federal court.”), especially since those persons would be permitted to request judicial review of the agency’s action, *see* *National Welfare Rights Org. v. Finch*, 429 F.2d 725, 736 (D.C. Cir. 1970) (“The right of judicial review cannot be taken as fully realized . . . if appellants are excluded from participating in the proceeding to be reviewed.”).

268. See *Investment Co. Inst. v. Camp*, 401 U.S. 617, 620-21 (1971); *Association of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970); *see also* *Air Courier Conference v. American Postal Workers Union*, 498 U.S. 517, 527-28 & n.5 (1991) (distinguishing decisions in which competitors were held to be within the zone of interests); *Clarke v. Securities Indus. Ass’n*, 479 U.S. 388, 399 (1987) (“[T]he test denies a right of review if the plaintiff’s interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit.”); *Stewart*, *supra* note 75, at 1733 (“It is difficult to construe these two statutes as designed to protect firms with whom banks might potentially compete. It is far more reasonable to regard their limitations as protecting bank customers . . .”); *Cass R. Sunstein, Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1445-51 (1988) (discussing zone of interest requirement).

interested persons,<sup>269</sup> again to promote interests such as improved access to potentially relevant information and enhanced legitimacy of decisionmaking.<sup>270</sup>

Thus, almost any interested person will be able to participate in rulemaking or adjudicatory proceedings before an agency. Although perhaps not constitutionally required, Congress and the agencies themselves have chosen to permit relatively unfettered public input into administrative decisionmaking. Even if courts use the "zone of interest" test to limit the standing of competitors absent some clear indication in the statute that Congress meant to protect existing businesses, this would only reduce the opportunity for judicial review and not affect access to agency proceedings. It would be unrealistic, therefore, to propose that agencies now close the doors to parties wishing to protect their own economic self-interests. Indeed, it would be difficult to argue that competitors in particular should be excluded from agency proceedings; agencies and courts repeatedly have accorded such entities the right to participate because, among all potential third parties, they may have the most direct interest at stake as well as the best information.<sup>271</sup> In any event, competitors might be able to circumvent any such limitation simply by filing their information anonymously or possibly even through public interest organizations.<sup>272</sup>

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269. See, e.g., 10 C.F.R. § 2.714 (1995) (NRC); 14 C.F.R. § 302.15(b) (1995) (DOT) (stating that criteria for intervention "will be liberally interpreted"); 16 C.F.R. § 3.14(a) (1995) (FTC); 18 C.F.R. § 385.214(b)(2)(ii) (1995) (FERC) (listing specific classes of interested persons, including competitors); 47 C.F.R. § 1.223 (1994) (FCC). Some agencies also permit interested persons to petition for the modification, suspension or revocation of a previously approved license. See, e.g., 10 C.F.R. § 2.206 (1995) (NRC).

270. See *Nichols v. Board of Trustees of Asbestos Workers Local 24 Pension Plan*, 835 F.2d 881, 897-98 (D.C. Cir. 1987); *Koniag, Inc. v. Andrus*, 580 F.2d 601, 606 (D.C. Cir.), cert. denied, 439 U.S. 1052 (1978). For additional background on the values promoted by liberal intervention rules, see Ernest Gellhorn, *Public Participation in Administrative Proceedings*, 81 YALE L.J. 359 (1972); David L. Shapiro, *Some Thoughts on Intervention Before Courts, Agencies and Arbitrators*, 81 HARV. L. REV. 721 (1968).

271. See *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 139 (1961) ("Indeed, it is quite probably people with just such a hope of personal advantage who provide much of the information upon which governments must act."); *Juarez Gas Co. v. FPC*, 375 F.2d 595, 599 (D.C. Cir. 1967) (noting that competitors threatened with the loss of business are in a "position to advance matters which are relevant and material for consideration" by the agency); *supra* notes 257, 266. *But cf.* *Block v. Community Nutrition Inst.*, 467 U.S. 340, 346-48 (1984) (holding that consumers could not seek review of USDA milk marketing orders).

272. Some may already do this for strategic reasons. See *Formal Comment Period on Food Additive Petitions Requested*, FOOD CHEM. NEWS, July 6, 1992, available in Westlaw, Foodchemn file (suggesting that the tardy submission by the Center for Science in the

### 3. Possibilities for Reform

In lieu of complete exclusion, agencies could limit the rights of participation in a manner designed to minimize the risks of anticompetitive abuses. The significant variability across agencies would, of course, make any uniform solutions problematic, but certain basic types of reforms could be adapted to even very different agency procedures. For example, intervention might be permitted only at a particular stage in the proceedings and in such a way as not to delay agency action. Courts have recognized that agencies possess considerable latitude in restricting the scope of an intervenor's participation in order to prevent dilatory tactics.<sup>273</sup> As the Supreme Court once noted, "administrative proceedings should not be a game or a forum to engage in unjustified obstructionism."<sup>274</sup> Moreover, in what appears to be a little-noticed provision, the APA itself directs agencies to take action on license applications with dispatch.<sup>275</sup>

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Public Interest of old data about sucralose (a food additive awaiting FDA approval), data that purportedly was received from an anonymous source, may have reflected bad faith intervention by a company seeking to retain its competitive advantage in the market for non-nutritive sweeteners).

273. See *Waterway Communications Sys., Inc. v. FCC*, 851 F.2d 401, 403 (D.C. Cir. 1988) (upholding FCC power to deny untimely requests for intervention); *City of Angels Broadcasting, Inc. v. FCC*, 745 F.2d 656, 666 (D.C. Cir. 1984) (upholding FCC power to deny intervention in comparative hearing); *Bellotti v. NRC*, 725 F.2d 1380, 1382-83 (D.C. Cir. 1983) (upholding denial of intervention where it would expand the scope of proceeding); *American Trucking Ass'ns, Inc. v. United States*, 627 F.2d 1313, 1320-24 (D.C. Cir. 1980) (holding that the ICC could limit intervention to carriers that had genuine competitive interests in license proceedings); *National Welfare Rights Org. v. Finch*, 429 F.2d 725, 738 (D.C. Cir. 1970) (intervenor's role may be limited to avoid repetition and delay); *City of San Antonio v. CAB*, 374 F.2d 326, 332 (D.C. Cir. 1967) (stating that the number of intervenors may be capped).

274. *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 533 (1978); see also *Union of Concerned Scientists v. NRC*, 920 F.2d 50, 55 (D.C. Cir. 1990) ("Whatever the statutory restraints on the NRC's authority to exclude material issues from its hearings, the Commission can certainly adopt a pleading schedule designed to expedite its proceedings."); *Office of Communication of United Church of Christ v. FCC*, 359 F.2d 994, 1005-06 (D.C. Cir. 1966) (stating that although representatives of listening audience must be permitted to intervene, the FCC need not "allow the administrative processes to be obstructed or overwhelmed by captious or purely obstructive protests").

275. See 5 U.S.C. § 558(c) (1994) ("When application is made for a license required by law, the agency, with due regard for the rights and privileges of all the interested parties or adversely affected persons and within a reasonable time, shall set and complete proceedings . . . and shall make its decision."); *Marathon Oil Co. v. EPA*, 564 F.2d 1253, 1261 n.25 (9th Cir. 1977) (interpreting § 558(c) as "requir[ing] any adjudicatory hearings mandated under other provision of law to be set and completed in an expeditious and judicious manner"); ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 89-90 (1947) ("The import of this sentence is that an agency shall hear

At present, however, many agencies halt proceedings or otherwise delay final decisionmaking when a third party raises objections.<sup>276</sup> These procedures provide obvious invitations for anticompetitive abuse,<sup>277</sup> especially if objections may be filed in a tardy or seriatim fashion.<sup>278</sup> Indeed, intervention procedures may represent political concessions to existing members of a regulated industry as a tool for retarding market entry by potential competitors.<sup>279</sup> They may also reinforce an agency's reluctance to act before all information has been considered; bureaucrats may be more concerned with unimpeachable decisionmaking than with the speedy resolution of matters.<sup>280</sup>

and decide licensing proceedings as quickly as possible. . . . The requirement that licensing proceedings be completed with reasonable dispatch is merely a statement of fair administrative procedure.”)

276. See, e.g., 49 U.S.C. §§ 10,725, 10,762(c)(3) (1988) (declaring that freight forwarder's new rates may be suspended pending agency review if objections are submitted to the ICC); *Consolidated Gas Co. v. City Gas Co.*, 665 F. Supp. 1493, 1509-10 (S.D. Fla. 1987) (incumbent's intervention and objection to competitor's natural gas allocation request prevented issuance of temporary certificate and delayed final FERC action by more than one year), *aff'd*, 880 F.2d 297 (11th Cir. 1989); 50 Fed. Reg. 28,045 (1985) (incumbent firm's objections to DEA registration delayed proceedings for almost two years).

277. See OWEN & BRAEUTIGAM, *supra* note 71, at 20 (“[T]he peculiar nature of the administrative process is to accentuate that delay and make the period of delay responsive to the actions of the parties. In particular, any party disadvantaged by the prospective decision is granted the right to delay that decision for many years.”); Miller, *supra* note 43, at 904 (“[H]ealth care providers, like truckers, can attempt to manipulate entry barriers by intervening in the administrative proceedings of their competitors.”).

278. See WIXT Television, Inc. v. Meredith Corp., 506 F. Supp. 1003, 1026 (N.D.N.Y. 1980) (describing allegations in antitrust case that competitor's objections were “filed late and with the intent of delaying the FCC proceeding”); *FDA Delay in Sucralose Approval Gets “Golden Grinch” Award from Sen. Matthews*, FOOD CHEM. NEWS, Aug. 29, 1994, available in Westlaw, Foodchemn file (quoting Sen. Harlan Matthews as complaining that “ ‘any third party could indefinitely delay approval of [a food] additive by simply repeatedly submitting their interpretation of data’ ”).

279. See *New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 439 U.S. 96, 109-10 & n.14 (1978) (upholding state statute giving existing automobile dealers notice and an opportunity to comment on the applications submitted by new entrants, notwithstanding automatic delays in approval of the applications); *supra* note 75 (discussing agency capture hypothesis).

280. See, e.g., Paul J. Quirk, *Food and Drug Administration*, in THE POLITICS OF REGULATION 191, 217-18 (James Q. Wilson ed., 1980) (“FDA may find it difficult not to be extremely cautious in approving new drugs . . . . [T]he prudent course for the FDA is to delay and strive for maximum certainty.”); OWEN & BRAEUTIGAM, *supra* note 71, at 5 (“The agency usually cannot resist the effort to delay through exhaustion of process because this would be grounds for reversal on appeal to the courts.”); C. Frederick Beckner, III, Note, *The FDA's War on Drugs*, 82 GEO. L.J. 529, 551-53 (1993) (describing substantial delays in the drug approval process).

On occasion, agencies do limit the opportunities for intervention in adjudicatory proceedings.<sup>281</sup> When the FDA issued its orphan drug approval regulations, for example, it rejected suggestions that it create a preapproval challenge procedure because it feared that incumbents might try thereby “to delay the marketing of competitors’ approvable” orphan drugs.<sup>282</sup> Earlier this year, DEA eliminated the right of incumbents to demand a hearing on a competitor’s application to manufacture controlled substances.<sup>283</sup> As the Agency explained when it first proposed this modification of its existing procedures:

[C]urrently registered manufacturers use the regulatory hearing requirement to deter others from applying or to delay entry of competitors into their marketplace. As often as not, a company whose new application is opposed by a current manufacturer retaliates by opposing the annual renewal of the other’s registration. This abuse of the regulatory hearing requirement adversely affects competition by delaying new registrations and results in the unnecessary expenditure of DEA resources . . . .<sup>284</sup>

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281. See, e.g., 10 C.F.R. § 2.714(a) (1995) (NRC); 14 C.F.R. § 302.15 (1995) (DOT); 16 C.F.R. § 1025.17 (1995) (CPSC); 18 C.F.R. § 385.214(b) (1995) (FERC); 46 C.F.R. § 502.72(b)(2) (1994) (FMC); 49 C.F.R. §§ 1112.4, 1113.7 (1994) (ICC); see also Gellhorn, *supra* note 270, at 387-88 (describing limited forms of intervention).

282. 57 Fed. Reg. 62,076, 62,083 (1992) (adding that incumbents would remain free to file citizen petitions to challenge approvals which allegedly impinged on their own exclusivity rights). Similarly, although competitors are permitted to file protests in response to motor carrier license applications, 49 C.F.R. § 1160.40-43 (1994), they may do so only after the ICC has first granted preliminary operating authority to the applicant. *Id.* § 1160.5(b); see also *American Transfer & Storage Co. v. ICC*, 719 F.2d 1283, 1306 (5th Cir. 1983) (finding that expedited procedures properly implement congressional intent to liberalize entry requirements for certified carriers).

283. See 60 Fed. Reg. 32,099, 32,101 (1995) (amending 21 C.F.R. pt. 1301). The agency emphasized that, whether or not a hearing is held, current registrants and applicants would still be permitted to submit comments or objections concerning an application for registration. *Id.* at 32,100. Because the statute provided a right to demand a hearing on an importer’s application, however, DEA felt powerless to similarly revise its procedures in that situation. *Id.*

284. 58 Fed. Reg. 52,246, 52,247 (1993); see also *supra* notes 24, 28. For these reasons, DEA originally proposed that incumbents could only request and not demand a hearing on a competitor’s application. Thereupon, in its supplemental notice of proposed rulemaking, the Agency proposed eliminating any opportunity for incumbent firms to trigger a hearing on an application, though such firms would be allowed to participate in any hearing requested by the applicant. See 59 Fed. Reg. 30,555 (1994) (reiterating its earlier view that “registrants and applicants have abused the mandatory hearing requirement in the past and it remains a future source of abuse where these individuals deter or delay new registrations and retaliate by opposing annual renewals”).

Thus, some of the delaying tactics employed by Alpha in the drug approval hypothetical set out in Part I may not be available to pharmaceutical companies in the future.

Reducing the procedural impact of intervention represents one particularly useful type of reform. In 1985, for example, the NRC announced that it would no longer delay final decisions concerning nuclear operating licenses to consider late objections unless they raised substantial safety questions.<sup>285</sup> The Commission explained that, in recent cases, it "has been confronted with the task of addressing large numbers of allegations which were brought to its attention very shortly before, and in some cases on the eve of, the date on which a decision on whether to authorize the issuance of an operating license was to be made."<sup>286</sup> Nonetheless, agencies are not free to ignore statutory rights of participation. When a person is entitled to intervene in a proceeding, an agency must provide a meaningful opportunity to be heard.<sup>287</sup> Legislative reforms may, therefore, be required.

Deregulation may minimize both the opportunities and incentives for sham petitioning. When Congress enacted the Motor Carrier Act of 1980,<sup>288</sup> it reduced the burden of proof placed on common carriers requesting certificates for motor or water transport of property, requiring only that applicants demonstrate that their proposed service "will serve a useful public purpose, responsive to public demand or need."<sup>289</sup> The burden then falls to those persons

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285. 50 Fed. Reg. 11,030 (1985).

286. *Id.* at 11,031 (adding that many of these allegations proved "to be unsubstantiated or of little, if any, safety significance"); see also Manso, *supra* note 72, at 131-32 (describing the proliferation of trivial objections that delayed operation of the Diablo Canyon Nuclear Power Plant); B. Paul Cotter, Jr., *Nuclear Licensing: Innovation Through Evolution in Administrative Hearings*, 34 ADMIN. L. REV. 497, 525-28 (1982) (urging revisions in NRC procedures to eliminate the delays caused by late intervention and meritless objections). It should be noted, however, that sham petitioning before the NRC appears to result from the antinuclear agendas of various public interest organizations rather than the anticompetitive machinations of rival utility companies.

287. See *Citizens for Allegan County, Inc. v. FPC*, 414 F.2d 1125, 1128 (D.C. Cir. 1969).

288. Pub. L. No. 96-296, 94 Stat. 793 (1980) (codified in scattered sections of 49 U.S.C.). For background on the Act, see American Trucking Ass'n, Inc. v. ICC, 659 F.2d 452, 457-59, 468-69 (5th Cir. 1981), *cert. denied*, 460 U.S. 1022 (1983); Tom B. Kretsinger, Jr., *The Motor Carrier Act of 1980: Report and Analysis*, 50 UMKC L. REV. 21 (1981-82); Rene Sacasas & Nicholas A. Glaskowsky, Jr., *Motor Carrier Deregulation: A Decade of Legal and Economic Conflict*, 18 TRANSP. L.J. 189 (1990).

289. 49 U.S.C. § 10,922(b)(1)(B) (1988). Applicants must continue to demonstrate that they are "fit, willing, and able" to provide that proposed service. *Id.* § 10,922(b)(1)(A); *Ritter Transp., Inc. v. ICC*, 684 F.2d 86, 87 (D.C. Cir. 1982), *cert. denied*, 460 U.S. 1022 (1983).

who oppose the requested certificate to prove that the proposed service would be "inconsistent with the public convenience and necessity."<sup>290</sup> In addition, the Act specifies that the ICC may not find such an inconsistency based solely on the possible diversion of revenue or traffic from an existing carrier,<sup>291</sup> and it also provides that others cannot protest an application unless they are able and willing to handle the traffic themselves or otherwise are granted special leave to intervene.<sup>292</sup>

Prior to 1980, motor carrier applicants had to prove that their proposed service would promote "public convenience and necessity," and other persons could raise objections largely without limitation. Indeed, the antitrust claims in *California Motor Transport* arose out of such proceedings.<sup>293</sup> After passage of the Motor Carrier Act in 1980, protests to certificate applications have largely ceased.<sup>294</sup> Of course, the procedural reforms found in the Act coincided with (and may well have been nothing more than an unintentional by-product of) a much broader deregulatory initiative.<sup>295</sup> The elimination of exclusive licensing requirements would, for instance, largely eliminate the need to conduct time-consuming comparative hearings of competing applications.<sup>296</sup>

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290. 49 U.S.C. § 10,922(b)(1) (1988) (stating that parallel provisions apply to certificates for motor carrier passenger services); *see id.* § 10,922(c)(1)(A); *Trailways Lines, Inc. v. ICC*, 766 F.2d 1537, 1539 (D.C. Cir. 1985). This burden is not easily satisfied. *See, e.g., Steere Tank Lines, Inc. v. ICC*, 724 F.2d 472, 478-80 (5th Cir. 1984); *RTC Transp., Inc. v. ICC*, 708 F.2d 620, 625-26 (11th Cir. 1983); *Film Transit, Inc. v. ICC*, 699 F.2d 298, 301 (6th Cir. 1983).

291. 49 U.S.C. § 10,922(b)(2)(B) (1988); *see also J.H. Rose Truck Line, Inc. v. ICC*, 683 F.2d 943, 950 (5th Cir. 1982) ("The Act specifically states that evidence directed at financial disadvantage to competitors, standing alone, is an insufficient basis for denying a certificate.")

292. 49 U.S.C. § 10,922(b)(7) (1988). Under no circumstances may a contract carrier protest the application of a common carrier. *Id.* § 10,922(b)(8). Essentially identical provisions apply to certificates for motor carrier passenger services, *id.* § 10,922(c)(7)&(8), and motor contract carriers or freight forwarders, *id.* § 10,923(b)(4).

293. 404 U.S. 508, 509 (1972).

294. *See* Letter from Henri F. Rush, General Counsel, ICC, to author (Nov. 8, 1994) ("In 1979, 8200 of 12,800 trucking applications were unopposed. By 1993, 12,313 of 12,316 were unopposed.") (on file with author).

295. *See* H.R. REP. NO. 1069, 96th Cong., 2d Sess. 12-17 (1980), *reprinted in* 1980 U.S.C.C.A.N. 2283, 2294-99; *Erickson Transp. Co. v. ICC*, 728 F.2d 1057, 1061-62, 1065 (8th Cir. 1984).

296. *See* Bradley Behrman, *Civil Aeronautics Board, in* THE POLITICS OF REGULATION, *supra* note 280, at 75, 114-15 (explaining that CAB route cases took an average of two years because the Board accorded generous procedural rights to all applicants, incumbents, and other interested persons).



In those contexts where exclusive licensing is unavoidable, as perhaps in the telecommunications field, or is considered necessary to encourage innovation, as in the pharmaceutical industry, legislators and regulators must ensure that opportunities for intervention are circumscribed so that incumbent firms cannot inappropriately inhibit competition. In a few instances, Congress has enacted provisions minimizing the opportunities for delay and anticompetitive manipulation of intervention rights. For instance, in a 1983 amendment to the Federal Communications Act, it sought to eliminate the practice of competing broadcasters to request, for purposes of delay, oral hearings on routine license modification proposals.<sup>297</sup> The previous year, Congress authorized the NRC to hold hearings on simple license modifications only after granting its approval of those modifications so as to avoid unnecessary delays.<sup>298</sup> Such procedural reforms should serve as a model and be adopted more widely to better protect the integrity of the regulatory processes of other agencies.

#### CONCLUSION

Whatever ultimately happens with the Federal Trade Commission's investigation of administrative petitioning activities in the pharmaceutical and medical device industries, there does appear to be a reasonable basis for fears that regulatory processes are being manipulated by firms in these or other industries. As illustrated by the Alpha Pharmaceutical Company hypothetical, drug manufacturers can make use of a variety of administrative procedures to delay or perhaps completely prevent market entry by potential competitors. Notwithstanding the admitted difficulties in trying to gauge the prevalence of such behavior, this Article has identified real opportunities for sham petitioning in administrative proceedings, especially when market entry requires some sort of licensing.

The FTC's planned reliance on the federal antitrust laws is, however, problematic for a number of reasons. The Sherman Act was not designed to combat anticompetitive abuse of the regulatory process, and the sham exception to *Noerr-Pennington* petitioning

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297. See Federal Communications Commission Authorization Act of 1983, Pub. L. No. 98-214, § 4(a), 97 Stat. 1467 (1983) (codified at 47 U.S.C. § 316 (1988)); H.R. REP. NO. 356, 98th Cong., 1st Sess. 15-16 (1983), reprinted in 1983 U.S.C.C.A.N. 2219, 2231-32.

298. See NRC Authorization, Pub. L. No. 97-415, § 12, 96 Stat. 2067 (1982) (codified at 42 U.S.C. § 2239(a) (1988)); S. REP. NO. 113, 97th Cong., 2d Sess. 14-15 (1982), reprinted in 1982 U.S.C.C.A.N. 3592, 3598-99.

immunity provides too limited a mechanism for ensuring meaningful antitrust scrutiny in this area. It is extremely difficult, for example, to establish that a regulatory petition is both objectively baseless and born of a subjective predatory intent. The constitutional right to petition has created a wide safe harbor for questionable regulatory submissions.

Because the antitrust laws cannot adequately deter anticompetitive abuses of the regulatory process, agency procedures may have to be modified to address any such concerns. Indeed, even if antitrust scrutiny provided some meaningful deterrent, procedural reforms could respond to sham petitioning more directly and effectively. Just as courts have developed special standards to govern the conduct of litigants, agencies may need to assume greater responsibility for controlling the behavior of participants in administrative proceedings. Professional responsibility and certification rules have only limited utility in deterring improper petitioning, so direct limitations on opportunities to trigger delay will be necessary. Although agencies permit and even encourage participation by persons with financial interests in licensing and other decisions, neither the constitutional right to petition nor guarantees of due process require that incumbent firms be given opportunities that may be used to block market entry by competitors.

