

IN THE MATTER OF
MOTOR TRANSPORT ASSOCIATION OF CONNECTICUT, INC.

FINAL ORDER, OPINION, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket 9186. Complaint, Sept. 18, 1984—Final Order, Aug. 25, 1989

This final order dismisses the complaint against the respondent, which represents approximately 585 competing motor carriers and files collective rates for its common carrier members with the state regulatory agency.

Appearances

For the Commission: *Michael E. Antalics, Phoebe D. Morse, Jerry A. Philpott and John H. Seesel.*

For the respondent: *Gerald A. Joseloff, Joseloff, Joseloff & Cramer, Wethersfield, Ct.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Motor Transport Association of Connecticut, Inc., a corporation, hereinafter sometimes referred to as "respondent," has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges as follows:

For the purposes of this complaint the use of the present tense includes the past tense and the following definitions apply:

"*Carrier*" means a common carrier of property by motor vehicle.

"*Intrastate transportation*" means the pickup or receipt, transportation and delivery of property for compensation wholly within any state of the United States by a carrier authorized by that state to engage therein.

"*Tariff*" means a publication and any supplements thereto stating the rates of a carrier for the intrastate transportation of property, excluding general rules and regulations.

"Member" means any carrier or other person that pays dues or belongs to Motor Transport Association of Connecticut, Inc., or to any successor corporation.

"Rate" means a charge, payment or fixed price according to a ratio, scale or standard for direct or indirect transportation service.

"Collective rate" means any rate or charge established under any contract, agreement, understanding, plan, program, combination or conspiracy between two or more competing carriers, or between any carrier and respondent.

PARAGRAPH 1. Respondent, Motor Transport Association of Connecticut, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of Connecticut, with its office and principal place of business located at 508 Tolland Street, East Hartford, Connecticut. Respondent publishes and issues tariffs containing rates for the intrastate transportation of property on behalf of its member carriers.

PAR. 2. Carriers engaging in intrastate transportation of property within Connecticut do so under certificates of public convenience and necessity granted by the Connecticut Department of Public Utility Control. Such carriers are subject to rate regulation by the Department and are required to charge just and reasonable rates. Carriers in Connecticut are required to charge the rates filed once they have been accepted by the Department.

PAR. 3. The statute which provides for regulation of carriers engaged in the intrastate transportation of property within Connecticut does not compel, command, authorize or otherwise provide for the establishment, operation or continuation of collective rates among carriers or others on their behalf.

PAR. 4. Except to the extent that competition has been restrained as herein alleged, respondent's members are now in competition among themselves and with other carriers.

PAR. 5. Respondent's membership consists of approximately 360 carriers engaging in intrastate transportation of property within Connecticut. Respondent's members are entitled to and do, among other things, vote for and elect the officers and directors of respondent. The control, direction and management of respondent are vested in the Board of Directors, which employs a general manager who acts as chief administrative officer of the corporation with direct charge of and supervision over the affairs of the corporation.

PAR. 6. The acts and practices of respondent set forth in paragraph

eight are in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, as amended, and respondent is subject to the jurisdiction of the Federal Trade Commission. Respondent's acts and practices:

(A) Affect the flow of substantial sums of money across state lines from businesses and other private parties to respondent's members for rendering intrastate transportation services;

(B) Affect respondent's members' purchase and use of equipment and other goods and services which are shipped across state lines; and

(C) Are supported by the receipt of dues and fees which are sent across state lines.

PAR. 7. Shippers use the intrastate services of respondent's members to transport property from warehouses and distribution centers in Connecticut to customers in Connecticut, which property was originally shipped into Connecticut from other states. For such intrastate deliveries of property from warehouses and distribution centers, carriers charge shippers or shippers' customers the intrastate rates published by respondent. These intrastate shipping charges are factors which influence the prices of such property. The intrastate delivery services of these carriers are an essential and integral part of the interstate business transactions of such shippers. Thus, the activities of these carriers have a substantial and direct effect upon interstate commerce.

PAR. 8. Respondent, its members, officers, directors, and others are engaging in a combination, conspiracy, agreement, concerted action or unfair and unlawful acts, policies and practices, the purpose or effect of which is to unlawfully hinder, restrain, restrict, suppress or eliminate competition among carriers engaged in the intrastate transportation of property within Connecticut.

Pursuant to and in furtherance thereof, respondent, its members and others engage in the following acts, policies and practices, among others:

(A) Initiating, preparing, developing, disseminating, and taking other actions to establish and maintain collective rates for the intrastate transportation of property within Connecticut;

(B) Participating in the collective rates; and

(C) Filing collective rates with the Connecticut Department of Public Utility Control.

PAR. 9. The acts and practices of respondent, its members and others as alleged in paragraph eight have the effect of:

Initial Decision

112 F.T.C.

(A) Fixing, stabilizing, raising, maintaining, or otherwise interfering or tampering with the rates charged by carriers for the intrastate transportation of property within Connecticut;

(B) Restricting, restraining, hindering, preventing or frustrating rate competition among carriers for the intrastate transportation of property within Connecticut;

(C) Depriving shippers patronizing carriers for intrastate transportation of property within Connecticut of the benefits of free and open competition in the provision of said services; and

(D) Depriving consumers in Connecticut of the benefits of free and open competition in the intrastate transportation of property.

PAR. 10. The acts, policies and practices of respondent, its members and others, as herein alleged, are all to the prejudice and injury of the public and constitute unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, as amended. The acts and practices of respondent, as herein alleged, are continuing and will continue in the absence of the relief herein requested.

INITIAL DECISION BY

JAMES P. TIMONY, ADMINISTRATIVE LAW JUDGE

JANUARY 9, 1987

I. INTRODUCTION

Respondent Motor Transport Association of Connecticut, Inc., ("MTAC") is a rate bureau¹ engaged in collective ratemaking for its motor carrier members. It submits to the Connecticut regulatory agency joint rate proposals on trucking prices for hauls within Connecticut of four types of commodities: general commodities, household goods, bulk commodities in dump trucks and liquid bulk products in tank trucks.

II. SUMMARY OF PROCEEDINGS

On September 18, 1984, the Commission issued its complaint charging respondent, its members, and others with an unlawful

¹ For a general description of the nature of the industry, see *Southern Motor Carriers Rate Conference, Inc. v. United States*, 105 S.Ct. 1721 (1985); and *Massachusetts Furniture & Piano Movers, Inc.*, 102 FTC 1176, 1209 (1983), *rev'd on other grounds*, 773 F.2d 391 (1st Cir. 1985), (referred to herein as "*Mass. Movers*").

combination involving the developing and filing of collective rates with the state regulatory agency.

Respondent's answer dated October 31, 1984, admitted certain corporate facts but denied all jurisdictional facts and substantive allegations of the complaint. In addition, respondent raised thirteen defenses to the complaint. Respondent moved to amend its Answer to add a fourteenth defense but the motion was denied on May 1, 1985.

Complaint counsel moved to stay this matter pending the disposition of *Mass. Movers*, and the motion was granted on June 17, 1985. This case was assigned to me on October 1, 1986. By order dated October 9, 1986, trial was set for January 5, 1987. Respondent moved to stay proceedings pending the disposition by the Commission of *New England Motor Rate Bureau, Inc.*, Docket No. 9170. The motion was denied on November 18, 1986. The parties thereafter agreed to stipulate the record, filing a stipulation of facts and exhibits. The trial was therefore cancelled and the record closed. Order of November 24, 1986. [3]

III. FINDINGS OF FACT

A. Respondent

1. Motor Transport Association of Connecticut, Inc., is a corporation organized, existing and doing business under the laws of the State of Connecticut. Stipulation filed November 17, 1986, paragraph number 1.²

2. MTAC's members engage in the intrastate transportation of property by motor vehicle in Connecticut. (S. 2)

3. MTAC has approximately 585 competing motor carrier members. Answer ¶¶ 9, 10.

4. Intrastate common carriers of property by motor vehicle in Connecticut operate under certificates of public convenience and necessity granted by the State of Connecticut. (S. 3)

5. MTAC was formed in 1920 and incorporated in 1930. Its purpose was to promote and preserve the advantage of highway transportation; promote economical and efficient service by motor truck; promote safety of operation on the highways; promote and support necessary and beneficial legislation; and engage in any other activities that will benefit the welfare of highway transportation and the public generally. (S. 4)

² The stipulation will be referred to as "S." followed by a number designating the paragraph of the stipulation.

6. MTAC issues tariffs and supplements thereto ("MTAC tariffs") in which it publishes intrastate rates on behalf of some of its motor common carrier members engaged in intrastate transportation of property within the State of Connecticut. (S. 5)

7. Any motor carrier may become an active member of MTAC. (S. 6)

8. MTAC's active members are entitled to, and do, among other things, vote for and elect the directors of MTAC. The control, direction and management of MTAC is vested in its Board of Directors. The President is the chief executive officer of MTAC. (S. 7)

9. At its annual meeting MTAC's membership approves and ratifies the actions of MTAC, its directors and officers, since the last annual membership meeting. (S. 8) [4]

10. Officers and directors of MTAC must be representatives of active members. (S. 9)

11. MTAC's President is John E. Blasko. Prior to becoming President, Mr. Blasko was Executive Vice President and General Manager of MTAC for 16 years. His duties in all three capacities were the same: complete control of MTAC's office, employees, records, and property; managing the day-to-day operations of MTAC; and lobbying for the industry. (S. 10)

B. FTC Jurisdiction

12. MTAC does not possess a certificate of public convenience and necessity from the Interstate Commerce Commission. (S. 22) MTAC does not engage in the transportation of goods. (S. 23)

13. MTAC actively promotes the economic benefit of its members. (Findings 25-39)³

C. Commerce

14. Seventy-five to 100 of MTAC's active members are located outside the State of Connecticut. The majority of these are motor carriers. (S. 11)

15. MTAC renders its out-of-state members services for which it charges a fee. (S. 12)

16. MTAC's out-of-state members pay substantial amounts of money for dues and for fees for services performed by MTAC. These monies are transmitted across state lines to MTAC's offices in Connecticut. (S. 13)

³ Findings are referred to herein as "F." followed by the number of the finding.

17. MTAC purchases goods and services from people or firms located outside Connecticut. (S. 14)

18. MTAC holds some of its conventions of its membership outside Connecticut and expends funds for that purpose. (S. 15)

19. Carrier members of MTAC transport substantial numbers of shipments that originate and terminate within Connecticut for private shippers or receivers with headquarters and principal places of business located outside Connecticut. The rates charged for these shipments are governed by MTAC tariffs. (S. 16)

20. Some of MTAC's carrier members transmit bills for intrastate transportation services to private shippers or receivers at their headquarters and principal places of business outside Connecticut. (S. 17)

21. The private shippers or receivers for whom property is transported within Connecticut by carrier members of MTAC under rates in MTAC tariffs, which shippers or receivers have their headquarters and principal places of business outside Connecticut, transmit to said carrier members of MTAC substantial sums of money in payment for the intrastate transportation services rendered. (S. 18)

22. MTAC members located in Connecticut transport substantial quantities of general commodities of property from warehouses and distribution centers located within Connecticut to customers located within Connecticut, which property had been transported from origin points outside Connecticut to such warehouses and distribution centers for distribution within Connecticut or distribution in other states. In many cases MTAC members charge shippers or shippers' customers the intrastate rates contained in the MTAC tariffs for the intrastate transportation of these general commodities of property from warehouses and distribution centers. (S. 19)

23. Some MTAC members located in Connecticut purchase substantial amounts of equipment and other goods for use in their transportation business, including their intrastate transportation business, from private businesses with headquarters and principal places of business located outside of Connecticut, and the equipment and other goods are transported into Connecticut. (S. 20)

24. Some MTAC members located in Connecticut transmit substantial sums of money in payment for equipment and other goods purchased for use in their transportation business, including their intrastate transportation business, to private businesses from whom the equipment and other goods were purchased, whose headquarters

and principal places of business are located outside Connecticut. (S. 21)

D. Conduct

25. MTAC files proposed tariffs with the Connecticut Department of Public Utility Control ("DPUC") on behalf of its members. (S. 24) [6]

26. Subsequent to DPUC approval, rates published in a MTAC tariff are charged for intrastate shipments within Connecticut to shippers using the services of MTAC members that participate in that MTAC tariff. (S. 28)

27. MTAC acts on behalf of its members pursuant to written powers of attorney. DPUC requires that a carrier desiring to have an agent issue and file its tariffs execute a document citing such appointment. (S. 29; Joint Exhibit 1)⁴

28. MTAC files four different tariffs: (1) the Local and Joint Tariff of Class and Commodity Rates Applying Between Points in Connecticut ("General Commodities Tariff"), which the New England Motor Rate Bureau, Inc. ("NEMRB"), issues and files in conjunction with MTAC; (2) the Local Commodity Tariff Applying On Transportation of Liquid Commodities in Bulk, in Tank Trucks, Between All Points In Connecticut ("Bulk Liquid Tariff"); (3) the Motor Freight Tariff of Local Commodity Rates Applying On Dump Truck Service Between Points Within Connecticut ("Dump Truck Tariff"); and (4) the Motor Freight Tariff of Local Commodity Rates Applying On Household Goods Between All Points in Connecticut ("Household Goods Tariff"). (S. 30; JX 2, JX 3, JX 4, JX 5)

29. The Bulk Liquid Tariff, Dump Truck Tariff and Household Goods Tariff are issued by MTAC without the involvement of NEMRB. (JX 3a, JX 4a, JX 5a)

30. At all relevant times, two or more members of MTAC have participated in the rates set by each of the MTAC tariffs. (S. 31)

31. In general, each MTAC tariff sets out rules and definitions for computing the rates applicable to any given movement of freight covered by the tariff, contains tables standardizing distance computations, and contains tables of rates applicable to movements and to ancillary services. For example, a rule in the General Commodities Tariff defines what collection and delivery services are included in the basic movement rates and specifies a minimum charge and a per

⁴ The Joint Exhibits attached to and incorporated by reference into the Stipulation filed November 17, 1986 are referred to herein as "JX" followed by the exhibit number.

pound rate for collection or delivery beyond the defined area under various specified conditions. Other rules govern the applicability of waiting time, demurrage, storage and other special charges and set minimum or standard charges for these and other ancillary services. (S. 32)

32. The General Commodities Tariff specifies rates per pound and minimum charges for commodities grouped by "class" and [7] by standardized distance "scale numbers." There are five basic classes, as defined in the Coordinated Freight Classification issued by NEMRB, over which MTAC has no control or authority. There are also several "levels" of class rates, which are multiples of class rates. Thus, for any given quantity of any given product covered by the Coordinated Freight Classification there is a specific rate per pound corresponding to the standardized distance between the pickup and delivery points, unless the specified minimum charge applies. To illustrate, effective February 15, 1980, for movements of any less-than-truckload shipment of 500 to 1,999 pounds of any class 5 product between Hartford and New Haven the rate was \$2.89 per hundred pounds over the line of any participating carrier. At that time 14 of the approximately 174 carriers that participated in that tariff took exception to this rate and, as shown in the tariff itself, applied a higher rate of \$3.61 per hundred pounds to the same shipment. At 500 pounds, minimum charges do not appear to be a factor. (S. 33; JX 2)

33. The Household Goods Tariff specifies three or more different sets of rates to be charged by all participating carriers. First, for ancillary services such as packing and unpacking, a rate is specified for each type of service. Second, for moves of twenty miles or less, each participating carrier elects one of several tables of transportation rates per hour for a truck of a certain size with a driver and with or without helpers, with separate tables for normal business hour rates and overtime hour rates. To illustrate, in the tariff effective February 21, 1983, 28 carriers elected table VI which listed a rate of \$22.55 per hour during normal business hours for a vehicle not exceeding 700 cubic feet and a driver and \$11.50 per hour for each helper. At that time, ten carriers elected table VII and three elected table VIII, which had higher rates for vehicle and driver of \$26.20 and \$31.30 per hour, respectively, and for helper of \$13.40 and \$15.00 per hour, respectively. Eleven carriers elected lower priced tables. Third, for moves of over twenty miles, mileage rates applicable to all participating carriers are

specified. To illustrate, to load and unload one ton of household goods valued at no more than \$.60 per pound and move it 105 miles within Connecticut, the rate in the tariff effective February 21, 1983, was \$17.17 per hundred pounds or \$343.40 over the lines of all participating carriers. (S. 34; JX 3)

34. The Bulk Liquids Tariff specifies rates per gallon for particular classes of bulk liquids transported by participating carriers between named points in Connecticut or per mile between any other points in Connecticut. To illustrate, in the tariff effective March 15, 1983, in which eleven carriers participated as to gasoline, exclusive of dedicated continuous service, the rate for hauling gasoline between Bridgeport and Hartford was \$.0235 per gallon, subject to a minimum of 7500 gallons per truck [8] or a minimum charge of not less than \$70.80 for a smaller truck. Different rates applied to different bulk liquids. (S. 35; JX 4)

35. The Dump Truck Tariff specifies rates per mile or hour, minimum shipments, demurrage charges and other rules for specific materials to be hauled by participating carriers. To illustrate, the regular time rate for hauling six ton or larger loads of commercial crushed stone, commercial sand or commercial gravel between any two points in Connecticut in the tariff effective May 12, 1986, was \$1.35 per ton for the first four miles and \$.17 per ton for each additional mile for 79 of the 105 carriers participating. (S. 36; JX 5)

36. Starting in 1959, pursuant to Connecticut law and in response to a petition by MTAC and others, DPUC has periodically issued minimum rate orders pertaining to rates that may be charged for the carriage of general commodities. Under the minimum rate orders, carriers whose tariffs are below the minimum rates are required to increase their rates unless they successfully petition for an exemption. Over 50 carriers have filed petitions for exemption from a minimum rate order. Competing carriers may protest any exemption. The function of a minimum rate order is to set a floor on rates. (S. 38; JX 6, JX 7)

37. MTAC petitioned DPUC to impose a minimum rate order on general commodities in 1958, seeking "a stabilization of rates and charges for motor common carriers authorized to transport general commodities between points in Connecticut." (JX 6d) It further requested that the Commission prescribe a "single hourly rate schedule for the purpose of obtaining uniformity in rates to be applied by carriers performing intrastate transportation service in Connecticut." (JX 6p)

38. MTAC has petitioned DPUC from time to time on behalf of some of MTAC's general commodity carrier members to increase the minimum rate order that sets a floor on intrastate general commodity rates. (JX 7b, i, j) For example, on August 18, 1983, MTAC petitioned DPUC for an increase in minimum rates of approximately 25%. (S. 39; JX 7a-b)

39. MTAC has intervened in opposition to petitions by individual carriers to seek permission to charge less than the minimum rate order. (JX 16q)

E. Active State Supervision

40. Effective in October 1986, DPUC had appointed Edward Regan, formerly head of the Transportation Division, the head and [9] supervisor of the Tariff Division (JX 12) and reporting to him are two rate analysts who review tariffs filed by MTAC and others, Thomas J. Brookman and Joseph Bystrowski. (S. 46, 55)

41. All common carriers are required to file a tariff with DPUC. When a proposed tariff is received by DPUC, it is reviewed by one of these rate analysts, who stamps it as received, ascertains that powers of attorney for the carriers participating are correct, compares the requested rates to the previous ones, assures that they are above the ones in the minimum rate orders, if applicable, and places the tariff on the public record for 30 days unless it is merely a carrier adopting a bureau tariff, in which case only one day's notice is required. The rate analyst may also refuse to place it on the public record if it does not satisfy these and other requirements set forth herein. Other than DPUC regulations, there are no published standards for review of tariffs. If the increases are less than 5% and there are no errors or corrections, the tariff is approved without a hearing unless there is a protest. If there is a protest, the tariff is suspended and a public hearing may be held. Except for hearings on minimum rate orders and petitions for exemption for the minimum rate orders, there have been few public hearings in the last sixteen years. When a hearing is held, witnesses for the tariff proponent testify as to the need for an increase. Normally, there is little opposition and the hearing takes one day. Frequently, the petitioner refiles in an effort to satisfy the DPUC rate analyst. (S. 46, 56, 60, 69; JX 8g)

42. Between 1980 and 1983, DPUC's accounting division reviewed a tariff filing only if a rate analyst requested such a review. Since 1983, as a result of an internal policy review, the accounting division has taken a larger role. (S. 47)

43. If the tariff becomes effective without a rejection, suspension or hearing, that action results from an opinion of the rate analyst that the proposed rates meet the requirements of the statutes and regulations. (S. 49)

44. If a rate increase is for more than 5%, DPUC requires that it be accompanied by financial information designed to justify the reasonableness of the increase, consisting of the proponent's operating revenues, operating expenses, tonnage and revenue to be generated, a *pro forma* operating statement and net operating income. DPUC generally regards an operating ratio (operating expenses divided by operating revenues) of 93% as reasonable. If a tariff affects more than one carrier, a cross section of carriers affected may be used for purposes of analyzing operating ratios. (S. 50, 62, 68; JX 9, JX 10)

45. Since 1957 DPUC has not initiated a minimum rate order review. It has responded to carrier petitions to initiate or increase minimum rates, all of which have been submitted by NEMRB [10] jointly with MTAC. Since then it has issued about twelve additional minimum rate orders in response to carrier petitions. (S. 51; JX 6, JX 7)

46. The Minimum Rate Order issued in 1959 (JX 6) pertains to General Commodities and does not affect the Bulk Liquid Tariff, Dump Truck Tariff or Household Goods Tariff. (JX 6d, m)

47. DPUC does not review carrier decisions to move from one table to another in the Household Goods Tariff, but it does review any change in the tables themselves. (S. 52)

48. Aside from its role in reviewing proposed rate increases, DPUC does not monitor conditions in the intrastate trucking industry in Connecticut (except for safety, insurance, and issuance of stamps (license fees)). (S. 53)

49. DPUC has permitted tariffs to become effective without suspension or hearing. (S. 64; JX 7a)

50. If a tariff rate, charge or rule is set down for a hearing, a legal notice is issued by the DPUC and published in selected Connecticut newspapers of general circulation. (S. 65)

51. Rate analysts in the DPUC submit written recommendations with respect to applications for changes in tariff on all matters that go to a hearing. A written recommendation is also submitted when a matter is not set down for a hearing. (S. 66; JX 15)

52. Any change in the rates and charges filed with DPUC must be held in abeyance for 30 days to permit DPUC to review the rate filings

and permit public comment, except that a shorter period is permissible when such change is to enable the carrier to meet the rate of a competing carrier. (S. 67)

53. If the tariff submitted to DPUC is below the minimum rate order or orders, the carrier must file a petition for exemption in which event the tariff is suspended. (JX 16) A hearing may be held to justify the proposed rate. (S. 69)

54. When a proposal for a general rate increase is submitted by a rate bureau such as MTAC, it must be accompanied by an elaborate justification statement. (F. 44) This justification statement is thoroughly analyzed by the tariff section as well as the audit section of the Commission and a written recommendation is prepared for submission to the Commission. (S. 70)

55. There are about 400 carriers having intrastate rights in Connecticut. If each were to file individual tariffs, in the opinion of DPUC it would be impossible for DPUC to process them without a tremendous increase in its staff and a substantial increase of its budget. (S. 74) [11]

56. The DPUC has the power to prescribe minimum rates and does prescribe them, either on its own motion or upon petition by an interested party. (S. 57, S. 58; JX 8w)

57. When a tariff is filed it is always checked to determine whether it is the same, below or above the minimum rate orders and whether it should be suspended, rejected, returned for errors or corrections or set down for a hearing. The DPUC has rejected some tariffs filed by independent carriers. (S. 59; JX 13d, e)

58. The tariff is processed initially by the tariff section of the DPUC. It always refers a carrier with new authority to the audit section to consider and analyze the financial information submitted. (S. 60)

59. An application for operating rights must be accompanied by a proposed tariff, and its rates are always checked by the tariff section to determine if they are at least equal to or above the minimum rate order at the time. (S. 61)

60. The DPUC has issued several citations for charging rates different than the rate in the tariff. (S. 63; JX 14)

61. If a tariff submitted is above the minimum rate order and the increase is substantial (over 5%) the tariff is checked, the carrier is notified, and the tariff is suspended pending a conference or hearing. If the carrier makes corrections or adjustments satisfying to the tariff section, it is accepted and no hearing is required. (S. 68)

62. Whenever operating rights are transferred, an informal conference is required between the tariff section of the DPUC and the selling carrier at which conference the rates of the selling carrier are checked for compliance with the statutes and regulations. (S. 71)

63. Whenever a complaint by a shipper or another carrier affecting rates is filed, the matter is investigated. If any violation is found the carrier is required to cease and desist immediately and to make the required corrections or rebates if that is indicated. The shipper is always kept informed. (S. 72; JX 17)

64. If a carrier does not obey an order to cease and desist violations of the statutes or regulations, a citation is issued requiring compliance. Penalties are usually imposed if a violation is found. (S. 73)

65. DPUC, in a formal opinion dated February 9, 1975, approved a petition to increase rates for transportation of general commodities, after a hearing. (JX 7z-4) In an opinion dated December 5, 1977 another rate increase on transportation of [12] general commodities was granted after a hearing. (JX 7v) In an opinion dated March 3, 1979 another petition for rate increase was denied after hearing. (JX 7r) In an opinion dated December 14, 1979, a petition for rate increase was granted after hearing. (JX 7r) The next petition for a rate increase was not filed until August 18, 1983, and it was approved on October 5, 1983, without a hearing, since it involved only the smallest carriers, who continually have cash flow problems, and because many of the carriers had gone bankrupt in the past several years or had relinquished their certificates. (S. 38; JX 7a, c)

F. Legislative Intent

66. The DPUC is empowered to prescribe maximum and minimum rates and may prescribe reasonable regulations therefor; rates and charges "shall be just and reasonable and reasonably compensatory, except that a rate may be established to meet the existing rate of a competing rate of a motor common carrier or a common carrier not subject to this chapter." (JX 8g Sec 16-287(a))

67. Motor common carriers of freight may agree to establish joint rates. If the carriers fail to agree, the DPUC shall, after hearing, establish by order such a division. (JX 8g Sec 16-287(b))

68. Discrimination in rates is prohibited, "nor shall any carrier refund or remit in any matter any portion of a rate so specified, nor give any unreasonable preference or advantage to any person—nor subject any person to any unreasonable prejudice or discrimination." (JX 8u Sec 16-288)

69. Rates may be changed only after a thirty day notice to the public; the DPUC may on its own initiative or upon protest hold a hearing on any rate changes and "may allow or disallow or prescribe the rate or rates." This statute further provides that the change in rate may become effective upon the effective date of the rate of the competing motor common carrier. (JX 8v Sec 16-289)

70. Any motor carrier who charges less than the regular rates on file shall be fined not more than \$500.00 for each offense. (JX 8x, y Sec 16-306)

71. The DPUC has been granted wide regulatory authority over the rates, certification, routes, speed, service, financial responsibility, insurance, liability, accounting and record keeping, safety and equipment of motor carriers, and has exercised that authority by rule making. (JX 8w, x Sec 16-304, JX 9a-i) [13]

IV. DISCUSSION

In its Answer to the Complaint, respondent raised thirteen affirmative defenses. All of these defenses were raised by the respondent in a very similar case, *The New England Motor Rate Bureau, Inc.*, Docket No. 9170, and were dismissed by Chief Judge Ernest G. Barnes in his Initial Decision dated December 12, 1986 and Order dated March 7, 1986. Furthermore, except for arguments that respondent is not engaged in price fixing and that the state action doctrine applies, these other defenses have not been briefed and, therefore, need not be decided. *Hospital Corporation of America v. Federal Trade Commission*, — F.2d — (7th Cir. 1986) (decided December 18, 1986), slip opinion at pp. 19-20.

A. Price Fixing

Respondent MTAC is a rate bureau composed of competing common carriers operating in the State of Connecticut. (Answer ¶ 6) The rate bureau, on behalf of 585 competing carriers (Answer ¶¶ 9, 10), submits joint rate proposals to the Connecticut Department of Public Utility Control which has authority over motor carrier rates within the State of Connecticut. (Answer ¶ 6) The members elect the directors of MTAC and the directors control and direct MTAC. (F. 8) Officers and directors are representatives of members of MTAC. (F. 10) MTAC acts on behalf of its members. (F. 27) MTAC has petitioned DPUC on behalf of its members to increase the rates charged for transportation of commodities in the State of Connecticut. (F. 36-38, 65)

MTAC initiates minimum rate orders by petitioning the state. (F. 37) The function of a minimum rate order is to set a floor on rates. (F. 36) Carriers can petition for exemptions from the minimum rate order (F. 53), and competing carriers can protest the exemption. (F. 36) MTAC can also protest. (F. 39)

The general commodities tariff states the rates at which commodities may be transported within Connecticut. (JX 2; F. 32) MTAC publishes three other tariffs: the Bulk Liquid Tariff (JX 4), the Dump Truck Tariff (JX 5), and the Household Goods Tariff (JX 3). (F. 28, 29) These tariffs specify rates at which participating carriers will move these categories of goods. (F. 33, 34, 35) Participating carriers charge only a rate in the tariff. (F. 26) The effect of these tariffs is to fix the price charged for intrastate transportation of each of these categories. (F. 26, 60, 64, 70) At least two members of MTAC have participated in each rate set in each MTAC tariff. (F. 30) MTAC's active members control MTAC. (F. 8, 9, 10) MTAC acts as an agent on behalf of its members. (F. 27) [14]

Respondent's collective rate-making activities violate Section 5 of the Federal Trade Commission Act. The stipulated evidence establishes that the challenged conduct constitutes price-fixing and, in the absence of valid defense, is *per se* illegal. An agreement among competitors to eliminate price competition violates the antitrust laws, notwithstanding any argument that may be advanced to justify it. *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 647 (1980) (*per curiam*).

Respondent's conduct is virtually identical to that engaged in by the household goods carriers association in *Mass. Movers* which was found to violate Section 5 of the FTC Act. As in that case, respondent MTAC and its competing carrier members (F. 3), in cooperation with the New England Motor Rate Bureau (NEMRB), prepare tariffs pertaining to the intrastate transportation of commodities, approve them and participate in these collectively set rates. (F. 6, 9, 25-39). These activities, as well as the Bureau's publication and dissemination to its members of tariffs (JX 2-5) and tariff revisions containing collectively-set rates and classifications, constitute price-fixing. *Georgia v. Pennsylvania Railroad*, 324 U.S. 439, 460-61 (1945). In *Mass. Movers*, the Commission found that the Association's development of joint tariffs that were formally adopted and adhered to by its members was "*per se* unlawful under the antitrust laws." 102 FTC at 1225

The fact that individual member carriers are free to file rates

independently from the collectively agreed upon rates is irrelevant. An agreement to fix prices that does not coerce adherence is nevertheless illegal price-fixing. *Arizona v. Maricopa County Medical Society*, 457 U.S. 332, 345 (1982); *United States v. Container Corp.*, 393 U.S. 333, 337 (1969); "The continuation of some price competition is not fatal to the Government's case."

Respondent argues that the record does not establish that the carrier members initiated, prepared, developed and disseminated rates and collectively agreed on the rates, and that MTAC merely copies tariff proposals already filed with DPUC. While the stipulated record does show that MTAC relies on NEMRB for help in developing the general commodities tariff (F. 28, 32, 45), it also establishes that MTAC issues other tariffs without the involvement of NEMRB. (F. 29) Furthermore, there is overwhelming evidence of an unlawful combination of MTAC and its members, as well as NEMRB, with respect to the tariff and rates charged for transportation of general commodities. (F. 8-10, 26, 27, 30, 65), *United States v. Container Corp.*, 393 U.S. at 335. Moreover, respondent's argument is based on deposition testimony which was not offered or received as evidence in this case. Order Setting Briefing Schedule, filed November 24, 1986. The stipulation filed November 17, 1986, and the joint exhibits referred to therein, are the entire factual record of this case. *Ibid.* [15]

B. State Action Defense

1. Law

Parker v. Brown, 317 U.S. 341, 344-45 (1943) held that federal antitrust law was not intended to apply to certain state action. To be exempt, the acts must be clearly authorized and supervised by the sovereign state. *Hoover v. Ronwin*, 466 U.S. 558, 568-69 (1984). To determine whether the respondent's acts are exempt, the facts must be analyzed under the standard of *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980).

The Court in *Midcal* set out the controlling two part test: "First, the challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy'; second, the policy must be 'actively supervised' by the State itself." *Ibid.*

The second prong of the *Midcal* test prevents the state from "casting . . . a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement." 445 U.S. at 106. This active supervision requirement ensures that a state's actions will

immunize the anticompetitive conduct of private parties only when the state has demonstrated its commitment to a program through its exercise of regulatory oversight. *Southern Motor Carriers Rate Conf. v. United States*, 105 S.Ct. 1721, 1729 n. 23 (1985).

The parties have joined issue on the second prong of the *Midcal* test of the state action defense. Complaint counsel argues that the state regulatory commission does not actively supervise the proposed collectively formulated rates through hearings to review the reasonableness of proposed tariffs. Hearings by a regulatory commission on proposed rates do, of course, constitute evidence that such applications are not "rubberstamped" or approved *pro forma* without hearing or change, and that the state agency actively supervises the anticompetitive conduct. *Sonitrol of Fresno, Inc. v. AT&T*, 629 F. Supp. 1089, 1094-95 (D.D.C. 1986). The requirement that applicants file extensive and detailed memoranda with the regulatory commission is also evidence that the state commission supervises heavily the rate approval process. *Id.* at 1095. The facts here show that respondent participates in both such hearings and filings, *infra*.

Complaint counsel, however, argues that in order to meet the state action exemption, the state regulatory agency must hold hearings, or at least give public notice and opportunity to comment, and publish a reasoned decision in every ratemaking decision.⁵ The basis for this argument is the policy cited in Areeda & Turner, *Antitrust Law*, Vol. 1 at ¶ 213f (1978) [16]

. . . [I]naction evades statutory approval procedures designed to (1) to accord opponents the opportunity to present facts and arguments against the challenged act, (2) to assure conscious consideration by those particular state officials charged with the power and responsibility for approval, and (3) to allow judicial review of the agency record.

Complaint counsel implies that the procedure described in the Areeda & Turner treatise should be used in reviewing all acts by a state regulatory commission under *Parker v. Brown*, to ensure that adequate state approval is contemplated.⁶ To support this argument, counsel relies on cases where statutes required an administrator to support an act by a written statement of reasons, *Dunlop v. Bachowski*, 421 U.S. 560, 573 (1975), or where hearings by the agency, upon application for rate approval, were cited as evidence of

⁵ Memorandum of Law dated December 5, 1986 at pp. 53-58.

⁶ Memorandum of Law dated December 5, 1986. at n. 58.

state supervision leading to immunity for anticompetitive conduct. *Sonitrol, supra*.

Chief Judge Barnes answered this argument in the Initial Decision in *The New England Motor Rate Bureau, Inc.*, Docket No. 9170, decided December 12, 1986, slip opinion at p. 30:

This Areeda-Turner idea would permit not only judicial review of agency decisions, but would compel the agencies to scrutinize more closely the basis for their decisions. Thus, much can be said for [its] adoption and implementation by the states. However, where the state by statute has granted the regulatory commission clear oversight authority to review rates for reasonableness, to suspend rates found to be unreasonable, and to establish just and reasonable rates when necessary, the existence of this latent oversight authority and the presumption of official regularity should shift the burden to the party challenging the ratemaking process to demonstrate that the regulatory commission in fact has never engaged in any active supervision of the ratemaking process. A mere showing that a state supervisory agency has not followed the Areeda-Turner suggested procedures is not sufficient to establish a lack of active supervision. The agency must be given some discretion as to its method and manner of supervision. Instead of concentrating on an agency's failure to follow [17] theoretical and desirable procedures, the record must concentrate on what the agency actually did.⁷

Furthermore, the Areeda-Turner proposal applies only where the regulatory agency has failed to act, *Areeda & Turner* at ¶ 213f.⁸ When the agency shows some regulatory activity and the issue is "how rigorous the supervision," the Professors suggest an entirely different theory, *id.* at ¶ 213c:

213c. **How rigorous the supervision?** When state agencies act within their authority, should the manner in which they exercise their discretion ordinarily be reviewed by the antitrust court? Should the court scrutinize the rigor with which the state supervises the challenged activity to ensure that supervision is more than *pro forma*? We answer in the negative, with the proviso that an outright attempt by a state to simply evade the antitrust laws should not be countenanced. We recognize that our approach may make such evasion easier, but we see no suitable way around this.

... There simply is no way to tell if the state has "looked" hard enough at the data,

⁷ The burden of proof rests on the party asserting the affirmative of an issue in the pleadings. *Koehler v. Marcona Mining Co.*, 391 F. Sup. 1158, 1160 (N.D. Cal. 1973), *aff'd*, 518 F.2d 696 (9th Cir. 1975). The procedure suggested by Judge Barnes therefore involves a shifting of the burden of proceeding rather than a shifting of the burden of persuasion. *A General Discussion of the Theory of Presumptions*, 45 Geo. L.J. 410, 417-21 (1957). *But see Ticor Title Ins. Co.*, Docket 9190, Initial Decision issued on January 6, 1987, slip opinion at p. 94, which apparently adopts a shifting of the burden of persuasion.

⁸ The total absence of activity by a state agency will not be active supervision within the meaning of *Midcal State of Northern Carolina v. P.I.A. Asheville, Inc.*, 740 F.2d 274, 279 (7th Cir. 1984) (en banc). Where the state does not monitor market conditions or engage in any pointed reexamination of the program, the second prong of the state action immunity test will not be met. *Id.* at 279.

and there certainly are no manageable judicial standards by which a court may weigh the various elements of a "public interest" judgment in order to determine whether the legislature or agency decision was correct. . . . Those are political judgments and ought to be made by the legislature and its delegates. [18]

The facts of this case show that the state has demonstrated its commitment to a program exempt from the antitrust laws through statutory delegation and the exercise of regulatory oversight and active supervision of rates by the DPUC.

2. Facts

The state legislature clearly intended to create a program of regulatory oversight of transportation of commodities by motor carrier. (F. 66-71) And that program has been active. Effective in October, 1986, DPUC appointed Edward Regan, formerly head of the Transportation Division, the head and supervisor of the tariff division, and reporting to him are two rate analysts who review tariffs filed. (F. 40) Since 1983, the DPUC's accounting division has taken a larger role in reviewing tariff filings. (F. 42)

All carriers are required to file their rates with the DPUC. (F. 41) Rate analysts review the tariffs to check, among other matters, if rates are above the minimum rate orders. (F. 41) Tariffs are filed and held in abeyance on the public record for thirty days, unless to meet a competing carrier's tariff in which even a shorter period is permissible. (F. 52) Rate analysts can refuse to file the tariff on the public record if it does not satisfy the tariff regulations and requirements. (F. 41)

If the increases are less than five percent and there are no errors or corrections, there is a presumption that the request is reasonable and the tariff is approved without a hearing unless there is a protest. (F. 41, F. 43, F. 49) If there is a protest, a public hearing may be held. (F. 41) Frequently, rejected tariffs are refiled to satisfy the requirements of a DPUC rate analyst. (F. 41)

If a rate increase is for more than five percent, it must be accompanied by financial information to justify the reasonableness of the increase consisting of proponent's operating revenues, operating expenses, tonnage and revenue to be generated, a *pro forma* operating statement, relationship of proposed rates to class rates, net operating income. A net operating ratio of 93% is considered reasonable. (F. 44; JX 9d).

The DPUC has the power to prescribe minimum rates and does

prescribe them, either on its own motion or upon petition by an interested party. (F. 56) The Commission initiated a minimum rate order in 1959 and about twelve additional minimum rate orders since that time in response to carrier petitions. Several of these orders were based on records developed in adversary hearings and were accompanied by a formal published opinion and explication. (F. 45, F. 65) [19]

When a tariff is filed it is always checked to determine whether it is the same, below or above the minimum rate orders and whether it should be suspended, rejected, returned for errors or corrections or set down for a hearing. The DPUC has rejected some tariffs filed by independent carriers. (F. 57) The tariff is processed initially by the tariff section of the DPUC. It always refers a carrier with new authority to the audit section to consider and analyze the financial information submitted. (F. 58) An application for operating rights must be accompanied by a proposed tariff, and its rates are always checked by the tariff section to determine if they are at least equal to or above the minimum rate order at the time. (F. 59) The DPUC has issued several citations for charging rates different than the rate in the tariff. (F. 60) When a tariff rate change or rule is set down for a hearing, a legal notice is issued to the public by DPUC and published in selected Connecticut newspapers of general circulation. (F. 50)

Rate analysts in DPUC submit written recommendations with respect to applications for tariff changes on all matters that go to hearing. Written recommendations are also submitted at times when a matter is not set down for hearing. (F. 51) If a tariff submitted is above the minimum rate order and the increase is substantial (over 5%) the tariff is checked, the carrier is notified, and the tariff is suspended pending a conference or hearing. If the carrier makes corrections or adjustments satisfying to the tariff section, it is accepted and no hearing is required. (F. 61)

If a tariff submitted is below the minimum rate order, the carrier must file a petition for exemption, in which event, the tariff is suspended. A hearing may be held to justify the proposed rate. (F. 41) When a general rate increase is proposed, it must be accompanied by an elaborate justification statement. This statement is thoroughly analyzed by the tariff and audit sections and a written recommendation is prepared. (F. 54)

Whenever operating rights are transferred, an informal conference is required between the tariff section of the DPUC and the selling carrier at which conference the rates of the selling carrier are checked

for compliance with the statutes and regulations. (F. 62) Whenever a complaint by a shipper or another carrier affecting rates is filed, the matter is investigated. If any violation is found the carrier is required to cease and desist immediately and to make the required corrections or rebates if that is indicated. The shipper is always kept informed. (F. 63) If a carrier does not obey an order to cease and desist violations of the statutes or regulations, a citation is issued requiring compliance. Penalties are usually imposed if a violation is not found. (F. 64) [20]

V. CONCLUSIONS

1. The Federal Trade Commission has jurisdiction over the subject matter of this proceeding and over respondent.

2. The acts and practices charged in the complaint took place in or affected commerce within the meaning of the Federal Trade Commission Act.

3. Respondent and its members, officers, and directors have engaged in a conspiracy to restrain price competition amongst common carriers of property by motor vehicle. This conspiracy is an unfair method of competition and an unfair act and practice in commerce or affecting commerce in violation of Section 5 of the Federal Trade Commission Act.

4. This conspiracy is, however, exempt from Section 5 of the Federal Trade Commission Act by reason of the "state action" defense, *Parker v. Brown*.

Accordingly, the complaint must be dismissed.

OPINION OF THE COMMISSION

BY AZCUENAGA, *Commissioner*:

This case involves allegations that the respondent Motor Transport Association of Connecticut unlawfully combined with its members and others to fix prices in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, by collectively developing and filing rates for the intrastate transportation of property in the state of Connecticut. After trial on a stipulated record, the Administrative Law Judge dismissed the complaint, holding that the collective ratemaking was unlawful price fixing but that the conduct is protected from action under Section 5 by the state action doctrine of *Parker v. Brown*, 317 U.S. 341 (1943). For the reasons set forth below, we affirm the dismissal of the complaint.

THE FACTS

The undisputed facts in this case show that the Motor Transport Association of Connecticut, Inc. ("MTAC" or "Association"), is an association of approximately 585 competing motor common carriers engaged in the intrastate transportation of property in Connecticut. I.D.F. 1-3.¹ The active members of the Association elect its directors, who, in turn, control and manage the Association. I.D.F. 8. The active members meet annually and approve and ratify the actions of the Association and its directors and officers since the last annual meeting. I.D.F. 9; Stip. 8. Active membership is available to persons or firms that provide motor vehicle transportation for hire or for their own account and to motor vehicle dealers. I.D.F. 7; Stip. 6. Others are eligible for associate membership.

The member carriers are regulated by the state. The state requires that each carrier hold a state certificate of public convenience and necessity and that each carrier file a schedule of rates and charges for transportation services. Conn. Gen. [2] Stat. §§ 16-283 & 16-287 (1985).² A carrier's certificate is subject to revocation for failure to have a tariff on file, and a carrier may not charge a rate different from that filed without thirty days' notice, except "to meet the rate of a competing carrier" or "for good cause shown." Conn. Gen. Stat. § 16-289. Enforcement action may be taken against carriers for failure to have an effective tariff on file, *e.g.*, J.X. 18c-18e, or for failure to adhere to filed rates. I.D.F. 60; *see* J.X. 18h-18m.

The Association files proposed tariffs with the Connecticut Department of Public Utility Control ("DPUC") on behalf of its members. I.D.F. 25. After an MTAC tariff is approved by the DPUC, the rates contained in the tariff govern the fees of the members of the Association that choose to participate in it. I.D.F. 26. Members of the Association may participate in tariffs filed by MTAC, or they may file a separate tariff or file an exception to the MTAC tariff. Stip. 27 & 31.

¹ We use the following abbreviations in this opinion:

I.D.	Initial Decision
I.D.F.	Initial Decision Finding
R.R.B.	Respondent's Reply Brief
C.A.B.	Complaint Counsel's Appeal Brief
C.R.B.	Complaint Counsel's Reply Brief
Stip.	Stipulation of the Parties (Nov. 17, 1986)
J.X.	Joint Exhibit.

² All citations to Connecticut statutes and regulations are to those identified by the parties as the statutes and regulations pursuant to which MTAC filed tariffs and the DPUC reviewed tariffs during the period covered by the complaint. Stip. 44; J.X. 8, 9 & 10.

At all times relevant to the complaint, at least two members of MTAC have participated in the rates set by each of the MTAC tariffs. I.D.F. 30; Stip. 31.

a. *MTAC Tariffs*

MTAC files four different tariffs or schedules of rates, each of which includes rate schedules, general rules for computing applicable rates and rules for applying rates to transportation and ancillary services. I.D.F. 28 & 31. For example, the MTAC tariff of Local Commodity Rates Applying on Household Goods, effective on February 21, 1983, specifies several different sets of basic rates, the services included in the basic rate, the rates for additional services such as packing, piano moving, waiting time and overtime, and transportation rates on a time basis (for moves of 20 miles or less) and on a mileage basis (for moves of more than 20 miles). J.X. 3; *see* I.D.F. 33.

In addition to the Household Goods Tariff, MTAC files a Local and Joint Tariff of Class and Commodity Rates ("General Commodity Tariff"), J.X. 2, a Local Commodity Tariff Applying on Transportation of Liquid Commodities in Bulk, in Tank Trucks ("Bulk Liquid Tariff"), J.X. 4, and a Motor Freight Tariff of Local Commodity Rates Applying on Dump Truck Service ("Dump Truck Tariff"), J.X. 5. *See* I.D.F. 28-35. [3]

The General Commodity Tariff specifies rates per pound and minimum charges for commodities grouped by "class" for standardized distances. I.D.F. 32. The Bulk Liquids Tariff specifies rates per gallon for particular classes of bulk liquids moved between named points in the state or per mile between other points in the state. I.D.F. 34. The Dump Truck Tariff specifies rates per mile or hour, minimum shipments and other rules for hauling specific materials. I.D.F. 35.

In addition to filing tariffs, MTAC, in conjunction with New England Motor Rate Bureau, has from time to time petitioned the DPUC to issue minimum rate orders. I.D.F. 36, 37, 38 & 45. The function of a minimum rate order is, as the term suggests, to set a floor on rates. Carriers are required to charge no less than the minimum rate order unless they successfully petition the DPUC for an exemption. I.D.F. 36. Between 1957 and 1979, the DPUC issued twelve minimum rate orders. I.D.F. 45; *see, e.g.*, J.X. 6 & 7. MTAC also has intervened in opposition to petitions by carriers seeking exemptions from minimum rate orders. I.D.F. 39.

b. *State Regulation*

The Connecticut Department of Public Utility Control regulates motor common carriers. The DPUC is responsible for, among other things, issuing certificates of public convenience and necessity and reviewing proposed tariffs. Connecticut law provides that motor common carrier rates “shall be just and reasonable and reasonably compensatory” and gives the DPUC authority to “prescribe maximum or minimum or maximum and minimum rates or charges” for motor common carriers. Conn. Gen. Stat. ¶ 16-287(a). The DPUC may prescribe rates on its own motion or on the motion of any interested party, after a hearing. *Id.*

After a proposed tariff is filed with the DPUC, it is reviewed by one of the agency’s rate analysts, who stamps it as received, ascertains that the proposed rates comply with any applicable minimum rate orders and checks the form of the proposed tariff.³ If these and certain other requirements are met, the rate analyst places the proposed tariff on the public record for thirty days.⁴ I.D.F. 41. [4]

Carrier rates are required to be “just and reasonable and reasonably compensatory,” but no standards for review of proposed rates have been published. Stip. 46.⁵ In practice, the DPUC presumes that a proposed rate increase that is within 5% of the previously filed rate is reasonable. If a proposed rate increase falls within this 5% “zone of reasonableness” and no other corrections are necessary (and no protests are filed), the DPUC will approve the tariff without a hearing. I.D.F. 41.

If a proposed rate is an increase of more than 5% over the previous rate, the DPUC requires financial information to justify the increase, such as the carrier’s operating revenues and expenses, tonnage and revenue to be generated, net operating income and a *pro forma* operating statement. I.D.F. 44; Stip. 50, 62. The DPUC generally

³ Regulations of the DPUC address the technical aspects of tariff filing. See, e.g., Conn. Agencies Regs. §§ 16-304-C2, et seq., which specify the size of paper, the arrangement of the title page and other requirements as to form of tariffs.

⁴ Rates filed with the DPUC may be changed only after 30 days’ notice, except to meet a competing rate or for good cause shown. One day’s notice is required when a carrier files to adopt a bureau tariff. Conn. Gen. Stat. § 16-289.

⁵ The DPUC has said that rates should be sufficient to meet “[t]he public need for a sound and stabilized motor common carrier industry” in the state and to “provide revenues which will cover all costs of operations and afford carriers a reasonable degree of profit.” In the Matter of Investigation and Stabilization of Rates of Motor Common Carriers, DPUC Docket No. 9652, April 15, 1959, at 15 (J.X. 60).

regards an operating ratio (operating expenses divided by operating revenues) of 93% as presumptively reasonable.⁶ I.D.F. 44.

Between 1980 and 1983, DPUC's accounting division reviewed a tariff filing only if requested to do so by a rate analyst. Since 1983, as a result of an internal policy review, the accounting division has taken a larger role in reviewing filings. I.D.F. 42. All tariffs filed by carriers with new authority are referred to the audit section of the DPUC to consider and analyze the financial information submitted. I.D.F. 58. A proposal for a general rate increase submitted by a rate bureau such as MTAC must be accompanied by an elaborate justification statement, which is thoroughly analyzed by both the staff and the audit sections of the DPUC, after which a written recommendation is prepared for the Commission. I.D.F. 54. [5]

State law provides for a thirty day public comment period on proposed tariffs, during which time the DPUC reviews the filing, Stip. 67, and a rate analyst prepares a written recommendation with respect to the proposed tariff. I.D.F. 51; Stip. 66. If the proposed tariff is presumptively reasonable—that is, the proposed increase is less than 5% and at least equal to any applicable minimum rate order—then the tariff usually is permitted to become effective at the end of the thirty-day period without a hearing. I.D.F. 41 & 49. When a tariff becomes effective without a rejection, suspension or hearing, the rate analyst to whom the matter has been assigned has concluded that the proposed rates meet the requirements of the applicable statutes and regulations. I.D.F. 43; Stip. 49.

A proposed tariff can be set for a hearing if a protest is filed by "any interested person," or the DPUC may set the matter for a hearing on its own initiative. Conn. Gen. Stat. § 16-289. If a hearing is held, the DPUC issues a legal notice, and the staff of the DPUC submit a written recommendation. I.D.F. 51; Stip. 66. Except for hearings on minimum rate orders and on petitions for exemptions from minimum rate orders, few public hearings have been held in the last sixteen years. I.D.F. 41; Stip. 46. When a hearing is held, normally there is little opposition to the rate increase, and the hearing takes one day. Frequently, when the DPUC poses questions, the petitioner revises and refiles its tariff in order to satisfy the concerns of the DPUC rate analyst. *Id.*

⁶ The DPUC found that an operating ratio of 93% was reasonable in Docket No. 9652, at 15 (J.X. 6o). The DPUC denied a joint MTAC/New England Motor Rate Bureau minimum rate petition on the ground that the projected operating ratio of 83.7% was "more than just reasonable and adequate to enable the Petitioners to provide properly for the public convenience, necessity and welfare." DPUC Docket 781114, March 12, 1979, at 3 (J.X. 7t).

The DPUC has disapproved a minimum rate petition filed jointly by MTAC and the New England Motor Rate Bureau, I.D.F. 65; *see* note 6 *supra*, and it has rejected some tariffs filed by independent carriers. I.D.F. 57; Stip. 59. The DPUC investigates complaints filed by shippers or other carriers concerning a carrier's rates, and it can issue an order requiring a carrier to cease the violation and to pay rebates. I.D.F. 63. The DPUC also can issue citations requiring compliance if an order is not obeyed, and the DPUC has issued citations to carriers for charging rates different from those in the filed tariff. I.D.F. 60.

LEGAL ANALYSIS

After establishing that the Commission has jurisdiction over the Association under the Federal Trade Commission Act, two questions of law remain. First, we must determine whether the Association's conduct constitutes unlawful price fixing. If the conduct is unlawful, we then must consider whether it is protected from the Federal Trade Commission Act because it is state action within the meaning of *Parker v. Brown*, 317 U.S. 341 (1943). [6]

I. JURISDICTION

The Motor Transport Association of Connecticut has not raised jurisdiction as an issue on appeal.⁷ We note, nevertheless, that the Commission has jurisdiction over MTAC. Section 5(a)(2) of the Federal Trade Commission Act extends the Commission's jurisdiction to "corporations," which, as defined in Section 4 of the Act, includes any firm "organized to carry on business for its own profit or that of its members." MTAC is a nonprofit corporation, organized and doing business in the state of Connecticut. Stip. 1, Answer ¶ 18. The fact that MTAC is a nonprofit corporation does not defeat the Commission's jurisdiction. The Association is subject to the Commission's jurisdiction if its activities provide an economic benefit to its members and if those activities are a substantial part of the Association's activities, rather than merely incidental to the noncommercial activity. *American Medical Association*, 94 FTC 701, 983-84 (1979), *aff'd*, 638 F.2d 443, 447-48 (2d Cir. 1980), *aff'd per curiam by equally divided Court*, 455 U.S. 676 (1982); *National Commission on Egg*

⁷ The respondent lists its Answer defenses, other than state action, in its Answering Brief, R.R.B. at 2-3, but did not brief them at trial or on appeal. The Administrative Law Judge decided that because the defenses were not briefed, they need not be decided, I.D. at 13, and we agree. *See Hospital Corp. of America v. FTC*, 807 F.2d 1381, 1393 (7th Cir. 1986) (Posner, J.) ("[I]ssues cannot be preserved . . . merely by being raised . . . or by being developed inadequately. . . ." (Citations omitted.)).

Nutrition, 88 FTC 89, 177 (1976), *modified*, 570 F.2d 157 (7th Cir. 1977), *cert. denied*, 439 U.S. 821 (1978). MTAC has provided substantial economic benefits for its members by issuing and filing tariffs with the DPUC on behalf of its members and by petitioning the DPUC to issue minimum rate orders. I.D.F. 13 & 25-29.

Although some of the Association's members are carriers subject to the Interstate Commerce Act and therefore exempt from the Federal Trade Commission Act, 15 U.S.C. 45(a)(2), MTAC does not transport goods and is not a common carrier. I.D.F. 12; Stip. 22, 23. The fact that the Association operates as an agent for common carriers does not bring it within the common carrier exemption. *See Massachusetts Furniture & Piano Movers Association, Inc. v. FTC*, 773 F.2d 391, 394 (1st Cir. 1985) (association that is not a common carrier is not within the common carrier exemption); *Official Airline Guides, Inc. v. FTC*, 630 F.2d 920, 923 (2d Cir. 1980), *cert. denied*, 450 U.S. 917 (1981). [7]

II. PRICE FIXING

The Motor Transport Association of Connecticut also does not dispute on appeal that it has engaged in price-fixing. On behalf of its members, MTAC prepares and files with the state DPUC tariffs containing proposed rates for transportation services, which, after approval by the DPUC, establish the prices for those of its carrier members that elect to participate in a particular tariff. In addition to tariff proposals, MTAC has petitioned the state DPUC to adopt minimum rate orders, setting a floor on prices for some transportation services for all intrastate carriers.

This activity is collective ratemaking, concerted activity to fix or stabilize prices, that "easily fits the classic description of a 'naked price restraint.'" *United States v. Southern Motor Carriers Rate Conference, Inc.*, 467 F. Supp. 471, 486 (N.D. Ga. 1979), *aff'd*, 702 F.2d 532 (5th Cir. 1983), *rev'd on other grounds*, 471 U.S. 48 (1985); *see also Massachusetts Furniture & Piano Movers Association, Inc.*, 102 FTC 1176, 1224-25 (1983), *rev'd on other grounds*, 773 F.2d 391 (1st Cir. 1985). The Association and all of its members need not agree to a single price level in order to fix prices. Rather, it is sufficient to show an agreement having the purpose or effect of inhibiting price competition. Such an agreement is *per se* unlawful. "Price is the 'central nervous system of the economy,' *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 226 N.59 [1940], and an agreement

that 'interfere[s] with the setting of price by free market forces' is illegal on its face." *National Society of Professional Engineers v. United States*, 435 U.S. 679, 692 (1978).

III. STATE ACTION

The primary issue on this appeal is whether the otherwise unlawful conduct of the Association is protected from the Federal Trade Commission Act by the state action doctrine.⁸ The Association claims that because the tariffs that it proposes are subject to approval by the state, the tariffs are the action of the state and not the product of private collective ratemaking that is subject to Section 5 of the Federal Trade Commission Act.

The state action doctrine involves principles of federalism and state sovereignty. These principles were invoked in *Parker v. Brown*, 317 U.S. 341 (1943), in which the Supreme Court held that the Sherman Act was not intended to prohibit the states from [8] imposing restraints on competition. The Court said, "In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress." 317 U.S. at 351. On the other hand, the court said, "a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful." *Id.*⁹

To determine whether the challenged conduct is private action or state action, the Court in *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), articulated a rigorous two-part test. Under *Midcal*, a private party's conduct is protected by state action if, first, the challenged restraint is "clearly articulated and affirmatively expressed as state policy" and, second, the policy is actively supervised by the state. *Id.* at 105.¹⁰ The purpose

⁸ The state action doctrine is available in Section 5 cases applying Sherman Act standards. *E.g.*, *Asheville Tobacco Board of Trade, Inc. v. FTC*, 263 F.2d 502 (4th Cir. 1959).

⁹ The state action doctrine reflects the "principle that the federal antitrust laws pre-empt state laws authorizing or compelling private parties to engage in anticompetitive behavior," 324 *Liquor Corp. v. Duffy*, 479 U.S. 335, 346 n.8 (1987), but state law is not preempted when the *Midcal* criteria are met. *See Fisher v. City of Berkeley*, 475 U.S. 260, 264-65 (1986); *Community Communications Co., Inc. v. City of Boulder*, 455 U.S. 40, 60 (1982) (Rehnquist, J., dissenting).

¹⁰ The *Midcal* test does not apply when the state acts as sovereign through its legislature, *Parker v. Brown*, 317 U.S. 341 (1943), or through its supreme court, *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977). Municipalities must show that their conduct is pursuant to a clearly articulated state policy but need not demonstrate active supervision by the state. *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985). The Court has not decided whether active supervision applies when the actor is a state agency, *id.* at 46 n.10, but lower courts have held that active supervision does not apply to state agencies. *See Interface Group v.*

(footnote cont'd)

of the *Midcal* standard is to ensure that the state action doctrine protects what is in fact state action, not private action.

Because MTAC is a private entity, both parts of the *Midcal* standard must be met here for the state action doctrine to apply. [9]

a. *Clear Articulation*¹¹

The state regulations here are similar to the regulatory scheme considered in *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48 (1985), in which the Court applied the first part of the *Midcal* standard to collective ratemaking by intrastate common carrier rate bureaus. Although the statutes of Connecticut, like the statutes of Mississippi at issue in *Southern Motor Carriers*, do not specifically address collective ratemaking, they give the state agency authority to regulate common carriers and to prescribe rates for the intrastate transportation of property. The Court in *Southern Motor Carriers* concluded that the Mississippi legislature, by its delegation of ratemaking power to the state agency, "thus made clear its intent that intrastate rates would be determined by a regulatory agency, rather than by the market." 471 U.S. at 63-64.¹² The legislature, having made clear its intent to displace competition with regulation, left "[t]he details of the inherently anticompetitive rate-setting process . . . to the agency's discretion." *Id.* at 64.

The Court concluded that this was sufficiently clear articulation to satisfy the first part of the *Midcal* test:

As long as the State as sovereign clearly intends to displace competition in a particular field with a regulatory structure, the first prong of the *Midcal* test is satisfied. . . . [T]he State's failure to describe the implementation of its policy in detail will not subject the program to the restraints of the federal antitrust laws.

Id. at 64-65 (footnote omitted). Applying this standard to Connecticut's regulatory scheme, we conclude that the state legislature has clearly articulated its intent to displace [10] competition with

Massachusetts Port Authority, 816 F.2d 9 (1st Cir. 1987); *Cine 42d Street Theater Corp. v. Nederlander Organization, Inc.*, 790 F.2d 1032, 1047 (2d Cir. 1986).

¹¹ Although complaint counsel note that the Commission could decide that Connecticut has not clearly articulated a policy favoring the conduct challenged here, this issue was not argued at trial. See C.A.B. at 10 n.11; C.R.B. at 2-4; note 7 *supra*.

¹² In Connecticut, as in Mississippi, the state agency is not authorized to choose competition but is required to prescribe rates for motor common carriers on the basis of statutorily enumerated factors that "bear no discernible relationship to the prices that would be set by a perfectly efficient and unregulated market." *Southern Motor Carriers*, 471 U.S. at 65 n.25. Connecticut law requires that rates be "just and reasonable and reasonably compensatory." Conn. Gen. Stat. § 16-287(a).

regulation and, therefore, that the first part of the *Midcal* test has been met in this case. See also *Massachusetts Furniture & Piano Movers Association v. FTC*, 773 F.2d 391, 395-97 (1st Cir. 1985).

b. *Active Supervision*

To be protected by the state action doctrine, the Association also must show that the state actively supervises the Association's collective ratemaking. The purpose of the active supervision requirement is to ensure "that a State's actions will immunize the anticompetitive conduct of private parties only when the 'state has demonstrated its commitment to a program through its exercise of regulatory oversight.'" *Southern Motor Carriers*, 471 U.S. at 61 n.23, quoting I P. Areeda & D. Turner, *Antitrust Law* ¶ 213a, at 73 (1978).¹³ Absent evidence of active supervision, "[w]here a private party is engaging in the anticompetitive activity, there is a real danger that he is acting to further his own interests, rather than the governmental interests of the State." *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 47 (1985).¹⁴

Although the purpose of the active supervision requirement is clear, neither judicial nor Commission precedent precisely establishes how the requirement should apply to the facts of this case. We are guided, however, by the three cases in which the Supreme Court has applied the active supervision requirement. The Court found no active supervision of state liquor price posting regulatory schemes in *Midcal* and *324 Liquor Corp. v. Duffy*, 479 U.S. 335 (1987), when the "State simply authorize[d] price setting and enforce[d] the prices established by private parties":

The State neither establishes prices nor reviews the reasonableness of the price schedules; nor does it regulate the terms of fair trade contracts. The State does not monitor market conditions or engage in any "pointed reexamination" of the program. [11]

Midcal, 445 U.S. at 105-06; accord, *324 Liquor Corp.*, 479 U.S. at 344-45 ("The State has displaced competition among liquor retailers without substituting an adequate system of regulation.").

The Supreme Court most recently applied the active supervision requirement in *Patrick v. Burget*, — U.S. —, 108 S. Ct. 1658 (1988),

¹³ Accord, *Asheville Tobacco Board of Trade v. FTC*, 263 F.2d 502, 509 (4th Cir. 1959) (no state action when private decisions not "adequately supervised by independent state officials").

¹⁴ The Court also said that "[w]e may presume, absent a showing to the contrary, that the municipality acts in the public interest." 471 U.S. at 45 (footnote omitted).

a case involving a challenge under the Sherman Act to a decision by a group of physicians to revoke the plaintiff's hospital privileges. The Court held that the state did not actively supervise the peer review decisions of the defendants, because there was no showing that any state entity reviewed or even had the authority to review those decisions and to correct them if they were inconsistent with state policy. *Id.* at 1663.

The Court's decisions establish that active supervision exists when "state officials have and exercise the power to review" the challenged private acts and to "disapprove those that fail to accord with state policy." 108 S. Ct. at 1663. Consistent with this standard, the Court has established that no active supervision exists when a state agency lacks the authority to set prices, even though the agency could grant exceptions to the privately established prices. *324 Liquor Corp.*, 479 U.S. at 345 n.7. No active supervision exists in the ability of the state legislature to consider proposals to change the regulatory pricing scheme, because "periodic reexaminations by the state legislature [do not] exert any significant control over retail liquor prices or mark-ups." *Id.*¹⁵ And no active supervision exists when state entities do not have the "power to overturn a decision that fails to accord with state policy." *Patrick v. Burget*, 108 S. Ct. at 1664.

In this case, unlike *Midcal* and *324 Liquor Corp.*, the state agency has the authority to review private common carrier rate proposals to ensure that they are "just and reasonable and reasonably compensatory," to reject rate proposals that do not comply with the applicable standards and to "prescribe maximum or minimum or maximum and minimum rates or charges" for motor common carriers. The state, through the DPUC, has the power that was lacking in *Midcal*, *324 Liquor Corp.* and *Patrick v. Burget* to review private price setting and to disapprove those privately established prices that are not consistent with state policy. The state's system of regulation, on its face, provides for active supervision. [12]

The respondent suggests that the fact that the DPUC has authority to prescribe prices and to review proposed tariffs is alone sufficient to establish active supervision. See R.R.B. at 19. In *Midcal*, *324 Liquor Corp.* and *Patrick*, because the states lacked this kind of authority, the Supreme Court did not have occasion to consider whether such state authority would alone be sufficient for active supervision.

¹⁵ Although the state legislature's power to change the regulatory scheme apparently would not constitute active supervision, "pointed re-examination by the policymaker . . . in enforcement proceedings" constituted active supervision in *Bates v. State Bar of Arizona*, 499 U.S. 950, 959 (1977).

Nevertheless, the Court has said that the state must "have *and* exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy." *Patrick v. Burget*, 108 S. Ct. at 1663 (emphasis added).

An assumption that authority alone establishes the existence of active supervision would effectively eviscerate the active supervision requirement, and the "national policy in favor of competition [could] be thwarted by casting . . . a gauzy cloak of state involvement," *Midcal*, 445 U.S. at 106, over private price fixing by the mere existence of a regulatory framework that is never put to use. Instead, to determine the state's "commitment to a program through its exercise of regulatory oversight," *Southern Motor Carriers*, 471 U.S. at 61 n.23, we must consider whether the state agency exercises the authority delegated to it, whether the state in fact actively supervises the private anticompetitive conduct.

We find that the Connecticut DPUC exercises its delegated authority over intrastate motor common carrier rates. The record shows that the DPUC regularly reviews proposed tariffs and considers the reasonableness of proposed rates in the context of minimum rate orders and other agency guidelines for evaluating proposed tariffs. I.D.F. 41-45.¹⁶ The record discloses specific examples of active oversight by the DPUC, when the agency has suspended a proposed rate, held a hearing and issued a written decision. I.D.F. 65. The record shows that the DPUC has prescribed rates in minimum rate orders, pursuant to the notice and hearing procedures provided by state statute. *See* notes 5 & 6 *supra*. The record also shows that when the DPUC allows a proposed rate to become effective without invoking its hearing procedures, that action results from the decision of the agency that the proposed rate "meet[s] the requirements of the statutes and regulations." I.D.F. 43.¹⁷ [13]

Complaint counsel argue that the Association's collective ratemaking is not actively supervised unless the state agency acts affirmatively with respect to proposed rates to ensure that "the *state* has in fact acted to insert its judgment in place of market forces." C.A.B. at 17 (emphasis in original). In a thoughtful brief, complaint counsel propose that unless the state agency provides public notice of each

¹⁶ The DPUC's 5% "zone of reasonableness" for proposed rate increases, *see* I.D.F. 41, is a matter within the agency's discretion. *See Southern Motor Carriers*, 471 U.S. at 62-64.

¹⁷ The alleged inaction in this case is not a failure to review proposed tariffs, *see* I.D.F. 41-43, but rather the DPUC's failure to invoke notice and hearing procedures with respect to every proposed tariff. *See* C.A.B. at 5-7.

pending rate proposal and opportunity for interested persons to comment and publishes a reasoned explanation of its decision, active supervision cannot be found. C.A.B. at 21.

We conclude that a hearing and a written opinion with respect to every rate proposal are not a necessary precondition for finding active state supervision. We have found no precedent for the proposition that notice and hearing procedures are a prerequisite for active supervision. In the cases cited by complaint counsel, the courts did not say that notice and hearing procedures were essential for active supervision. Instead, they considered whether particular notice and hearing procedures implemented under state law constituted active supervision.

Although we agree with complaint counsel that implementation of notice and hearing procedures would provide tangible evidence of the state's active supervision and its commitment to the regulatory scheme, we decline to impose such requirements through the state action doctrine. To be sure, review of proposed tariffs pursuant to negative option procedures, like those created by the Connecticut statute,¹⁸ may provide less tangible evidence of active supervision than the notice, hearings and published decisions that complaint counsel would require.¹⁹ But the use of negative option procedures need not demonstrate the absence of active supervision, unless administrative silence is deemed equivalent to the abandonment of [14] administrative duty.²⁰ The state can exercise its authority to supervise prices, as Connecticut does, by reviewing proposed rates for compliance with the applicable criteria and allowing rates to become effective after determining that the rates in fact are in compliance.

CONCLUSION

We conclude that the Connecticut DPUC has and exercises ultimate

¹⁸ In Connecticut, proposed tariffs are effective 30 days after filing unless suspended and set for a hearing by the DPUC. Conn. Gen. Stat. § 16-289. The Court in *Southern Motor Carriers* described state regulatory procedures virtually identical to those used by the Connecticut DPUC and concluded that "[t]he State [agencies] thus have and exercise ultimate authority and control over all intrastate rates." 471 U.S. at 50-51 (*dicta*).

¹⁹ "[T]he requirement of active state supervision serves essentially an evidentiary function: it is one way of ensuring that the actor is engaging in the challenged conduct pursuant to state policy." *Town of Hallie v. City of Eau Claire*, 471 U.S. at 46.

²⁰ Professors Areeda and Turner suggest that negative option procedures, like those used in Connecticut, ought not be sufficient for state action, because (1) "inaction" may suggest lack of awareness and (2) such procedures may evade statutory notice and hearing procedures designed to assure a certain level of awareness by responsible state officials. I P. Areeda and D. Turner, *Antitrust Law* ¶ 213f, at 78-79 (1978). These concerns are inapposite here. First, the record shows that the DPUC is aware and reviews the contents of proposed tariffs. *E.g.*, I.D.F. 41, 43, 44, 51-54, 57-59 & 61. Second, the procedures at issue here were themselves created by the state legislature.

authority and control over intrastate motor common carrier rates, that the clear articulation and active supervision requirements of *Midcal* have been satisfied and, therefore, that the Association's conduct is protected from action under Section 5 of the FTC Act.

The complaint is dismissed.

FINAL ORDER

This matter having been heard by the Commission on the appeal of complaint counsel from the initial decision and on briefs and oral arguments in support of and in opposition to the appeal, for the reasons stated in the accompanying Opinion, the Commission affirms the decision of the Administrative Law Judge.

Accordingly, *it is ordered*, That the complaint be and it hereby is dismissed.

Chairman Steiger and Commissioner Machol not participating.

IN THE MATTER OF

TICOR TITLE INSURANCE COMPANY, ET AL.

FINAL ORDER, OPINION, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket 9190. Complaint, Jan. 7, 1985—Final Order, Sept. 19, 1989

This final order prohibits, among other things, each respondent from discussing, proposing, setting, or filing any rates for title search and examination services through a rating bureau in New Jersey, Pennsylvania, Connecticut, Wisconsin, Arizona and Montana.

Appearances

For the Commission: *Michael E. Antalics, James C. Egan, Jr. and Ann Malester.*

For the respondents: *John C. Christie, Jr., Bell, Boyd & Lloyd, Washington, D.C. David M. Foster, Fulbright & Jaworski, Washington, D.C. Robert E. Cooper, Gibson, Dunn & Crutcher, Los Angeles, Ca. and John F. Graybeal, Adams, McCullough & Beard, Raleigh, N.C.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended (15 U.S.C. 41 *et seq.*), and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the respondents named in the caption hereof have violated the provisions of Section 5 of the Federal Trade Commission Act and that a proceeding by it in respect thereof would be in the public interest, hereby issues this complaint, stating its charges as follows:

DEFINITIONS

PARAGRAPH 1. The following definitions shall apply in this complaint:

- a. *"Title search and examination services"* means all activities which are designed to identify and describe the ownership of a particular parcel of real property as well as any other actual or potential rights to, encumbrances on, or interests in the property.