

IN THE MATTER OF
NEW ENGLAND MOTOR RATE BUREAU, INC.

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket 9170. Final Order, Aug. 18, 1989—Modifying Order, Sept. 4, 1991

This order reopens the proceeding and modifies a 1989 final order that requires the respondent to halt its collective ratemaking activities in certain states. The Commission has determined to reopen the proceeding based on changed conditions of fact and to modify the order to permit the respondent to continue its collective ratemaking operations in New Hampshire.

ORDER REOPENING AND MODIFYING ORDER

On April 22, 1991, New England Motor Rate Bureau, Inc. ("NEMRB"), filed a Request to Reopen and Set Aside ("Request") the order in Docket 9170, pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), and Section 2.51 of the Commission's Rules of Practice, 16 CFR 2.51. The Request was on the public record for thirty days, and no comments were received.

NEMRB in its Request asserts that reopening is required by changed conditions of fact, because the state of New Hampshire now actively supervises collective ratemaking. The request to reopen the order is granted, and the order is modified to permit NEMRB to engage in collective ratemaking in New Hampshire, but the request to set aside the order is denied for the reasons stated below.

BACKGROUND

The 1983 complaint in this matter alleged that NEMRB violated Section 5 of the Federal Trade Commission Act by collectively formulating and filing in four states motor common carrier rates for the intrastate transportation of property. NEMRB asserted in defense, *inter alia*, that its collective ratemaking activities were protected from Section 5 by the state action doctrine.

Private conduct is protected from Section 5 as state action if the conduct is pursuant to a "clearly articulated and affirmatively expressed" state policy to displace competition with regulation and is "actively supervised" by the state. *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97, 106 (1980);

Parker v. Brown, 317 U.S. 341, 351 (1943). The Commission in its opinion in *New England Motor Rate Bureau, Inc.*, Docket 9170, slip op. at 12-13 (August 18, 1989), found that the state of New Hampshire had clearly articulated a policy to displace competition with regulation of intrastate motor common carrier rates but concluded that the state did not actively supervise joint ratemaking. On appeal, NEMRB did not challenge the conclusions of the Commission concerning New Hampshire, which was then "engaged in establishing policies and procedures to implement the revised statutory framework." *New England Motor Rate Bureau, Inc. v. FTC*, 908 F.2d 1064, 1066 n.2 (1st Cir. 1990).

The Commission's order required NEMRB, among other things, to cease its collective ratemaking activities in New Hampshire. The order permitted NEMRB to engage in collective ratemaking activities in states in which the Commission found that NEMRB's joint ratemaking was pursuant to a policy clearly articulated and actively supervised by the state.¹ NEMRB now requests that the order be reopened and set aside on the ground that conditions have changed and that New Hampshire now actively supervises collective ratemaking.

STANDARD FOR REOPENING A FINAL ORDER OF THE COMMISSION

Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), provides that the Commission shall reopen an order to consider whether it should be altered, modified or set aside if the respondent "makes a satisfactory showing that changed conditions of law or fact" so require.² A satisfactory showing sufficient to require reopening is made when a request to reopen identifies significant changes in circumstances and shows that the changes eliminate the

¹ The order, issued August 18, 1989, barred NEMRB's collective ratemaking in Massachusetts and New Hampshire. The Commission deleted all references to the state of Massachusetts in its Modified Order to Cease and Desist, issued November 6, 1990, pursuant to the decision of the Court of Appeals for the First Circuit in *New England Motor Rate Bureau v. FTC*, 908 F.2d 1064, 1077 (1st Cir. 1990), holding that NEMRB had a valid state action defense in Massachusetts.

² Section 5 (b) provides, in part:

[T]he Commission shall reopen any such order to consider whether such order (including any affirmative relief provision contained in such order) should be altered, modified, or set aside, in whole or in part, if the person, partnership or corporation involved files a request with the Commission which makes a satisfactory showing that changed conditions of law or fact require such order to be altered, modified, or set aside, in whole or in part.

The 1980 amendment to Section 5(b) did not change the standard for order reopening and modification but "codifie[d] existing Commission procedures by requiring the Commission to reopen an order if the specified showing is made," S. Rep. No. 96-500, 96th Cong., 2d Sess. 9-10 (1979), and added the requirements that the Commission act on petitions to reopen within 120 days of filing.

need for the order or make continued application of the order inequitable or harmful to competition. *Louisiana-Pacific Corp.*, Docket C-2956, Letter to John C. Hart (June 5, 1986), at 4; S. Rep. No. 96-500, 96th Cong., 2d Sess. 9 (1979) (significant changes or changes causing unfair disadvantage); see *Phillips Petroleum Co.*, Docket C-1088, 78 FTC 1573, 1575 (1971) (modification not required for changes reasonably foreseeable at time of consent negotiations); *Pay Less Drugstores Northwest, Inc.*, Docket C-3039, Letter to H.B. Hummelt (Jan. 22, 1982) (changed conditions must be unforeseeable, create severe competitive hardship and eliminate dangers order sought to remedy); see also *United States v. Swift & Co.*, 286 U.S. 106, 119 (1932) ("clear showing" of changes that eliminate reasons for order or such that order causes unanticipated hardship).

Section 5(b) also provides that the Commission may modify an order when, although changed circumstances would not require reopening, the Commission determines that the public interest so requires. Respondents are therefore invited in petitions to reopen to show how the public interest warrants the requested modification. 16 CFR 2.51. In such a case, the respondent must demonstrate as a threshold matter some affirmative need to modify the order. *Damon Corp.*, Docket C-2916, Letter to Joel E. Hoffman, Esq. (March 24, 1983), at 2 ("Damon Letter"). For example, it may be in the public interest to modify an order "to relieve any impediment to effective competition that may result from the order." *Damon Corp.*, Docket C-2916, 101 FTC 689, 692 (1983). Once such a showing of need is made, the Commission will balance the reasons favoring the modification requested against any reasons not to make the modification. *Damon Letter* at 2; see, e.g., *Chevron Corp.*, Docket C-3147, 105 FTC 228 (1985) (public interest warrants modification where potential harm to respondent's ability to compete outweighs any further need for order). The Commission also will consider whether the particular modification sought is appropriate to remedy the identified harm. *Damon Letter* at 4.

The language of Section 5(b) plainly anticipates that the burden is on the petitioner to make a "satisfactory showing" of changed conditions to obtain reopening of the order. See also *Gautreaux v. Pierce*, 535 F. Supp. 423, 426 (N.D. Ill. 1982) (petition must show "exceptional circumstances, new, changed or unforeseen at the time the decree was entered"). The legislative history also makes clear that the petitioner has the burden of showing, by means other than

conclusory statements, why an order should be modified.³ If the Commission determines that the petitioner has made the necessary showing, the Commission must reopen the order to determine whether modification is required and, if so, the nature and extent of the modification. The Commission is not required to reopen the order, however, if the petitioner fails to meet its burden of making the satisfactory showing of changed conditions required by the statute. The petitioner's burden is not a light one in view of the public interest in repose and the finality of Commission orders. *See Federated Department Stores, Inc. v. Moitie*, 425 U.S. 394 (1981) (strong public interest considerations support repose and finality); *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 296 (1974) ("sound basis for . . . [not reopening] except in the most extraordinary circumstances"); *RSR Corp. v. FTC*, 656 F.2d 718, 721-22 (D.C. Cir. 1981) (applying *Bowman Transportation* standard to FTC order).

CHANGED CONDITIONS OF FACT

NEMRB in its Request relies on changed conditions of fact as the basis for reopening. NEMRB also asserts that leaving the order in effect would be contrary to the public interest, Request at 7, but the Request offers no support for this conclusion. The Commission has based its decision to reopen and modify the order on the changed conditions of fact alleged in the Request.

The order of the Commission with respect to NEMRB's activities in New Hampshire was based on a conclusion that the state did not actively supervise collective ratemaking and, therefore, the state action doctrine did not protect NEMRB's collective ratemaking in New Hampshire. *See New England Motor Rate Bureau, Inc.*, Docket 9170, slip op. at 20-21 (Aug. 18, 1989). The changed conditions of fact alleged by NEMRB are the implementation by the state of New Hampshire of its clearly articulated policy to displace competition with regulation of motor common carrier rates. These changes in fact, if sufficient to constitute active supervision of common carrier rates, warrant reopening and modifying the order.

³ The legislative history of amended Section 5(b), S. Rep. No. 96-500, 96th Cong., 2d Sess. 9-10 (1979), states:

Unmeritorious, time-consuming and dilatory requests are not to be condoned. A mere facial demonstration of changed facts or circumstances is not sufficient. . . . The Commission, to reemphasize, may properly decline to reopen an order if a request is merely conclusory or otherwise fails to set forth specific facts demonstrating in detail the nature of the changed conditions and the reasons why these changed conditions require the requested modification of the order.

The active supervision requirement of the state action doctrine requires that “state officials 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. 1658, 1663 (1988), *quoted in New England Motor Rate Bureau, Inc. v. FTC*, 908 F.2d at 1070. The inquiry involves two questions: whether state officials have the power to review and to disapprove proposed rates and whether they exercise that power. NEMRB has established that state officials in New Hampshire have and exercise the power to review rates and to disapprove those that do not meet the statutory requirements that rates be just and reasonable and not discriminatory.

According to the Request, a “regulatory agency has been established and funded” in New Hampshire to carry out the state’s regulation of motor common carrier rates, and “state officials are positioned to discharge their regulatory duties.” Request at 4, *citing* Affidavit of Douglas L. Patch, Assistant Commissioner, Department of Safety, State of New Hampshire (March 29, 1991). The state agency is charged with investigating the reasonableness of proposed rates, and it has authority to suspend rates that are unreasonable and to establish lawful rates. The agency’s rate analyst is “instructed to recommend for investigation any tariffs which appear to violate” the statutory standards. Patch Affidavit at 3. Based on these statements, the state agency appears to have sufficient authority to “review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy.”

The next question under *Patrick v. Burget* is whether the state agency exercises this authority. According to Mr. Patch’s affidavit, the state agency reviews the proposed tariffs to determine whether they are consistent with the statutory requirements that rates be just and reasonable and nondiscriminatory. Also according to Mr. Patch, rates that do not satisfy the statutory standards are not allowed to become effective. Patch Affidavit at 3. Based on these statements, we conclude that the state agency exercises its authority to review the reasonableness of the collectively established rates and to disapprove those that are not reasonable.

THE ORDER SHOULD BE REOPENED AND MODIFIED

The changed conditions of fact make the state action doctrine applicable to NEMRB’s collective ratemaking in New Hampshire, and,

therefore, the order should be reopened and modified to permit NEMRB to engage in this conduct in New Hampshire. Modifying the order by deleting the references to the state of New Hampshire and by deleting the requirement to withdraw tariffs previously filed in New Hampshire is appropriate and sufficient to accomplish the relief that NEMRB seeks.

As modified, the order will prohibit collective ratemaking by NEMRB in states in which the conduct is not protected by the state action doctrine. This prohibition is consistent with law and with the violation that the Commission found. In addition, NEMRB does not claim that the conduct should be permitted in states in which it is not protected by the state action doctrine.⁴ Setting aside the order is unnecessary to permit NEMRB to engage in collective ratemaking in states in which the conduct is not unlawful.

Accordingly, *it is ordered*, that this matter be, and it hereby is, reopened and that the Commission's order in Docket 9170 be, and it hereby is, modified by deleting "except as to the state of New Hampshire" from the proviso to Paragraph I of the order and by deleting Paragraph II of the order.

Commissioner Yao not participating.

⁴ NEMRB alleges that it "does not file intrastate rates in any state" in which collective ratemaking is not protected by the state action doctrine. Request at 6. The claim that a respondent is not now engaged in unlawful conduct is not a basis for setting aside the order.

IN THE MATTER OF
MEDICAL STAFF OF BROWARD GENERAL
MEDICAL CENTER

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

Docket C-3344. Complaint, Sept. 10, 1991—Decision, Sept. 10, 1991

This consent order prohibits, among other things, the medical staff of a Florida Hospital from entering, or attempting to enter, into any agreement which would prevent or restrict the offering or delivery of health care services by Broward General Hospital, Cleveland Clinic Florida (CCF), any CCF physician, or any other provider of health care services.

Appearances

For the Commission: *Paul J. Nolan* and *Mark J. Horoschak*.

For the respondent: *Davis W. Duke, Gunser, Yoakley & Stewart, P.A.*, Fort Lauderdale, FL.

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 the Medical Staff of Broward General Medical Center has violated and is violating Section 5 of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues this complaint stating its charges in that respect as follows:

RESPONDENT MEDICAL STAFF

PARAGRAPH 1. Respondent Medical Staff of Broward General Medical Center ("respondent Medical Staff" or "Medical Staff") is an unincorporated association, organized and existing under the laws of the State of Florida, with its mailing address at 1600 South Andrews Avenue, Fort Lauderdale, Fl. The Medical Staff is composed of physicians and other health care practitioners who have privileges to attend patients at Broward General Medical Center ("Broward