

Complaint

IN THE MATTER OF

MINNESOTA TRANSPORT SERVICES ASSOCIATION

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

Docket C-4097; File No. 0210115

Complaint, September 15, 2003--Decision, September 15, 2003

This consent order, among other things, prohibits Respondent Minnesota Transport Services Association – an association with, as members, approximately 89 household goods movers that conduct business within the State of Minnesota – from filing tariffs that contain collective intrastate rates. The order also prohibits the respondent from engaging in activities such as exchanges of information that would facilitate member movers in agreeing on the rates contained in their intrastate tariffs. In addition, the order prohibits the respondent from maintaining a tariff committee or agreeing with movers to institute any automatic intrastate rate increases. The order also requires the respondent to cancel all tariffs it has filed that contain intrastate collective rates; to cancel any provisions in its governing documents that permit it to engage in activities prohibited by the order; and to send its members a letter explaining the terms of the order.

Participants

For the Commission: *Dana Abrahamsen, Patrick J. Roach,
Richard B. Dagen, John Howell and Mary T. Coleman.*

For the Respondent: *Patrick Williams, Briggs & Morgan P.A.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act (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 Minnesota Transport Services Association (hereinafter sometimes referred to as “respondent” or “MTSA”), a corporation, has violated and is now violating the provisions of Section 5 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:

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PARAGRAPH 1. Respondent Minnesota Transport Services Association is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Minnesota, with its office and principal place of business located at 1821 University Avenue, Suite S-213, St. Paul, Minnesota 55104.

PARAGRAPH 2. Respondent is an association organized for and serving its members' interests, including their economic interests, by promoting, fostering, and advancing the household goods moving industry in the State of Minnesota. One of the primary functions of respondent is the initiation, preparation, development, dissemination, and filing with the Minnesota Department of Transportation of tariffs and supplements thereto on behalf of and as agent for its members. Said tariffs and supplements contain rates and charges for the intrastate and local transportation of household goods and for related services, including, among other things, transporting bulky articles; packing boxes and crates; and extra charges for elevator, stair, and long distance carrying of items. (For purposes of this complaint, the term "tariff" means the publication stating the rates of a carrier for the transportation of property between points within the State of Minnesota, including updates, revisions, and/or amendments, including general rules and regulations.)

PARAGRAPH 3. Pursuant to Minnesota state law, each household goods mover is required to file a tariff with the Minnesota Department of Transportation containing the carrier's rates, fares, or charges for the intrastate transportation of household goods.

PARAGRAPH 4. Members of respondent are engaged, among other things, in the business of providing transportation and other services for compensation as household goods movers between points within the State of Minnesota. Except to the extent that competition has been restrained as herein alleged, members of respondent have been and are now in competition among themselves and with other household goods movers.

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PARAGRAPH 5. The membership of MTSA consists of approximately 89 household goods movers that conduct business within the State of Minnesota. MTSA members receive compensation for intrastate and local moves. Members of MTSA are entitled to and do, among other things, vote for and elect the trustees who elect officers of the association. The control, direction and management of MTSA are vested in the trustees and officers, including a President, several Vice Presidents, a Secretary and a Treasurer to carry on the day-to-day administration and management of MTSA.

PARAGRAPH 6. The acts and practices of respondent set forth in Paragraph 7 have been and are now 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. Among other things, the aforesaid acts and practices:

- (A) Affect the flow of substantial sums of money from the federal government, business, and other private parties to the respondent's members for rendering transportation services, which money flows across state lines;
- (B) Affect the purchase and use of equipment and other goods and services by respondent's members that are shipped in interstate commerce;
- (C) Include the use of the United States mail and other instruments of interstate commerce in furthering the agreements described below; and
- (D) Are supported by the receipt of dues and fees for publications and services from out-of-state members and others.

PARAGRAPH 7. For many years and continuing up to and including the date of the filing of this complaint, respondent, its members, its officers and directors, and others have agreed to

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engage, and have engaged, in a combination and conspiracy, an agreement, concerted action or unfair and unlawful acts, policies and practices, the purpose or effect of which is, was, or may be to unlawfully hinder, restrain, restrict, suppress, or eliminate competition among household goods movers in the intrastate Minnesota household goods moving industry.

Pursuant to, and in furtherance of, said agreement and concert of action, respondent, its members and others have engaged and continue to 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, with the purpose or effect of fixing, establishing, stabilizing or otherwise tampering with rates and charges for the transportation of household goods between points within the State of Minnesota;
- (B) Participating in and continuing to participate in the collectively set rates;
- (C) Filing collectively set rates with the Minnesota Department of Transportation; and
- (D) Initiating, organizing, coordinating, and conducting meetings or providing a forum for any discussion or agreement among competing carriers concerning or affecting rates charged or proposed to be charged for the intrastate transportation of household goods; or otherwise influencing its members to raise their rates, charge the same or uniform rates, or participate or continue to participate in the collectively set rates.

PARAGRAPH 8. The acts and practices of respondent, its members and others, as alleged in Paragraph 7, have had and are now having the effects, among others, of:

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- (A) Raising, fixing, stabilizing, pegging, maintaining, or otherwise interfering or tampering with the prices of household goods moves;
- (B) Restricting, restraining, hindering, preventing, or frustrating price competition in the household goods moving industry; and
- (C) Depriving consumers of the benefits of competition.

PARAGRAPH 9. The acts, policies and practices of respondent, its members and others, as herein alleged, were and are to the prejudice and injury of the public and constituted 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, as herein alleged, are continuing and will continue in the absence of the relief herein requested.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this fifteenth day of September, 2003, issues its complaint against MTSA.

By the Commission, Commissioner Harbour not participating.

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DECISION AND ORDER

The Federal Trade Commission (“Commission”) having initiated an investigation of certain acts and practices of Minnesota Transport Services Association (“MTSA”), hereinafter sometimes referred to as “Respondent,” and Respondent having been furnished thereafter with a copy of the draft of Complaint that the Bureau of Competition presented to the Commission for its consideration and which, if issued by the Commission, would charge Respondent with violations of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

Respondent, its attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Order (“Consent Agreement”), containing an admission by Respondent of all the jurisdictional facts set forth in the aforesaid draft of Complaint, a statement that the signing of the Consent Agreement is for settlement purposes only and does not constitute an admission by Respondent that the law has been violated as alleged in such Complaint, or that the facts as alleged in such Complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission’s Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that Respondent has violated the said Act, and that a Complaint should issue stating its charges in that respect, and having accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby makes the following jurisdictional findings and issues the following Decision and Order (“Order”):

1. Respondent Minnesota Transport Services Association is a corporation organized and existing under the laws of the State of Minnesota with its principal office and place of business at 1821 University Avenue, Suite S-213, St. Paul, Minnesota 55104.

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2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of Respondent, and the proceeding is in the public interest.

ORDER

I.

IT IS ORDERED, that for the purposes of this Order, the following definitions shall apply:

- A. "Respondent" or "MTSA" means Minnesota Transport Services Association, its officers, executive board, committees, representatives, agents, employees, successors and assigns;
- B. "Carrier" means a common carrier of property by motor vehicle;
- C. "Intrastate transportation" means the pickup or receipt, transportation and delivery of property hauled between points within the State of Minnesota for compensation by a carrier authorized by the Minnesota Department of Transportation to engage therein;
- D. "Member" means any carrier or other person that pays dues or belongs to MTSA or to any successor corporation;
- E. "Tariff" means the publication stating the rates of a carrier for the transportation of property between points within the State of Minnesota, including updates, revisions, and/or amendments, including general rules and regulations;
- F. "Rate" means a charge, payment or price fixed according to a ratio, scale or standard for direct or indirect transportation service;

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- G. "Collective rates" 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 two or more carriers and Respondent; and
- H. "Person" means both natural persons and artificial persons, including, but not limited to, corporations, unincorporated entities, and governments.

II.

IT IS FURTHER ORDERED that Respondent, a corporation, its successors and assigns, and its officers, agents, representatives, directors and employees, directly or through any corporation, subsidiary, division or other device, shall forthwith cease and desist from entering into and within 120 days after service upon it of this Order cease and desist from adhering to or maintaining, directly or indirectly, any contract, agreement, understanding, plan, program, combination or conspiracy to fix, stabilize, raise, maintain or otherwise interfere or tamper with the rates charged by two or more carriers for the intrastate transportation of property or related services, goods or equipment, including but not limited to:

1. Knowingly preparing, developing, disseminating or filing a proposed or existing tariff that contains collective rates for the intrastate transportation of property or other related services, goods or equipment;
2. Providing information to any carrier about rate changes considered or made by any other carrier employing the publishing services of Respondent prior to the time at which such rate change becomes a matter of public record;
3. Inviting, coordinating or providing a forum (including publication of an informational bulletin) for any discussion or agreement between or among competing carriers concerning

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rates charged or proposed to be charged by carriers for the intrastate transportation of property or related services, goods or equipment;

4. Suggesting, urging, encouraging, persuading or in any way influencing members to charge, file or adhere to any existing or proposed tariff provision which affects rates, or otherwise to charge or refrain from charging any particular price for any services rendered or goods or equipment provided;
5. Maintaining any rate or tariff committee or other entity to consider, pass upon or discuss intrastate rates or rate proposals; and
6. Preparing, developing, disseminating or filing a proposed or existing tariff containing automatic changes to rates charged by two or more carriers.

III.

IT IS FURTHER ORDERED that Respondent shall, within 120 days after service upon it of this Order:

1. Cancel all tariffs and any supplements thereto on file with the Minnesota Department of Transportation that establish collective rates for transportation of property or related services, goods or equipment by common carriers in the State of Minnesota and take such action as may be necessary to effectuate cancellation and withdrawal;
2. Terminate all previously executed powers of attorney and rate and tariff service agreements, between it and any carrier utilizing its services, authorizing the publication and/or filing of intrastate collective rates within the State of Minnesota;
3. Cancel those provisions of its articles of incorporation, by-laws and procedures and every other rule, opinion, resolution, contract or statement of policy that has the purpose or effect of

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permitting, announcing, stating, explaining or agreeing to any business practice enjoined by the terms of this Order; and

4. Amend its by-laws to require members of MTSA to observe the provisions of the Order as a condition of membership in MTSA.

IV.

IT IS FURTHER ORDERED that, within fifteen (15) days after service upon it of this Order, Respondent shall mail or deliver a copy of this Order, under cover of the letter attached hereto as "Appendix," to each current member of Respondent, and for a period of three (3) years from the date of service of this Order, to each new member within ten (10) days of each such member's acceptance by Respondent.

V.

IT IS FURTHER ORDERED that Respondent notify the Commission at least thirty (30) days prior to any proposed change in Respondent, such as dissolution, assignment or sale resulting in the emergence of a successor corporation, or any other proposed change in the corporation which may affect compliance obligations arising out of the Order.

VI.

IT IS FURTHER ORDERED that Respondent shall file a written report within six (6) months of the date of service of this Order, and annually on the anniversary date of the original report for each of the five (5) years thereafter, and at such other times as the Commission may require by written notice to Respondent, setting forth in detail the manner and form in which it has complied with this Order.

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VII.

IT IS FURTHER ORDERED that this Order shall terminate on September 15, 2023.

By the Commission, Commissioner Harbour not participating.

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APPENDIX

(Letterhead of the Minnesota Transport Services Association)

Dear Member:

The Federal Trade Commission has ordered Minnesota Transport Services Association (MTSA) to cease and desist its collective tariff rate-making activities. A copy of the Commission's Decision and Order is enclosed.

In order that you may readily understand the terms of the Order, we have set forth its essential provisions, although you must realize that the Order itself is controlling, rather than the following explanation of its provisions:

(1) MTSA is prohibited from engaging in any collective rate-making activities, including the proposal, development or filing of tariffs which contain any collectively formulated rates for intrastate transportation services. Each member carrier must independently set its own rates for transportation of property or related services, goods or equipment between points within the State of Minnesota but may use MTSA as a tariff publishing agent for members' independently established rates.

(2) MTSA is prohibited from providing a forum for its members for the purpose of discussing rates.

(3) MTSA is prohibited from urging, suggesting, encouraging or in any way attempting to influence the rates members charge for their intrastate transportation services; MTSA may not provide non-public information to any carrier about rate changes ordered by another carrier.

(4) MTSA is prohibited from maintaining any rate or tariff committee which discusses or formulates intrastate rates or rate proposals.

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(5) MTSA is given 120 days to cancel all tariffs and tariff supplements containing collective rates currently in effect and on file at the Minnesota Department of Transportation which were prepared, developed or filed by MTSA.

(6) MTSA is required to amend its by-laws to require its members to observe the provisions of the Order as a condition of membership in MTSA.

Sincerely yours,

[appropriate MTSA officer]

Enclosure

Analysis

Analysis of Proposed Consent Order to Aid Public Comment

The Federal Trade Commission has accepted for public comment an Agreement Containing Consent Order with Minnesota Transport Services Association (“MTSA” or “Respondent”). The Agreement is for settlement purposes only and does not constitute an admission by MTSA that the law has been violated as alleged in the Complaint or that the facts alleged in the Complaint, other than jurisdictional facts, are true.

I. The Commission’s Complaint

The proposed Complaint alleges that Respondent Minnesota Transport Services Association, a corporation, has violated and is now violating Section 5 of the Federal Trade Commission Act. Specifically, the proposed Complaint alleges that Respondent has agreed to engage, and has engaged, in a combination and conspiracy, an 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 household goods movers in the household goods moving industry.

Respondent is an association organized for and serving its members, which are approximately 89 household goods movers that conduct business within the State of Minnesota. One of the primary functions of Respondent is preparing, and filing with the Minnesota Department of Transportation, tariffs and supplements on behalf of its members. These tariffs and supplements contain rates and charges for the intrastate and local transportation of household goods and for related services.

The proposed Complaint alleges that Respondent is engaged in initiating, preparing, developing, disseminating, and taking other actions to establish and maintain collective rates, which have the purpose or effect of fixing, establishing or stabilizing rates for the transportation of household goods in the State of Minnesota.

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The proposed Complaint further alleges that Respondent organizes and conducts meetings that provide a forum for discussion or agreement between competing carriers concerning or affecting rates and charges for the intrastate transportation of household goods.

The proposed Complaint further alleges that Respondent's conduct is anticompetitive because it has the effect of raising, fixing, and stabilizing the prices of household goods moves. The acts of Respondent also have the effect of depriving consumers of the benefits of competition.

II. Terms of the Proposed Consent Order

The proposed Order would provide relief for the alleged anticompetitive effects of the conduct principally by means of a cease and desist order barring Respondent from continuing its practice of filing tariffs containing collective intrastate rates.

Paragraph II of the proposed Order bars Respondent from filing a tariff that contains collective intrastate rates. This provision will terminate Respondent's current practice of filing tariffs that contain intrastate rates that are the product of an agreement among movers in the State of Minnesota. This paragraph also prohibits Respondent from engaging in activities such as exchanges of information that would facilitate member movers in agreeing on the rates contained in their intrastate tariffs. For example, the order bars Respondent from providing to other carriers certain non-public information.¹ It also bars Respondent from maintaining a tariff committee or agreeing with movers to institute any automatic intrastate rate increases.

¹ Under a state statute, a carrier's tariff filing "constitutes notice to the public" of the contents of the tariff. MINN. STAT. ANN. § 221.161(Subd. 1).

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Paragraph III of the proposed Order requires Respondent to cancel all tariffs that it has filed that contain intrastate collective rates. This provision will ensure that the collective intrastate rates now on file in the State of Minnesota will no longer be in force, allowing for competitive rates in future individual mover tariffs. Paragraph III of the proposed Order also requires Respondent to cancel any provisions in its governing documents that permit it to engage in activities barred by the Order.

Paragraph IV of the proposed Order requires Respondent to send to its members a letter explaining the terms of the Order. This will make clear to members that they can no longer engage in collective rate-making activities.

Paragraphs V and VI of the proposed Order require Respondent to inform the Commission of any change in Respondent that could affect compliance with the Order and to file compliance reports with the Commission for a number of years. Paragraph VII of the proposed Order states that the Order will terminate in 20 years.

III. Opportunity for Modification of the Order

Respondent can seek to modify the proposed Order to permit it to engage in collective rate-making if it can demonstrate that the “state action” defense would apply to its conduct.² The state action doctrine dates back to the Supreme Court’s 1943 opinion in *Parker v. Brown*, which held that, in light of the States’ status as sovereigns, and given basic principles of federalism, Congress would not have intended the Sherman Act to apply to the activities

² 16 C.F.R. § 2.51. Because of this possibility, and because the issues raised by this case frequently arise, it is appropriate to address the state action defense in some detail as we did in *Indiana Household Movers and Warehousemen, Inc.*, File No. 021-0115 (Mar. 18, 2003) (proposed consent order) available at <http://www.ftc.gov/os/2003/03/indianahouseholdmoversanalysis.pdf>

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of States themselves.³ The defense also has been interpreted in limited circumstances to shield from antitrust scrutiny private firms' activities that are conducted pursuant to state authority. States may not, however, simply authorize private parties to violate the antitrust laws.⁴ Instead, a State must substitute its own control for that of the market.

Thus, the state action defense would be available to Respondent only if it could demonstrate that its conduct satisfied the strict two-pronged standard the Supreme Court set out in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*: “the challenged restraint must be ‘one clearly articulated and affirmatively expressed as state policy’” and “the policy must be ‘actively supervised’ by the state itself.”⁵

Under the first prong of *Midcal*'s two-part test, Respondent would be required to show that the State of Minnesota had “clearly articulated and affirmatively expressed as state policy” the desire to replace competition with a regulatory scheme. With regard to this prong, a Minnesota statute in effect until recently specifically addressed collective rates:

³ 317 U.S. 341 (1943).

⁴ *Parker v. Brown*, 317 U.S. at 351 (“[A] state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or declaring that their action is lawful.”).

⁵ 445 U.S. 97, 105 (1980) (“*Midcal*”) (quoting *City of Lafayette v. Louisiana Power & Light*, 435 U.S. 389, 410 (1978)). The “restraint” in this instance is the collective rate-setting. This articulation of the state action doctrine was reaffirmed by the Supreme Court in *FTC v. Ticor Title Insurance Co.* (“*Ticor*”), 504 U.S. 621, 633 (1992), where the Court noted that the gravity of the antitrust violation of price fixing requires exceptionally clear evidence of the State's decision to supplant competition.

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In order to ensure nondiscriminatory rates and charges for shippers and receivers, the board shall establish a collective rate-making procedure which will ensure the publication and maintenance of just and reasonable rates and charges under uniform, reasonably related rate structures.⁶

On June 8, 2003 this statute was repealed.⁷ With this statute repealed, Respondent would meet its burden only if it could show that some other provision of Minnesota law constitutes a clear expression of state policy to displace competition and allow for collective rate-making among competitors.

Respondent has asserted that the majority of its members were essentially compelled to file collective tariffs with the state because the state statute contemplated granting exemptions from filing collective rates only under limited circumstances.⁸ The repeal of the Minnesota collective rate statute moots this issue in this case. However, even assuming a state statute compels private entities to file collective rates, this would not remove anticompetitive conduct from potential federal antitrust liability. The Supreme Court has made clear that where a state statute compels a private party to engage in a *per se* violation of the federal antitrust laws in order to comply with the state statute, the state statute will be pre-empted by the federal Sherman Act unless

⁶ MINN. STAT. ANN. § 221.165.

⁷ H.F. 1214, 83rd Leg. (MINN. 2003-2004).

⁸ MINN. STAT. ANN. § 221.165; Minnesota Administrative Rule § 8900.1000 (Subpart 2) (exemption can be granted if the mover “will suffer no hardship in publishing its own rates,” the grant will “not conflict with the legislative purpose to be accomplished by commissioner approval of collective ratemaking” and “the grant will be consistent with the public interest”). There is no evidence that the movers participating in the collective tariffs sought exemptions.

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the requirements of the state action doctrine have been met. *Rice v. Norman Williams Co.*, 458 U.S. 654, 661 (1982).⁹ If a state statute compelled competitors to file collective rates, it would be mandating horizontal price fixing, which is the classic *per se* violation of the Sherman Act. If a state chooses to compel such facially anticompetitive private conduct, the private parties are free from federal antitrust liability only when the requirements of the state action doctrine have been met, including active supervision by the state of the private collective rate-setting.¹⁰

Under the second prong of the *Midcal* test, Respondent would be required to demonstrate “active supervision” by state officials. The Supreme Court has made clear that the active supervision standard is a rigorous one. It is not enough that the State grants general authority for certain business conduct or that it approves

⁹ A state statute may be “condemned under the antitrust laws . . . if it mandates or authorizes conduct that necessarily constitutes a violation of the law in all cases, or if it places irresistible pressure on a private party to violate the antitrust laws in order to comply with the statute. Such condemnation will follow under § 1 of the Sherman Act when the conduct contemplated by the statute is in all cases a *per se* antitrust violation.” *Rice*, 458 U.S. at 661.

¹⁰ As the Supreme Court itself noted in *Rice v. Norman Williams Co.*, its earlier decision in *Midcal*, articulating the two prongs of the state action doctrine, overturned a statute that “required members of the California wine industry to file fair trade contracts or price schedules with the State, and provided that if a wine producer had not set prices through a fair trade contract, wholesalers *must* post a resale price schedule for that producer’s brands.” 458 U.S. at 659 (emphasis in original). Thus, the statute at issue in *Midcal* “facially conflicted with the Sherman Act because it *mandated* resale price maintenance, an activity that has long been regarded as a *per se* violation of the Sherman Act.” *Id.* at 659-60 (emphasis in original).

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private agreements with little review. As the Court held in *Midcal*, “The national policy in favor of competition cannot be thwarted by casting such a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement.”¹¹ Rather, active supervision is designed to ensure that a private party’s anticompetitive action is shielded from antitrust liability only when “the State has effectively made [the challenged] conduct its own.”¹²

In order for state supervision to be adequate for state action purposes, state officials must engage in a “pointed re-examination” of the private conduct.¹³ In this regard, the State must “have and exercise ultimate authority” over the challenged anticompetitive conduct.¹⁴ To do so, state officials must exercise “sufficient independent judgment and control so that the details of the rates or prices have been established as a product of deliberate state intervention, not simply by agreement among private parties.”¹⁵ One asserting the state action defense must demonstrate that the state agency has ascertained the relevant facts, examined the substantive merits of the private action, assessed whether that private action comports with the underlying statutory criteria established by the state legislature, and squarely ruled on the merits of the private action in a way sufficient to establish the challenged conduct as a product of deliberate state intervention rather than private choice.

IV. General Characteristics of Active Supervision

¹¹ *Midcal*, 445 U.S. at 105-06.

¹² *Patrick v. Burget*, 486 U.S. 94, 106 (1988).

¹³ *Midcal*, 445 U.S. at 106. *Accord*, *Ticor*, 504 U.S. at 634-35; *Patrick v. Burget*, 486 U.S. at 100-01.

¹⁴ *Patrick v. Burget*, 486 U.S. at 101 (emphases added).

¹⁵ *Ticor*, 504 U.S. at 634-35.

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At its core, the active supervision requirement serves to identify those responsible for public policy decisions. The clear articulation requirement ensures that, if a State is to displace national competition norms, it must replace them with specific state regulatory standards; a State may not simply authorize private parties to disregard federal laws,¹⁶ but must genuinely substitute an alternative state policy. The active supervision requirement, in turn, ensures that responsibility for the ultimate conduct can properly be laid on the State itself, and not merely on the private actors. As the Court explained in *Ticor*:

States must accept political responsibility for actions they intend to undertake. . . . Federalism serves to assign political responsibility, not to obscure it. . . . For States which do choose to displace the free market with regulation, our insistence on real compliance with both parts of the *Midcal* test will serve to make clear that the State is responsible for the price fixing it has sanctioned and undertaken to control.¹⁷

Through the active supervision requirement, the Court furthers the fundamental principle of accountability that underlies federalism by ensuring that, if allowing anticompetitive conduct proves to be unpopular with a State's citizens, the state legislators will not be "insulated from the electoral ramifications of their decisions."¹⁸

In short, clear articulation requires that a State enunciate an affirmative intent to displace competition and to replace it with a

¹⁶ *Parker*, 317 U.S. at 351.

¹⁷ 504 U.S. at 636.

¹⁸ See *New York v. United States*, 505 U.S. 144, 168-69 (1992).

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stated criterion. Active supervision requires the State to examine individual private conduct, pursuant to that regulatory regime, to ensure that it comports with that stated criterion. Only then can the underlying conduct accurately be deemed that of the State itself, and political responsibility for the conduct fairly be placed with the State.

Accordingly, under the Supreme Court's precedents, to provide meaningful active supervision, a State must (1) obtain sufficient information to determine the actual character of the private conduct at issue, (2) measure that conduct against the legislature's stated policy criteria, and (3) come to a clear decision that the private conduct satisfies those criteria, so as to make the final decision that of the State itself.

V. Standard for Active Supervision

There is no single procedural or substantive standard that the Supreme Court has held a State must adopt in order to meet the active supervision standard. Satisfying the Supreme Court's general standard for active supervision, described above, is and will remain the ultimate test for that element of the state action defense.

Nevertheless, in light of the foregoing principles, the Commission in this Analysis identifies the specific elements of an active supervision regime that it will consider in determining whether the active supervision prong of state action is met in future cases (as well as in any future action brought by Respondent to modify the terms of this proposed Order). They are three: (1) the development of an adequate factual record, including notice and opportunity to be heard; (2) a written decision on the merits; and (3) a specific assessment – both qualitative and quantitative – of how the private action comports with the substantive standards established by the state legislature. All three elements further the central purpose of the active supervision prong by ensuring that responsibility for the private conduct is fairly attributed to the State. Each will be discussed below.

Analysis

**A. Development of an Adequate Factual Record,
Including Notice and Opportunity to Be Heard**

To meet the test for active state supervision, in this case Respondent would need to show that the State had in place an administrative body charged with the necessary review of filed tariffs and capable of developing an adequate factual record to do so.¹⁹ In *Ticor*, the Court quoted language from earlier lower court cases setting out a list of organizational and procedural characteristics relevant as the “beginning point” of an effective state program:

[T]he state’s program is in place, is staffed and funded, grants to the state officials ample power and the duty to regulate pursuant to declared standards of state policy, is enforceable in the state’s courts, and demonstrates some basic level of activity directed towards seeing that the private actors carry out the state’s policy and not simply their own policy²⁰

¹⁹ At the time of any request for a modification, Respondent will be required to produce evidence of what the state reviewing agency is likely to do in response to collective rate-making. We recognize that this involves some prediction and uncertainty, particularly when the Respondent requests an order modification on the basis of a state review program that might be authorized but not yet operating, as the Respondent will still be under order. In such cases it may be appropriate for the Respondent to show what the state program is designed, directed, or organized to do. If a particular state agency is already conducting reviews in some related area, evidence of its approach to these tasks will be particularly relevant.

²⁰ *Ticor*, 504 U.S. at 637 (citations omitted).

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Moreover, that body would need to be capable of compiling, and actually compile, an adequate factual record to assess the nature and impact of the private conduct in question. The precise factual record that would be required would depend on the substantive norm that the State has provided; the critical question is whether the record has sufficient facts for the reviewing body sensibly to determine that the State's substantive regulatory requirements have been achieved. In the typical case in which the State has articulated a criterion of consumer impact, obtaining reliable, timely, and complete economic data would be central to the regulatory board's ability to determine if the State's chosen criterion has been satisfied.²¹ Timeliness in particular is an ongoing concern; if the private conduct is to remain in place for an extended period of time, then periodic state reviews of that private conduct using current economic data are important to ensure that the restraint remains that of the State, and not of the private actors.

Additionally, in assembling an adequate factual record, the procedural value of notice and opportunity to comment is well established. These procedural elements, which have evolved in various contexts through common law, through state and federal constitutional law, and through Administrative Procedure Act rulemakings,²² are powerful engines for ensuring that relevant

²¹ As the *Ticor* Court held, "state officials [must] have undertaken the necessary steps to determine the specifics of the price-fixing or ratesetting scheme." *Id.* at 638.

²² The Administrative Procedure Act defines a rule, in part, as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy." 5 U.S.C. § 551(4). Actions "concerned with the approval of 'tariffs' or rate schedules filed by public utilities and common carriers" are typical examples of rulemaking proceedings. E. Gellhorn & R. Levin, *Administrative Law & Process* 300 (1997).

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facts – especially those facts that might tend to contradict the proponent’s contentions – are brought to the state decision-maker’s attention.

B. A Written Decision

A second important element the Commission will look to in determining whether there has been active supervision is whether the state board renders its decision in writing. Though not essential, the existence of a written decision is normally the clearest indication that the board (1) genuinely has assessed whether the private conduct satisfies the legislature’s stated standards and (2) has directly taken responsibility for that determination. Through a written decision, whether rejecting or (the more critical context) approving particular private conduct that would otherwise violate the federal antitrust laws, the state board would provide analysis and reasoning, and supporting evidence, that the private conduct furthers the legislature’s objectives.²³

C. Qualitative and Quantitative Compliance with State Policy Objectives

In determining active supervision, the substance of the State’s decision is critical. Its fundamental purpose must be to determine that the private conduct meets the state legislature’s stated criteria. Federal antitrust law does not seek to impose federal substantive standards on state decision-making, but it does require that the

²³ A record preserved by other means, such as audio or video recording technology, might also suffice, provided that it demonstrated that the board had (1) genuinely assessed the private conduct and (2) taken direct responsibility. Such an audio or video recording, however, will be an adequate substitute for a written opinion only when it provides a sufficiently transparent and decipherable view of the decision-making proceeding to facilitate meaningful public review and comment.

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States – in displacing federal law – meet their own stated standards. As the *Ticor* Court explained:

Our decisions make clear that the purpose of the active supervision inquiry is not to determine whether the State has met some normative standard, such as efficiency, in its regulatory practices. Its purpose is to determine whether the State has exercised sufficient independent judgment and control so that the details of the rates or prices have been established as a product of deliberate state intervention, not simply by agreement among private parties. Much as in causation inquiries, the analysis asks whether the State has played a substantial role in determining the specifics of the economic policy. The question is not how well state regulation works but whether the anticompetitive scheme is the State's own.²⁴

Thus, a decision by a state board that assesses both qualitatively and quantitatively whether the “details of the rates or prices” satisfy the state criteria ensures that it is the State, and not the private parties, that determines the substantive policy. There should be evidence of the steps the State took in analyzing the rates filed and the criteria it used in evaluating those rates. There should also be evidence showing whether the State independently verified the accuracy of financial data submitted and whether it relied on accurate and representative samples of data. There should be evidence that the State has a thorough understanding of the consequences of the private parties’ proposed action. Tariffs, for instance, can be complex, and there should be evidence that the State not only has analyzed the actual rates charged but also has analyzed the complex rules that may directly or indirectly impact the rates contained in the tariff.

If the State has chosen to include in its statute a requirement that the regulatory body evaluate the impact of particular conduct

²⁴ *Ticor*, 504 U.S. at 634-35.

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on “competition,” “consumer welfare,” or some similar criterion, then – to meet the standard for active supervision – there should be evidence that the State has closely and carefully examined the likely impact of the conduct on consumers. Because the central purpose of the federal antitrust laws is also to protect competition and consumer welfare,²⁵ conduct that would run counter to those federal laws should not be lightly assumed to be consistent with parallel state goals. Especially when, as here, the underlying private conduct alleged is price fixing – which, as the *Ticor* Court noted, is possibly the most “pernicious” antitrust offense²⁶ – a careful consideration of the specific monetary impact on consumers is critical to any assessment of an overall impact on consumer welfare. To the maximum extent practicable, that consideration should include an express quantitative assessment, based on reliable economic data, of the specific likely impact upon consumers.

It bears emphasizing that States need not choose to enact criteria such as promoting “competition” or “consumer welfare” – the central end of federal antitrust law. A State could instead enact some other criterion. Then, the State’s decision would need to assess whether that objective had been met.

On the other hand, if a State does not disavow (either expressly or through the promulgation of wholly contrary regulatory criteria) that consumer welfare is state regulatory policy, it must address consumer welfare in its regulatory analysis. In claiming the state action defense, a respondent would need to demonstrate that the state board, in evaluating arguably anticompetitive conduct, had

²⁵ Indeed, consideration of consumer impact is at the heart of “[a] national policy” that preserves “the free market and . . . a system of free enterprise without price fixing or cartels.” *Id.* at 632.

²⁶ *Id.* at 639 (“No antitrust offense is more pernicious than price fixing.”).

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carefully considered and expressly quantified the likely impact of that conduct on consumers as a central element of deciding whether to approve that conduct.²⁷

In the present case, Minnesota has chosen to give consideration to, among other state interests, the interests of consumers. Statutes require that the rates not be "unjust, unreasonable, unjustly discriminatory, unduly preferential or prejudicial"²⁸ and that they not be "excessive."²⁹ Thus, to establish active supervision, Respondent would be obligated to show that the State, prior to approving the rates at issue, performed an analysis and quantification of whether the rates to consumers are "excessive."

VI. Opportunity for Public Comment

The standards of active supervision remain those laid out by the Supreme Court in *Midcal* and its progeny. Those standards have been explained in detail above to further illustrate how they would apply should Respondent seek to modify this proposed Order. Applying these standards, the Commission believes, will further the principles of federalism and accountability enunciated by the Supreme Court, will help clarify for States and private parties the reach of federal antitrust law, and will ultimately redound to the benefit of consumers.

The proposed Order has been placed on the public record for 30 days in order to receive comments from interested persons.

²⁷ This requirement is based on the principle that the national policy favoring competition "is an essential part of the economic and legal system within which the separate States administer their own laws." *Id.* at 632.

²⁸ MINN. STAT. ANN. § 221.161(Subd. 1).

²⁹ MINN. STAT. ANN. § 221.161(Subd. 2).

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Comments received during this period will become part of the public record. After 30 days, the Commission will again review the Agreement and comments received, and will decide whether it should withdraw from the Agreement or make final the Order contained in the Agreement.

By accepting the proposed Order subject to final approval, the Commission anticipates that the competitive issues described in the proposed Complaint will be resolved. The purpose of this analysis is to invite and facilitate public comment concerning the proposed Order. It is not intended to constitute an official interpretation of the Agreement and proposed Order or to modify their terms in any way.

Complaint

IN THE MATTER OF

SOUTH GEORGIA HEALTH PARTNERS, L.L.C., ET AL.CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-4100; File No. 0110222**Complaint, October 31, 2003--Decision, October 31, 2003*

This consent order, among other things, prohibits Respondent South Georgia Health Partners, L.L.C. ("SGHP") -- a for-profit organization whose members include approximately 500 physicians and 15 hospitals -- and eight other respondents, including five other physician-hospital organizations; and three independent practice associations, from entering into or facilitating any agreement between or among any physicians: (1) to negotiate with payors on any physician's behalf; (2) to deal, refuse to deal, or threaten to refuse to deal with payors; (3) on what terms to deal with any payor; or (4) not to deal individually with any payor, or not to deal with any payor through an arrangement other than respondents. The order also prohibits the respondents from facilitating exchanges of information between physicians concerning whether, or on what terms, to contract with a payor. In addition, the order prohibits the respondents from attempting to engage in, or from inducing anyone to engage in, any action prohibited by the order. The order also requires a respondent that has formed certain types of arrangements to notify the Commission at least 60 days prior to negotiating or entering into agreements with payors or discussing price or related terms among the participants of the arrangement, and requires the respondents to notify certain payors that any contract with SGHP may be terminated at the payor's written request.

Participants

For the Commission: *Steven J. Osnowitz, Jerod T. Klein, Pamela L. Timus, Emily R. Pitlick, David R. Pender, Jeffrey W. Brennan, Anne R. Schenof, Roberta S. Baruch, Fred Martin Louis Silvia and Mary T. Coleman.*

For the Respondents: *Jeffrey Spigel, King & Spalding and David Robbins, Duane Morris.*