

Complaint

IN THE MATTER OF

MOVERS CONFERENCE OF MISSISSIPPI, INC.CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket 9308; File No. 0210115**Complaint, July 8, 2003--Decision, December 4, 2003*

This consent order, among other things, prohibits Respondent Movers Conference of Mississippi, Inc. – an association with, as members, approximately 39 household goods movers that conduct business within the State of Mississippi – 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: *Keith Allison, pro se.*

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 Movers Conference of Mississippi, Inc. (hereinafter sometimes referred to as “respondent” or “MCM”), 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:

Complaint

NATURE OF THE CASE

This matter concerns horizontal agreements among competing household goods movers that, through respondent, file tariffs for intrastate moving services in Mississippi. The tariffs contain collective rates that participating movers charge consumers for moving services. Through these tariffs, the participating movers engage in a horizontal agreement to fix prices for their services.

RESPONDENT AND ITS MEMBERS

PARAGRAPH 1. Respondent Movers Conference of Mississippi, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Mississippi, with its office and principal place of business located at P.O. Box 961, Jackson, Mississippi.

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 Mississippi. One of the primary functions of respondent is the initiation, preparation, development, dissemination, and filing with the Mississippi Public Service Commission 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 cartons 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 Mississippi, including updates, revisions, and/or amendments, including general rules and regulations.)

PARAGRAPH 3. Pursuant to Mississippi state law, each household goods mover is required to file a tariff with the Mississippi Public Service Commission containing the carrier's

Complaint

rates, fares, or charges for the intrastate transportation of household goods. By Mississippi law, a household goods mover is not permitted to charge a rate, fare, or charge different from those contained in its tariff or supplements thereto once the Mississippi Public Service Commission has accepted it.

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 Mississippi. 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.

PARAGRAPH 5. The membership of MCM consists of approximately 39 household goods movers that conduct business within the State of Mississippi. MCM members receive compensation for intrastate moves. MCM's Rate and Tariff Committee conducts MCM's tariff-related activities. The Rate and Tariff Committee's Board of Directors is comprised of one representative for each MCM member; these representatives designate officers.

JURISDICTION

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;

Complaint

(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.

THE CHALLENGED CONDUCT

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 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 Mississippi 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 Mississippi;

(B) Participating in and continuing to participate in the collectively set rates;

Complaint

(C) Filing collectively set rates with the Mississippi Public Service Commission; 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:

(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.

THE VIOLATION CHARGED

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.

Complaint

Notice

Notice is hereby given to the Respondent that the eighth day of October, 2003, at 10:00 a.m., or such later date as determined by an Administrative Law Judge of the Federal Trade Commission, is hereby fixed as the time and Federal Trade Commission offices, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580, as the place when and where a hearing will be had before an Administrative Law Judge of the Federal Trade Commission, on the charges set forth in this complaint, at which time and place you will have the right under the FTC Act to appear and show cause why an order should not be entered requiring you to cease and desist from the violations of law charged in the complaint.

You are notified that the opportunity is afforded to you to file with the Commission an answer to this complaint on or before the twentieth (20th) day after service of it upon you. An answer in which the allegations of the complaint are contested shall contain a concise statement of the facts constituting each ground of defense; and specific admission, denial, or explanation of each fact alleged in the complaint or, if you are without knowledge thereof, a statement to that effect. Allegations of the complaint not thus answered shall be deemed to have been admitted.

If you elect not to contest the allegations of fact set forth in the complaint, the answer shall consist of a statement that you admit all of the material facts to be true. Such an answer shall constitute a waiver of hearings as to the facts alleged in the complaint and, together with the complaint, will provide a record basis on which the Administrative Law Judge shall file an initial decision containing appropriate findings and conclusions and an appropriate order disposing of the proceeding. In such answer, you may, however, reserve the right to submit proposed findings and conclusions under § 3.46 of the Commission's Rules of Practice for Adjudicative Proceedings and the right to appeal the initial decision to the Commission under § 3.52 of said Rules.

Complaint

Failure to answer within the time above provided shall be deemed to constitute a waiver of your right to appear and contest the allegations of the complaint and shall authorize the Administrative Law Judge, without further notice to you, to find the facts to be as alleged in the complaint and to enter an initial decision containing such findings, appropriate conclusions, and order.

The ALJ will schedule an initial prehearing scheduling conference to be held not later than 14 days after the last answer is filed by any party named as a Respondent in the complaint. Unless otherwise directed by the ALJ, the scheduling conference and further proceedings will take place at the Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Room 532, Washington, D.C. 20580. Rule 3.21(a) requires a meeting of the parties' counsel as early as practicable before the prehearing scheduling conference, and Rule 3.31(b) obligates counsel for each party, within 5 days of receiving a Respondent's answer, to make certain initial disclosures without awaiting a formal discovery request.

Notice of Contemplated Relief

Should the Commission conclude from the record developed in any adjudicative proceedings in this matter that respondent's conduct violated Section 5 of the Federal Trade Commission Act as alleged in the complaint, the Commission may order such relief as is supported by the record and is necessary and appropriate, including but not limited to:

1. Requiring respondent to cease and desist from 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. Requiring respondent to cease and desist from providing information to any carrier about rate changes considered or

Complaint

made by any other carrier employing the publishing services of respondent prior to the time at which such rate changes become a matter of public record.

3. Requiring respondent to cease and desist from inviting, coordinating or providing a forum (including maintaining any rate or tariff committee) for any discussion or agreement between or among competing carriers concerning rates charged or proposed to be charged by carriers for the intrastate transportation of property or related services, goods or equipment.
4. Requiring respondent to cease and desist from suggesting, urging, 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. Requiring respondent to cease and desist from preparing, developing, disseminating or filing a proposed or existing tariff containing automatic changes to rates charged by two or more carriers.
6. Requiring respondent to cancel all tariffs and any supplements thereto on file with the state that establish rates for transportation of property or related services, goods or equipment.
7. Requiring respondent to cancel those provisions of its articles of incorporation, by-laws and procedures, tariff service agreements and every other rule that has the purpose or effect of permitting, announcing, explaining or agreeing to any business practice enjoined by the terms of any order, and to amend its by-laws to require members to observe the provisions of any order.

Complaint

8. Requiring respondent to make public, in a manner likely to reach as many members as possible, the nature of the relief ordered by the Commission.
9. Such additional relief as is necessary to correct or remedy the violations alleged in the complaint.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this eighth day of July, 2003, issues its complaint against MCM.

Decision and Order

DECISION AND ORDER

The Federal Trade Commission (“Commission”) having heretofore issued its Complaint charging the Movers Conference of Mississippi, Inc. (“MCM”), hereinafter sometimes referred to as “Respondent,” with violations of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and Respondent having been served with a copy of that Complaint, together with a Notice of Contemplated Relief; and

Respondent 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 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 Secretary of the Commission having thereafter withdrawn this matter from adjudication in accordance with Commission Rule 3.25(c), 16 C.F.R. § 3.25(c); and

The Commission having thereafter considered the matter and thereupon 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 3.25(f), 16 C.F.R. § 3.25(f), the Commission hereby makes the following jurisdictional findings and issues the following Decision and Order (“Order”):

1. Respondent Movers Conference of Mississippi, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Mississippi, with its office and

Decision and Order

principal place of business located at P.O. Box 961, Jackson, Mississippi.

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 "MCM" means the Movers Conference of Mississippi, Inc., its officers, executive board, committees, parents, 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 Mississippi for compensation by a carrier authorized by the Mississippi Public Service Commission to engage therein;
- D. "Member" means any carrier or other person that pays dues or belongs to MCM 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 Mississippi, including updates, revisions, and/or amendments, including general rules and regulations;

Decision and Order

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

Decision and Order

3. Inviting, coordinating or providing a forum (including publication of an informational bulletin) for any discussion or agreement between or among competing carriers concerning 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 Mississippi Public Service Commission that establish rates for transportation of property or related services, goods or equipment by common carriers in the State of Mississippi 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 Mississippi;

Decision and Order

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 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 MCM to observe the provisions of the Order as a condition of membership in MCM.

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 engaged in the transportation of household goods, and for a period of three (3) years from the date of service of this Order, to each new member engaged in the transportation of household goods 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

Decision and Order

forth in detail the manner and form in which it has complied with this Order.

VII.

IT IS FURTHER ORDERED that this Order shall terminate on December 4, 2023.

By the Commission, Commissioner Harbour not participating.

Decision and Order

APPENDIX

(Letterhead of the Movers Conference of Mississippi, Inc.)

Dear Member:

The Federal Trade Commission has ordered the Movers Conference of Mississippi, Inc. ("MCM") to cease and desist its tariff and collective rate-making activities. A copy of the Commission 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) The MCM 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 Mississippi, but may use MCM as a tariff publishing agent.
- (2) MCM is prohibited from providing a forum for its members for the purpose of discussing rates.
- (3) MCM is prohibited from urging, suggesting, encouraging or in any way attempting to influence the rates members charge for their intrastate transportation services; MCM may not provide non-public information to any carrier about rate changes ordered by another carrier.
- (4) MCM is prohibited from maintaining any rate or tariff committee which discusses or formulates intrastate rates or rate proposals.

Decision and Order

(5) MCM is given 120 days to cancel all tariffs and tariff supplements currently in effect and on file at the Mississippi Public Service Commission which were prepared, developed or filed by MCM.

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

Sincerely yours,

[appropriate MCM officer]

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 Movers Conference of Mississippi, Inc. (“MCM” or “Respondent”) to resolve matters charged in an Administrative Complaint issued by the Commission on July 9, 2003. The agreement has been placed on the public record for thirty (30) days for receipt of comments from interested members of the public. The Agreement is for settlement purposes only and does not constitute an admission by MCM 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.

The Commission’s decision to issue its Complaint in this matter was made after considering whether Respondent’s activities were protected by the state action defense. As discussed in detail in Section III below, a key element of the state action defense is the extent to which the State supervises private action. The facts developed during staff’s investigation pertaining to the extent to which Mississippi supervised rates contained in tariffs filed by Respondent are discussed in this Analysis to illustrate how the Commission analyzed Respondent’s ability to establish a state action defense.¹

¹ Settlement in this matter precludes the possibility of a litigated record. Thus, the Commission’s understanding of the facts as set forth in this Analysis is based on the record developed during staff’s investigation. The Commission has decided to include discussion of the relevant parts of the investigatory record to provide the best guidance it can on the scope of the state action defense and to facilitate comment on the proposed Consent Agreement.

Analysis

I. The Commission's Complaint

The Complaint alleged that Respondent Movers Conference of Mississippi, Inc., a corporation, violated Section 5 of the Federal Trade Commission Act. Specifically, the Complaint alleged that Respondent agreed to engage, and had engaged, in a combination and conspiracy, an agreement, concerted action or unfair and unlawful acts, policies and practices, the purpose or effect of which was 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 39 household goods movers that conduct business within the State of Mississippi. One of the primary functions of MCM is preparing, and filing with the Mississippi Public Service Commission, tariffs and supplements on behalf of its members. These tariffs and supplements contain rates and charges for the intrastate transportation of household goods and for related services.

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

The Complaint further alleged that Respondent organized and conducted meetings that provided a forum for discussion or agreement between competing carriers concerning or affecting rates and charges for the intrastate transportation of household goods.

The Complaint further alleged that Respondent's conduct was anticompetitive because it had the effect of raising, fixing, and stabilizing the prices of household goods moves. The acts of Respondent also had the effect of depriving consumers of the benefits of competition.

Analysis

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 Mississippi. 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.² It also bars Respondent from maintaining a tariff committee or agreeing with movers to institute any automatic intrastate rate increases.

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 Mississippi 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.

² A state statute requires that carriers file their tariffs and make them available to the public. MISS. CODE ANN. § 77-7-211.

Analysis

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.³ 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 of States themselves.⁴ 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.⁵ Instead, a State must substitute its own

³ 16 C.F.R. § 2.51. We discuss the state action defense below in some detail. *See also 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>; *Iowa Movers and Warehousemen’s Association*, File No. 021-0115 (Aug. 1, 2003) (proposed consent order) available at <http://www.ftc.gov/os/2003/08/imwaanalysis.htm>; and *Minnesota Transport Services Association*, File No. 021-0115 (Aug. 1, 2003) (proposed consent order) available at <http://www.ftc.gov/os/2003/08/mtsaanalysis.htm>.

⁴ 317 U.S. 341 (1943).

⁵ *Parker v. Brown*, 317 U.S. at 351 (“[A] state does not give immunity to those who violate the Sherman Act by authorizing

Analysis

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.”⁶

Under the first prong of *Midcal*’s two-part test, Respondent would be required to show that the State of Mississippi had “clearly articulated and affirmatively expressed as state policy” the desire to replace competition with a regulatory scheme. With regard to this prong, it appears that under Mississippi law tariffs must be “just and reasonable.”⁷ Respondent would meet its burden if it could show that these or some other provision of Mississippi law constitutes a clear expression of state policy to displace competition and allow for collective rate-making among competitors.⁸

them to violate it, or declaring that their action is lawful.”).

⁶ 445 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.

⁷ MISS. CODE ANN. § 77-7-151; MISS. CODE ANN. § 77-7-221.

⁸ *United States v. Southern Motor Carriers Rate Conference*, 471 U.S. 48, 63-65 (1985).

Analysis

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 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.”⁹ 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.”¹⁰

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.¹¹ In this regard, the State must “have and exercise ultimate authority” over the challenged anticompetitive conduct.¹² 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.”¹³ 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

⁹ *Midcal*, 445 U.S. at 105-06.

¹⁰ *Patrick v. Burget*, 486 U.S. 94, 106 (1988).

¹¹ *Midcal*, 445 U.S. at 106. *Accord*, *Ticor*, 504 U.S. at 634-35; *Patrick v. Burget*, 486 U.S. at 100-01.

¹² *Patrick v. Burget*, 486 U.S. at 101 (emphases added).

¹³ *Ticor*, 504 U.S. at 634-35.

Analysis

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

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,¹⁴ 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.¹⁵

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

¹⁴ *Parker*, 317 U.S. at 351.

¹⁵ 504 U.S. at 636.

Analysis

“insulated from the electoral ramifications of their decisions.”¹⁶

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

¹⁶ See *New York v. United States*, 505 U.S. 144, 168-69 (1992).

Analysis

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.

**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.¹⁷ 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

¹⁷ 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.

Analysis

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 policy¹⁸

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.¹⁹ 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.

In Mississippi, the State had in place rules and regulations pertaining to, and had staff assigned to review, household goods tariffs. In connection with a recent tariff increase request, Respondent sent to the State very general written assertions that movers' costs had increased as well as some assertions regarding specific cost increases. The staff did undertake some review including, for example, checking to see if the cost of packaging material had increased as asserted by movers. In addition, the

¹⁸ *Ticor*, 504 U.S. at 637 (citations omitted).

¹⁹ 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.

Analysis

State monitored Bureau of Labor Statistics printouts giving the national consumer price index and Department of Labor's notices of increases in the national minimum wage.

Nevertheless, Respondent made no showing that the State had done the necessary research into the economic conditions of the moving industry in Mississippi that would enable it to assess the impact of the Respondent's proposal.²⁰ Moreover, there was no showing that the State sought independently to verify the accuracy of the financial information submitted by the movers.²¹

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

²⁰ Cf. *New England Motor Rate Bureau, Inc.*, 112 F.T.C. 200, 233, 266, 279-80 (1989) (active supervision not found because, *inter alia*, the State had "never conducted an economic study of the intrastate trucking industry nor of the effects of its regulatory policy on the intrastate trucking industry within the state"). Although the First Circuit reversed the Commission's decision, *New England Motor Rate Bureau v. FTC*, 908 F.2d 1064 (1st Cir. 1990), the First Circuit's standard for active supervision was later found to be "insufficient" in *Ticor*. 504 U.S. at 637.

²¹ Cf. *United States v. Southern Motor Carriers Rate Conference*, 467 F. Supp. 471, 477 (N.D.Ga. 1979), *aff'd*, 702 F.2d 543 (5th Cir. Unit B 1983) (active supervision found where, among other things, the State undertook "on-site review and verification of motor carrier books and records"), *rev'd on other grounds*, 471 U.S. 48 (1985).

²² The Administrative Procedure Act defines a rule, in part, as "the whole or a part of an agency statement of general or

Analysis

facts – especially those facts that might tend to contradict the proponent’s contentions – are brought to the state decision-maker’s attention. In Mississippi, the Public Service Commission did give notice to the public that a hearing was to take place to consider increases in rates and it did hold hearings where witnesses testified about their increased costs.²³ For reasons discussed throughout, however, the mere fact of a hearing will not establish active supervision. To show active supervision, Respondent would need to establish that the State takes additional steps to ensure that it makes the rates its own.

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

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).

²³ See, e.g., August 8, 1995, Notice, Public Service Commission of the State of Mississippi, 95-MC-0329, *In Re: Application of Mississippi Movers Conference Filing Supplement No. 2 to Mississippi Movers Conference Tariff No 2*; October 10, 1995, Public Hearing before the Public Service Commission of the State of Mississippi, 95-MC-0329, *In Re Application of Mississippi Movers Conference Filing Supplement No. 2 to Mississippi Movers Conference Tariff No 2*.

Analysis

(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.²⁴

In Mississippi, the State issued written orders granting requests for price increases.²⁵ These written orders simply announced the State's decision. The orders did not discuss evidence supporting the increases nor did they provide the State's analysis or reasoning when the State granted rate increases.

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

²⁴ 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.

²⁵ See, e.g., December 19, 1995, Order, Public Service Commission of the State of Mississippi, 95-MC-0329, *In Re Application of Mississippi Movers Conference Filing Supplement No. 2 to Mississippi Movers Conference Tariff No 2*.

Analysis

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.²⁶

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 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

²⁶ *Ticor*, 504 U.S. at 634-35.

Analysis

likely impact of the conduct on consumers. Because the central purpose of the federal antitrust laws is also to protect competition and consumer welfare,²⁷ 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 offense²⁸ – a careful consideration of the specific monetary impact on consumers is critical to any assessment of an overall impact on consumer welfare. 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 should address consumer welfare in its regulatory analysis. In claiming the state action defense, a respondent should demonstrate that the state board, in evaluating arguably anticompetitive conduct, had carefully considered and quantified the likely impact of that conduct on consumers as a central element of deciding whether to

²⁷ 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.

²⁸ *Id.* at 639 (“No antitrust offense is more pernicious than price fixing.”).

Analysis

approve that conduct.²⁹

In the present case, Mississippi has expressly chosen to give significant consideration to, among other state interests, the interests of consumers when determining whether rates are “just and reasonable”:

In the exercise of its power to prescribe just and reasonable rates for the transportation of passengers or household goods . . . the commission shall give due consideration, among other factors, to:

* * * *

the need, in the public interest, of adequate and efficient transportation service by such carriers at the lowest cost consistent with the furnishing of such services.³⁰

Thus, to establish active supervision, Respondent would be obligated to show that the State, when approving the rates at issue, performed an analysis and quantification of whether the rates to consumers were “at the lowest cost consistent with the furnishing of service.” Here, however, Respondent did not produce any substantial evidence that the State had done such an analysis or that the State had adopted a method for evaluating movers’ rates against the statutory criteria.³¹

²⁹ 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.

³⁰ MISS. CODE ANN. § 77-7-211.

³¹ *Cf. United States v. Southern Motor Carriers Rate Conference*, 467 F. Supp. 471, 477 (N.D. Ga. 1979), *aff’d*, 702 F.2d 543 (5th Cir. Unit B 1983) (active supervision established where, among other things, the State reviewed a request for an

Analysis

In fact, during one Public Service Commission hearing held to consider movers' request for an increase in rates, a mover opposed the proposed increase on the grounds that he and other movers could continue to profitably move customers at the existing rates.³² The Public Service Commission approved the requested increase in rates without explaining why it rejected this testimony

increase in motor carrier rates by analyzing motor carriers' operating ratios), *rev'd on other grounds*, 471 U.S. 48 (1985).

³² The mover testified as follows:

I think the majority of movers here are making fairly decent money doing this business, some an exception, and I can't answer why because you can make money doing this and there's no problem with that. Any time you buy a box for 50 cents and sell it for \$2.20, you're going to make money on that box.*** I was basically going to say that my company can currently operate profitably based on these rates and provide a good service to the average consumer

I don't know how many of my customers have said, even at church when I'm talking to some of my friends and I tell them how much I sell a box for, they just look at me and say you're robbing us, you're just stealing us blind. And granted this is a hard business to make a profit. I'm not one to make a big profit; I just make a steady living, feed my kids, take care of my house, and give my guys good employment. That's all I do. I'm not out to make a million dollars.

October 10, 1995, Public Hearing before the Public Service Commission of the State of Mississippi, 95-MC-0329, *In Re Application of Mississippi Movers Conference Filing Supplement No. 2 to Mississippi Movers Conference Tariff No 2*, at transcript pages 40, 42, 45.

Analysis

or how it decided that the higher rates were at the “lowest cost consistent with the furnishing of [moving] services.”

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.

These review techniques may also help to show active state supervision in other contexts. In this Analysis we have described particular techniques that can show active supervision in the context of tariff filings. Such filings often involve recurring, concrete acts of private rate setting that tend to automatically trigger review on the occasion of each such filing. As noted above, however, if a rate filing remains in place for a prolonged period of time, the state will have an obligation to review the level of those rates on an ongoing basis. Similarly, there may be other industries where specific events do not trigger a review of private conduct, yet where the state has still displaced competition and therefore the state action defense would apply only where it could be shown that the conduct was being actively supervised. We believe that the review principles described here can be adapted to those circumstances as well. Evidence of active supervision then might be required, not in connection with particular events, but rather on a reasonable periodic basis. That supervision might still involve the elements discussed here, such as notice, analysis in light of the statutory purposes, and a written decision.

The proposed Order has been placed on the public record for 30 days in order to receive comments from interested persons. Comments received during this period will become part of the

Analysis

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 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.

Commission Opinion

IN THE MATTER OF

SCHERING-PLOUGH CORPORATION, ET AL.OPINION OF THE COMMISSION AND FINAL ORDER IN REGARD TO
ALLEGED VIOLATIONS OF SEC. 5 OF THE
FEDERAL TRADE COMMISSION ACT*Docket 9297; File No. 9910256**Complaint, March 30, 2001--Decision, December 8, 2003*

In a unanimous Opinion, the Commission addressed (1) an agreement between Respondent Schering-Plough Corporation and Respondent Upsher-Smith Laboratories, Inc. that, among other things, Upsher-Smith would not market any generic version of Schering's K-Dur 20 product --an extended-release microencapsulated potassium chloride product used to treat patients with low potassium or hypokalemia -- until September 2001, and (2) an agreement between Respondent Schering-Plough and Respondent American Home Products Corporation ("AHP") that, among other things, AHP would not market any generic version of Schering's K-Dur 20 before January 2004. The Commission concluded that both agreements violated Section 5 of the Federal Trade Commission Act. The Final Order, among other things, prohibits the respondents -- in connection with the Sale of Drug Products (as defined by the Order) -- from being a party to any agreement resolving or settling a patent infringement claim, with certain exceptions, in which (A) an Abbreviated New Drug Application ("ANDA") filer receives anything of value and (B) the ANDA filer agrees not to research, develop, manufacture, market, or sell the ANDA product for any period of time.

Participants

For the Commission: *Karen G. Bokat, Bradley S. Albert, Elizabeth R. Hilder, Michael B. Kades, Philip Eisenstat, Markus H. Meier, Judith A. Moreland, Melvin H. Orlans, Philip Eisenstat, and David R. Pender.*

For the Respondents: *John W. Nields, Jr., Laura S. Shores, Marc G. Schildkraut, Howrey Simon Arnold & White, and Robert D. Paul, J. Mark Gidley, and Christopher M. Curran, White & Case LLP.*