

**ANALYSIS OF PROPOSED CONSENT ORDER TO AID PUBLIC COMMENT
IN ALABAMA TRUCKING ASSOCIATION, INC., DOCKET NO. 9307**

The Federal Trade Commission has accepted for public comment an Agreement Containing Consent Order with Alabama Trucking Association, Inc. (“ATA” 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 ATA 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 Alabama 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

I. The Commission’s Complaint

The Complaint alleged that Respondent Alabama Trucking Association, 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 80 household goods movers that conduct business within the State of Alabama. One of the primary functions of ATA is preparing, and filing with the Alabama 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,

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.

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 Alabama.

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.

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 Alabama. 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 Alabama 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

² A state statute requires that carriers file their tariffs with the state and keep them open to public inspection. ALA. CODE § 37-3-20.

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.

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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 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.

that the State of Alabama 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 Alabama law tariffs must be “just and reasonable.”⁷ Respondent would meet its burden if it could show that this or some other provision of Alabama law constitutes a clear expression of state policy to displace competition and allow for collective rate-making among competitors.⁸

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

⁷ ALA. CODE § 37-3-19(b).

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

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.

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 "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

¹⁴ *Parker*, 317 U.S. at 351.

¹⁵ 504 U.S. at 636.

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

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.

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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. In Alabama, it has been many years since the State has held a hearing to consider the rates contained in the tariff. In addition, many rate increases have been approved without a hearing to consider movers’ requests for rate increases and without the opportunity for public comment on proposed rate increases.

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 In Alabama, the State does not issue written decisions on household goods rates. Many rate increases have been granted without a written explanation of the evidence supporting the increases and without a record of the State’s analysis or reasoning in granting the 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:

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

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 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.

²⁴ *Ticor*, 504 U.S. at 634-35.

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 whe8 Ttral elhTf9.-0.008 Tc-0.R*3j12 0 0 12 165.[0.000

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 ALA. CODE § 37-3-19(g).

²⁹ *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 increase in motor carrier rates by analyzing motor carriers’ operating ratios), *rev’d on other grounds*, 471 U.S. 48 (1985).

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 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.