[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.

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.

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 letterwhich had the

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

[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.*

[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).

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.

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 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 policy . . . .[18]

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

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[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.

[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.

[20]

[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

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:

> 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 likely impact of the conduct on consumers. Because the central purpose of the federal antitrust laws is also to protect competition and

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[26] *Ticor*, 504 U.S. at 634-35.

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 offense[28] – 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 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:
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> * * * *
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> 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]

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[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.").

[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

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 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.