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.[19]

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.[20]

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 consumer welfare,[21] 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 [22]—a careful consideration of the specific monetary impact on consumers is critical to any assessment of an overall impact on consumer welfare. To the maximum extent practicable, that consideration should include an express quantitative assessment, based on reliable economic data, of the specific likely impact upon consumers.

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

On the other hand, if a State does not disavow (either expressly or through the promulgation of wholly contrary regulatory criteria) that consumer welfare is state regulatory policy, it must address consumer welfare in its regulatory analysis. In claiming the state action defense, a respondent would need to demonstrate that the state board, in evaluating arguably anticompetitive conduct, had carefully considered and expressly quantified the likely impact of that conduct on consumers as a central element of deciding whether to approve that conduct.[23]

In the present case, Iowa has chosen to give consideration to, among other state interests, the interests of consumers. A state statute prohibits movers from charging ''more for the transportation of persons or property than a fair and just rate or charge.'' [24] Thus, to establish active supervision, Respondent would be obligated to show that the State, prior to approving the rates at issue, performed an analysis and quantification of whether the rates to consumers would be higher than a ''fair and just rate.''

VI. Opportunity for Public Comment

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

The proposed Order has been placed on the public record for 30 days in order to receive comments from interested persons. Comments received during this period will become part of the public record. After 30 days, the Commission will again review the Agreement and comments received, and will decide whether it should withdraw from the Agreement or make final the Order contained in the Agreement.

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

By direction of the Commission.

Donald S. Clark,

Secretary.

[FR Doc. 03–20370 Filed 8–8–03; 8:45 am]

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[19] 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.

[20] *Ticor,* 504 U.S. at 634–35.

[21] 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.

[22] *Id.* at 639 (''No antitrust offense is more pernicious than price fixing.'').

[23] 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.

[24] Iowa Code section 325D.13.

FEDERAL TRADE COMMISSION

[File No. 021 0115]

Minnesota Transport Services Association; Analysis To Aid Public Comment

AGENCY: Federal Trade Commission.

ACTION: Proposed consent agreement.

SUMMARY: The consent agreement in this matter settles alleged violations of Federal law prohibiting unfair or deceptive acts or practices or unfair methods of competition. The attached Analysis to Aid Public Comment describes both the allegations in the draft complaint that accompanies the consent agreement and the terms of the consent order—embodied in the consent agreement—that would settle these allegations.

DATES: Comments must be received on or before September 1, 2003.

ADDRESSES: Comments filed in paper form should be directed to: FTC/Office of the Secretary, Room 159–H, 600 Pennsylvania Avenue, NW., Washington, DC 20580. Comments filed in electronic form should be directed to: *consentagreement@ftc.gov,* as prescribed in the **SUPPLEMENTARY INFORMATION** section.

FOR FURTHER INFORMATION CONTACT: Dana Abrahamsen, FTC, Bureau of Competition, 600 Pennsylvania Avenue, NW., Washington, DC 20580, (202) 326–2906.

SUPPLEMENTARY INFORMATION: Pursuant to section 6(f) of the Federal Trade Commission Act, 38 Stat. 721, 15 U.S.C. 46(f), and § 2.34 of the Commission's Rules of Practice, 16 CFR 2.34, notice is hereby given that the above-captioned consent agreement containing a consent order to cease and desist, having been filed with and accepted, subject to final approval, by the Commission, has been placed on the public record for a period of thirty (30) days. The following Analysis to Aid Public Comment describes the terms of the consent agreement, and the allegations in the complaint. An electronic copy of the full text of the consent agreement package can be obtained from the FTC Home Page (for August 1, 2003), on the World Wide Web, at *http://www.ftc.gov/os/2003/08/index.htm.* A paper copy can be obtained from the FTC Public Reference Room, Room 130–H, 600 Pennsylvania Avenue, NW., Washington, DC 20580, either in person or by calling (202) 326–2222.

Public comments are invited, and may be filed with the Commission in either paper or electronic form. Comments filed in paper form should be directed to: FTC/Office of the Secretary, Room 159–H, 600 Pennsylvania Avenue, NW., Washington, DC 20580. If a comment contains nonpublic information, it must be filed in paper form, and the first page of the document must be clearly labeled ''confidential.'' Comments that do not contain any nonpublic information may instead be filed in electronic form (in ASCII format, WordPerfect, or Microsoft Word) as part of or as an attachment to email messages directed to the following e-mail box: *consentagreement@ftc.gov.* Such comments will be considered by the Commission and will be available for inspection and copying at its principal office in accordance with section 4.9(b)(6)(ii) of the Commission's Rules of Practice, 16 CFR 4.9(b)(6)(ii)).

Analysis of Proposed Consent Order To Aid Public Comment

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

I. The Commission's Complaint

The proposed Complaint alleges that Respondent Minnesota Transport Services Association, a corporation, has violated and is now violating Section 5 of the Federal Trade Commission Act. Specifically, the proposed Complaint alleges that Respondent has agreed to engage, and has engaged, in a combination and conspiracy, an agreement, concerted action or unfair and unlawful acts, policies and practices, the purpose or effect of which is to unlawfully hinder, restrain, restrict, suppress or eliminate competition among household goods movers in the household goods moving industry.

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

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

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

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

II. Terms of the Proposed Consent Order

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

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

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

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

[1] Under a state statute, a carrier's tariff filing ''constitutes notice to the public'' of the contents of the tariff. Minn. Stat. Ann. § 221.161(Subd. 1).

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

III. Opportunity for Modification of the Order

Respondent can seek to modify the proposed Order to permit it to engage in collective rate-making if it can demonstrate that the ''state action'' defense would apply to its conduct.[2] The state action doctrine dates back to the Supreme Court's 1943 opinion in *Parker* v. *Brown,* which held that, in light of the States' status as sovereigns, and given basic principles of federalism, Congress would not have intended the Sherman Act to apply to the activities of States themselves.[3] The defense also has been interpreted in limited circumstances to shield from antitrust scrutiny private firms' activities that are conducted pursuant to state authority. States may not, however, simply authorize private parties to violate the antitrust laws.[4] Instead, a State must substitute its own control for that of the market.

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

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

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

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

Respondent has asserted that the majority of its members were essentially compelled to file collective tariffs with the state because the state statute contemplated granting exemptions from filing collective rates only under limited circumstances.[8] The repeal of the Minnesota collective rate statute moots this issue in this case. However, even assuming a state statute compels private entities to file collective rates, this would not remove anticompetitive conduct from potential Federal antitrust liability. The Supreme Court has made clear that where a state statute compels a private party to engage in a *per se* violation of the Federal antitrust laws in order to comply with the state statute, the state statute will be pre-empted by the Federal Sherman Act unless the requirements of the state action doctrine have been met. *Rice* v. *Norman Williams Co.*, 458 U.S. 654, 661 (1982).[9] If a state statute compelled competitors to file collective rates, it would be mandating horizontal price fixing, which is the classic *per se* violation of the Sherman Act. If a state chooses to compel such facially anticompetitive private conduct, the private parties are free from Federal antitrust liability only when the requirements of the state action doctrine have been met, including active supervision by the state of the private collective rate-setting.[10]

Under the second prong of the *Midcal* test, Respondent would be required to demonstrate ''active supervision'' by state officials. The Supreme Court has made clear that the active supervision standard is a rigorous one. It is not enough that the State grants general authority for certain business conduct or that it approves private agreements with little review. As the Court held in *Midcal*, ''The national policy in favor of competition cannot be thwarted by casting such a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement.''[11] Rather, active supervision is designed to ensure that a private party's anticompetitive action is shielded from antitrust liability only when ''the State has effectively made [the challenged] conduct its own.''[12]

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

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

[3] 317 U.S. 341 (1943).

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

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

[6] MINN. STAT. ANN. section 221.165.

[7] H.F. 1214, 83rd Leg. (MINN. 2003–2004).

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

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

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

[11] *Midcal*, 445 U.S. at 105–06.

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

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

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

[15] *Ticor*, 504 U.S. at 634–35.

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,[16] but must genuinely substitute an alternative state policy. The active supervision requirement, in turn, ensures that responsibility for the ultimate conduct can properly be laid on the State itself, and not merely on the private actors. As the Court explained in *Ticor:*

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

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

In short, clear articulation requires that a State enunciate an affirmative intent to displace competition and to replace it with a stated criterion. Active supervision requires the State to examine individual private conduct, pursuant to that regulatory regime, to ensure that it comports with that stated criterion. Only then can the underlying conduct accurately be deemed that of the State itself, and political responsibility for the conduct fairly be placed with the State.

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

V. Standard for Active Supervision

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

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

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

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

[T]he state's program is in place, is staffed and funded, grants to the state officials ample power and the duty to regulate pursuant to declared standards of state policy, is enforceable in the state's courts, and demonstrates some basic level of activity directed towards seeing that the private actors carry out the state's policy and not simply their own policy . * * *[20]

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

Additionally, in assembling an adequate factual record, the procedural value of notice and opportunity to comment is well established. These procedural elements, which have evolved in various contexts through common law, through State and Federal constitutional law, and through Administrative Procedure Act rulemakings,[22] are powerful engines for ensuring that relevant facts—especially those facts that might tend to contradict the proponent's contentions—are brought to the state decision-maker's attention.

[16] *Parker*, 317 U.S. at 351.

[17] 504 U.S. at 636.

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

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

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

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

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

B. A Written Decision

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

C. Qualitative and Quantitative Compliance with State Policy Objectives

In determining active supervision, the substance of the State's decision is critical. Its fundamental purpose must be to determine that the private conduct meets the state legislature's stated criteria. Federal antitrust law does not seek to impose Federal substantive standards on state decision-making, but it does require that the States—in displacing Federal law—meet their own stated standards. As the *Ticor* Court explained:

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

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

If the State has chosen to include in its statute a requirement that the regulatory body evaluate the impact of particular conduct on ''competition,'' ''consumer welfare,'' or some similar criterion, then—to meet the standard for active supervision—there should be evidence that the State has closely and carefully examined the likely impact of the conduct on consumers. Because the central purpose of the Federal antitrust laws is also to protect competition and consumer welfare, [25] conduct that would run counter to those Federal laws should not be lightly assumed to be consistent with parallel state goals. Especially when, as here, the underlying private conduct alleged is price fixing—which, as the *Ticor* Court noted, is possibly the most ''pernicious'' antitrust offense [26]—a careful consideration of the specific monetary impact on consumers is critical to any assessment of an overall impact on consumer welfare. To the maximum extent practicable, that consideration should include an express quantitative assessment, based on reliable economic data, of the specific likely impact upon consumers.

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

On the other hand, if a State does not disavow (either expressly or through the promulgation of wholly contrary regulatory criteria) that consumer welfare is state regulatory policy, it must address consumer welfare in its regulatory analysis. In claiming the state action defense, a respondent would need to demonstrate that the state board, in evaluating arguably anticompetitive conduct, had carefully considered and expressly quantified the likely impact of that conduct on consumers as a central element of deciding whether to approve that conduct.[27]

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

VI. Opportunity for Public Comment

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

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

[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.

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

[26] *Id.* at 639 (''No antitrust offense is more pernicious than price fixing.'').

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

[28] Minn. Stat. Ann. section 221.161(Subd. 1).

[29] Minn. Stat. Ann. section 221.161(Subd.2).

proposed Order or to modify their terms in any way.

By direction of the Commission.

Donald S. Clark,

Secretary.

[FR Doc. 03–20371 Filed 8–8–03; 8:45 am]

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GENERAL SERVICES ADMINISTRATION

Privacy Act of 1974; Proposed Revisions to a Privacy Act System of Records

AGENCY: General Services Administration.

ACTION: Notice of proposed revision to an existing Privacy Act system of records.

SUMMARY: The General Services Administration (GSA) proposes to revise the system of records, Credentials, Passes, and Licenses (GSA/HRO–8). The purpose of the system is to assemble in one system information on passes and credentials for identification and security purposes. The system is being revised to cover new categories of individuals, consisting of Federal tenants and contractors, to provide greater security and control access to Federal buildings and systems. In addition, administrative enhancements to improve system effectiveness and operation include an upgrade in electronic capabilities through the use of Smart Card technology, and updates to agency forms, organizational responsibilities, and office addresses.

DATES: Interested persons may submit written comments on this proposal. The revision will become effective without further notice on September 10, 2003, unless comments received on or before that date require changes to the proposal.

ADDRESSES: Comments should be submitted to the GSA Privacy Act Officer (CI), Office of the Chief People Officer, General Services Administration, 1800 F Street, NW., Washington DC 20405.

FOR FURTHER INFORMATION CONTACT: The GSA Privacy Act Officer at the above address, or call 202–501–1452.

Dated: July 31, 2003.

Fred Alt,

Chief Information Officer, Office of the Chief People Officer.

GSA/HRO–8

SYSTEM NAME:

Credentials, Passes, and Licenses (GSA/HRO–8).

SYSTEM LOCATION:

This system of records is operated and maintained by the Office of the Chief Information Officer (CIO) for GSA's Services, Staff Offices, and regions, which are responsible for ensuring the integrity of the data in the system. System records are located in Central Office at 1800 F Street, NW., Washington DC, and in the regional offices listed in the *Appendix.*

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

GSA associates, Federal tenants, contractors, and other persons assigned responsibilities that require the issuance of credentials for identification and security purposes, including individuals participating in identification methods using the latest technologies, such as biometrics (*e.g.*, electronic fingerprinting).

CATEGORIES OF RECORDS IN THE SYSTEM:

Passes, licenses, and identification credentials, which may contain name, Social Security Number, photograph, office and home addresses and phone numbers, signature, identification serial number, next of kin name and phone number, medical information, and biometric identification information. The following GSA forms and associated databases will be used agency-wide:

a. GSA Form 277, Employee Identification and Authorization Credential (Revised 2003);

b. GSA Form 277U, Temporary Pass;

c. GSA Form 277V, Visitor Pass;

d. OF 7, Property Pass;

e. GSA Form 2941, Parking Application; and

f. Biometric information, such as fingerprints, collected electronically.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

The Federal Property and Administrative Services Act of 1949 (63 Stat. 377) as amended.

PURPOSE:

To assemble in one system information pertaining to passes and credentials for identification and security purposes; to facilitate the issuance and control of cards, parking permits, building passes, licenses, and similar credentials; and to ensure only authorized access to secure areas and systems.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

Information from this system may be disclosed as a routine use:

a. To the Federal, State, or local agency responsible for investigating, prosecuting, enforcing, or implementing a statute, rule, regulation, or order, where the General Services Administration becomes aware of a violation or potential violation of civil or criminal law or regulation.

b. To a member of Congress or a congressional staff member in response to an inquiry from that congressional office made at the request of the individual who is the subject of a record.

c. To another Federal agency or to a court when the government is party to a judicial proceeding before the court.

d. To a Federal agency, on request, in connection with the hiring and retention of an employee, the issuance of a security clearance, the conducting of a security or suitability investigation of an individual, the classifying of a job, the letting of a contract, or the issuance of license, grant, or other benefit by the requesting agency, to the extent that the information is relevant and necessary to the requesting agency's decision.

e. By the Office of Personnel Management in the production of summary descriptive statistics in support of the function for which the records are collected and maintained, or for related workforce studies.

f. To the Office of Management and Budget in connection with the review of private relief legislation as set forth in OMB Circular No. A–19 at any stage of the legislative coordination and clearance process.

g. To officials of the Merit Systems Protection Board, including the Office of Special Counsel; the Federal Labor Relations Authority and its General Counsel; or the Equal Employment Opportunity Commission when requested in the performance of their authorized duties.

h. To an authorized appeal or grievance examiner, formal complaints examiner, equal employment opportunity investigator, arbitrator, or other duly authorized official engaged in investigation or settlement of a grievance, complaint, or appeal filed by an employee to whom the information pertains.

i. To the Office of Personnel Management in accordance with the agency's responsibility for evaluation of Federal personnel management.

j. To the extent that official personnel records in the custody of GSA are covered within the systems or records published by the Office of Personnel Management as Government-wide records, they will be considered a part of that government-wide system. Other official personnel records covered by notices published by GSA and considered to be separate systems of