

IN THE MATTER OF

SILO, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE
ENERGY POLICY AND CONSERVATION ACT & THE FEDERAL TRADE
COMMISSION'S APPLIANCE LABELING RULE

Docket C-3263. Complaint, July 20, 1989—Decision, July 20, 1989

This consent order requires, among other things, the Philadelphia, Pa. based corporation, that operates stores that sell major appliances, to pay \$45,000 in civil penalties.

Appearances

For the Commission: *Kathryn Nielsen.*

For the respondent: *Erin Scher, Weil, Gotshal & Manges, New York City.*

COMPLAINT

Pursuant to the provisions of the Energy Policy and Conservation Act ("EPCA"), as amended, and by virtue of the authority vested in it by the aforementioned Act, the Federal Trade Commission, having reason to believe that SILO, Inc., a corporation, hereinafter sometimes referred to as respondent, has violated and is violating said Act, and the Commission's Rule for Using Energy Costs and Consumption Information Used in Labeling and Advertising for Consumer Appliances Under the Energy Policy and Conservation Act ("Appliance Labeling Rule"), and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues this complaint, stating its charges in that respect as follows:

PARAGRAPH 1. SILO, Inc. ("SILO") is a Pennsylvania corporation, with its office and principal place of business located at 6900 Lindbergh Boulevard, Philadelphia, Pennsylvania.

PAR. 2. Respondent advertises, offers for sale, and sells household appliances and electronic equipment in its retail stores located throughout the United States.

PAR. 3. The Energy Policy and Conservation Act, 42 U.S.C. 6291 et

seq., authorizes the Federal Trade Commission to prescribe rules requiring manufacturers to disclose certain energy usage information on labels placed on the exterior surface of covered products, including clothes washers, dishwashers, freezers, refrigerators, and refrigerator-freezers. EPCA also prohibits retailers from removing the labels from the appliances or rendering the labels illegible. 42 U.S.C. 6302(a)(2).

PAR. 4. Pursuant to 42 U.S.C. 6294, the Commission promulgated the Appliance Labeling Rule, 16 CFR 305, which requires manufacturers to affix an EnergyGuide label to the exterior surface of certain covered products, including clothes washers, dishwashers, freezers, refrigerators, and refrigerator-freezers. Section 305.11(a)(5) of the Appliance Labeling Rule, 16 CFR 305(11)(a)(5), specifies the contents of the EnergyGuide label, including a requirement that the following statement appear at the bottom of the label: "IMPORTANT. REMOVAL OF THIS LABEL BEFORE CONSUMER PURCHASE IS A VIOLATION OF FEDERAL LAW (42 U.S.C. 6302)." The Appliance Labeling Rule prohibits retailers from removing the EnergyGuide labels from the exterior surface of the appliances or rendering the labels illegible. 16 CFR 305.4(a)(2).

PAR. 5. Silo is a "retailer" or "covered products" as those terms are defined in 16 CFR 305.2(d) and (o) and 42 U.S.C. 6291(a)(13) and (a)(2).

PAR. 6. In numerous instances, SILO has removed the EnergyGuide labels from covered products, including refrigerators, refrigerator-freezers, freezers, dishwashers, and clothes washers or has rendered them illegible, thereby violating 16 CFR 305.4(a)(2) and 42 U.S.C. 6302(a)(2).

PAR. 7. At the times respondent engaged in the acts or practices described in paragraph six above, it did so "knowingly" as that term is used in 16 CFR 305.4(f) and 42 U.S.C. 6303(b). Respondent therefore is liable for civil penalties pursuant to 16 CFR 305.4(a)(2) and 42 U.S.C. 6303(a).

PAR. 8. 42 U.S.C. 6303(a) authorizes the Commission to assess a civil penalty of not more than \$100.00 for each violation. For purposes of assessing the civil penalty, each violation of 42 U.S.C. 6303(a) constitutes a separate violation with respect to each covered product.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of

certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Seattle Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Energy Policy and Conservation Act and the Federal Trade Commission's Appliance Labeling Rule; and

The respondent, its attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said 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, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act and Rule, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent SILO, Inc. is a Pennsylvania corporation, with its offices and principal place of business located at 6900 Lindbergh Boulevard, Philadelphia, Pennsylvania.
2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent.

ORDER

It is ordered, That respondent shall, within 30 days from the date of issuance of this order, pay, pursuant to 42 U.S.C. 6303, a civil penalty in the amount of \$45,000.00. Respondent shall make this payment by cashier's or certified check payable to the Treasurer of the United States and deliver it to Regional Director, Federal Trade Commission, 915 Second Avenue, Room 2806, Seattle, Washington 98174 for appropriate disposition. In the event of default, respondent shall be liable for interest calculated in accordance with 28 U.S.C. 1961, as amended.

Commissioner Strenio dissenting.

DISSENTING STATEMENT OF COMMISSIONER ANDREW J. STRENIO, JR.

I have voted against this consent agreement because it lacks an injunction barring SILO from violating the Energy Policy and Conservation Act. Such an injunction would increase deterrence against future violations by SILO or others and thereby assist the Commission in achieving compliance with this law.

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Complaint

IN THE MATTER OF
NUTRITONE, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SECS.
5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3264. Complaint, July 24, 1989—Decision, July 24, 1989

This consent order prohibits, among other things, a Massachusetts corporation from making any representations concerning the efficacy of electric muscle stimulation ("EMS") treatment programs and products, unless respondents possess reliable scientific evidence to substantiate the representations. Respondents are required to retain, for at least five years, records supporting any future advertising and also required to post a copy of the order on the premises.

Appearances

For the Commission: *Sara V. Greenberg, William P. McDonough*
and *Phoebe Morse*.

For the respondents: *Alan J. Cushner*, Boston, Ma.

COMPLAINT

The Federal Trade Commission, having reason to believe that Nutritone, Inc., a corporation, also trading and doing business as Body By Design, and Dinah H. Simonini and Donald L. Simonini, individually and as officers of said corporation ("respondents"), have violated Sections 5(a) and 12 of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges that:

PARAGRAPH 1. (a) Respondent Nutritone, Inc., is a Massachusetts corporation. Its principal office or place of business is at 1172 Beacon Street, Newton, Massachusetts.

(b) Dinah H. Simonini and Donald L. Simonini are officers of the corporate respondent. They formulate, direct and control the acts and practices of the corporate respondent, including all the acts and practices alleged in this complaint below. Their principal office or place of business is the same as that of the corporation.

PAR. 2. Respondents have advertised, offered for sale, sold and distributed to the public an electric muscle stimulation program.

PAR. 3. Respondents have caused to be prepared and placed for publication and have caused the dissemination of advertising and promotional materials, including, but not limited to, the advertising and promotional materials attached hereto as Exhibits A through D to promote the sale of their electric muscle stimulation treatment program.

PAR. 4. The acts or practices of respondents alleged in this complaint have been in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 5. In the course and conduct of their business, respondents have disseminated and caused the dissemination of advertisements and promotional materials for electric muscle stimulation, by various means in or affecting commerce and including *inter alia*, placing advertisements for broadcast by radio, in magazines and in newspapers distributed through the mail and across state lines, for the purpose of inducing, and which were likely to induce, directly or indirectly, the purchase of respondents' electrical muscle stimulation program.

PAR. 6. Typical statements in such advertisements and promotional materials, disseminated as previously described, but not necessarily inclusive thereof, are found in advertisements and promotional materials attached hereto as Exhibits A through D. Specifically, these advertisements and promotional materials contain the following statements:

1. Exercise 20 muscle groups simultaneously and achieve up to 1000 muscle contractions as in situps, pushups and leglifts.
2. Men develop the "V" shape.
3. Women tone stomachs, thighs and buttocks.
4. EMS can be the best workout of your life with significant strength gains.
5. Save time—in just 35 min. you can do the equivalent of 2 hours in the gym.
6. EMS is the new high technology way to tone or strengthen muscles for Men and Women.
7. No agonizing exercise—no pain.

PAR. 7. Through the use, *inter alia*, of the statements referred to in paragraph six and other statements contained in advertisements or promotional materials not specifically set forth herein, respondents have represented, and now represent, directly or by implication, that their electric muscle stimulation treatments:

1. Cause muscle contractions of comparable intensity to those

produced when normal healthy people do conventional physical exercise such as situps, pushups and leglifts;

2. Change the girth of various parts of the body such as the stomach, buttocks, and thighs;

3. Provide all the health benefits to normal healthy people of rigorous physical exercise;

4. Provide greater health benefits and increases in strength for normal healthy people in a specified period of time than a program of rigorous physical exercise for the same time period;

5. Are the result of recent scientific and technological learning and experimentation; and

PAR. 8. In truth and in fact, respondents' electric muscle stimulation treatments consisting of low-frequency, low-current muscle stimulation:

1. Do not cause muscle contractions of comparable intensity to those produced when normal healthy people do conventional physical exercise such as situps, pushups and leglifts;

2. Do not change the girth of various parts of the body such as the stomach, buttocks, and thigh;

3. Do not provide all the health benefits to normal healthy people of rigorous physical exercise;

4. Do not provide greater health benefits and increases in strength for normal healthy people in a specific period of time than programs of regular gym exercises for the same time period;

5. Are not the result of recent scientific and technological learning and experimentation. Therefore, the representations set forth in paragraph seven are false and misleading.

PAR. 9. Through the use, *inter alia*, of the statements referred to in paragraph six, and other statements contained in advertisements and promotional materials not specifically set forth herein, respondents have represented and now represent, directly or by implication, that at the time of making the representations set forth in paragraph seven respondents possessed and relied upon a reasonable basis for these representations.

PAR. 10. In truth and in fact, at the time of those representations respondents did not possess and rely upon a reasonable basis for making such representations. Therefore, the representation set forth in paragraph nine was, and is, false and misleading.

PAR. 11. The acts and practices of respondents as alleged in this complaint, and the placement in the hands of others of the means and

instrumentalities by and through which others may have used said acts and practices, constitute unfair and deceptive acts or practices in or affecting commerce and the dissemination of false advertisements in violation of Sections 5(a) and 12 of the Federal Trade Commission Act.

EXHIBIT A

Have Any BODY You Want



FREE* SESSIONS

BODY BY DESIGN®

1172 Beacon St., Newton Four Corners
964-TRIM
288 Newbury St., Boston
236-TRIM

EMS — electrical muscle stimulation is the new high technology way to tone or strengthen muscles for Men or Women

- EMS can be the best workout of your life with significant strength gains.
- Exercise 20 muscle groups simultaneously and achieve up to 1000 muscle contractions as in situps, pushups and leglifts.
- Lie back and relax in private rooms with trained personnel.
- Save time — in just 35 min. you can do the equivalent of 2 hours in the gym.
- Men develop the "V" shape.
- Women tone stomachs, thighs and buttocks
- Used for years by doctors for therapy

Call 964-TRIM for your introductory session. And bring in this ad for "ONE WEEK OF FREE VISITS (valued at \$67) when you sign up for a Body by Design program.

Offer expires May 30, 1987
Monday-Thursday 7:30 am-9 pm • Friday 7:30 am-8 pm
Saturday 9 am-5 pm

30. Use VISA, Mastercard, or American Express. 1

Learning Adventure Magazine April/May 1987


Exhibit A

Complaint

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EXHIBIT B

Have Any BODY You Want



**FREE*
SESSIONS**

**EMS — electrical muscle stimulation is
the new high technology way to tone
or build muscles for Men or Women**

- Best workout of your life with twice the muscle response.
- Work 20 areas and do the equivalent of 1000 situps, leglifts and pushups in 35 minutes.
- Lie back and relax in private rooms with licensed personnel.
- Save time — 1 month on EMS is worth 4-6 months at the gym.
- Men develop the "V" shape.
- Women tone stomachs, thighs and buttocks.
- No agonizing exercise or next day pain.
- Used for years by doctors for therapy

Call 964-TRIM for your introductory session. And bring in this ad for *ONE WEEK OF FREE VISITS (valued at \$67) when you sign up for a Body by Design program.

Offer expires June 21, 1986
Call 964-TRIM

BODY BY DESIGN

1172 Beacon St., Newton Four Corners
Staffed by Licensed Medical Professionals
Monday-Thursday 8 am-9 pm • Friday 8 am-8 pm • Saturday 9 am-5 pm

*Boston Globe
June 10, 1986*

Complaint

EXHIBIT C

Bill, This is a copy of the coupon I received in yesterday's mail
3/5/86
Carole

Have Any BODY You Want Absolutely Free *

EMS
Advanced muscle stimulation is the best high tech way to lose weight.

- Lose 20 ors, and do the equivalent of 1000 steps, pushing lbs. on 1000 pushups in 35 minutes.
- Save time—1 month on EMS is worth 4-6 months at the gym.
- Lie back and relax in private rooms with licensed personnel.
- Men develop the "V" shape. Women tone stomach, thighs and buttocks.

WEIGHT NORMALIZATION PROGRAM

- Body fat analysis with weight recommendations
- Computerized food analysis meal plans and nutritional counseling
- Diet without hunger or loss of energy
- Exceed USDA requirements

BRING THIS COUPON For One Week FREE
Use on body fat analysis only. Valid thru Expires 4/5/86

BRING THIS COUPON For 25% Off Our Weight Normalization Program
Expires 4/5/86

Call 964-TRIM
TO SCHEDULE YOUR INTRODUCTORY SESSION

BODY BY DESIGN
1172 Beacon St., Newton Four Corners
Staffed by Licensed Medical Professionals

Monday-Thursday 7:30 am-9 pm • Friday 7:30 am-8 pm • Saturday 9 am-5 pm
ADVERTISE WITH SUPER COUPS (617) 551-1210 (TIC-01) B-12/PT-8A 014.15

Exhibit C


FEDERAL TRADE COMMISSION DECISIONS

Complaint

112 F.T.C.

EXHIBIT D

Have Any BODY You Want



FREE* SESSIONS

EMS — electrical muscle stimulation is the new high technology way to tone or build muscles for Men or Women

- Best workout of your life with twice the muscle response.
- Work 20 areas and do the equivalent of 1000 situps, leglifts and pushups in 35 minutes.
- Lie back and relax in private rooms with licensed personnel.
- Save time — 1 month on EMS is worth 4-6 months at the gym.
- Men develop the "V" shape.
- Women tone stomachs, thighs and buttocks.
- No agonizing exercise or next day pain.
- Used for years by doctors for therapy.

Call 964-TRIM for your introductory session. And bring in this ad for **ONE WEEK OF FREE VISITS** (valued at \$84) when you sign up for a Body by Design program.

Offer expires May 3, 1986
Call 964-TRIM

BODY BY DESIGN

1172 Beacon St., Newton Four Corners
Staffed by Licensed Medical Professionals
Monday-Thursday 8 am-9 pm • Friday 8 am-8 pm • Saturday 9 am-5 pm

Boston Globe

April 22, 1986

Exhibit D

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Boston Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent, Nutritone, Inc., is a corporation, d/b/a/ Body By Design, organized, existing and doing business under and by virtue of the laws of the Commonwealth of Massachusetts, with its office and principal place of business located at 65 Main Street, Watertown, Massachusetts.

2. Respondents Dinah H. Simonini and Donald L. Simonini are officers of the corporation.

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

ORDER

I.

It is ordered, That respondents Nutritone, Inc., a corporation, its officers, and Dinah H. Simonini and Donald L. Simonini, individually and as officers of the corporation, their successors and assigns, and respondents, agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, selling or distribution of any electric muscle stimulation treatment program or product in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication, contrary to fact, that any low-frequency (1000 Hz and below) electric muscle stimulation treatment or product:

- A. Can cause muscle contractions of similar intensity to those produced by conventional exercise.
- B. Will visibly change the girth of any part of the body without a reduction in caloric intake or participation in a weight loss program.
- C. Provides similar or superior health benefits to those produced by rigorous conventional exercise for normal healthy people.
- D. Provides, in the same or shorter time period, health benefits similar or superior to those produced by conventional exercise.
- E. Are a result of any new or recent scientific and technological research and experimentation.

II.

It is further ordered, That respondents Nutritone, Inc., a corporation, its officers, and Dinah H. Simonini and Donald L. Simonini, individually and as officers of the corporation, their successors and assigns, and respondents' agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of any diet, strength development, or fitness program or product in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from making any representation, directly or by implication, concerning such program's or product's efficacy, or the comparability or superiority over other programs or products, or the results typically achieved by

consumers of the program or product unless, at the time of making such representation respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation; *provided, however*, that for purposes of this order for any test, analysis, research, study, or other evidence to be "competent and reliable" it must be conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.

III.

It is further ordered, That respondents shall for at least five years after the date of the last dissemination of the representation, maintain and upon reasonable request make available to the Federal Trade Commission for inspection and copying copies of:

1. All materials that were relied upon by respondents in disseminating any representation covered by this order.
2. All test reports, studies, surveys, or demonstrations in their possession or control that contradict any representation of respondents that is covered by this order.

IV.

It is further ordered, That respondents shall conspicuously post a copy of this order on their premises.

V.

It is further ordered, That the corporate respondent and the individual respondents shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order, or of any change in the position or responsibilities of Dinah H. Simonini or Donald L. Simonini in regard to any corporation or subsidiary of which either is an officer and which corporation or subsidiary is, directly or indirectly, involved in the sale or distribution of any electric muscle stimulation treatment program or product.

VI.

It is further ordered, That respondents shall, within sixty (60) days after service of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF
ADOLPH COORS COMPANY

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket 8845. Order, Feb. 4, 1975—Modifying Order, Aug. 1, 1989*

This order reopens the proceeding and modifies the Commission's order issued on Feb. 4, 1975 (85 FTC 187), by deleting provisions that prohibited respondent from imposing certain territorial and customer restrictions on its distributors.

ORDER GRANTING IN PART AND DENYING IN PART PETITION TO
REOPEN AND MODIFY ORDER

Adolph Coors Company ("Coors"), has filed, on April 3, 1989, a "Petition to Modify Order" ("Petition"), pursuant to Section 5(b), of the Federal Trade Commission Act, 15 U.S.C. 45(b), and Section 2.51 of the Commission's Rules of Practice and Procedure, 16 CFR 2.51. The petition asks the Commission to reopen the proceeding and set aside the modified cease and desist order entered by the Commission on February 4, 1975, in Docket No. 8845, 85 FTC 187, "except insofar as the order prohibits price fixing or resale price maintenance." Petition at 2. Specifically, Coors requests that the Commission set aside in their entirety paragraphs 4(c), 5, 6, 7, 8 and 11 of the order, which prohibit Coors from, among other things, imposing non-price vertical restraints on distributors of Coors' beer products.¹ In support of its request, Coors argues that the order modification is warranted by changed conditions of law. Petition at 2-3. The petition was placed on the public record for thirty days, pursuant to Section 2.51(c) of the Commission's Rules, and one comment was received. For the reasons discussed below, the Commission has determined that Coors has not shown a changed condition of law requiring reopening the order but that Coors has shown that granting the request, with one exception, would be in the public interest. The Commission has therefore reopened and modified the order.

*Decision issued July 24, 1973 (83 FTC 32).

¹ In addition to prohibiting Coors from refusing to deliver beer to distributors selling outside their designated territory, paragraph 7 of the order also prohibits Coors from refusing to deliver beer to distributors who sell beer at prices, markups or profits lower than those approved by Coors. 85 FTC at 189.

I.

The Commission's complaint, issued on June 7, 1971, 83 FTC 32, alleges that Coors violated Section 5 of the Federal Trade Commission Act by, among other things, fixing wholesale and retail prices, imposing territorial and customer restrictions on its distributors, and using unfair short-term termination provisions in its contracts with distributors. Following extensive evidentiary hearings, the Administrative Law Judge ("ALJ") ordered the dismissal of the complaint against Coors. 83 FTC at 174. On appeal from the ALJ's Initial Decision, the Commission substituted its findings for those of the ALJ and issued its order on July 24, 1973. 83 FTC at 211. The Commission condemned Coors' territorial restraints as *per se* unlawful because they were part of an unlawful resale price maintenance scheme. Coors appealed the Commission's order to the United States Court of Appeals for the Tenth Circuit, which upheld all of the provisions of the Commission's order, except those dealing with the notice and arbitration requirement in the event of a distributor's termination. The court also held that Coors' territorial restraints were themselves *per se* unlawful under *United States v. Arnold, Schwinn & Co., et al.*, 388 U.S. 365 (1967). See *Adolph Coors Company v. FTC*, 497 F.2d 1178 (10th Cir. 1974), *cert. denied*, 419 U.S. 1105 (1975).

Consequently, the Commission issued its final order on February 4, 1975. The order, among other things, prohibits Coors from engaging in wholesale and retail price fixing, imposing certain non-price vertical restrictions on its distributors, including territorial restraints, and requiring exclusive draught accounts. 85 FTC 187.

II.

Coors requests that the Commission reopen the proceeding and set aside in their entirety paragraphs 4(c), 5, 6, 7, 8 and 11 of the order. Paragraph 4(c) of the order prohibits Coors from refusing to sell beer to any Coors distributor or terminating any Coors distributor because the distributor sold Coors beer to another distributor or retailer located outside of the territory granted to the Coors distributor. 85 FTC at 188. Paragraph 5 prohibits Coors from restricting "the territory in which or the persons to whom a distributor may sell Coors beer."² *Id.* at 189. Paragraph 6 prohibits Coors from allocating Coors

² A proviso to paragraph 5 states, however, that the order does not prohibit Coors from "complying with the

beer among its distributors "in times of beer shortage at the Coors brewery," by any means not equitably related to their proportionate purchases of Coors beer during "the last three months before the allocation" *Id.* Paragraph 7 prohibits Coors from refusing to deliver all of a distributor's order because the distributor made sales outside of his assigned territory or because the distributor is selling Coors beer at "unapproved" prices or markups. *Id.* Paragraph 8 of the order prohibits Coors from prohibiting its distributors from selling Coors beer for "central warehouse delivery."³ *Id.* Finally, paragraph 11 generally prohibits Coors from hindering, suppressing or eliminating competition between or among distributors or retailers handling Coors beer. *Id.* at 189-90.⁴

Coors argues that these provisions of the order, especially in the context of Coors' unique brewing method, and experience with the unauthorized distribution of its products in expansion markets, have "placed Coors at a competitive disadvantage and [have] been harmful." Petition at 9. Among other things, Coors beer distributors are required to maintain Coors' beer products in refrigerated warehouses. Additionally, the distributors must monitor the age of their Coors inventory and are responsible for closely monitoring product shelf-life and ensuring that only fresh product is available to consumers. Petition at 5. Coors believes that its ability to restrict its distributors' territories and impose other non-price vertical restraints is necessary because such restrictions would allow Coors to (1) monitor better its distributors' performance, (2) provide incentives to distributors to invest the resources and provide services necessary to comply with Coors' quality control requirements, and (3) compete better against other beer brewers.

Coors asserts that the relief it seeks is required by a change in law. Specifically, Coors argues that the order provisions it is asking the Commission to set aside were predicated upon the *Schwinn* doctrine,

requirements of any state law." *Id.*

³ Coors, however, is not prohibited from establishing refrigeration standards for the central warehouses "which are substantially similar to those established for distributors." 85 FTC at 189.

⁴ Paragraph 1 of the order prohibits Coors from fixing the prices at which distributors sell Coors beer to retailers or the prices at which retailers sell Coors beer to consumers. Paragraphs 2 and 3 of the order (prohibiting Coors from suggesting prices or mark-ups for its distributors) expired by their own terms in 1978. Subparagraphs 4(a), (b) and (d) prohibit Coors from terminating any distributor because the distributor either sold beer or advertised at prices different from those approved by Coors, or because the distributor has distributed the product of another brewer. Paragraph 9 prohibits Coors from requiring that retailers serve Coors draught beer as their only light-colored draught beer. Paragraph 10 prohibits Coors from requiring its distributors to eliminate or refrain from obtaining and handling rival brands of beer in order to become or remain a Coors distributor. 85 FTC at 187-90. Coors does not seek relief from these remaining operative order provisions. Petition at 16.

which the Supreme Court overruled in *Continental T.V., Inc. v. GTE-Sylvania, Inc.*, 433 U.S. 36 (1977). Consequently, according to Coors, Coors' non-price vertical restraints "were never put to . . . the 'market power' analysis currently used in vertical, non-price restraint cases." Petition at 12. Coors asserts that it does not have sufficient market power⁵ to raise its prices significantly without materially and adversely affecting its business, and suggests that Coors' non-price vertical restraints would be judged under a rule of reason analysis today.

III.

Section 5(b) of the FTC Act, 15 U.S.C. 45(b), provides that the Commission shall reopen an order to consider whether it should be modified if the respondent "makes a satisfactory showing that changed conditions of law or fact" require such modification. A satisfactory showing sufficient to require reopening is made when a request to reopen identifies significant changes in circumstances and shows that the changes eliminate the need for the order or make continued application of it inequitable or harmful to competition. *Louisiana-Pacific Corp.*, Docket No. C-2956, Letter to John C. Hart (June 5, 1986), at 4.

The Commission may also modify an order pursuant to Section 5(b) when, although changed circumstances would not require reopening, the Commission determines that the public interest requires such action. Therefore, Section 2.51 of the Commission's Rules of Practice invites respondents in petitions to reopen to show how the public interest warrants the requested modification. In the case of a request for modification based on this latter ground, a petitioner must demonstrate as a threshold matter some affirmative need to modify the order. *Damon Corp.*, Docket No. C-2916, Letter to Joel E. Hoffman, Esq. (March 29, 1983), at 2. For example, it may be in the public interest to modify an order "to relieve any impediment to effective competition that may result from the order." *Damon Corp.*, Docket No. C-2916, 101 FTC 689 (1983). If the showing of need is made, the Commission will balance the reasons favoring the requested modification against any reasons not to make the modification. *Damon Letter* at 2. The Commission will also consider whether the

⁵ Coors' national market share is less than eight percent and it no longer holds the leading position in any

particular modification sought is appropriate to remedy the identified harm.

The language of Section 5(b) plainly anticipates that the burden is on the petitioner to make the requisite satisfactory showing. The petitioner must make a "satisfactory showing" of changed conditions to obtain reopening of the order. The legislative history also makes it clear that the petitioner has the burden of showing, other than by conclusory statements, why an order should be modified.⁶ If the Commission determines that the petitioner has made the required showing, the Commission must reopen the order to consider whether modification is required and, if so, the nature and extent of the modification. The Commission is not required to reopen the order, however, if the petitioner fails to meet its burden of making the satisfactory showing required by the statute. The petitioner's burden is not a light one given the public interest in the finality of Commission orders. See *Federated Department Stores, Inc. v. Moitie*, 425 U.S. 394 (1981) (strong public interest considerations support repose and finality).

IV.

Based on the information provided by Coors, and other available information, the Commission has determined that Coors has not made a satisfactory showing that changes in law require reopening the proceeding and setting aside the order provisions prohibiting Coors from imposing upon its distributors certain non-price vertical restraints, including territorial restrictions. However, the Commission has concluded that Coors has made a satisfactory showing that reopening the order and setting aside the non-price vertical restraints provisions is in the public interest.

The Commission's 1973 decision in this case, after finding that Coors engaged in unlawful resale price maintenance, called the territorial restraints "an obvious adjunct to Coors' efforts to control the prices at which its distributors and their retail accounts dispose of the product". 83 FTC at 192. Consequently, the Commission condemned Coors' territorial restraints as *per se* unlawful because they were part of the unlawful RPM scheme, but determined that it

⁶ The Commission may properly decline to reopen an order if a request is "merely conclusory or otherwise fails to set forth specific facts demonstrating in detail the nature of the changed conditions and the reasons why these changed conditions require the requested modification of the order." S. Rep. No. 96-500, 96th Cong., 1st Sess. 9-10 (1979).

was not necessary to conclude that the restrictions in themselves were unlawful *per se*.⁷ The court of appeals held the restraints in themselves *per se* unlawful, citing *Schwinn*, albeit with substantial criticism. 497 F.2d 1178 at 1186-87.

Sylvania, which was decided shortly after the Commission issued the final order in this case, recognized that exclusive territories and other non-price vertical restraints are not inherently anticompetitive and must thus be judged under the rule of reason.⁸ *Sylvania* replaced the *per se* test for non-price vertical customer and territorial restraints outside RPM with a rule of reason test, but the Court did not change the *per se* rule for non-price vertical restraints that are part of a RPM scheme. See *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 760, n. 6 (1984). *Sylvania*, therefore, is not a change in law as to the order in this matter.

Although non-price vertical restraints are still *per se* unlawful as part of a RPM scheme, Coors does not request elimination of the order's prohibitions on RPM. Therefore, any territorial or other non-price vertical restrictions imposed as part of a resale price maintenance scheme would be *per se* unlawful and would violate this order even if modified as Coors requests. The non-price provisions of the order, apart from the RPM provisions, are thus best viewed as fencing-in provisions, intended to prevent the recurrence of resale price fixing. Coors has shown that the benefits of those provisions, when viewed under the rule of reason approach in *Sylvania*, are outweighed by the costs they impose, and may now be set aside in the public interest.

V.

Coors has made a threshold showing that the order provisions it requests be set aside impede and deter Coors (in states that do not permit or require territorial restrictions) from correcting impaired distribution problems and from adopting efficiency-maximizing distribution arrangements that would intensify interbrand competition.⁹

⁷ The Commission noted that "[a]s the court in *Schwinn* recognized, whatever the status of vertical restrictions unaccompanied by price-fixing, the presence of price-fixing as part and parcel of a system of territorial restrictions renders the entire package illegal *per se*." *Id.* at 194.

⁸ See *Bellone Electronics Corporation*, 100 FTC 68 (1982).

⁹ For example, any steps Coors might take to increase distributor emphasis on providing a consistently fresh, quality product to the consuming public or to improve geographic market coverage may subject Coors to the risk of being accused of violating the order and, consequently, the risk of a civil penalty suit and judgment. By not being able to correct these distribution problems effectively, Coors is injured in its competition with other brewers. In fact, this order may injure Coors more than it would other brewers because of Coors' unique

(footnote cont'd)

These arrangements are available to Coors' competitors, and these order provisions therefore injure Coors' ability to compete effectively with other breweries.

Setting aside the non-price vertical restraints provisions of the order would enable Coors to employ distribution methods that likely would be reasonable under the rule of reason standard, because Coors lacks the necessary market power to raise its prices to supracompetitive levels. It would also allow Coors to take advantage of certain efficiencies in the distribution of its products, which, in turn, would promote interbrand competition. *Sylvania, supra*, at 54-55.

Allowing Coors to use what it considers the most efficient and cost effective distribution of its products, including agreeing with distributors in certain states to dedicate their sales efforts to designated geographic areas, would put Coors on an equal footing with other brewers and should make Coors and its distributors more effective competitors. This is consistent with the recognition that in competitive markets consensual non-price vertical arrangements can benefit both competition and the consumer. Coors' inability to impose non-price vertical restraints that its competitors are using places Coors at a competitive disadvantage. Because of the competitive nature of the beer industry, the costs of the prohibitions on non-price vertical restraints outweigh the continued need for these provisions. That balancing therefore supports modifying the order in the public interest.

VI.

With respect to Coors' request that the Commission set aside paragraph 11 of the order, the Commission has concluded that that paragraph's general prohibition against Coors "[h]indering, suppressing or eliminating competition . . . between or among distributors . . .," 85 FTC at 189-90, is overly restrictive and broad. This language may have a chilling effect on Coors' ability to take advantage of certain efficiencies in the distribution of its products. Moreover, in view of the current legal framework for analyzing vertical restraints, and the retention of the order's resale price maintenance prohibitions, paragraph 11 is no longer necessary to fence-in Coors' conduct concerning non-price vertical restraints it may impose upon its distributors.

brewing and distribution methods. See Bureau of Economics, Federal Trade Commission, *The Brewing Industry* at 111-13 (1978).

Finally, the Commission has also concluded that Coors has not made a satisfactory showing that changed conditions of fact or law or the public interest require that the Commission set aside the part of paragraph 7 of the order that concerns conduct involving resale price maintenance. Setting aside this part of paragraph 7 would be inconsistent with Coors' request that the Commission set aside "the order . . . except insofar as that order prohibits price fixing or resale price maintenance." Petition at 3.¹⁰ Additionally, retention of the resale price maintenance part of paragraph 7 is consistent with the primary objective of the order.

VII.

Accordingly, *it is ordered*, that this matter be reopened and that the Commission's order in Docket No. 8845, issued on February 4, 1975, be, and it hereby is, modified, as of the date of service of this order, by setting aside paragraphs 4(c), 5, 6, 8, and 11, and by modifying paragraph 7 to read:

7. Refusing to deliver all of a distributor's order because the distributor or the distributor's customer is selling Coors beer at prices, markups or profits lower than those approved by respondent.

Commissioner Strenio not participating.

¹⁰ Coors has not asked to be relieved from Subparagraphs 4(a) and (b), which prohibit Coors from terminating a distributor because that distributor or its customers resell at other than approved prices.

IN THE MATTER OF

PROMODES, S.A., ET AL.

Docket 9228. Interlocutory Order, August 10, 1989

ORDER

By motion dated August 4, 1989, the parties have jointly moved that respondent The Kroger Company ("Kroger") be dismissed from this action. In connection therewith, Kroger, along with Promodes S.A. and Red Food Stores, Inc. (collectively "Red Food"), and complaint counsel agree to the following provisions regarding discovery in this matter:

1. Kroger will respond in a timely manner to reasonable discovery requests, including document requests and interrogatories; and
2. Kroger documents, Kroger interrogatory responses and the sworn testimony of Kroger officials will be admissible to the same extent as if Kroger were a party. Complaint counsel and Red Food will not object to the introduction of Kroger documents, Kroger interrogatory responses or the sworn testimony of Kroger officials on the grounds that Kroger is no longer a party to this litigation.

The motion to dismiss is granted.

Complaint

112 F.T.C.

IN THE MATTER OF

NEW ENGLAND MOTOR RATE BUREAU, INC.

FINAL ORDER, OPINION, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket 9170. Complaint, Oct. 24, 1983—Final Order, Aug. 18, 1989*

This final order requires, among other things, the respondent to halt its collective ratemaking activities in certain states and to cancel, within six months, all tariffs it has filed in those states.

Appearances

For the Commission: *Michael E. Antalics, Robert J. Schroeder, Harold F. Moody and John H. Seesel.*

For the respondent: *Bryce Rea, Jr., Rea, Cross & Auchincloss, Washington, D.C. and Curtis Wood, New England Motor Rate Bureau, Inc., Burlington, Ma.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that The New England Motor Rate Bureau, Inc., a corporation, hereinafter sometimes referred to as "respondent," has violated the provisions 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:

For purposes of this complaint the term "*carrier*" means a common carrier of property by motor vehicle.

"*Intrastate transportation*" means the pickup or receipt, transportation and delivery, wholly within any state of the United States, of property for compensation by a carrier authorized by that state to engage therein.

"*Member*" means any carrier or other person which pays dues or belongs to The New England Motor Rate Bureau, Inc., or to any successor corporation.

"*Tariff*" means the publication stating the rates of a carrier for the

intrastate transportation of property, excluding general rules and regulations.

“*Rate*” means a charge, payment or fixed price according to a ratio, scale or standard for direct or indirect transportation service.

“*Collective rate*” 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 carrier and respondent.

PARAGRAPH 1. Respondent, The New England Motor Rate Bureau, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Massachusetts, with its office and principal place of business located at 14 New England Executive Park, Burlington, Massachusetts. Respondent publishes and issues tariffs and supplements thereto containing intrastate rates for the transportation of property on behalf of member carriers.

PAR. 2. Common carriers by motor vehicle engaged in intrastate transportation of property within each of the states of Massachusetts, New Hampshire, Rhode Island and Vermont do so under certificates of public convenience and necessity granted by state regulatory agencies in the respective states. Such motor carriers are subject to rate regulation by a state agency and are required to charge just and reasonable rates. Motor common carriers in these states are not permitted to change the rates filed once they have been accepted by the state regulatory agencies in the respective states.

PAR. 3. The statutes which provide for regulation of common carriers engaged in the transportation of property within the states of Massachusetts, New Hampshire, Rhode Island and Vermont do not command, authorize or otherwise provide for the establishment, operation or regulation of rate agreements containing collective rates among such common carriers or motor carrier rate-making bureaus.

PAR. 4. Except to the extent that competition has been restrained as herein alleged, respondent’s members have been and are now in competition among themselves and with other common carriers.

PAR. 5. Respondent’s membership consists of approximately 900 common carriers of property by motor vehicle. Respondent’s members are entitled to and do, among other things, vote for and elect the officers and directors of respondent. The control, direction and management of respondent is vested in the members of the Board of Directors, who employ a general manager who acts as chief

administrative officer of the corporation with direct charge of and supervision over the affairs of respondent.

PAR. 6. The acts and practices of respondent set forth in paragraph eight 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 businesses and other private parties to respondent's members for rendering intrastate transportation services, which money flows across state lines;

(B) Affect the purchase and use of equipment and other goods and services by respondent's members which are shipped in interstate commerce; and

(C) Are supported by the receipt of dues and fees for services from out-of-state members and others.

PAR. 7. Shippers use intrastate transportation services of carriers within the states of Massachusetts, New Hampshire, Rhode Island and Vermont to move general commodities from warehouses and distribution centers to customers located in the same state as the warehouse or distribution center. These general commodities are transported from out-of-state origin points to such warehouses and distribution centers for distribution within these states. For intrastate deliveries of general commodities from warehouses and distribution centers, carriers charge shippers or shippers' customers the intrastate rates published by respondent. These intrastate shipping charges are factors which influence the prices of such general commodities. The intrastate delivery services of these carriers are an essential and integral part of the interstate business transactions of such shippers. Thus, the activities of these carriers have a substantial and direct effect upon interstate commerce.

PAR. 8. For many years and continuing up to and including the date of the issuance of this complaint, respondent, its members, officers and directors and others have agreed to engage, and have engaged, in a combination and conspiracy, 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 carriers engaged in the intrastate transportation of property within the states of Massachusetts, New Hampshire, Rhode Island and Vermont.

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, which have the purpose or effect of fixing, establishing, stabilizing or otherwise tampering with rates charged for the intrastate transportation of property within the states of Massachusetts, New Hampshire, Rhode Island and Vermont;

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

(C) Filing collective rates with the state regulatory agencies in Massachusetts, New Hampshire, Rhode Island and Vermont.

PAR. 9. The acts and practices of respondent, its members and others as alleged in paragraph eight have been and are now having the effects, among others, of:

(A) Raising, fixing, stabilizing, pegging, maintaining, or otherwise interfering or tampering with the rates charged by carriers for the intrastate transportation of property within the states of Massachusetts, New Hampshire, Rhode Island and Vermont;

(B) Restricting, restraining, hindering, preventing or frustrating rate competition among carriers in the intrastate transportation of property within the states of Massachusetts, New Hampshire, Rhode Island and Vermont;

(C) Depriving shippers patronizing carriers for intrastate transportation of property within the states of Massachusetts, New Hampshire, Rhode Island and Vermont of the benefits of free and open competition in the provision of said services; and

(D) Depriving consumers in the states of Massachusetts, New Hampshire, Rhode Island and Vermont of the benefits of free and open competition in the intrastate transportation of property within said states.

PAR. 10. 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.

Initial Decision

112 F.T.C.

INITIAL DECISION BY

ERNEST G. BARNES, ADMINISTRATIVE LAW JUDGE

DECEMBER 12, 1986

PRELIMINARY STATEMENT

The complaint herein issued on October 24, 1983.¹ It charges [3] respondent, its members, officers and directors, and others with a continuing combination and conspiracy to fix rates charged for the intrastate transportation of property within the states of Massachusetts, New Hampshire, Rhode Island and Vermont. The complaint alleges that respondent's membership consists of approximately 900 common carriers of property by motor vehicle, and that respondent, its members and others, have taken action to establish and maintain collective rates, which have the purpose of fixing, stabilizing or otherwise tampering with rates charged for the intrastate transportation of property within the states of Massachusetts, New Hampshire, Rhode Island and Vermont, and that these collective rates have been filed with the state regulatory agencies in such states. This action is alleged to have deprived shippers and consumers of the benefits of

¹ The delay in concluding this matter has occurred for several reasons. A prehearing conference was held on January 16, 1984, at which time the parties contemplated preparation and submission of a stipulation of facts. On March 23, 1984, the parties filed a stipulation of facts, and reserved the right to present further evidence into the record. Subpoenas *duces tecum* were issued at the request of complaint counsel to several of respondent's carrier members. By order dated May 25, 1984, the undersigned denied a motion to quash these subpoenas. The member carriers thereafter refused to comply with the subpoenas and by order of August 23, 1984 court enforcement of the subpoenas was directed by the Commission.

Enforcement of the subpoenas was ordered by the court on December 5, 1984. *FTC v. The New England Motor Rate Bureau, Inc., et al.*, Misc. No. 84-0268 (D.D.C. 1984) Subsequent to the court's order, on January 14, 1985, respondent and complaint counsel entered into a stipulation concerning the matters covered by the subpoenas.

Complaint counsel, on April 29, 1985, filed a motion for partial summary decision pursuant to Section 3.24 of the Commission's Rules of Practice. Respondent's answer to this motion was made in the form of a cross-motion for summary decision (see Cross Motion For Summary Decision, July 1, 1985), and complaint counsel's response to respondent's cross-motion was filed July 19, 1985.

Rulings on complaint counsel's motion for partial summary decision, and respondent's cross-motion for summary decision, were made on March 7, 1986. The delay in ruling on counsels' motions was occasioned by awaiting the First Circuit Court of Appeal's decision in *Massachusetts Furniture & Piano Movers Ass'n Inc., v. FTC*, 773 F.2d 391 (1985), *reh. denied* November 21, 1985, and the Commission's decision in the matter after the First Circuit's remand of the proceeding to the Commission. The Commission dismissed the *Mass. Movers* case by order dated March 19, 1986.

A prehearing conference was held April 29, 1986, and an order was issued to prepare for a trial to commence no later than mid-July 1986. On July 8, 1986 counsel advised the administrative law judge that a factual stipulation would be submitted which would expedite the completion of this matter. Such a stipulation was filed on August 28, 1986, and the record for reception of evidence was closed on September 26, 1986. Briefing of this matter followed and, after one extension of time for briefing purposes, was concluded on

free and open competition in the intrastate transportation of property within those states. Such acts, policies and practices are alleged to be to the prejudice and injury of the public and constitute unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act.

Respondent's answer, dated November 30, 1983, denied the charging allegations of the complaint, and sets forth thirteen defenses to the complaint. These defenses include contentions that the complaint fails to state a claim on which relief can be granted; that respondent's members are subject to the Interstate Commerce Act, 49 U.S.C. 10101 *et seq.*, and exempt from regulation by the Federal Trade Commission; that respondent's member carriers are the real parties in interest and are indispensable parties to this proceeding; that regulation of the activities challenged in the complaint is within the exclusive jurisdiction of the several states; that the challenged activities are subject to a special regulatory scheme and because of the clear repugnancy between that regulatory scheme and the Federal Trade Commission Act, the latter is impliedly repealed; that the activities alleged in the complaint are exempt from the Federal Trade Commission Act under the doctrines of *Parker v. Brown* and *Noerr-Pennington*; that the activities alleged in the complaint are exempt from the provisions of the Federal Trade Commission Act by virtue of Section 10706(b) of the Interstate Commerce Act, 49 U.S.C. 10706(b); that because of pervasive state regulation it would be unfair to hold respondent responsible for conduct implementing state regulation; that all matters raised by the complaint are within the primary jurisdiction of federal or state transportation regulatory agencies charged with the exclusive right and duty to regulate such matters and the Federal Trade Commission has failed to exhaust these administrative remedies; and that this proceeding is barred by doctrines of laches, estoppel and/or waiver.

On March 23, 1984 counsel for the parties filed a stipulation of facts and reserved the right to present further evidence into [4] the record. Complaint counsel then sought subpoenas *duces tecum* to be issued to respondent's carrier members. Subpoenas were issued but the member carriers refused to comply. Court enforcement was sought and compliance was ordered by the United States District Court for the District of Columbia. *FTC v. The New England Motor Rate Bureau, Inc., et al.*, Misc. No. 84-0268 (December 5, 1984) Thereafter, on January 14, 1985, the parties filed a stipulation which covered the matters sought by the subpoenas.

Complaint counsel, on April 29, 1985, filed a motion for partial summary decision pursuant to Section 3.24 of the Commission's Rules of Practice. Respondent's answer to this motion was in the form of a cross-motion for summary decision. (See Cross Motion For Summary Decision, dated July 1, 1985) Rulings were entered on March 7, 1986 granting in part complaint counsel's motion and denying respondent's motion. Since the rulings of March 7, 1986, granting in part complaint counsel's motion and denying respondent's motion, contained substantial findings of fact and conclusions and disposed of all of the issues in this proceeding except for respondent's *Parker v. Brown* [317 U.S. 341 (1942)] state action defense, the findings of fact, conclusions, and orders contained therein are made a part of this Initial Decision and are attached hereto as Attachments I and II.

Having reviewed the entire record of this proceeding,² and [5] the proposed findings of fact and legal memoranda submitted by the parties, including the memorandum filed by the National Association of Regulatory Utility Commissioners,³ the following findings of fact and conclusions are made and an appropriate order is entered.

FINDINGS OF FACT

NEW ENGLAND MOTOR RATE BUREAU, INC.

1. The New England Motor Rate Bureau, Inc. (NEMRB) is regulated by the Interstate Commerce Commission (ICC). See 40 U.S.C. 10706(b); *Motor Carrier Rate Bureaus—Implementation of P.L. 96-296*, 364 I.C.C. 464, 921 (1980). (Stip. August 28, 1986, ¶ 1) The ICC's Boston Regional Office is sent notice of NEMRB's Annual, Board of Directors, General Rate Committee and Docket meetings, and an ICC agent from that office has attended those meetings on a

² The record of this proceeding consists of the following:

- (1) Stipulation, dated March 23, 1984
- (2) Complaint Counsel's First Request for Admissions, dated April 24, 1984*
- (3) Respondent's Answer To Complaint Counsel's First Request For Admissions, dated April 30, 1984*
- (4) Stipulation, dated January 14, 1985
- (5) Complaint Counsel's Second Request For Admissions, dated March 6, 1985*
- (6) Respondent's Answer To Complaint Counsel's Second Request For Admissions, dated March 15, 1985*
- (7) Order Granting In Part Complaint Counsel's Motion For Partial Summary Decision, dated March 7, 1986 (Attachment I hereto)
- (8) Order Denying Respondent's Cross-Motion For Summary Decision dated March 7, 1986 (Attachment II hereto)
- (9) Stipulation, dated August 28, 1986

* See Appendix to Complaint Counsel's Motion For Partial Summary Decision, dated April 29, 1985.

³ See Order Granting Motion Of The National Association of Regulatory Utility Commissioners For Leave To Intervene For Limited Purpose Of Filing Memorandum, dated December 10, 1986.

spot check basis. Notices of these meetings are also sent to the States of New Hampshire and Rhode Island and the Commonwealth of Massachusetts. (Stip. August 28, 1986, ¶ 3) The ICC last did a complete audit of NEMRB in late 1983 and early 1984. At that time a three-person investigating team from the ICC examined the records of NEMRB in depth and questioned its personnel at length regarding the operations of the Bureau. (Stip. August 28, 1986, ¶ 2)

2. Effective July 1, 1986, motor common carriers of freight (except parcel express carriers) are no longer required to file tariffs with the State of Vermont. Accordingly, NEMRB no longer formulates rates applicable to intrastate transportation of property in Vermont, nor does it file tariffs or supplements published by it with any agent in Vermont. (Stip. August 28, 1986, ¶ 4) [6]

STATE OF NEW HAMPSHIRE

3. Exhibit A attached to Stipulation dated August 28, 1986 is a true copy of New Hampshire's motor carrier statute. N.H. Rev. Stat. Ann. § 21-L; § 375-A&B *et seq.* (Stip. August 28, 1986, ¶ 5) Exhibit B attached to Stipulation dated August 28, 1986 is a true copy of New Hampshire's rules and regulations governing motor carriers of property. N.H. Admin. Code Puc 800 *et seq.*; 900 *et seq.* (Stip. August 28, 1986, ¶ 8)

4. The New Hampshire Department of Transportation (NHDOT) was created by statute in 1985 and it assumed responsibility for regulating intrastate transportation from the New Hampshire Public Utilities Commission, which formerly held such responsibilities. (Stip. August 28, 1986, ¶ 6) A Commissioner heads NHDOT and is responsible for regulating motor common carriers. N.H. Rev. Stat. Ann. § 21-L:2; § 375-A:14, § 375-B:17(I). The Commissioner may adopt rules regulating the form of tariff schedules and the manner of their filing. (Stip. August 28, 1986, ¶ 7)

5. The Bureau of Common Carriers (BCC) is a branch of NHDOT's Division of Public Works. BCC is primarily responsible for regulating intrastate motor carriers that transport property for hire. The Administrator of BCC reports to the Director of Public Works and Transportation, who is nominated by the Commissioner and appointed by the Governor. N.H. Rev. Stat. Ann. § 21-L:3 (II). (Stip. August 28, 1986, ¶ 9)

6. A motor carrier of property for hire must obtain from NHDOT a certificate, if a common carrier, or a permit, if a contract carrier,

before providing service within the state. N.H. Rev. Stat. Ann. § 375-B:4. A certificate or permit is usually issued only after a public hearing where a determination is made that the applicant is fit, willing and able and that the service is needed. However, hearings are not held on applications for dump truck motor carrier authority. (Stip. August 28, 1986, ¶ 10) After a determination is made on a carrier's application, the Administrator of the BCC issues a written order on behalf of NHDOT's Director of Public Works and Transportation. A right of appeal exists as to applicants that desire to contest the order. (Stip. August 28, 1986, ¶ 11)

7. Entry into motor freight carrier operations is strictly controlled in New Hampshire. Only one application for a certificate of public convenience and necessity seeking to transport general commodities was filed in the past two years, and it was denied after a hearing. (Stip. August 28, 1986, ¶ 12)

8. Authority granted to motor carriers of property is transferable to other carriers who are found to be fit, willing and able to perform the transportation service, provided the authority is found not to be dormant. If authority is allowed to become dormant for a period of six months it is subject to [7] automatic revocation. N.H. Admin. Code Puc 802.14. The transfer method of entry is easier than *de novo* entry because it usually does not generate opposition from present motor freight carriers when the purchaser is fit to assume the authority. In a transfer proceeding the issue of whether the service is needed is not present. Often the most difficult burden for a *de novo* entrant to overcome is showing that the service is needed. (Stip. August 28, 1986, ¶ 13)

9. About 60 or 70 of New Hampshire's approximate 2,000 registered motor carriers have bus operating authority. Another 60 to 75 have household goods transportation authority. The remainder are common or contract carriers of property other than household goods. About 35 major general freight common carriers are members of NEMRB or the New Hampshire Motor Transport Association. The remaining carriers are small one-truck operators who work on an hourly basis. These include dump truck, rubbish, towing, heavy equipment, and boat carriers. There are also 50 to 75 general freight carriers who file individual commodity rate tariffs. (Stip. August 28, 1985, ¶ 14)

10. BCC has seven field inspectors. This number increased from four to seven after the creation of NHDOT. (Stip. August 28, 1986,

¶ 16) Field inspectors have police power to enforce New Hampshire's motor carrier statutes: N.H. Rev. Stat. Ann. § 376 *et seq.* (regulating buses); N.H. Rev. Stat. Ann. § 375-A *et seq.* (regulating household goods carriers); and N.H. Rev. Stat. Ann. s1 375-B *et seq.* (regulating common and contract property carriers). Field inspectors have the power of a deputy sheriff in any county in New Hampshire. When requested to do so, motor carriers are required to stop and submit their vehicles to inspection to determine the condition of the vehicle and the service being performed. N.H. Rev. Stat. Ann. § 375-B:18. The primary function of field inspectors is to monitor motor carriers to ensure that they are properly certified and are complying with safety regulations. (Stip. August 28, 1986, ¶¶ 16, 17)

11. New Hampshire law requires each motor common carrier of property to print, file with the BCC, and keep open for public inspection schedules of rates and charges governing the transportation services it performs. N.H. Rev. Stat. Ann. § 375-B:13. (Stip. August 28, 1986, ¶ 18) Unless otherwise authorized by NHDOT, rates filed by motor common carriers of property become effective thirty (30) days after filing. N.H. Admin. Code Puc 802.11(b). (Stip. August 28, 1986, ¶ 20)

12. Motor common carriers of property are prohibited from making, giving or causing any undue or unreasonable preference or advantage to any particular person or locality or from subjecting any particular person or locality to any unjust discrimination or any undue or unreasonable prejudice or disadvantage. N.H. Rev. Stat. Ann. § 375-B:14. (Stip. August 28, 1986, ¶ 19) NHDOT lacks statutory authority to reject or suspend any tariff filed by a common carrier of property for being unjust or [8] unreasonable. (Stip. August 28, 1986, ¶ 21) The New Hampshire superior courts have equity jurisdiction to restrain the violation of any statutory provision, any rule or order issued or adopted by the NHDOT, or any provision of any certificate or permit. N.H. Rev. Stat. Ann. § 375-B:24a.

13. BCC has an administrator and one tariff investigator or rate analyst. The rate analyst's duties include contacting, visiting and investigating motor carriers of property suspected of not complying with their filed tariffs; assisting carriers in filing their tariffs in the format required by state regulations; providing the public and motor carriers with copies of carrier tariffs; investigating other complaints against carriers; and reviewing filed tariffs of New Hampshire's approximate 2,000 registered motor carriers of property to determine

whether the tariffs are discriminatory. In determining whether the carriers are adhering to their filed tariffs, the rate analyst uses inspection forms developed by the agency for this purpose. If any discrepancies are found, they are pointed out in detail to the carriers. The carriers are further required to refund overcharges or submit new billings for undercharges to correct the errors. The BCC has suspended the certificates of carriers for failure to adhere to their filed rates. It has power to revoke permanently such certificates should such action be warranted. N.H. Rev. Stat. Ann. § 375-B:9. (Stip. August 28, 1986, ¶ 22)

14. The tariff investigator examines tariffs only to ensure that they conform to the format prescribed in the state's regulations and that they do not discriminate among shippers. (Stip. August 28, 1986, ¶ 23) A discriminatory rate is one that specifically names a shipper for preferential treatment. A hearing may be held to investigate rates that appear discriminatory. (Stip. August 28, 1986, ¶ 24)

15. It is the opinion of the rate analyst that whenever tariffs become effective that decision results from a determination that the proposed rates meet the regulatory criteria of the statute, orders, rules and regulations pertaining to motor carriers. (Stip. August 28, 1986, ¶ 25) Once the rates are established the carriers must strictly adhere to them and no carrier may refund or remit in any manner or by any device, any portion of the rates or charges specified in the tariffs. N.H. Rev. Stat. Ann. § 375-B:15. (Stip. August 28, 1986, ¶ 26)

16. Motor common carriers of property may not discriminate by giving undue preference or advantage to any particular person or locality. Therefore, motor common carriers of property must charge the same rate to all people seeking to ship to and from the points designated in the tariff. A contract carrier can transport the goods of a shipper that is party to an agreement with the carrier at a rate different from the common carrier rate as long as such rate is not less than that which the contract carrier was required to file with the BCC. See N.H. Rev. Stat. [9] Ann. § 375-B:16 (II). About half of New Hampshire's carriers have both contract and common carrier authority. (Stip. August 28, 1986, ¶ 27)

17. It is the responsibility of each motor carrier of property to determine and file its own rates. New Hampshire permits, but does not require, a carrier to give authority to an agent to issue and file for the carrier tariffs and supplements thereto. A carrier does so by executing a power of attorney and filing it with the BCC. (Stip.

August 28, 1986, ¶ 28) The BCC has a long history of working with agents, such as NEMRB, which file collective rate proposals on behalf of their members. (Stip. August 28, 1986, ¶ 29)

18. In New Hampshire, NEMRB files general rate restructures, general rate increases and supplements thereto which have previously been filed with the ICC. NEMRB accompanies such filings with the justification statement that has been filed with the ICC. If the ICC suspends the proposal, NEMRB requests the BCC to postpone the effective date of the proposal in New Hampshire pending the outcome of the ICC investigation. At the conclusion of the ICC investigation, NEMRB requests the BCC to take the same action with respect to the intrastate New Hampshire proposal as the ICC has taken with respect to the interstate proposal. Examples of such requests and the orders of the NHDOT authorizing such action are identified as Exhibit C to the Stipulation dated August 28, 1986. (Stip. August 28, 1986, ¶ 30) Only NEMRB members are allowed to participate in its tariff. NEMRB's tariff includes a list of its members participating in the tariff. (Stip. August 28, 1986, ¶ 31)

19. NHDOT has no involvement in the initiation or development of NEMRB's intrastate tariffs or supplements thereto which NEMRB files with the NHDOT, except in connection with NHDOT's review of the filed tariffs. (Stip. August 28, 1986, ¶ 32) NHDOT does not engage in an effort to monitor the pre-filing, filing or post-filing activities of NEMRB except as prescribed in the attached statutes and regulations or as set out herein in Findings 13-15, 17-18 and 20-23. No NHDOT employee has ever attended a NEMRB meeting. (Stip. August 28, 1986, ¶ 35)

20. NHDOT has neither authority nor a mechanism to process complaints by members against NEMRB. However, if a complaint alleges a violation of the statute or the orders, rules or regulations of the NHDOT, it will be investigated and appropriate action taken if warranted. Otherwise, a member's complaint against NEMRB must be filed with the attorney general's office and be processed like any private citizen's complaint. (Stip. August 28, 1986, ¶ 34)

21. Aside from its role in reviewing proposed rates, NHDOT does not monitor economic conditions in the intrastate trucking industry of New Hampshire. (Stip. August 28, 1986, ¶ 36) NHDOT has never conducted a study of the intrastate trucking industry [10] with regard to economic regulation or of the effects of state regulatory policy on the intrastate trucking industry of New Hampshire. (Stip. August 28, 1986, ¶ 37)

22. NHDOT does not initiate changes in rates unless they have been shown to be in violation of the statute, or the orders, rules or regulations of the NHDOT. Changes in rates are initiated by carriers, either independently, through rate bureaus, including NEMRB, or through other agents. (Stip. August 28, 1986, ¶ 38)

23. It is the view of the BCC employees charged with the duty of initially determining the lawfulness of tariffs that without the help of agents and tariff bureaus such as NEMRB, the BCC would be hindered in its ability to regulate rates of motor carriers in New Hampshire. They also believe that if all carriers were required to file rate proposals individually rather than collectively, the BCC could not meet its regulatory responsibilities with its present staff. (Stip. August 28, 1986, ¶ 39)

COMMONWEALTH OF MASSACHUSETTS

24. Exhibit D attached to Stipulation dated August 28, 1986 is a true copy of Massachusetts' motor carrier statute. Mass. Gen. Laws Ann. ch. 159B (Law. Co-op. 1979) (hereinafter ch. 159B) (Stip. August 28, 1986, ¶ 40)

25. The Massachusetts Department of Public Utilities (MDPU) is responsible for regulating electric, gas, telephone, and water utilities, as well as bus companies and commercial motor vehicles. (Stip. August 28, 1986, ¶ 41) Exhibit E attached to Stipulation dated August 28, 1986 is a true copy of MDPU's rules and regulations governing motor carriers of property. (Stip. August 28, 1986, ¶ 53)

26. The Commercial Motor Vehicle Division (CMVD), created by statute to be a semi-autonomous body within MDPU, has as its primary function the regulation of motor vehicle carriers which transport property for hire. (Stip. August 28, 1986, ¶ 42) CMVD's current staff or approximately 16 or 17 employees includes about 12 field inspectors, as well as several hearing officers and clerical staff. The MDPU Commissioners determine the responsibilities of the CMVD. (Stip. August 28, 1986, ¶ 43)

27. The Assistant Director of Rates and Research of CMVD is the only rate analyst for CMVD and is responsible for processing motor carrier rates filed with CMVD. The rate analyst reports directly to MDPU on rate issues. (Stip. August 28, 1986, ¶ 44) The present rate analyst assumed the position six years ago. At that time he was assisted by three clerks. Today there is only one to assist him. (Stip. August 28, 1986, ¶ 45) [11]

28. A motor common carrier of property must obtain a certificate from the MDPU before providing services within Massachusetts. ch. 159B, § 3. A certificate or permit is issued only after a public hearing where a determination is made that the petitioner is fit, willing, and able and that the service is needed. (Stip. August 28, 1986, ¶ 46) After a determination is made on a carrier's petition, MDPU issues a written order. (Stip. August 28, 1986, ¶ 47)

29. Hundreds of motor carriers of property have applied for intrastate carrier authority in Massachusetts during the past several years, most of which were dump truck and courier operators. Only a few motor common carriers of general commodities have applied for operating authority. (Stip. August 28, 1986, ¶ 48)

30. Intrastate operating authority granted to motor carriers of property is transferable with the approval and consent of the MDPU, after a public hearing. Mass. Admin. Code tit. 220, § 260.01(3). The MDPU applies a standard similar to that used in granting authority in the first instance. Generally, transfer of operating authority does not generate much opposition from present motor carriers of property. (Stip. August 28, 1986, ¶ 50)

31. Once authority has been granted, a motor carrier of property must publish, file, and keep open for public inspection a tariff containing its charges for transportation services. ch. 159B, § 6, ¶¶ 1, 2. A carrier has the right to seek whatever rate it desires. No one at the MDPU looks behind the filed rates to determine whether they accurately reflect a carrier's profits and costs. The rate analyst has never requested financial information to support a tariff nor has he rejected a rate because of the price to be charged. However, if confronted with a tariff containing rates that in his judgment are out of line with the average rates that have been established in the involved pricing zone, or seem extraordinarily high, such as a 20% to 50% increase, he would recommend suspension and investigation of the tariff by the MDPU Commissioners. Likewise, if a tariff appeared to contain discriminatory provisions, such as being applicable only for the account of a named shipper or shippers rather than being available to the general public, the CMVD would recommend suspension and investigation. (Stip. August 28, 1986, ¶ 51)

32. It is the policy of Massachusetts to promote economical and efficient service at reasonable rates. ch. 159B, § 1 Every carrier must establish, observe and enforce reasonable rates. The DPU may determine and prescribe lawful rates. ch. 159B, § 6 Although MDPU

has the authority to establish maximum and minimum rates, ch. 159B, § 6 ¶ 5, it has not done so as to motor carriers of property, except a minimum rate order was entered many years ago with respect to dump trucks and petroleum tank truck carriers. *CF. Mass. Admin. Code tit. 220, § 272 et seq. [12] Rates for the Towing of Motor Vehicles.* (Stip. August 28, 1986, ¶ 52)

33. There is a 30-day waiting period before a rate filing may become effective. ch. 159B, § 6 ¶ 2. The MDPU will grant permission to establish rates on less than statutory notice only when real need is shown. *Mass. Admin. Code tit. 220, § 260.03 (hereinafter MDPU Rules) MDPU Rule 11.* Petitions complaining of and seeking suspension of a tariff may be filed with the MDPU no later than 10 days prior to the effective date of the tariff. *MDPU Rule 12.* The purpose of the 30-day statutory notice period is to permit the MDPU to review rate filings and to permit public comment. (Stip. August 28, 1986, ¶ 54) Once the rates are established, the carriers must strictly adhere to them and no carrier may refund or remit in any manner or by any device, any portion of the rates or charges specified in the tariffs. ch. 159B, § 6A, ¶ 1. (Stip. August 28, 1986, ¶ 63)

34. The MDPU is authorized to reject or suspend proposed rates which are not consistent with the statute or the MDPU's orders, rules and regulations. ch. 159B, § 6, ¶¶ 1, 2. (Stip. August 18, 1986, ¶ 53) Regulations pertaining to filing formats are promulgated by MDPU under the authority of ch. 159B, § 6, ¶ 3. The rate analyst reviews filed tariffs to ensure that they comply with the filing format of the statute (Stip. August 28, 1986, ¶ 56), and to ensure that the tariffs accurately reflect the rates that carriers intend to charge. (Stip. August 28, 1986, ¶ 57) He rejects only filed tariffs that do not comply with the filing requirements of the regulations. *See, e.g., Exhibit F attached to Stipulation dated August 28, 1986.* (Stip. August 28, 1986, ¶ 57) He does not audit carriers' records because of the lack of time to do so. (Stip. August 28, 1986, ¶ 59)

35. It is the opinion of the rate analyst that whenever tariffs become effective without rejection, suspension or hearing, that action results from a determination that the proposed rates meet the regulatory criteria of the statute, orders, rules and regulations pertaining to motor carriers of property. (Stip. August 28, 1986, ¶ 62)

36. Massachusetts is divided into pricing zones. These zones were not established by state authority but were developed by carrier pricing practices. (Stip. August 28, 1986, ¶ 60)

37. The MDPU, upon complaint of any motor common carrier of property or any other person, or upon its own motion, after hearing, may allow or disallow any filed or existing rates and may alter or prescribe rates in accordance with the legal standards provided. ch. 159B, § 6, ¶ 5. (Stip. August 28, 1986, ¶ 61) During the past six years MDPU has not held a public hearing either to investigate or suspend a motor carrier's rate. (Stip. August 28, 1986, ¶ 68) [13]

38. It is the responsibility of each carrier to determine and file its own rates. The MDPU has authorized, but does not require, motor common carriers of property to give authority to an agent to issue and file tariffs and supplements thereto in their stead. A carrier does so by executing a power of attorney and filing it with the MDPU. The power of attorney may be revoked by the carrier or agent on not less than sixty days' notice to the MDPU. MDPU Rule 6. (Stip. August 28, 1986, ¶ 64) The MDPU has a long history of working with agents, such as NEMRB, which file collective rate proposals on behalf of their members. (Stip. August 28, 1986, ¶ 65)

39. In Massachusetts, NEMRB files general rate restructures, general rate increases, and supplements thereto that have previously been filed with the ICC. Although not required to do so, NEMRB accompanies such filings with a justification statement that has been filed with the ICC. (Stip. August 28, 1986, ¶¶ 58, 66) If the ICC suspends the proposal, NEMRB requests the MDPU to postpone the effective date of the proposal in Massachusetts pending the outcome of the ICC investigation. At the conclusion of the ICC investigation, NEMRB requests the MDPU to take the same action with respect to the intrastate Massachusetts proposal as does the ICC with the interstate proposal. Generally, the MDPU relies on the fact that the ICC has already conducted an investigation and reached a conclusion as to the justness and reasonableness of the NEMRB proposals. (Stip. August 28, 1986, ¶ 66) Carriers who are not members of NEMRB or of any other rate bureau do not regularly provide similar ICC data. (Stip. August 28, 1986, ¶ 58)

40. Massachusetts does not have a posting requirement for filed tariffs other than carriers posting their rates at their place of business. (Stip. August 28, 1986, ¶ 67)

41. The NEMRB files tariffs on behalf of its members that are intrastate carriers. (Stip. August 28, 1986, ¶ 69) Only members of the NEMRB are allowed to participate in its tariffs. The NEMRB's tariff includes a list of all carriers participating in the tariff. (Stip. August 28, 1986, ¶ 70)

42. MDPU currently employs 12 field inspectors who have police power to enforce Massachusetts' motor carrier statute. The primary function of field inspectors is to monitor carriers to ensure that they are properly certified and that they are complying with safety regulations. Field inspectors also spot check carriers to investigate complaints that they are not charging the rates that they have filed. (Stip. August 28, 1986, ¶ 72)

43. MDPU has no involvement in the initiation or development of NEMRB's intrastate tariffs or supplements thereto which NEMRB files with MDPU, except in connection with its review of the filed tariffs. (Stip. August 28, 1986, ¶ 73) MDPU does not engage in an effort to monitor the pre-filing, filing or post-filing [14] activities of NEMRB except as prescribed in the statutes and regulations or as set out herein in Findings 31-34, 37-40, and 42-45. (Stip. August 28, 1986, ¶ 74) No MDPU employee has ever attended a NEMRB meeting. (Stip. August 28, 1986, ¶ 77) MDPU has neither authority nor a mechanism to process complaints by members against NEMRB. However, if a complaint alleges a violation of Chapter 159B or any order, rule or regulation adopted thereunder, it will be investigated and appropriate action taken if warranted. (Stip. August 28, 1986, ¶ 75)

44. Violations of Chapter 159B or any order, rule or regulation adopted thereunder are punishable by fine; and, in addition, the Supreme Judicial and superior courts severally have jurisdiction in equity to restrain any such violation upon petition of MDPU, or of any person affected by such violation. Any person also may file with the MDPU a complaint of any violation and the MDPU is required to investigate such complaint within seven days, and within 14 days issue an order for remedial action if warranted, or order hearings to be conducted within 21 days from the date of the MDPU order. The MDPU is required to render a decision on the complaint no later than 90 days from the date of hearing. ch. 159B, § 21. (Stip. August 28, 1986, ¶ 76)

45. The MDPU does not initiate changes in rates unless they have been shown to be in violation of the statute or the orders, rules or regulations of the MDPU. Changes in rates are initiated by carriers, either independently or through rate bureaus, including NEMRB, or through other agents. (Stip. August 28, 1986, ¶ 80) Aside from its role in reviewing proposed rates, MDPU does not monitor economic conditions in the intrastate trucking industry of Massachusetts. (Stip.

August 28, 1986, ¶ 78) MDPU has never conducted a study of the intrastate trucking industry or of the effects of state regulatory policy on the intrastate trucking industry of Massachusetts. (Stip. August 28, 1986, ¶ 79)

46. Approximately 20,000 motor carriers operate in Massachusetts and about 10 percent of these are motor common carriers of general commodities. (Stip. August 28, 1986, ¶ 71) It is the view of the MDPU employees charged with the duty of initially determining the lawfulness of tariffs, that without the help of agents and tariff bureaus such as NEMRB, the MDPU would be hindered in its ability to regulate rates of motor carriers in Massachusetts. They also believe that if all carriers were required to file rate proposals individually rather than collectively, the MDPU could not meet its regulatory responsibilities with its present staff. (Stip. August 28, 1986, ¶ 81)

STATE OF RHODE ISLAND

47. Exhibit G attached to Stipulation dated August 28, 1986 is a true copy of Rhode Island's motor carrier statute. R.I. [15] Gen. Laws § 39-12-1 *et seq.* (1985). (Stip. August 28, 1986, ¶ 45)

48. Violations of Rhode Island's motor carrier statute are punishable by fine and if the offense for which a person is convicted is an unlawful discrimination in rates or charges for the transportation of property, such person shall, in addition to the fine, be subject to imprisonment for a term not exceeding one year. R.I. Gen. Laws § 39-12-36. (Stip. August 28, 1986, ¶ 88)

49. The Rhode Island Public Utilities Commission (RIPUC) regulates motor common carriers of property through the Division of Public Utilities and Carriers (DPUC). (Stip. August 28, 1986, ¶ 83) Rhode Island law requires that the Chairman of the RIPUC also serve as the Administrator of DPUC. (Stip. August 28, 1986, ¶ 84) The Administrator heads DPUC and is responsible for regulating motor carriers of property. (Stip. August 28, 1986, ¶ 85) One of the Administrator's duties is to prescribe rules regulating motor carriers of property. (Stip. August 28, 1986, ¶ 86) Exhibit H attached to Stipulation dated August 28, 1986 is a true copy of DPUC's rules and regulations governing motor carriers of property. (Stip. August 28, 1986, ¶ 87)

50. DPUC staff consists of three field investigators, two clerks, a rate analyst, an attorney, and an associate administrator. (Stip. August 28, 1986, ¶ 89) The field investigators conduct road checks of

motor carriers of property to determine whether the carriers have registered their vehicles; whether the vehicles are in safe operating condition; and whether the carriers are charging shippers in accordance with the carrier's established tariff. The field investigators report to the Associate Administrator. (Stip. August 28, 1986, ¶ 90)

51. A motor carrier of property must obtain from DPUC a certificate if a common carrier, or a permit if a contract carrier, before providing service with Rhode Island. DPUC holds a public hearing to determine whether the applicant is fit, willing and able to perform properly the proposed service. In addition, DPUC must determine whether the public convenience requires a common carrier's service or whether a contract carrier's proposed service is consistent with the public interest. R.I. Gen. Laws § 39-12-6; § 39-12-9. (Stip. August 28, 1986, ¶ 91) To establish that the public convenience requires its service, a motor carrier of property must demonstrate to DPUC that its services are necessary. A carrier can accomplish this by showing the absence of any service or the inferior quality of existing service. An applicant cannot satisfy the public convenience element of the certification standard merely by showing that its rates will be lower than those of incumbent carriers. (Stip. August 28, 1986, ¶ 92)

52. The Associate Administrator or an attorney presides at rate and new carrier hearings. The presiding officer drafts decisions and final orders for the signature of both the [16] Administrator and the Associate Administrator. (Stip. August 28, 1986, ¶ 93) Last year DPUC held between 30 and 50 hearings on applications from motor carriers of property for operating authority. (Stip. August 28, 1986, ¶ 95) Presently, there are approximately 700 motor carriers of property authorized to engage in intrastate transportation of property within Rhode Island. (Stip. August 28, 1986, ¶ 96)

53. DPUC permits motor carriers of property to transfer their active operating authority to another carrier after DPUC determines the fitness of the transferee to assume the operating authority. The public convenience and necessity for the transferee's service is not an issue in transfer hearings since DPUC made that determination prior to the issuance of the certificate to the original holder. (Stip. August 28, 1986, ¶ 94)

54. Rhode Island law requires every motor common carrier of property to print, file with the Administrator, and keep open for public inspection tariffs showing all of the rates governing the transportation it performs. R.I. Gen. Laws § 39-12-11. (Stip. August 28, 1986,

¶ 98) Rates of motor common carriers of property are required to be just and reasonable and reasonably compensatory. R.I. Gen. Laws § 39-12-12. Carriers are prohibited from charging rates that are unjustly discriminatory, unduly preferential or unduly prejudicial. R.I. Gen. Laws § 39-12-13. (Stip. August 28, 1986, ¶ 99)

55. There is a 30-day waiting period before a rate filing may become effective. R.I. Gen. Laws § 39-12-12. The DPUC will grant permission to establish rates on less than statutory notice only in cases where actual emergency or real merit is shown. DPUC Rule 12. Petitions seeking suspension of a tariff may be filed with the DPUC no later than 10 days prior to the effective date of the tariff. DPUC Rule 13. The purpose of the 30-day statutory notice period is to permit the DPUC to review rate filings and to take whatever action may be deemed necessary prior to the tariff becoming effective. (Stip. August 28, 1986, ¶ 100) During the interim between the filing of a tariff and its effective date, the rate analyst reviews the tariff to determine whether it complies with DPUC's regulations governing the format of tariffs. (Stip. August 28, 1986, ¶ 101)

56. The rate analyst has the authority to reject tariffs whose formats do not conform to the regulations. (Stip. August 28, 1986, ¶ 102) The rate analyst also examines tariffs to ascertain whether the rates are within a "zone of reasonableness." (Stip. August 28, 1986, ¶ 103) The "zone of reasonableness," which is a measure developed by the rate analyst, consists of a range between the maximum and minimum industry averages of previously approved rates for each category of motor carrier. (Stip. August 28, 1986, ¶ 104) Those rates that fall within the "zone of reasonableness" are approved without a hearing. (Stip. August 28, 1986, ¶ 105) In [17] determining the reasonableness of a proposed tariff, the rate analyst may also consider the percentage of the rate increase as well as the date of the carrier's last request for a price increase. (Stip. August 28, 1986, ¶ 106) When the rate analyst cannot complete his tariff review within the 30-day period before a newly filed tariff will become effective, DPUC suspends the tariff. (Stip. August 28, 1986, ¶ 109)

57. DPUC requires carriers to submit cost information or other financial data to justify proposed tariff changes only if the tariff is suspended and the matter is set for hearing. (Stip. August 28, 1986, ¶ 107)

58. The tariff filings by NEMRB are handled as follows: NEMRB files general rate restructures, general increases in rates and

supplements thereto that have previously been filed with the ICC. NEMRB accompanies such filings with justification statements that have been filed with the ICC. The DPUC staff analyzes those statements and makes use of the information contained therein to make its initial determination of the lawfulness of the NEMRB proposals. After making its initial determination on an individual or NEMRB proposal, the staff drafts an order, which may be accompanied by a memorandum, recommending that the Administrator either approve the proposal or suspend it and conduct a hearing. In either case, the Administrator, who has the final authority in such matters, issues an order. Exhibit I attached to Stipulation dated August 28, 1986 is a copy of an order suspending an increase filed by NEMRB on behalf of its members. Following the issuance of that suspension order, the DPUC requested the NEMRB to attend an informal conference at the DPUC's offices to answer certain questions the DPUC had about the proposal. Following the informal conference, the DPUC conducted a formal public hearing on the proposal at its offices on July 9, 1986. Exhibit J attached to Stipulation dated August 28, 1986 is the Notice of the Public Hearing. Exhibit K attached to Stipulation dated August 28, 1986 is a true copy of the transcript of the hearing held on July 9 by the DPUC. (Stip. August 28, 1986, ¶ 108)

59. The DPUC is authorized to reject or suspend and investigate proposed rates which are not consistent with the statute or the DPUC's orders, rules and regulations. R.I. Gen. Laws § 39-12-11; § 39-12-12. (Stip. August 28, 1986, ¶ 111)

60. Similarly, DPUC suspends unjust or unreasonable tariffs pending a public hearing during which the tariff's proponent must justify the suspended rates. (Stip. August 28, 1986, ¶ 110) Upon finding that the evidence adduced at the hearing does not justify a proposed rate, DPUC will deny the tariff proponent's request for rate approval and establish a rate that the evidence supports. In determining the appropriate rate, DPUC does not use a precise formula, but rather sets a rate that will afford the carrier a good living and that will allow for increased expenses. (Stip. August 28, 1986, ¶ 112) DPUC does not permit [18] rate increases based solely on inflation unless a hearing is held and it is determined that the increase is warranted. (Stip. August 28, 1986, ¶ 113) At the conclusion of a hearing, the hearing officer drafts an order and decision, which the Administrator approves by signing. (Stip. August 28, 1986, ¶ 114)

61. DPUC authorizes motor common carriers of property to give authority to an agent to issue and file tariffs and supplements thereto in their stead. A carrier does so by executing a power of attorney and filing it with the DPUC. The power of attorney may be revoked by the carrier or agent on not less than sixty days' notice to the DPUC. DPUC Rule 20. (Stip. August 28, 1986, ¶ 115)

62. The DPUC, upon complaint of any motor common carrier of property or any person, or upon its own motion, after hearing, may allow or disallow any filed or existing rates and may alter or prescribe rates of carriers in accordance with the legal standards provided. R.I. Gen. Laws § 39-12-13. (Stip. August 28, 1986, ¶ 116)

63. It is the view of the DPUC employees charged with the duty of initially determining the lawfulness of tariffs that whenever tariffs are permitted to come effective without rejection, suspension or hearing, that action results from a determination that the proposed rates meet the regulatory criteria of the statute, orders, rules and regulations of the DPUC. (Stip. August 28, 1986, ¶ 117)

64. Once the rates are established carriers must strictly adhere to them and no carrier may refund or remit in any manner or by any device, any portion of the rates or charges specified in the tariffs. R.I. Gen. Laws § 39-12-12. DPUC currently employs three field investigators whose duties include investigating complaints that carriers are not adhering to their approved rates. (Stip. August 28, 1986, ¶ 118)

65. DPUC employees do not attend NEMRB meetings at which NEMRB formulates tariffs, nor does DPUC receive any NEMRB publications other than tariffs or supplements thereto to be filed and the accompanying justification statements. (Stip. August 28, 1986, ¶ 119) DPUC has no involvement in the initiation or development of NEMRB's intrastate tariffs or supplements thereto, which NEMRB files with DPUC, except in connection with its review of the filed tariffs. (Stip. August 28, 1986, ¶ 122) DPUC does not engage in any effort to monitor the pre-filing, filing or post-filing activities of NEMRB, except as prescribed in the attached statutes and regulations or as set out herein in Findings 52-64. (Stip. August 28, 1986, ¶ 124) DPUC has neither authority nor a mechanism to process complaints by members against NEMRB. However, if a complaint alleges a violation of the statute, or the orders, rules or regulations of [19] the DPUC, it will be investigated and appropriate action taken if warranted. (Stip. August 28, 1986, ¶ 125)

66. Aside from its role in reviewing proposed rates, DPUC does not

monitor economic conditions in the intrastate trucking industry of Rhode Island. (Stip. August 28, 1986, ¶ 120) DPUC has never conducted a study of the intrastate trucking industry with regard to economic regulation or of the effects of state regulatory policy on the intrastate trucking industry of Rhode Island. (Stip. August 28, 1986, ¶ 123)

67. It is the view of the DPUC employees charged with the duty of initially determining the lawfulness of tariffs, that without the help of agents and tariff bureaus such as NEMRB, DPUC would be hindered in its ability to regulate rates of motor carriers in Rhode Island. They also believe that if all carriers were required to file rate proposals individually rather than collectively, DPUC could not meet its regulatory responsibilities with its present staff. (Stip. August 28, 1986, ¶ 121)

CONCLUSIONS

Complaint counsel, on April 29, 1985, filed a motion for partial summary decision pursuant to Section 3.24 of the Commission's Rules of Practice. Respondent, on July 1, 1985, filed a cross-motion for summary decision. By orders dated March 7, 1986, the undersigned granted in part complaint counsel's motion and denied respondent's motion.⁴ In these rulings all issues in this proceeding were decided except for respondent's state action (*Parker v. Brown*) defense. Thus, the issue remaining is whether the Commonwealth of Massachusetts, and the States of New Hampshire and Rhode Island⁵ in their regulation of intrastate motor common carrier rates meet the two-pronged [20] test set forth by the Supreme Court in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980)⁶, and thus are exempt from the federal antitrust laws. The *Midcal* test requires that (1) there be a "clearly articulated and affirmatively expressed state policy" to displace competition in the

⁴ See Attachments I and II hereto.

⁵ The complaint contained allegations concerning respondent's filing of rates in Vermont. Counsel have stipulated that motor common carriers of freight are no longer required to file tariffs with the State of Vermont, and that respondent no longer formulates rates applicable to intrastate transportation of property in Vermont; nor does it file tariffs published by it with any agent in Vermont. (F. 2) Complaint counsel has determined not to pursue charges concerning respondent's alleged activities in the State of Vermont, and has moved to dismiss the complaint allegations as they relate to the State of Vermont. (See Complaint Counsel's Motion To Dismiss As To Respondent's Collective Activities In The State Of Vermont, dated November 17, 1986.) Complaint counsel's motion to dismiss in this respect is granted.

⁶ Complaint counsel made a decision not to pursue a challenge to respondent's collectively developed commodity classifications. (See Complaint Counsel's Memorandum On How We Intend To Proceed (Apr. 18, 1986, pp. 11-12))

relevant market and (2) the policy must be "actively supervised." *Midcal*, 445 U.S. at 105.

The Court has made clear that as long as the State as sovereign clearly intends to displace competition in a particular field with a regulatory structure, the first prong of the *Midcal* test is satisfied. "A clearly articulated *permissive* policy will satisfy the first prong of the *Midcal* test." *Southern Motor Carriers Rate Conference, Inc. v. United States*, 105 S. Ct. 1721, 1729, n. 23 (1985) However, the regulatory agencies, acting alone, cannot immunize private anticompetitive conduct. (*Ibid.*) The second prong of the test prevents states from thwarting the national policy in favor of competition by "casting ... a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement." *Midcal*, 445 U.S. at 106 "This active supervision requirement ensures that a state's actions will immunize the anticompetitive conduct of private parties only when the 'state has demonstrated its commitment to a program through its exercise of regulatory oversight.'" *Southern Motor Carriers*, 105 S. Ct. at 1729, n. 23 The tests set forth in *Midcal* underscore the fundamental premise that it is the state, not private parties, that must exercise complete control over restraints on competition.

The *Parker v. Brown* doctrine is an implied exemption to the antitrust laws. The *Parker* decision was premised on the assumption that Congress, in enacting the Sherman Act, did not intend to compromise the States' ability to regulate their domestic commerce. However, implied antitrust immunities are disfavored, *National Gerimedical Hospital and Gerontology Center v. Blue Cross of Kansas City*, 452 U.S. 378, 388-389 (1981); *United States v. National Ass'n of Securities Dealers, Inc.*, 422 U.S. 694, 719-720 (1975), and any exemptions from the antitrust laws are to be strictly construed. *Group Life & Health Insurance Co. v. Royal Drug Co.*, 440 U.S. 205, 231 (1979); *Abbott Laboratories v. Portland Retail Druggists Ass'n, Inc.*, 425 U.S. 1, 11 (1976) These canons of construction reflect the indispensable role of antitrust policy in the maintenance of a free economy. *United States v. Philadelphia National Bank*, 374 U.S. 321, 348 (1963). [21]

CLEARLY ARTICULATED AND AFFIRMATIVELY
EXPRESSED STATE POLICY

In *Southern Motor Carriers*, the court stated that the Public Service Commissions of North Carolina, Georgia, Tennessee, and

Mississippi permit collective ratemaking. However, acting alone, these agencies could not immunize private anticompetitive conduct. *Parker* immunity is available only when the challenged activity is undertaken pursuant to a clearly articulated policy of the State itself. North Carolina, Georgia, and Tennessee have statutes that explicitly permit collective ratemaking by common carriers. Thus, the rate bureaus' actions in those States were taken pursuant to an express and clearly articulated state policy. Mississippi's legislature had not specifically addressed collective ratemaking. In considering the collective rate-making activity of the rate bureau in Mississippi, the court stated:

The Mississippi Motor Carrier Regulatory Law of 1938, ... gives the State Public Service Commission authority to regulate common carriers. The statute provides that the commission is to prescribe 'just and reasonable' rates for the intrastate transportation of general commodities. ... The legislature thus made clear its intent that intrastate rates would be determined by a regulatory agency, rather than by the market. The details of the inherently anticompetitive rate-setting process, however, are left to the agency's discretion. The state commission has exercised its discretion by actively encouraging collective ratemaking among common carriers. ... We do not believe that the actions petitioners took pursuant to this regulatory program should be deprived of *Parker* immunity.

A private party acting pursuant to an anticompetitive regulatory program need not 'point to a specific, detailed legislative authorization' for its challenged conduct. ... As long as the State as sovereign clearly intends to displace competition in a particular field with a regulatory structure, the first prong of the *Midcal* test is satisfied. ...

If more detail than a clear intent to displace competition were required of the legislature, States would find it difficult to implement through regulatory agencies their anticompetitive policies. Agencies are created because they are able to deal with problems unforeseeable to, or outside the competence of, the legislature. Requiring express authorization for every action that an agency might find necessary to effectuate state policy would diminish, if not destroy, its usefulness. ... Therefore, we hold that if the State's intent to establish an anticompetitive regulatory program is clear, as it is in Mississippi, the State's failure to [22] describe the implementation of its policy in detail will not subject the program to the restraints of the federal antitrust laws. (Footnotes omitted)

Southern Motor Carriers, 105 S. Ct. at 1731-1732.

MASSACHUSETTS

The First Circuit Court of Appeals, in *Massachusetts Furniture & Piano Movers Ass'n, Inc. v. FTC*, 773 F.2d 391 (1985), held that Massachusetts General Laws Annotated, ch. 159B, with language comparable to that of the Mississippi statute referred to by the Supreme Court in *Southern Motor Carriers*, clearly establishes the

State's intent to countenance collective ratemaking among motor carriers, notwithstanding Massachusetts' claims in its *amicus* brief to the contrary. *Mass. Movers*, 773 F.2d at 396⁷ The Federal Trade Commission did not seek Supreme Court review of this decision. Thus, Massachusetts has satisfied the first prong of the *Midcal* holding.

NEW HAMPSHIRE

New Hampshire has established a Department of Transportation under the executive direction of a Commissioner. N.H. Rev. Stat. Ann. Ch. 21-L:2 The Department is responsible for planning, developing, and maintaining a state transportation network which will provide for safe and convenient movement of people and goods throughout the State. N.H.R.S.A. 21-L:2 II(a) It has responsibility for regulating motor common carriers of property and it may adopt rules relative to reasonable and adequate service, and safety of operation and equipment. N.H.R.S.A. Ch. 375-B:17 The Department may also adopt rules relating to the form and content of schedules of rates and charges. N.H.R.S.A. Ch. 375-B:13II The statutes provide for criminal penalties for any violation of the statutes or rules, and the superior courts [23] of New Hampshire have jurisdiction to restrain any such violations. N.H.R.S.A. Ch. 375-B:24, 24-a

New Hampshire statutes require every motor common carrier of property to file a schedule of rates and charges with the Department and keep filed schedules available for public inspection. N.H.R.S.A. Ch. 375-B:13 Unless otherwise authorized by the Department, filed rates become effective thirty (30) days after filing. N.H. Admin. Code Puc 802.11(b) Motor common carriers are prohibited from discriminating or giving unreasonable preference or advantage to any person or locality. N.H.R.S.A. Ch. 375-B:14 Once rates are established carriers must adhere to them and may not refund or remit any portion of the rates specified in the tariffs. N.H.R.S.A. Ch. 375-B:15

Motor common carriers must obtain a certificate before providing service within the state. A certificate will be issued upon a determination that the public interest and public convenience will be

⁷ The court specifically referred to the language of Mass. Gen. Laws Ann. ch. 159B, §§ 1 and 6. The court considered that pursuant to the Massachusetts statute there is a state regulatory agency in Massachusetts which sets motor common carriers' rates for the intrastate transportation of goods, and that agency exercises ultimate authority and control over all intrastate rates. Common carriers are required to submit proposed rates to the relevant commission for approval; proposed rates become effective if the state agency takes no action within a specified period of time, or after a hearing, upon affirmative agency approval; and, while every common carrier remains free to submit individual rate proposals to the regulatory agency, common carriers are allowed to agree on rate proposals, and to jointly submit their proposals to the regulatory agency.

served thereby. N.H.R.S.A. Ch. 375-B:4, 375-B:5, 375-B:7 The criteria for determining “public convenience” and “public interest” are set out in the New Hampshire Code of Administrative Rules—Puc 801.02, 801.03. The criteria emphasize a need for the service and the effect the new applicant will have on existing carriers. Nowhere is consideration given to lower rates, or to competition in rates.

The Department lacks statutory authority to reject or suspend any tariff filed by a motor common carrier of property for being unjust or unreasonable. (F. 12)⁸ Tariffs are reviewed only to ensure that they conform to the prescribed format and that they do not discriminate among shippers. (F. 14) New Hampshire permits, but does not require, a carrier to give authority to an agent to issue and file tariffs on its behalf. New Hampshire has a long history of working with agents which file collective rate proposals on behalf of their members. (F. 17)

New Hampshire statutes do not set forth a clearly articulated and affirmatively expressed policy to displace competition in motor common carrier rates and charges. The State is concerned primarily with safety and with ensuring adequate, not wasteful [24] duplication of service.⁹ There is no policy declaration, or even an admonition, that rates be “just and reasonable.” The setting of rates and charges is not supervised by the State but is left open to competition. There is no statutory policy of permitting collective ratemaking. While the Department of Transportation has permitted collective ratemaking over the years, this does not meet the *Midcal* standard. The Supreme Court has stated: “Acting alone, however, these agencies [Public Service Commissions] could not immunize private anticompetitive conduct.” *Southern Motor Carriers*, 105 S. Ct. at 1729

Respondent contends that the New Hampshire statutory scheme is comparable to the Mississippi statutes, which the Supreme Court held to satisfy the first prong of *Midcal*, and the Massachusetts statute, which the First Circuit Court of Appeals held to satisfy the first prong of *Midcal*. (Respondent’s Reply Memorandum, pp. 1-5) On the contrary, there are significant differences in the statutes of these States. As the Supreme Court noted, in Mississippi the statute

⁸ F. followed by a number refers to a finding of fact herein.

⁹ “The rapid increase in the number of vehicles so operated [transporting property for hire], and the fact that they are not sufficiently regulated, have increased the dangers and hazards on public highways, and regulation of common carriers and contract carriers as hereafter defined is necessary to the end that highways may be rendered safer for the use of the general public; that the use of the highways for the transportation of property for hire may be restricted to the extent required by the necessity and convenience of the shippers and receivers of freight, . . .” N.H.R.S.A. Ch. 375-B:1 *Declaration of Policy*.

requires the Mississippi Public Service Commission to prescribe "just and reasonable rates" for the intrastate transportation of property. (Miss. Code Ann. § 77-7-221 (1972)) In Massachusetts, the policy of the Commonwealth is to "[P]romote adequate, economical and efficient service by motor carriers, and reasonable charges therefor, (Ann. Laws of Mass. ch. 157B, § 1) In Massachusetts every common carrier shall establish, observe and enforce "just and reasonable rates." (Ann. Laws of Mass. ch. 157B, § 6) The Department of Public Utilities "may allow or disallow any filed or existing rates and may alter or prescribe the rates of common carriers" (*Ibid*) Whenever the Department shall be of the opinion that any rate is "unjust or prejudicial," the Department "shall determine and prescribe the lawful rate of charge" (*Ibid*)

There is no indication in the New Hampshire statutes that the policy is to have just and reasonable rates. The Department lacks statutory authority to reject or suspend any tariff filed by a motor common carrier for being unjust or unreasonable. The stated policy of the State is to improve safety; fatally absent is statutory authority over setting of rates. The State neither establishes the rates nor reviews the reasonableness of the filed [25] rates. The State merely enforces the rates filed by private parties. Thus, the rates in New Hampshire cannot be said to be those of the State; it is the private parties that set the rates. Since New Hampshire does not have a clearly articulated and affirmatively expressed state policy to replace competition in the setting of rates, respondent's activities in collective ratemaking constitutes price-fixing in violation of the antitrust laws.

RHODE ISLAND

Rhode Island has a statutory policy of regulating the transportation of property by motor vehicles within the State. The stated policy includes the promotion of adequate, economical, and efficient service at reasonable charges without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices. Gen. Laws of R.I., Ch. 12 § 39-12.1 Motor common carriers of property are regulated by the Rhode Island Public Utilities Commission through the Division of Public Utilities ("DPU"). DPU is headed by an Administrator with authority to make all rules and regulations necessary for such regulation, and to investigate whether motor carriers are complying with the statutes and rules. Gen. Laws of R.I. Ch. 12 § 39-12-1, § 39-12-3 and 4

Motor common carriers must file rates with the Administrator and it is the duty of every such carrier to establish, observe, and enforce just, reasonable, and reasonably compensatory rates and charges. Gen. Laws of R.I. Ch. 12 § 39-12-12 The Administrator may reject any filed tariff not consistent with the regulations concerning filing of tariffs. Gen. Laws of R.I. Ch. 12 § 39-12-11 Filed rates become effective within thirty (30) days unless suspended by the Administrator. Gen. Laws of R.I. Ch. 12 § 39-12-12 The Administrator, upon complaint of any common carrier or of any person, or on his own motion, may disallow any filed or existing rate and may alter or prescribe rates of motor common carriers. If the Administrator, after hearing, determines that any rate is or will be unjust or unreasonable, or unjustly discriminatory, or unduly preferential, or unduly prejudicial, he may determine and prescribe the rate to be charged thereafter. Gen. Laws of R.I. Ch. 12 § 39-12-13 Statutory factors to be considered in determining just and reasonable rates include the need, in the public interest, of adequate and efficient transportation service at the lowest cost consistent with the furnishing of service, and the need of revenues sufficient to enable carriers under honest, economical, and efficient management to provide service. The burden of proof in any hearing involving a change in rates shall be upon the carrier to show that the changed rate is just and reasonable. Gen. Laws of R.I. Ch. 12 § 39-12-14 The rules of practice and procedure issued pursuant to the Rhode Island motor carrier statute specifically provides for collective rate filings by agents of carriers. Rules No. 8, 11, 20 Rule No. 18 provides [26] that rates prescribed by the Administrator shall be duly promulgated by the carrier to which such order applies.

From the above it is clear that the State of Rhode Island has articulated a policy to replace competition in the motor common carrier of property market with a detailed program of rate setting pursuant to statute. Rates are required to be just, reasonable, and reasonably compensatory. The Administrator may disallow filed rates, and he may, after a hearing, prescribe rates to be charged. He is provided with statutory guidelines to be utilized in determining what is a just and reasonable rate. (See *Morgan v. Division of Liquor Control*, 664 F.2d 353 (2nd Cir. 1981) Thus, Rhode Island has met the requirements of the first prong of *Midcal*.

SUPERVISION

The second prong of *Midcal* is the requirement that there be "active

supervision" by the state to warrant an antitrust exemption. *Midcal*, 445 U.S. at 105 In *Midcal*, the California legislative policy was to permit resale price maintenance. The State authorized price setting by private parties and enforced the prices filed by the parties. The State neither established the prices nor reviewed the reasonableness of the filed price schedules. The State did not regulate the fair trade contracts, and did not engage in any "pointed reexamination" of the program. *Midcal*, 445 U.S. at 105-106 The Court held that the State of California could not thwart the national policy in favor of competition by "casting such a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement." *Id.* at 106 In *Southern Motor Carriers*, the issue of "active supervision" by the States was stipulated so that the Court did not provide guidelines as to what may constitute active supervision under the *Parker v. Brown* doctrine.¹⁰ The Court did observe that the legislatures did not have to disclose the details of the rate-setting process but could leave to the discretion of the regulatory commissions the implementation of the anticompetitive policies. This indicates a general deference by the Court to the States and their regulatory agencies.

If a State establishes a commission to regulate motor common carriers, including rates, should the manner in which they exercise their discretion and the rigor with which they supervise [27] the ratemaking be reviewed by the Federal Trade Commission? There are few guidelines to follow in this area.¹¹ One authoritative source has highlighted the problems with court review of a regulatory commission's supervisory activities:

When state agencies act within their authority, should the manner in which they exercise their discretion ordinarily be reviewed by the antitrust court? Should the court scrutinize the rigor with which the state supervises the challenged activity to ensure that supervision is more than pro forma? We answer in the negative, with the proviso that an outright attempt by a state to simply evade the antitrust laws should not be countenanced. We recognize that our approach may make such evasion easier, but we see no suitable way around this.

The federalism concerns at the heart of *Parker* cannot be reconciled with federal court probing of the "true" motives of state legislatures and agencies ... There simply

¹⁰ In *U.S. v. Southern Motor Carriers Rate Conf., Inc.*, 702 F.2d 532, 539 n. 12 (11th Cir. 1983) (*en banc*) the Court stated: "The government points out that the district court conducted no fact finding as to this issue [active supervision]. The record, however, reveals that the state commissions conduct hearings to review the reasonableness of proposed carrier tariffs and routinely suspend their effectiveness."

¹¹ In *Massachusetts Furniture & Piano Movers Ass'n v. FTC*, 773 F.2d 391 (1985), the First Circuit remanded the proceeding to the Commission for "definitive factual findings on the active supervision requirement." *Mass. Movers*, 773 F.2d at 397 By order dated March 19, 1986, the Commission dismissed the *Mass. Movers* proceeding for lack of public interest, offering no guidance on the active supervision issue.

is no way to tell if the state has "looked" hard enough at the data, and there certainly are no manageable judicial standards by which a court may weigh the various elements of a "public interest" judgment in order to determine whether the legislature or agency decision was correct. Those are political judgments and ought to be made by the legislature and its delegates.

Moreover, it can hardly be said that this position leaves state agencies any freer than their federal counterparts. Charges of "rubber stamping" industry proposals are as common in the federal field as in the state. There seems little reason to hold state agencies to a higher standard, particularly when Congress has been silent on the matter. Thus, we conclude that an allegation that state officials customarily "rubber stamp" the self-interested decisions or recommendations of the private parties involved should not ordinarily oust *Parker* immunity. We must confess, however, that the law on this point is very uncertain. The problem is compounded because courts may easily hide judgments about the rigor of [28] supervision behind general conclusions that "no supervision" was present.

P. Areeda & D. Turner, I *Antitrust Law* § 213c (footnotes omitted)

While the Court in *Southern Motor Carriers* seemed to defer to the states in finding a clearly articulated state policy to replace competition with regulation, the Court has stated that there must be "active" supervision; that states cannot cast a "gauzy cloak" over what is essentially a private price-fixing arrangement. *Midcal* makes clear that the state must have authority and control over prices and must engage in a "pointed reexamination" of its regulatory program. Where prices are filed by private parties and the state does not review the reasonableness of the filed prices, as in *Midcal*, active supervision is lacking and there can be no antitrust exemption. This conclusion is in accord with the accepted view that any inferred antitrust exemption must be narrowly construed.

Respondent contends that the courts rely *solely* on the language of the state statute in determining whether there is regulatory oversight (Respondent's Proposed Findings, p. 42), citing several court proceedings, including *New Motor Vehicle Board v. Orrin W. Fox Co.*, 439 U.S. 96 (1978); *Capital Telephone Co. v. N.Y. Telephone Co.*, 750 F.2d 1154 (2nd Cir. 1984); *Morgan v. Division of Liquor Control*, 664 F.2d 353 (2nd Cir. 1981); *Fisher Foods, Inc. v. Ohio Dept. of Liquor Control*, 555 F. Supp. 641 (D.C.N.D. Ohio 1982); and *Euster v. Eagle Downs Racing Ass'n*, 677 F.2d 992 (3rd Cir. 1982).¹² In these proceedings the court found active supervision from the regulatory scheme set forth in the statute. On the other hand,

¹² Cf. *Mass. Movers*, where the First Circuit Court of Appeals found a clearly articulated state policy to replace competition with regulation based on the statutory language, but remanded the proceeding to the Commission for "definitive factual findings on the active supervision requirement." 773 F.2d at 397

respondent refers to decisions where the court held there was no active supervision based on the absence of a statutory mechanism for active supervision; *i.e.*, *North Carolina v. P.I.A. Asheville, Inc.*, 740 F.2d 274 (4th Cir. 1984); and *Miller v. Oregon Liquor Control Com'n*, 688 F.2d 1222 (9th Cir. 1982).

In *New Motor Vehicle Board*, the statute required notice and a hearing when any protest was filed which activated the statute. In *Capital Telephone Co.*, the Public Service Commission was given "general supervision" of all telephone corporations, with authority to examine "all books, contracts, records, documents and papers." 750 F.2d at 1163 In *Morgan*, the statute had structured "a detailed mechanism for determining prices of alcoholic beverages." 664 F.2d at 356 In *Fisher Foods*, formulas [29] for determining prices had been established, and the Department had power to inspect books, records, accounts, and places of business. Also, the Department is required to hold four public hearings annually for the purpose of hearing complaints as to its policies. 555 F. Supp. at 647 In *Euster*, the Pennsylvania Horse Racing Commission set the jockey fees pursuant to formal notice and hearing procedures. The challenge there was not to an alleged need for more supervision, but a claim that the supervision was biased in favor of the jockeys. 677 F.2d at 995.

In contrast to the above proceedings where the statutes set out the details to be followed by the regulatory agencies, in *P.I.A. Asheville* the court found that once a certificate of need was issued there was a total absence of supervision provided for by North Carolina. 740 F.2d at 278-279 In *Miller*, the court stated:

Oregon mandates the posting of prices to be charged by each wholesaler, but does not in any way review the reasonableness of the prices set. While the commission 'may reject any price posting which is in violation of any of its rules,' . . . the effect of that rule is simply to effectuate the price posting and the prohibitions on quantity discounts and transportation allowances. It does not provide for government establishment of the prices themselves.

688 F.2d at 1226-1227

The above court decisions support a general proposition; namely, that where the state statute clearly sets forth requirements to be followed in carrying out the statutory mandate; *i.e.*, a requirement for a hearing, a formula for establishing prices, broad powers to support general supervision over all activities, active supervision can be inferred from the statutory mandate. It is presumed that public

officials carry out their statutory responsibilities, especially where there is no showing that supervision is, in fact, absent. When there is a challenge to the state action exemption and the statute does not provide clearly the details to be followed in supervision of the marketplace, courts must look beyond the statutory language and explore the supervision that has been provided by the regulatory agencies.

Complaint counsel contends that the procedures suggested by Professors Areeda and Turner in their treatise are necessary to ensure that adequate state supervision is being exercised. Complaint counsel insists that to qualify for the state action exemption procedures are required which will (1) accord opponents the opportunity to present facts and arguments against the challenged act, (2) assure conscious consideration by those particular state officials charged with the power and responsibility for approval, and (3) allow judicial review of the agency record. *See P. Areeda & D. Turner, I Antitrust Law ¶ 213 [30] (1978)* Complaint counsel points out that giving opponents and members of the public notice and an opportunity to comment may allow state regulators to become aware of alternatives, problems and possible inaccuracies in the joint rate filings. Unless state officials consciously consider the rates they are supposed to regulate, there are actually no constraints on private proposals. Finally, unless the state agency articulates a reasoned basis for its decision-making that is susceptible to judicial review, there can be no assurance that conscious consideration, rather than inaction, is behind official decisions. (*See Complaint Counsel's Proposed Findings of Fact, pp. 52-53*)

The requirements which Professors Areeda and Turner and complaint counsel suggest, would permit not only judicial review of agency decisions, but would compel the agencies to scrutinize more closely the basis for their decisions. Thus, much can be said for their adoption and implementation by the states.¹³ However, where the state by statute has granted the regulatory commission clear oversight authority to review rates for reasonableness, to suspend rates found to be unreasonable, and to establish just and reasonable rates when necessary, the existence of this latent oversight authority

¹³ Respondent notes that its collective ratemaking activities are carried out pursuant to an agreement approved by the Interstate Commerce Commission under Section 10706(b) of the Interstate Commerce Act, 49 U.S.C. 10706(b), and that notice to interested parties and an open hearing is provided. The Interstate Commerce Commission pursuant to federal requirements supervises respondent's *interstate* ratemaking procedures. There is no state involvement in respondent's *intrastate* activities, and the active supervision requirement for antitrust immunity for intrastate collective ratemaking has not been delegated to the Interstate Commerce Commission by the states.

and the presumption of official regularity should shift the burden to the party challenging the ratemaking process to demonstrate that the regulatory commission in fact has never engaged in any active supervision of the ratemaking process. A mere showing that a state supervisory agency has not followed the Areeda-Turner suggested procedures is not sufficient to establish a lack of active supervision. The agency must be given some discretion as to its method and manner of supervision. Instead of concentrating on an agency's failure to follow theoretical and desirable procedures, the record must concentrate on what the agency actually did. In this proceeding we have a stipulated record of the supervision exercised by the regulatory agencies. [31]

MASSACHUSETTS

In Massachusetts the Department of Public Utilities ("MDPU") has statutory authority to suspend or reject filed rates, and to conduct hearings and establish just and reasonable rates. However, the stipulated record shows that the MDPU does not look behind filed rates to determine carrier profits and costs; has never requested financial information from a carrier; has never rejected a filed tariff because of the rate (F. 31); has never established reasonable maximum or minimum rates for motor common carriers of property although charged by statute to do so annually (ch. 159B § 6 par. 5, 6; F. 32); has not held a hearing on rates for at least the past six years (F. 37);¹⁴ has a long history of dealing with motor common carrier agents who file collective rates; does not monitor the ratemaking process utilized by the respondent in this proceeding; and has 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.¹⁵ Further, the commission does not have a staff adequate to monitor the reasonableness of filed rates; any review is limited to form only. (See August 28, 1986 Stip. Ex. I, p. 11 [Transcript of Hearing by Rhode Island Division of Public Utilities and Carriers]; F. 27, 34)

Given the record facts summarized above, it is concluded that Massachusetts has not engaged in active supervision of the intrastate motor common carrier rates which are filed by the industry and permitted to become effective, and there has been no "pointed

¹⁴ See August 28, 1986 Stip. Ex. K, pp. 42-43 (Transcript of Hearing Before Rhode Island Division of Public Utilities and Carriers)

¹⁵ Massachusetts is divided into pricing zones which were established by the carriers, not the State. (F. 36)

reexamination" of its regulatory program. Since there is no State *commitment* to a program of regulatory oversight of intrastate motor common carrier rates, there is no immunity from the antitrust laws.

NEW HAMPSHIRE

It has been determined that New Hampshire does not have a clearly articulated policy to replace competition in the establishing of intrastate motor common carrier rates. (See pp. 22-25, *infra*) Further, the record makes clear that new Hampshire does not actively supervise the intrastate ratemaking process.

Rates filed by carriers with the New Hampshire Department of Transportation become effective thirty days after filing. (F. 11) The Department lacks statutory authority to reject or [32] suspend any tariff filed by a motor common carrier for being unjust or unreasonable. (F. 12) Filed tariffs are reviewed only for conformance with proper format and to ensure that they are not discriminatory. (F. 14) Certificates of carriers have been suspended for failure to adhere to their filed rates. (F. 13) The Department has a long history of working with agents which file collective rates on behalf of their member carriers. (F. 17) the Department does not involve itself in the pre-filing determination of rates by agents, nor does it monitor the activities of the agents. (F. 19) The Department does not monitor economic conditions in the intrastate motor common carrier industry and has never conducted a study of the industry nor the effects of state regulatory policy on the industry. (F. 21) The Department does not have a staff adequate to monitor the reasonableness of filed rates. (See August 28, 1986 Stip. Ex. K, p. 11 [Transcript of Hearing by Rhode Island Division of Public Utilities and Carriers]; F. 13, 23) Apparently no hearings have been held in recent years concerning rates filed by the respondent herein. (See August 28, 1986 Stip. Ex. K, pp. 42-43 [Transcript of Hearing by Rhode Island Division of Utilities and Carriers]) The lack of statutory authority to determine rates, or to suspend or reject rates, and the failure to examine rates for reasonableness contrasts sharply with the extensive procedures available and utilized to investigate and correct rates that appear discriminatory. (F. 13)

Given the record facts summarized above, New Hampshire has not engaged in active supervision of the intrastate motor common carrier rates which are filed by industry and permitted to become effective, and there has been no "pointed reexamination" of its regulatory

program. Since there is no State *commitment* to a program of regulatory oversight of intrastate motor common carrier rates, there is no immunity from the antitrust laws.

RHODE ISLAND

The Rhode Island Public Utilities Commission regulates motor common carriers of property through the Division of Public Utilities and Carriers (DPUC), which is headed by an Administrator. DPUC prescribes rules regulating motor common carriers of property. (F. 49) Presently there are approximately 700 motor common carriers of property within Rhode Island. (F. 52) The DPUC staff consists of three field investigators (who check vehicles for registration, safe operating conditions, and to determine if carriers are adhering to filed tariffs), two clerks, a rate analyst, an attorney and an associate administrator. (F. 50)

Motor common carriers of property are required to file rates with the DPUC, which rates are required to be just and reasonable and reasonably compensatory. (F. 54) Rates become effective thirty days after filing. (F. 55) Rates are examined to ascertain whether they conform to the required format and are [33] within a "zone of reasonableness," which is a measure developed by the DPUC rate analyst and consists of a range between the maximum and minimum industry averages of previously approved rates. (F. 56) Rates falling within the "zone of reasonableness" are approved without a hearing. (*Ibid.*) In determining the reasonableness of a proposed tariff, the rate analyst also may consider the percentage of the rate increase as well as the date of the carrier's last request for an increase. If the rate analyst cannot complete his review of a newly filed tariff within the thirty day period before the tariff becomes effective, DPUC suspends the tariff. (F. 56) DPUC requires carriers to submit cost information or other financial data to justify proposed tariff changes only if the tariff is suspended and the matter is set for hearing. (F. 57) Upon finding that the evidence adduced at the hearing does not justify a proposed rate, DPUC will deny the tariff proponent's request for rate approval and establish a rate that the evidence supports. In determining the appropriate rate, DPUC does not use a precise formula, but rather sets a rate that will afford the carrier a good living and that will allow for increased expenses. DPUC does not permit rate increases based solely on inflation unless a hearing is held and it is determined that the increase is warranted. At the conclusion of a

hearing, the hearing officer drafts an order and decision, which the Administrator approves by signing. (F. 60) Apparently Rhode Island did not conduct any hearings in recent years concerning respondent's filings for rate increases, until a hearing held on July 9, 1986. (See August 28, 1986 Stip. Ex. K, pp. 42-43 [Transcript of Hearing before Rhode Island Division of Public Utilities and Carriers])

The tariffs filed by respondent are accompanied with justification statements that have been filed with the ICC. (F. 58) DPUC analyzes those statements, makes use of the information contained therein to make its initial determination of the lawfulness of respondent's proposals, but does not place complete reliance on the ICC justification statements. (See August 28, 1986 Stip. Ex. K, pp. 12-13 [Transcript of Hearing by Rhode Island Division of Public Utilities and Carriers]) After making its initial determination, the staff drafts an order, which may be accompanied by a memorandum, recommending that the Administrator either approve the proposal or suspend it and conduct a hearing. In either case, the Administrator, who has the final authority in such matters, issues an order. (F. 58)

DPUC authorizes motor common carriers of property to give authority to an agent to issue and file tariffs and supplements thereto in their stead. (F. 61) A carrier does so by executing a power of attorney and filing it with the DPUC. DPUC does not engage in any effort to monitor the prefiling, filing or postfiling activities of respondent. (F. 65)

DPUC does not monitor economic conditions in the intrastate trucking industry in Rhode Island. DPUC has never conducted a study of the intrastate trucking industry with regard to economic [34] regulation or of the effects of the state regulatory policy on the intrastate trucking industry in Rhode Island. (F. 66)

Complaint counsel contends that the filing of rates with the Commission and the posting of rates at each office or station of the carrier at which it receives freight or maintains records does not provide effective notice to parties who might be interested in commenting on proposed tariffs. Record evidence is silent on the actual effectiveness of notice within Rhode Island. Complaint counsel also contends that the "zone of reasonableness" established by the rate analyst in reviewing tariffs is an informal, unpublished measure that even shippers may not be aware of. Record evidence on the reasonableness or unreasonableness of the rate analyst's "zone of reasonableness" is lacking. Complaint counsel also complains that the

written orders of the DPUC administrator fail to provide an explanation of why the tariffs meet, or fail to meet, the state's regulatory and statutory criteria.

However, the record does contain evidence of one hearing conducted by the DPUC. This hearing was held on July 9, 1986 to review a tariff filed by respondent on April 17, 1986. (F. 58) It is true that this hearing was held almost three years after the issuance of the Commission's complaint herein, and may have been brought about by the issuance of the Commission's complaint. The record is silent as to any previous hearings that may have been held over the years, and from a reading of the transcript of hearing (*see* Ex. K to Stip. of August 28, 1986) it appears that this may be the first and only formal hearing on any tariff filed by respondent or any other carrier or carrier's agent. Again, the record is unclear on this point.

Respondent has attached to its Proposed Findings Of Fact, Conclusions Of Law, Order, And Supporting Memorandum a copy of the Report And Order issued on October 24, 1986 by the DPUC,¹⁶ which is a ruling on respondent's tariff filed on April 17, 1986. This Report And Order constitutes a review of the evidence of record before the agency, including the hearing held on July 8, 1986, and it grants respondent's application for a general rate increase. The opinion discusses the evidence of record and gives reasons for accepting the proposed rate increase. This Report And Order appears adequate to permit a review by a court.

From the above summary it is concluded that the Rhode Island Public Utilities Commission has engaged in and is now engaging in an active program of supervision over intrastate motor common carrier rates within Rhode Island. Rates are reviewed, suspended, hearings are held, decisions are written, and rates [35] are established by the Commission. (F. 60) The record does not reveal the details of this program of active supervision nor when it began. Further, the record does not demonstrate the rigor with which rates are reviewed nor the effectiveness of the regulatory program in ensuring a competitive ratemaking program. Although the DPUC has a very small staff to review carrier rates (F. 50, 52, 67), the evidence amply demonstrates something more than mere *pro forma* filing of rates and acceptance of those rates by the DPUC. The record does not demonstrate that the State's regulatory program is a sham. Accordingly, the regulatory

¹⁶ It is proper to take official notice of this formal governmental action.

program of Rhode Island meets the *Midcal* criteria and an exemption from federal antitrust laws is warranted.

PUBLIC INTEREST

Respondent argues that Commission precedent requires dismissal of this complaint. Respondent refers to three Commission proceedings which have been dismissed for lack of public interest. *Massachusetts Furniture and Piano Movers Ass'n, Inc.*, Docket 9137 (Commission Order March 19, 1986); *Tristate Household Goods Tariff Conference, Inc.*, Docket 9184 (Commission Order July 5, 1985, 106 FTC 1); *Middle Atlantic Conference*, Docket 9185 (Commission Order June 27, 1985 105 FTC 406). Commission orders in the *Tristate* and *Middle Atlantic* matters specifically reference the fact that complaint counsel represented that all the elements of a state action defense as articulated by the Supreme Court in *Southern Motor Carriers* are available to the respondents. Thus, these two proceedings are not precedents for dismissal of this proceeding, since there has been no stipulation that all the elements of a state action defense are available to respondent. In *Mass. Movers* the Commission did not indicate the reasons for its determination that there was a lack of public interest in continuing that proceeding. Thus, *Mass. Movers* does not articulate a Commission policy or establish a precedent that can be applied to other rating bureau matters. Further, it must be assumed that the Commission is aware of its own docket of outstanding complaints, which includes this proceeding and one other rating bureau matter, *Motor Transport Association of Connecticut, Inc.*, Docket 9186. No order has been forthcoming to withdraw these matters from adjudication. Accordingly, there is no precedent available to the administrative law judge warranting dismissal of this proceeding. The ultimate determination of public interest in continuing this proceeding is for the Commission to make.

REMEDY

It was determined in my Order Granting In Part Complaint Counsel's Motion For Partial Summary Decision (Attachment I hereto) that respondent's collective ratemaking activities constitute price-fixing and as such is a *per se* violation of the Federal Trade Commission Act, absent a valid state action [36] defense. (Attachment I, pp. 23-25) Since it has been concluded herein that respondent's filing of collective freight rates in Massachusetts and New Hampshire

is not entitled to a state action exemption from the antitrust laws, a remedy must be entered.

The Commission has wide latitude in selecting the relief to remedy the practices found to be unlawful, *Jacob Siegel Co., v. FTC*, 327 U.S. 608, 611 (1946), and it need not confine the relief to the narrow path of the transgressor but "must be allowed to effectively close all roads to the prohibited goal so that its order may not be by-passed with impunity." *FTC v. Ruberoid Co.*, 343 U.S. 470, 473 (1952) Under this broad authority to select a remedy, complaint counsel has proposed an order that would prohibit respondent's collective ratemaking activities throughout its entire operating area, which includes Vermont, where respondent no longer formulates rates for its member carriers, and the States of Connecticut, Maine, and certain parts of New Jersey and New York, States not mentioned in the complaint.

Complaint counsel justifies the territorial coverage of the proposed order by the inclusion of a proviso in the order which would permit respondent to engage in collective ratemaking in any state which has a policy clearly articulated by the state to displace competition with respect to ratemaking and which policy is actively supervised by the state. Complaint counsel goes further and would require that the active supervision in such state consist of (1) notice reasonably calculated to notify the public, (2) affording members of the public an opportunity to provide written or oral comments on any joint tariff, and (3) issuing written explanations as to why the joint tariffs meet or fail to meet the statutory and regulatory criteria.

Complaint counsel's proposed remedy is not warranted by the record of this proceeding. As this record demonstrates, respondent's activities in Rhode Island are lawful under the state action exemption. Vermont has been stipulated out of this proceeding. The record is silent as to the availability to respondent of the state action defense in Connecticut, Maine, New Jersey and New York. The Commission has previously dismissed proceedings challenging collective rate formulation in Pennsylvania because of the availability of the state action defense in that state (*see* dismissals in *Tristate* and *Middle Atlantic, supra*). Presumably, each state where respondent files collectively formulated rates authorizes such joint activity. Accordingly, it appears appropriate to limit the remedy in this proceeding to those states where there is record evidence to support a conclusion that the state action defense is not available. Rather than place the burden on respondent to act at its peril in complying with state-authorized

activities, in an area of the law as uncertain as is the state action doctrine the burden should be on government to challenge respondent's activities where there is reason to believe there is a violation of the federal antitrust laws. [37]

Further, the proviso, which is included in complaint counsel's proposed order, is not in accord with my understanding of the present state of the law respecting the state action doctrine. Complaint counsel's proviso would limit respondent's filing of collectively determined rates to those states which follow the Areeda-Turner supervisory proposals; *i.e.*, reasonable notice, an opportunity for public comment, and a written opinion justifying the determination of the agency with respect to filed rates. As the Supreme Court has stated, active supervision should be left to the discretion of the state regulatory agencies; federal mandating of required procedures for state regulatory agencies to utilize in the course of their supervisory activities should be avoided, especially in an across-the-board order such as complaint counsel proposes.

The memorandum filed by the National Association Of Regulatory Utility Commissioners expresses concern that state regulatory agencies be left free to accept collective rates; that states be allowed to choose their own regulatory schemes; that federal antitrust laws not be used as an instrument for reformation of state regulatory policies. The concern of the Association is real and has been considered in the remedy to be entered. The order entered herein does not mandate the supervisory procedures which complaint counsel has proposed; regulatory agencies are left free to exercise their discretion in developing a regulatory policy. However, state regulatory policy and procedures must meet the requirements which the Supreme Court set forth in *Midcal*, and other decisions. There must be a clearly articulated state policy to replace competition with a regulatory structure, and there must be active supervision of the anticompetitive conduct. The remedy entered herein goes no farther than this existing precedent.

In *Mass. Movers*, 102 FTC 1176, 1225-1226 (1983), the Commission included some "fencing-in" provisions to prevent activities which facilitated price-fixing and which were used to exhort member carriers to match published rates. No such activity appears in this record; all of respondent's activities were open and above-board and undertaken in accordance with state authorization. Also, in the Commission's *Mass. Movers* proceeding, all of the respondent's collective rate activities were within Massachusetts where there was

held to be no state action defense available; in this proceeding respondent's activities in Rhode Island were found to be exempt from the federal antitrust laws, and activities in other states were not challenged. Therefore, some of the provisions of the *Mass. Movers* order have not been utilized in the order entered herein. Except as mentioned, the order in *Mass. Movers* has been used as a guideline in drafting an appropriate order in this proceeding. [38]

CONCLUSIONS OF LAW

1. The Federal Trade Commission has jurisdiction over the subject matter of this proceeding and over respondent herein.

2. The acts and practices charged in the complaint took place in or affecting commerce within the meaning of the Federal Trade Commission Act, as amended.

3. Respondent, its members, officers and directors, and others have been, and now are engaged in a continuing combination and conspiracy to fix rates charged by motor common carriers for the intrastate transportation of property within the Commonwealth of Massachusetts, and the States of New Hampshire and Rhode Island.

4. The acts and practices of respondent in the Commonwealth of Massachusetts and the State of New Hampshire, as set forth in paragraph 3 above, are to the prejudice and injury of the public and constitute unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act, as amended.

5. Respondent's activities in the Commonwealth of Massachusetts and the State of New Hampshire, as set forth in paragraphs 3 and 4 above, are not exempt from Section 5 of the Federal Trade Commission Act by reason of the *Parker v. Brown* "state action" doctrine.

6. Respondent's activities in the State of Rhode Island, as set forth in paragraph 3 above, are exempt from the prohibitions of the Federal Trade Commission act under the "state action" doctrine.

7. The order entered hereinafter is appropriate and warranted to remedy respondent's unlawful activities.

ORDER

I.

It is ordered, That New England Motor Rate Bureau, Inc., a

corporation, its successors and assigns, and its officers, agents, representatives, directors and employees directly or [39] through any corporation, subsidiary, division or other device shall forthwith cease and desist from:

1. Entering into, 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 carriers that compete for the intrastate transportation of property or related services, goods or equipment within the Commonwealth of Massachusetts and the State of New Hampshire.

2. Knowingly preparing, developing, disseminating or filing a proposed or existing tariff provision which contains collective rates for the intrastate transportation of property or other related services, goods or equipment within the Commonwealth of Massachusetts and the State of New Hampshire.

3. Providing information to any carrier about rate changes applicable to the intrastate transportation of property within the Commonwealth of Massachusetts and the State of New Hampshire ordered by any other carrier employing the publishing services of the respondent prior to the time at which such rate change becomes a matter of public record.

4. Inviting, coordinating or providing a forum for, including publication of an information bulletin, any discussion or agreement between or among competing carriers [40] concerning intrastate rates charged or proposed to be charged by carriers for the intrastate transportation of property or related services, goods or equipment within the Commonwealth of Massachusetts and the State of New Hampshire.

5. Suggesting, urging, encouraging, persuading or influencing in any way members to charge, file or adhere to any existing or proposed tariff provision which affects rates within the Commonwealth of Massachusetts and the State of New Hampshire, or otherwise to charge or refrain from charging any particular price for any services rendered or goods or equipment provided.

6. Agreeing with any carrier to institute automatic changes to rates on file for said carrier with the Commonwealth of Massachusetts and the State of New Hampshire.

II.

It is further ordered, That New England Motor Rate Bureau, Inc. shall, within six (6) months after service upon it of this order:

1. Take such action as may be necessary to effectuate cancellation and withdrawal of all tariffs and any supplements thereto on file with the Commonwealth of Massachusetts and the State of New Hampshire that establish rates for the intrastate [41] transportation of property or related services, goods or equipment by common carriers in Massachusetts and New Hampshire.

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 Commonwealth of Massachusetts and the State of New Hampshire.

III.

It is further ordered, That respondent shall within thirty (30) days after service upon it of this order, mail or deliver a copy of this order, under cover of the letter attached hereto as "Appendix," to each current member of respondent, and for a period of three (3) years from the date of service of this order, to each new member within ten (10) days of each such member's acceptance by respondent.

IV.

It is further ordered, That respondent notify the Commission at least thirty (30) days prior to any proposed change in the 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. [42]

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 years thereafter, and at such other times as the Commission may require by written notice to respondent, setting forth in detail the manner and form in which it has complied with this order.

Initial Decision

112 F.T.C.

APPENDIX

(Letterhead of The New England Motor Rate Bureau, Inc.)

Dear Member:

The Federal Trade Commission has ordered The New England Motor Rate Bureau, Inc. to cease and desist its tariff and collective rate-making activities in the Commonwealth of Massachusetts and the State of New Hampshire. A copy of the Commission Opinion 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 Bureau 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 in the Commonwealth of Massachusetts and the State of New Hampshire. Each member carrier must independently set its own rates for intrastate transportation of property or related services, goods or equipment within these States but may use the Association as a tariff publishing agent. [43]

(2) The Bureau is prohibited from providing a forum for its members for the purpose of discussing rates for the intrastate transportation of property within Massachusetts and New Hampshire.

(3) The Bureau may not provide non-public information to any carrier about intrastate rate changes in Massachusetts and New Hampshire ordered by another carrier.

(4) The Bureau is given six months to cancel all tariffs and tariff supplements currently in effect and on file in Massachusetts and New Hampshire referring to rates for the intrastate transportation of property or related services, goods or equipment within those states which were prepared, developed or filed by the Association.

(5) The Bureau is required to amend its by-laws to require its members to observe the provisions of the order as a condition of membership in the Association.

Sincerely yours,

General Manager

Enclosure

ATTACHMENT I

ORDER GRANTING IN PART COMPLAINT COUNSEL'S
MOTION FOR PARTIAL SUMMARY DECISION

By motion dated April 29, 1985, complaint counsel has requested a summary decision on all the issues for decision in this matter with the exception of respondent's

"state action" defense.¹ Since complaint counsel's motion is being granted in substantial part, this order sets forth those facts which are without substantial controversy, and the legal conclusions reached from such facts. An order directing further proceedings also is included.²

Preliminary Statement

The complaint herein issued on October 24, 1983. It charges respondent, its members, officers and directors, and others with a continuing combination and conspiracy to fix rates charged for the intrastate transportation of property within the states of Massachusetts, New Hampshire, Rhode Island and Vermont. The complaint alleges that respondent's membership consists of approximately 900 common carriers of property by motor vehicle, and that respondent, its members and others, have taken action to establish and maintain collective rates, which have the purpose of fixing, stabilizing or otherwise tampering with rates charged for the intrastate transportation of property [2] within the states of Massachusetts, New Hampshire, Rhode Island and Vermont, and that these collective rates have been filed with the state regulatory agencies in such states. This action is alleged to have deprived shippers and consumers of the benefits of free and open competition in the intrastate transportation of property within those states. Such acts, policies and practices are alleged to be to the prejudice and injury of the public and constitute unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act.

Respondent's answer, dated November 30, 1983, denied the charging allegations of the complaint, and sets forth thirteen defenses to the complaint. These defenses include statements that the complaint fails to state a claim on which relief can be granted; that respondent's members are subject to the Interstate Commerce Act, 49 U.S.C. 10101 *et seq.*, and exempt from regulation by the Federal Trade Commission; that respondent's member carriers are the real parties in interest and are indispensable parties to this proceeding; that regulation of the activities challenged in the complaint is within the exclusive jurisdiction of the several states; that the challenged activities are subject to a special regulatory scheme and because of the clear repugnancy between that regulatory scheme and the Federal Trade Commission Act, the latter is impliedly repealed; that the activities alleged in the complaint are exempt from the Federal Trade Commission Act under the doctrines of *Parker v. Brown* and *Noerr-Pennington*; that the activities alleged in the complaint are exempt from the provisions of the Federal Trade Commission Act by virtue of § 10706(b) of the Interstate Commerce Act, 49 U.S.C. 10706(b); that because of pervasive state regulation it would be unfair to hold respondent responsible for conduct implementing state regulation; that all matters raised by the complaint are within the primary jurisdiction of federal or state transportation regulatory agencies charged with the exclusive right and duty to regulate such matters and the Federal Trade Commission

¹ Complaint counsel's motion also seeks to strike certain of respondent's affirmative defenses. These contentions have been responded to by respondent (Respondent's Cross Motion For Summary Decision, pp. 32-36), and will be considered as part of complaint counsel's motion for partial summary decision.

² The determinations made herein were delayed pending a decision by the United States Court of Appeals For The First Circuit in *Massachusetts Furniture & Piano Movers Ass'n., Inc. v. FTC*, 773 F. 2d 391 (1st Cir. 1985), *reh. denied* (November 21, 1985). (See Complaint Counsel's Report On Status Of Proceeding, February 19, 1986)

has failed to exhaust these administrative remedies; and that this proceeding is barred by doctrines of laches, estoppel and/or waiver.

A prehearing conference was held on January 16, 1984, at which time the parties contemplated preparation and submission of a stipulation of facts. On March 23, 1984, the parties filed a stipulation of facts, and reserved the right to present further evidence into the record.

By order dated May 25, 1984, the undersigned denied a motion to quash certain subpoenas *duces tecum* issued to respondent and to its member carriers. In that order the undersigned determined that respondent is not a common carrier subject to the Acts to regulate commerce, since the Interstate Commerce Act defines a "motor common carrier" as one who holds "itself out to the general public to provide motor vehicle transportation for compensation," 49 U.S.C. § 10102(13), and respondent does not meet this definition. Further, it was [3] determined that respondent, as an agent for motor common carriers, does not qualify for an exemption under the Federal Trade Commission Act, see *Massachusetts Furniture and Piano Movers Ass'n, Inc.*, 102 FTC 1176, 1212-1213 (1983), and that respondent's member carriers were not indispensable parties in this proceeding. *Crush International Ltd., et al.*, 80 FTC 1023 (1972)

By order of August 7, 1984, complaint counsel's motion to seek court enforcement of subpoenas *duces tecum* addressed to respondent and certain of its member carriers was certified to the Commission. The Commission directed that court enforcement of the subpoenas be commenced (Commission Order, August 23, 1984), and enforcement of the subpoenas was ordered by the court on December 5, 1984. *FTC v. The New England Motor Rate Bureau, Inc., et al.*, Misc. No. 84-0268 (D.D.C. 1984) Subsequent to the court's order, on January 14, 1985, respondent and complaint counsel entered into a stipulation concerning the matters covered by the subpoenas.

Complaint counsel, on April 29, 1985, filed a motion for partial summary decision pursuant to Section 3.24 of the Commission's Rules of Practice. Respondent's answer to this motion was made in the form of a cross motion for summary decision. (See Cross Motion For Summary Decision, July 1, 1985.) Respondent's cross motion for summary decision has been considered in connection with this ruling. A separate ruling has been entered denying respondent's cross motion. (See Order Denying Respondent's Cross Motion For Summary Decision, March 7, 1986.)

Section 3.24 of the Commission's Rules of Practice authorizes any party to move with or without supporting affidavits for a summary decision in his favor upon all or any part of the issues being adjudicated. The granting of such a motion is directed where the affidavits and other evidence relied upon "show that there is no genuine issue as to any material fact and that the moving party is entitled to such a decision as a matter of law." (Section 3.24(a) (2)) Any such decision shall constitute the initial decision of the Administrative Law Judge.

Section 3.24 closely parallels Rule 56 of the Federal Rules of Civil Procedure. *The Hearst Corporation*, 80 FTC 1011, 1014 (1972) Summary judgment under Rule 56 may be granted only if there is no genuine issue as to any material fact or the inferences to be drawn from the undisputed facts. *United States v. Diebold, Inc.*, 369 U.S. 654 (1962); *Winters v. Highlands Ins.*, 569 F.2d 297 (5th Cir. 1978); *Handi Inv. Co. v. Mobil Oil Co.*, 550 F.2d 543 (9th Cir. 1977); *Weiss v. Kay Jewelry Stores, Inc.*, 470 F.2d 1259, 1261-62 (d.C. Cir. 1972) The moving party has the burden of establishing that no genuine issue of material fact exists; all doubts and inferences

are resolved against the movant; and summary judgment is improper if conflicting [4] inferences may be drawn from the same evidence. *Exnicious v. United States*, 563 F.2d 418 (10th Cir. 1977) This same standard has been accepted in Federal Trade Commission proceedings. *The Hearst Corporation, supra; American Medical Association*, Dkt. 9064, Order Denying Motion Of Respondent The American Medical Association ("AMA") For Summary Decision Dismissing The Complaint For Lack Of Jurisdiction, Apr. 26, 1976 Summary decision may be appropriate in an antitrust case, *First Nat. Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 290 (1968); especially where, as here, motive and intent are not an issue. See *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 467 (1962)

Full consideration has been given to the findings of fact and legal arguments presented by the parties. The Findings of Fact which follow are based on reliable evidence as to which there is no dispute as to authenticity or genuineness. This evidence consists principally of the pleadings, stipulations of fact, admissions by respondent, a deposition of respondent's General Manager, and certain other materials such as state regulatory statutes and rules as to which there is no dispute. Based on a careful study of the evidence presented by the parties hereto in support of and in opposition to the motion for partial summary decision, the following Findings of Fact and the inferences logically drawn from such facts are without substantial dispute.

Findings of Fact

1. Respondent, The New England Motor Rate Bureau, Inc. ("Bureau"), is a corporation, organized, existing and doing business under the laws of the Commonwealth of Massachusetts, with its office and principal place of business located at 14 New England Executive Park, Burlington, Massachusetts 01803. (Answer to Complaint at ¶ 6; CC Ex. A at 9)

2. Respondent Bureau is an organization of approximately 675 common carriers of property by motor vehicle engaged in the interstate and intrastate transportation of general commodities within the states of Massachusetts, New Hampshire, Rhode Island and Vermont. (Stipulation dated March 23, 1984 at ¶ 1)

3. Respondent Bureau was incorporated under the Laws of the Commonwealth of Massachusetts in 1936 as a successor to the Motor Truck Rate Bureau of Massachusetts, Inc., which was incorporated under the laws of the Commonwealth of Massachusetts in 1934. The latter organization functioned as the forum through which its members collectively formulated intrastate rates and classifications within Massachusetts. Respondent assumed that function respecting both interstate and intrastate rates and classifications in 1936. Since then it has functioned as the forum through which its members collectively formulated interstate and intrastate rates and classifications within the states of Massachusetts, New Hampshire, Rhode Island and Vermont. (Stipulation dated March 23, 1984 at ¶ 2; CC Ex. A at 9) [5]

4. Respondent Bureau issues tariffs and supplements thereto in which it publishes intrastate rates and commodity classifications on behalf of its motor common carrier members engaged in intrastate transportation of property within the states of Massachusetts, New Hampshire, Rhode Island and Vermont. (Stipulation dated March 23, 1984 at ¶ 3)

5. The Bureau's members are in competition among themselves and with other common carriers. (Answer to Complaint at ¶ 9)

6. The Bureau's members are entitled to, and do, among other things, vote for and elect the officers and directors of the Bureau. The control, direction and management of the Bureau is vested in the members of the Board of Directors, who employ a general manager who acts as chief administrative officer of the corporation with direct charge of and supervision over the affairs of the Bureau. (Complaint at ¶ 5; Answer to Complaint at ¶ 10; CC Ex. A at 20-21)

7. The Bureau has a Cost Research Department and an Accounting & Finance Department which gather financial information concerning motor carriers, including financial data furnished through a "Continuing Traffic Study" which is given to the General Rate and Classification Committee for its use in deciding if rates should be increased. (CC Ex. A at 37-40; CC Ex. C at 44-46)

8. The Bureau has a Legal Department which prepares and presents evidentiary submissions to state regulatory agencies and the Interstate Commerce Commission ("ICC") to justify rate change proposals. (CC Ex. A at 40-42; CC Ex. C at 46-47)

9. The Bureau's Legal Department also issues a "Watching Service Bulletin" which furnishes subscribing carrier members with information on tariffs filed with state motor carrier regulatory departments and the ICC for the carriers' use in deciding on changes in their tariffs. (CC Ex. A at 41-42; CC Ex. C at 47-48)

10. All of the members of the Bureau's Board of Directors and all of its officers are employees or officers of carrier members of the Bureau. (Stipulation dated March 23, 1984 at ¶ 10)

11. At its annual meeting the Bureau membership approves and ratifies the actions of the Bureau, its directors and its officers, since the last annual membership meeting. (Stipulation dated March 23, 1984 at ¶ 18)

12. Subsequent to appropriate state commission approval, rates published in Bureau intrastate general commodity tariffs for the states of Massachusetts, New Hampshire, Rhode Island and Vermont are charged to shippers utilizing the services of intrastate general commodity common carriers participating in the Bureau [6] intrastate tariffs within those four states. (Bureau response to Complaint Counsel's Second Request For Admissions dated March 15, 1985)

13. The Bureau carrier members listed in the Bureau's Participating Carrier Tariff as Massachusetts, New Hampshire, Rhode Island and Vermont intrastate carriers, participate in and charge the rates contained in the intrastate tariffs listed by number in The Participating Carrier Tariff adjacent to the names and addresses of those carrier members, except to the extent that they are party to tariff provisions rendering particular rates inapplicable for their account. (Stipulation dated March 23, 1984 at ¶ 20)

14. The Bureau carrier members listed in the Bureau's Coordinated Freight Classification as Massachusetts, New Hampshire, Rhode Island and Vermont intrastate carriers, participate in and apply the Bureau's Coordinated Freight Classification, except to the extent they are party to tariff provisions rendering particular Classification items inapplicable for their account. (Stipulation dated March 23, 1984 at ¶ 21)

15. Common carriers by motor vehicle engaged in the intrastate transportation of property within each of the states of Massachusetts, New Hampshire, Rhode Island and Vermont do so under certificates of public convenience and necessity granted by state regulatory agencies in the respective states. (Stipulation dated March 23, 1984 at ¶ 5)

16. The Bureau maintains a General Rate and Classification Committee (GRCC), made up of officers or employees of carrier members of the Bureau. Through the GRCC the Bureau's carrier members collectively formulate interstate and intrastate rates and classifications, including rates and classifications applicable to the intrastate transportation of general commodities of property within Massachusetts, New Hampshire, Rhode Island and Vermont, except that, since March, 1980, the committee, while continuing to consider proposals for changes in intrastate class rates, has not considered proposals to establish, change or cancel intrastate commodity rates. (Stipulation dated March 23, 1984 at ¶ 7; CC Ex. A at 24-35)

17. Member carriers of the Bureau indicate their formal acquiescence in the Bureau's tariffs by entering into an "Agreement as to Rate and Classification Procedures" with each other and with the Bureau. This agreement makes the Bureau the carrier members' agent and attorney in fact and establishes the collective rate-making procedures between the Bureau and its carrier members. (Stipulation dated March 23, 1984 at ¶ 11; CC Ex. A at 66)

18. The Bureau's docket bulletins, which contain GRCC meeting dates and rate and classification proposals concerning interstate and intrastate rates and classifications, are mailed at regular [7] intervals to carrier members participating in the Bureau's intrastate tariffs for the states of Massachusetts, New Hampshire, Rhode Island and Vermont, and to shippers and any other persons subscribing thereto. (Stipulation dated March 23, 1984 at ¶ 13; CC Ex. A at 27)

19. During the meetings of the GRCC, its members vote upon intrastate rate and classification proposals, except that since March 1980 the GRCC members have not voted upon proposals to establish, change or cancel intrastate commodity rates. Shippers, non-member carriers, and other interested parties may participate in discussions at these GRCC meetings but are not entitled to vote. (Stipulation dated March 23, 1984 at ¶ 14)

20. The tariffs and supplements published by the Bureau which have application to intrastate transportation in Massachusetts, New Hampshire, Rhode Island and Vermont, are filed by the Bureau's Tariff Publishing Department with the respective regulatory agencies of the four states and copies are sent to all members of the Bureau. (Stipulation dated March 23, 1984 at ¶ 15; CC Ex. C at 43-44)

21. The Bureau's Tariff Publishing Department mails an "advice of disposition" to all carrier members and subscribers to the docket bulletins after each meeting of the GRCC advising as to the action taken on proposals considered. (Stipulation dated March 23, 1984 at ¶ 16; CC Ex. C at 43-44)

22. Copies of the intrastate class, commodity or exceptions tariffs, or supplements thereto, which are approved by the GRCC, are printed, published or reproduced by the Bureau's Tariff Publishing Department and disseminated to carrier members and to any other persons subscribing thereto. (Stipulation dated March 23, 1984 at ¶ 17; CC Ex. C at 43-44)

23. The intrastate tariffs filed by the Bureau automatically go into effect on a date specified by respondent unless suspended by the state regulatory agency with which they are filed. (Mass. Gen. Laws Ann. ch. 159B § 6; R.I. Gen Laws Title 39 ch. 12 § 39-12-12; N.H. Code of Administrative Rules, ch. Puc 800 § PUC 802.11; Vt. Common Carrier Rate Schedule Filing Procedures § 1)

24. Before the establishment of the General Rate and Classification Committee in 1980, the rate-making activities of the Bureau were conducted by a Standing Rate

Committee and classification-making activities by a Classification Committee. (CC Ex. A at 24; CC Ex. B; CC Ex. C at 18, 22)

25. Each of these two committees was made up of three full time Bureau employees. (CC Ex. C at 19, 22)

26. These two committees were abolished because the Federal Motor Carrier Act of 1980 required that interstate rate and classification committee members be ICC licensed carrier members [8] of the Bureau, rather than Bureau employees. (CC Ex. C at 18, 22)

27. After the General Rate and Classification Committee was established, Mr. Leonard J. Duggan, Bureau General Manager, and a full time Bureau employee, who had chaired the Standing Rate Committee, became co-chairman of the General Rate and Classification Committee. (CC Ex. C at 5, 15-16, 19-20)

28. After the General Rate and Classification Committee was established, Mr. Edward Finnerty, a full time Bureau employee, who was a former member of the Classification Committee, also became co-chairman of the General Rate and Classification Committee. (CC Ex. C at 24)

29. At the same time that the General Rate and Classification Committee was established, the Bureau established a Rate Research Department and a Classification Research Department, both of which are also known as the Rate Analysis Section. (CC Ex. C at 20-23)

30. The former members of the Standing Rate Committee, full time Bureau employees, became the members of the Rate Research Department. (CC Ex. A at 99; CC Ex. 3 at 19-20)

31. The former members of the Classification Committee, full time Bureau employees, became the members of the Classification Research Department. (CC Ex. A at 111; CC Ex. C at 22-23)

32. Mr. Leonard J. Duggan, Bureau General Manager and Co-chairman of the General Rate and Classification Committee is, and has been since its inception, manager of the Rate Research Department. (CC Ex. C at 20-21)

33. The other Co-chairman of the General Rate and Classification Committee, Mr. Edward Finnerty, who was a former member of the Classification Committee, is manager of the Classification Research Department. (CC Ex. C at 24-25)

34. The Rate Research Department administers support services to the General Rate and Classification Committee by, *e.g.*, researching and analyzing data pertaining to rate proposals for the information of the General Rate and Classification Committee for its consideration in rate change proposals. (CC Ex. A at 98-103; CC Ex. C at 21-22)

35. The Classification Research Department renders support services to the General Rate and Classification Committee by, *e.g.*, researching and analyzing data pertaining to classification change proposals for the information of the General Rate and Classification Committee. (CC Ex. A at 111; CC Ex. C at 24-25)

36. Any change in the classification rating of a given commodity listed in the Bureau's Coordinated Freight [9] Classification Tariff will have an effect on the charge for transportation of that commodity under the Bureau's intrastate class rate tariffs. (CC Ex. C at 48-55)

37. The Bureau files a Section 10706(b) Agreement with the Interstate Commerce Commission which, when approved by the ICC, gives the Bureau limited immunity from the antitrust laws. (49 U.S.C. 10706). The Section 10706(b) Agreement filed by

the Bureau with the ICC is neither filed with, approved by, nor required by, the state regulatory agencies in Massachusetts, New Hampshire, Rhode Island or Vermont. (CC Ex. C at 25-26)

38. The Bureau does not file an agreement similar to the Section 10706(b) Agreement filed with the ICC, with the states of Massachusetts, New Hampshire, Rhode Island and Vermont with respect to intrastate rates. (CC Ex. C at 27-28)

39. The Bureau does not file its Massachusetts class rate tariff No. 524 with the Interstate Commerce Commission because it only applies on intrastate Massachusetts rates. (CC Ex. C at 28)

40. The Bureau does not file its Rhode Island intrastate tariff No. 320 with the Interstate Commerce Commission because it contains only intrastate Rhode Island rates. (CC Ex. C at 28-29)

41. The Bureau files its tariff No. 503, which contains intrastate class rates for New Hampshire and Vermont, with the Interstate Commerce Commission, but only because that tariff is also an interstate tariff. (CC Ex. C at 29)

42. Bureau carrier members holding only intrastate operating authority may serve on the Bureau's General Rate and Classification Committee. (CC Ex. C at 33)

43. The Bureau does not perform any transportation of general commodities. (Bureau Response to Complaint Counsel's First Request for Admissions, dated April 20, 1984 at ¶ 1)

44. The Bureau does not hold a certificate of public convenience and necessity issued by the Interstate Commerce Commission, Massachusetts Department of Public Utilities, Rhode Island Division of Public Utilities, New Hampshire Public Utilities Commission or Vermont Agency of Transportation. (Bureau Response to Complaint Counsel's First Request for Admissions, dated April 20, 1984 at ¶ 2)

45. The Bureau has 447 carrier members that hold certificates of public convenience and necessity issued by the Massachusetts Department of Public Utilities and participate in the Bureau's Massachusetts intrastate tariffs. Of those 447 carrier members, 315 also hold certificates of public convenience and necessity issued by the Interstate Commerce Commission and participate in the Bureau's interstate tariffs. (Stipulation dated March 23, 1984 at ¶ 25) [10]

46. The Bureau has 26 carrier members that hold certificates of public convenience and necessity issued by the New Hampshire Public Utilities Commission and participate in the Bureau's New Hampshire intrastate tariffs. All 26 of those carrier members also hold certificates of public convenience and necessity issued by the Interstate Commerce Commission and participate in the Bureau's interstate tariffs. (Stipulation dated March 23, 1984 at ¶ 26)

47. The Bureau has 80 carrier members that hold certificates of public convenience and necessity issued by the Rhode Island Division of Public Utilities and participate in the Bureau's Rhode Island intrastate tariffs. Of those 80 carrier members, 59 also hold certificates of public convenience and necessity issued by the Interstate Commerce Commission and participate in the Bureau's interstate tariffs. (Stipulation dated March 23, 1984 at ¶ 27)

48. The Bureau has three carrier members that hold certificates of public convenience and necessity issued by the Vermont Agency of Transportation and participate in the Bureau's Vermont intrastate tariffs. All three of those carrier members also hold certificates of public convenience and necessity issued by the

Interstate Commerce Commission and participate in the Bureau's interstate tariffs. (Stipulation dated March 23, 1984 at ¶ 28)

49. Of the 258 Bureau carrier members that filed annual reports with the Massachusetts Department of Public Utilities for calendar year 1983, 143 reported from 50% to 100% of their revenues as derived from intrastate Massachusetts transportation operations. (CC Ex. D)

50. The Interstate Commerce Commission may not in any manner or for any purpose regulate the rates charged for intrastate transportation of property by motor common carriers. (49 U.S.C. 10521(a)(b))

51. The states of Massachusetts, New Hampshire, Rhode Island and Vermont have no rules, regulations or statutes pertaining to the establishment or operation of motor carrier rate bureaus within these states. (Mass. Gen. Laws Ann. ch. 159B; R.I. Gen. Laws Title 39 ch. 12; N.H. RSA ch. 375-B; Vt. Stat. Ann. Title 38 ch. 5)

52. Carrier members of the Bureau transport substantial numbers of shipments of property which originate and terminate either within the Commonwealth of Massachusetts, the State of New Hampshire, the State of Rhode Island or the State of Vermont, for private businesses with headquarters and principal places of business located outside of the state within which the member carriers are located. The rates charged for that transportation [11] are governed by the Bureau's intrastate tariffs. (Stipulation dated January 14, 1985 at ¶ 1)

53. The Bureau's carrier members transmit bills for intrastate transportation services to these private businesses at their headquarters and principal places of business located outside of the Commonwealth of Massachusetts or States of New Hampshire, Rhode Island and Vermont. (Stipulation dated January 14, 1985 at ¶ 2)

54. The private businesses for whom property is transported by carrier members of the Bureau within the Commonwealth of Massachusetts and States of New Hampshire, Rhode Island and Vermont, which businesses have their headquarters and principal places of business located outside of the state within which the carrier members are located, transmit substantial sums of money, in payment for intrastate transportation services rendered, to carrier members of the Bureau located in the Commonwealth of Massachusetts and States of New Hampshire, Rhode Island and Vermont. (Stipulation dated January 14, 1985 at ¶ 3)

55. Bureau carrier members located in Massachusetts, New Hampshire, Rhode Island and Vermont transport substantial quantities of general commodities of property from warehouses and distribution centers located within those states to customers located within the same state as the warehouse or distribution center, which property had been transported from out-of-state origin points to such warehouses and distribution centers for distribution within those states or for distribution in other states. In many cases Bureau carrier members charge shippers or shippers' customers the intrastate rates contained in the Bureau's intrastate tariffs for the intrastate transportation of these general commodities of property from warehouses and distribution centers. (Answer to Complaint at 12; Stipulation dated January 14, 1985 at ¶ 4)

56. Bureau carrier members located in the Commonwealth of Massachusetts, State of New Hampshire, State of Rhode Island and State of Vermont purchase substantial amounts of equipment and other goods for use in their transportation business, including their intrastate transportation business, from private businesses with headquarters and principal places of business located outside of those states, and the

equipment and other goods are transported into the Commonwealth of Massachusetts, and States of New Hampshire, Rhode Island and Vermont. (Stipulation dated January 14, 1985 at ¶ 5)

57. Bureau carrier members located in the Commonwealth of Massachusetts and States of New Hampshire, Rhode Island and Vermont transmit substantial sums of money in payment for equipment and other goods purchased for use in their transportation business, including their intrastate transportation business, to private businesses from whom the equipment and other goods were purchased, whose headquarters and [12] principal places of business are located outside of those states. (Stipulation dated January 14, 1985 at ¶ 6)

58. Many of the Bureau's active members are persons, partnerships or corporations located in states other than Massachusetts. (Stipulation dated January 14, 1985 at ¶ 7)

59. The Bureau's out-of-state members pay substantial amounts of money for annual membership dues to the Bureau and fees for services performed by the Bureau on their behalf, which are transmitted across state lines to the Bureau's offices in Massachusetts. (Stipulation dated January 14, 1985 at ¶ 8).

60. The Bureau purchases substantial amounts of equipment and supplies from private businesses with headquarters and principal places of business located outside of Massachusetts, and transmits substantial sums of money to these businesses in payment for such equipment and supplies. (Stipulation dated January 14, 1985 at ¶ 9)

Conclusions

Paragraphs eight and nine of the complaint allege that respondent, its members, officers and directors, and others have engaged in a combination, conspiracy, agreement, or concerted action to unlawfully restrict, suppress or eliminate competition among motor common carriers engaged in the intrastate transportation of property within the states of Massachusetts, New Hampshire, Rhode Island and Vermont by establishing and maintaining collective rates for the intrastate transportation of property within said states. These acts and practices are alleged to fix, stabilize, maintain, and otherwise interfere with the intrastate rates charged by motor common carriers for the transportation of property within the states of Massachusetts, New Hampshire, Rhode Island and Vermont, depriving shippers and consumers within these states of the benefits of free and open competition in the intrastate transportation of property within said states.

Section 3.11(b)(2)(c) of the Commission's Rules of Practice requires only that the complaint contain a factual statement sufficiently clear and concise to inform respondent with reasonable definiteness of the types of acts or practices alleged to be in violation of law, and to enable respondent to frame a responsive answer. Commission complaints, like those in the federal courts, are designed only to give a respondent "fair notice of what the ... claim is and the grounds upon which it rests." *Conley v. Gibson*, 355 U.S. 41, 47 (1957) "Only a generalized statement of the facts from which the [Respondent] may form a responsive pleading is necessary" in order that a complaint state a claim upon which relief may be granted. *New Home Appliance Center, Inc. v. Thompson*, 250 F.2d 881, 883 (10th Cir. 1957) Moreover, in antitrust cases, all that is required to [13] state a claim of a violation of the Sherman Act is "an allegation of a conspiracy, contract or combination which unreasonably

restrains interstate commerce." *Burch v. Goodyear Tire and Rubber Co.*, 420 F. Supp. 82, 91 (D.Md. 1976), *aff'd*, 554 F.2d 633 (4th Cir. 1977)

As stated, the complaint charges a violation of law through collective rate-making by a combination of competitors which fixes, stabilizes, or maintains rates for the intrastate shipment of property. It has long been held that the Commission has jurisdiction over defendants engaged in a price-fixing combination. *FTC v. Pacific States Paper Trade Ass'n*, 273 U.S. 52 (1927); *see also FTC v. Cement Institute*, 333 U.S. 683, 693 (1948)

From the above, it is clear that the Commission's complaint states a cause of action that could constitute a violation of the Federal Trade Commission Act. Respondent's first defense, failure to state a claim on which relief can be granted, and respondent's fourth defense, lack of subject matter jurisdiction, are stricken.

As its second defense respondent asserts that it is "a non-profit membership organization of motor common carriers subject to the Interstate Commerce Act" and, as such, is exempt from FTC regulation or investigation. (Respondent's Answer at 4)

It is well established that the Commission has substantive authority to regulate not-for-profit corporations that are not primarily eleemosynary. In *FTC v. National Commission on Egg Nutrition*, 517 F.2d 485 (7th Cir. 1975), *cert. denied*, 426 U.S. 919 (1976), the court quoted the Eighth Circuit's opinion in *Community Blood Bank of Kansas City Area, Inc. v. FTC*, 405 F.2d 1011, 1017 (8th Cir. 1969), wherein the Eighth Circuit interpreted the legislative history of Section 4 of the FTC Act, stating:

Congress did not intend to provide a blanket exclusion of all non-profit corporations, for it was also aware that corporations ostensibly organized not-for-profit, such as trade [14] associations, were merely vehicles through which a pecuniary profit could be realized for themselves or their members.³

517 F.2d at 488.

In *American Medical Ass'n*, 94 FTC 701 (1979), the Commission concluded that it could assert jurisdiction over a respondent that is "engaged substantially in activities which confer a pecuniary benefit upon [its] members." 94 FTC at 986 The Second Circuit Court of Appeals, in affirming the Commission's jurisdictional determination, found FTC jurisdiction even "where [t]he business aspects of the activities of the petitioners [were] considered secondary to the charitable and social aspects of their work." *American Medical Assoc. v. FTC*, 638 F.2d 443, 448 (2d Cir. 1980), *aff'd by an evenly divided court*, 455 U.S. 676 (1982).

Clearly, in the present matter, the Bureau was organized for the profit of its motor common carrier members, and its collective rate-making activities enure to the financial benefit of its carrier members. The membership of the Bureau is composed of motor common carriers. (F. 2) All of the members of the Bureau's Board of Directors and all of its officers are employees or officers of carrier members of the Bureau. (F. 10) At its annual meeting the Bureau membership approves and ratifies the actions of the Bureau, its directors and its officers, since the last membership

³ The court, in *Community Blood Bank*, cited a number of court cases where the Commission has successfully exercised jurisdiction over trade associations; specifically, *FTC v. Cement Institute*, 333 U.S. 683 (1948); *Fashion Originators' Guild v. FTC*, 312 U.S. 457 (1941); *Millinery Creators Guild, Inc. v. FTC*, 312 U.S. 469 (1941); *Pacific States Paper Trade Ass'n v. FTC*, 273 U.S. 52 (1927); *California Lumbermen's Council v. FTC*, 115 F.2d 178 (9th Cir. 1940), *cert. den.*, 312 U.S. 709 (1941); *Chamber of Commerce v. FTC*, 13 F.2d 673 (8th Cir. 1926). *Community Blood Bank of Kansas City Area, Inc. v. FTC*, 405 F.2d 1011, 1019 (8th Cir. 1969)

meeting. (F. 11) The Bureau is supported by membership dues and fees paid by its carrier members. (See F. 59)

Among the purposes for which the corporation was formed, as set forth in its Articles of Organization, is the coordination of "the activities of motor freight rate bureaus and individual operators engaged in the transportation of freight and express by motor vehicle in the development of proper and legal rates, schedules and classifications" and "[t]o compile, publish and file as agent the rates, classifications, tariffs, and schedules of charges of common and contract carriers with state, federal and other regulatory bodies...." (Stipulation dated March 23, [15] 1984 at ¶ 11) The activities of the Bureau's General Rate and Classification Committee, which is composed of officers and employees of carrier members (F. 16), in compiling and approving proposals for changes in rates and classifications, and of its Tariff Publishing Department in the preparation, publication and filing of tariffs and supplements with federal and state agencies, obviously enure to the financial benefit of its carrier members. (F. 16-22)

Moreover, supported by dues of its members, the Bureau maintains a Rate Research Department, a Classification Research Department, a Legal Department, a Cost Research Department, and an Accounting and Financial Department which serve the business interests of the carrier members. The Rate Research Department, Classification Research Department, Cost Research Department, and Accounting and Finance Department collect and develop data for statistical and cost research purposes, which is used to justify rate increases for carrier members before regulatory bodies. (F. 7, 34-35) The Legal Department's employees appear before federal and state regulatory boards and agencies to present evidence and advocate Bureau justifications for rate increases in its filed tariffs. (F. 8-9) Such activity enures to the benefit of respondent's carrier members.

Taking all the above factors together, the character of its membership, source of funding, its origin, its functions, and its publications, it is manifest that respondent is not primarily an eleemosynary corporation, but is engaged in business practices through which its members realize a pecuniary benefit. Thus, the Commission has jurisdiction over respondent and its activities. See *National Commission On Egg Nutrition*, 80 FTC 89, 177 (1976), *aff'd*, 517 F.2d 485 (7th Cir. 1975), *cert. denied*, 426 U.S. 919 (1976).

Nor is respondent exempt from Commission jurisdiction under either section 5(a)(2) or Section 6(a) of the Federal Trade Commission Act, which sections exempt "common carriers subject to [16] the Acts to regulate commerce."⁴ Respondent does

⁴ Section 5(a)(2) of the Federal Trade Commission Act, 15 U.S.C. 45(a)(2), reads as follows:

The Commission is empowered and directed to prevent persons, partnerships, or corporations except banks, common carriers subject to the Acts to regulate commerce, air carriers and foreign air carriers subject to the Federal Aviation Act of 1958, and persons, partnerships, or corporations insofar as they are subject to the Packers and Stockyards Act, 1921, as amended, except as provided in section 406(b) of said Act, from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.

Section 6(a) of the Federal Trade Commission Act, 15 U.S.C. 46(a), reads as follows:

The Commission shall also have power—

(a) To gather and compile information concerning, and to investigate from time to time the organization, business, conduct, practices and management of any person, partnership, or corporation engaged in or whose business affects commerce, excepting banks, savings and loan institutions described in section

(footnote cont'd)

not possess a certificate of public convenience and necessity issued by the Interstate Commerce Commission (F. 44), and does not perform any transportation of general commodities. (F. 43) Thus, respondent is not a "motor common carrier" as that term is defined in the Interstate Commerce Act, because it does not hold "itself out to the general public to provide motor vehicle transportation for compensation." 49 U.S.C. 10102(12) Consequently, respondent is not an exempt common carrier within the aforesaid provisions of the Federal Trade Commission Act.

The argument that the Bureau is merely an agent for, or alter ego of, its common carrier members and therefore exempt from FTC jurisdiction must also be rejected. The Commission, in responding to a similar argument in *Mass. Movers*, stated:

The fact that the Association operates as an agent for common carriers, some of which are subject to the ICC, does not qualify it for a common carrier exemption. See *Breen Air Freight, Ltd. v. Air [17] Cargo, Inc.*, 470 F.2d 767, 771-73 (2d Cir. 1972), *cert. denied*, 411 U.S. 932 (1973), where a corporation formed solely to act as agent for airlines for terminal and cartage services was deemed not an "air carrier" under the Federal Aviation Act for purposes of federal antitrust jurisdiction; see also *Official Airline Guides, Inc. v. FTC*, 630 F.2d 920, 923 (2d Cir. 1980), *cert. denied*, 450 U.S. 917 (1981).

Massachusetts Furniture and Piano Movers Ass'n, 102 FTC 1176, 1212-13.

Nor does respondent derive any immunity from FTC jurisdiction from the fact that some of its members are common carriers subject to the Interstate Commerce Act. By respondent's own figures, approximately 27% of its member carriers do not operate in interstate commerce and, therefore, are never subject to the Interstate Commerce Act. (F. 45-48) The Commission, in *Mass. Movers*, considered a similar argument, and rejected the claim of exemption from its jurisdiction. The Commission stated:

Respondent argues that the Association derives immunity from the fact that some of its members are interstate carriers that are subject to ICC jurisdiction. It is questionable whether the status of the Association's membership is relevant to this case: the carrier members are not named in the complaint and the challenged conduct is that of the Association. However, since at least 50% of the Association's members are wholly intrastate carriers, its derived jurisdictional status can just as easily be characterized as nonimmune. In fact, cases construing analogous exemptions listed in FTCA § 5(a)(2) have held that membership by non-qualifying entities subjects an association to antitrust scrutiny. See e.g., *Case Swayne Co. v. Sunkist Growers, Inc.*, 389 U.S. 384 (1967), *rehearing denied*, 390 U.S. 930 (1968); *Crosse & Blackwell Co. v. FTC*, 262 F.2d 600 (1959)

102 FTC at 1213.

The United States Court of Appeals for the First Circuit in its consideration of the *Mass. Movers* proceeding, found no occasion to overturn the Commission's finding of jurisdiction over an organization similar in composition and activity to the present respondent. *Massachusetts Furniture & Piano Movers Ass'n, Inc. v. FTC*, 773 F.2d 391 (1st Cir. 1985)

Respondent's defenses raising the issue of primary jurisdiction and exhaustion of

18(f)(3), and common carriers subject to the Act to regulate commerce, and its relation to other persons, partnerships, and corporations.

administrative remedies are without merit. The Federal Trade Commission has sole responsibility for and jurisdiction to enforce the Federal Trade [18] Commission Act. The complaint herein charges a violation of that Act by the collective formulation of rates on intrastate shipments. The Interstate Commerce Commission has no jurisdiction over intrastate rates, 49 U.S.C. 10521(b)(2); therefore, resort to the ICC would be a useless act. There is no requirement that the Federal Trade Commission, a federal agency, exhaust state administrative remedies, if any, in enforcing the provisions of the Federal Trade Commission Act, a federal statute. The doctrine of primary jurisdiction is not applicable in such a situation. See *Ricci v. Chicago Mercantile Exchange*, 409 U.S. 289, 299-300 (1973).

It has been previously determined, in an earlier order entered in this proceeding, that respondent's motor carrier members are not indispensable parties to this proceeding. (Order Denying Motion To Quash Subpoenas Duces Tecum And Dismiss The Complaint, May 25, 1984, at 4) The notice of contemplated relief set forth in the complaint would apply only to respondent; there is no relief proposed as to respondent's carrier members. In the *Mass. Movers* proceeding, the Commission did not name any member carriers as a party to that proceeding, and relief was entered only as to the association. There are numerous antitrust proceedings, both in the federal courts and at the Commission, where it was determined unnecessary to join in the proceeding all parties to a contract the legality of which was being challenged in the proceeding. See *Crush International Ltd.*, 80 FTC 1023 (March 23, 1972); *L.G. Balfour Co. v. FTC*, 442 F.2d 1 (7th Cir. 1971) (contracts with fraternities cancelled, although fraternities were not party to litigation) Thus, respondent's carrier members are not indispensable parties to this proceeding.

As its Eighth defense respondent asserts that Section 10706(b) of the Interstate Commerce Act ("IC Act") (formerly Section 5(a) of the Reed-Bulwinkle Act, 49 U.S.C. 5(b)), exempts its collective rate-making activities from "the proscriptions of the (FTC) Act." (Respondent's Answer at 6) This provision of the IC Act provides for collective rate-making agreements between motor common carriers with respect to interstate rates, the parties to which, if the agreements are approved by the [19] Interstate Commerce Commission, are exempt from the antitrust laws "with respect to making or carrying out the agreement."⁵

Section 10706(b) of the IC Act expressly applies only to collective *interstate* rate-making, and as the agency responsible for administering the National Transportation Policy, the ICC has consistently held that the IC Act's Section 10706(b) exemption does not extend to intrastate rate-fixing. See, e.g., *Alaska Carriers Association*, 321

⁵ Section 10706(b) provides, in pertinent part, that:

[A] motor common carrier of property providing transportation or service subject to the jurisdiction of the Commission ... may enter into an agreement with one or more such carriers concerning rates ... allowances, classifications, divisions, or rules related to them, or procedures for joint consideration, initiation, or establishment of them. Such agreement may be submitted to the Commission for approval by any carrier or carriers which are parties to such agreement and shall be approved by the Commission upon a finding that the agreement fulfills each requirement of this subsection, unless the Commission finds that such agreement is inconsistent with the transportation policy set forth in section 10101(a) of this title. The Commission may require compliance with reasonable conditions consistent with this subtitle to assure that the agreement furthers such transportation policy. If the Commission approves the agreement, it may be made and carried out under its terms and under the conditions required by the Commission, and the antitrust laws, as defined in the first section of the Clayton Act (15 U.S.C. 12), do not apply to parties and other persons with respect to making or carrying out the agreement.

I.C.C. 7, 10 (1963); *Ohio Motor Freight*, 311 I.C.C. 127, 128 (1960); *Pacific Motor Tariff Bureau, Inc.*, 313 I.C.C. 406, 407-08 (1961) Respondent's argument was expressly rejected by the Fifth Circuit in *U.S. v. Southern Motor Carriers Rate Conference, Inc.*, 672 F.2d 469 (5th Cir. 1982), where, after discussing the provisions of Section 10706(b) of the IC Act, the court noted that "[t]he ICC has no similar jurisdiction over intrastate motor carrier rates. Indeed, 49 U.S.C. 10521(b) expressly reserves this area for state regulation." 672 F.2d at 475 n. 9 The First Circuit, in *Mass. Movers*, specifically rejected any statutory immunity from the Federal Trade Commission Act for any collective intrastate ratemaking. 773 F.2d at 394 Consequently, since the complaint in this matter addresses collective intrastate rate-fixing, the defense is insufficient and must be stricken. [20]

As its Twelfth defense respondent declares that this proceeding is barred by the doctrines of "laches, estoppel and/or waiver" because for nearly fifty years the Government has allegedly permitted and even encouraged the conduct which it now seeks to hold violative of the antitrust laws. (Respondent's Answer at 7) It is well-settled that the doctrines of laches, estoppel and waiver are inapplicable as a defense to a suit brought by the government to enforce the antitrust laws. *U.S. v. New Orleans Chapter, Associated General Contractors*, 382 U.S. 17 (1965), *reversing, per curiam*, 238 F. Supp. 273 (E.D. La. 1964); *U.S. v. Firestone Tire and Rubber Co.*, 374 F. Supp. 431, 433 (N.D. Ohio 1974); *American Motor Inns, Inc. v. Holiday Inns, Inc.*, 365 F. Supp. 1073, 1098 (D.N.J. 1973); *see also Horizon Corp.*, 97 FTC 464, 860 (1981) Moreover, any knowledge of or acquiescence in respondent's anticompetitive conduct by federal officials is legally irrelevant. *See U.S. v. Maryland & Virginia Milk Producers Association*, 167 F. Supp. 799, 808 (D.D.C. 1958); *U.S. v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 225-226 (1940)

Because respondent's twelfth defense is insufficient as a matter of law, it is stricken.

Respondent's answer to the complaint has denied that its activities were in or had an affect upon interstate commerce (Respondent's Answer to Complaint ¶ 6), and, as its Fourth Defense, respondent has asserted that the "activities alleged in the Complaint to be in violation of the Federal Trade Commission Act" were "within the exclusive jurisdiction of the several States...." (Respondent's Answer at 5)

Under the provisions of Section 5 of the Federal Trade Commission Act, unfair methods of competition "in or affecting commerce" are declared unlawful. The "affecting commerce" requirement is satisfied if some nexus exists between the acts and practices at issue and interstate commerce. Purely intrastate activities are deemed to "affect commerce" if the activity, local in nature, "has an effect on some other appreciable activity demonstrably in interstate commerce." *McLain v. Real Estate Bd. of New Orleans, Inc.*, 444 U.S. at 242 (1980); *see also Hospital Building Co. v. Trustees of Rex Hospital*, 425 U.S. 738 (1976) To establish the jurisdictional element of a Section 5 violation, "it would be sufficient [for complaint counsel] to demonstrate a substantial effect on interstate commerce" generated by respondent's overall rate bureau activities, a more particularized showing is not required. *McLain v. Real Estate Bd. of New Orleans, Inc.*, 444 U.S. at 242

In the conduct of their business, Bureau carrier members invoice and receive substantial sums of money from private businesses for rendering intrastate transportation services, which invoices and money flow across state lines. (F. 52-54) The prices charged for these transportation services are [21] determined by the

Bureau's tariffs (F. 52), and thus directly affects the amount of money flowing across state lines.

Bureau carrier members transport substantial quantities of general commodities of property from warehouses and distribution centers located in Massachusetts, New Hampshire, Rhode Island and Vermont to points within those states. These general commodities of property had been transported from out-of-state origin points to such warehouses and distribution centers. Consequently, these commodities have been transported in a continuous stream from points out of state to destinations within each of the states. The Bureau carrier members' intrastate transportation of such commodities are an integral part of the commodities' overall transportation, resulting in a substantial and direct effect upon interstate commerce. *Northern California Pharmaceutical Ass'n v. United States*, 306 F.2d 379, 387 (9th Cir.), cert. denied, 371 U.S. 862 (1982) In many cases the rates charged for the transportation of these general commodities are those contained in respondent's intrastate tariffs (F. 55), thus affecting interstate commerce.

Bureau carrier members purchase substantial amounts of equipment and other goods used in their intrastate transportation business from out-of-state suppliers. These supplies and equipment are transported into Massachusetts, New Hampshire, Rhode Island and Vermont from points outside such states. (F. 56-57) These interstate purchases are affected by respondent's activities to the extent that monies used for these purchases are derived from revenues for intrastate transportation services, the rates for which are established by the Bureau's tariffs.

Respondent's out-of-state carrier members pay substantial amounts of money for membership dues and fees to the Bureau, which money flows across state lines, and the Bureau transmits substantial sums of money to out-of-state businesses in payment for goods and supplies purchased for use in its business. (F. 58-60) This flow of funds substantially affects interstate commerce. *Rex Hospital, supra*; *Bodicker v. Arizona State Dental Ass'n*, 549 F.2d 626 (9th Cir.), cert. denied, 434 U.S. 825 (1977); *Evans v. S.S. Kresge Co.*, 544 F.2d 1184 (3d Cir. 1976), cert. denied, 433 U.S. 908 (1977)

The record in this proceeding clearly demonstrates that respondent's challenged acts and practices are in or affecting commerce, as commerce is defined in the Federal Trade Commission Act.

Respondent's Seventh Affirmative Defense alleges that its activities in connection with collectively formulating rates are protected by the *Noerr-Pennington* doctrine, which permits people to petition the government about matters in which they have an interest. *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657 (1985) Respondent has renewed this [22] assertion in its cross motion. (Respondent's Cross Motion For Summary Decision, pp. 35-36)

The *Noerr-Pennington* doctrine holds that attempts to influence governmental action are immune from prosecution as a violation of the Sherman Act, absent circumstances which constitute a "sham" or an abuse of process. The doctrine protects political activity, not collective ratemaking by private parties. "[N]othing in the *Noerr* opinion implies that the mere fact that a state regulatory agency may approve a proposal included in a tariff ... is a sufficient reason for conferring antitrust immunity on the proposed conduct." *Cantor v. Detroit Edison Co.*, 428 U.S. 579,

601-602 (1976); see also *Litton Systems, Inc. v. AT&T*, 700 F.2d 785 (2d Cir. 1983), cert denied, 104 S. Ct. 984 (1984).

The Commission, in *Mass. Movers*, held in a proceeding substantially similar to this present matter, that the *Noerr-Pennington* doctrine did not extend to collective ratemaking by a private association:

The *Noerr-Pennington* doctrine affords protection to certain joint efforts by private parties to influence governmental action, even where the motive of the private parties is to obtain an anticompetitive result. The anticompetitive conduct challenged here, however, cannot be characterized as a joint effort by the Association and its members to induce the MDPU to require collective ratemaking; the conduct challenged is the concerted behavior of the Association and its members in agreeing on the rates that they would include in their tariff and would charge the public. Such conduct, which is neither an effort to influence government action nor required in order to make such an effort, is not encompassed within the doctrine.

102 FTC 1224. This issue was not raised on appeal to the First Circuit. Thus, the Commission's determination stands, and respondent's defense based on *Noerr-Pennington* is stricken.

Paragraphs eight and nine of the complaint allege that respondent's collective rate-making activities violate Section 5 of the Federal Trade Commission Act. The record evidence establishes that respondent's motor carrier members, through respondent's General Rate and Classification Committee which is composed of officers or employees of the motor carrier members, collectively formulate intrastate rates and classifications applicable to the intrastate transportation of general commodities of property within Massachusetts, New Hampshire, Rhode Island and Vermont. (F. 16) The rates and classifications [23] which are collectively formulated, are filed by respondent with the regulatory authorities of aforesaid states (F. 20), where they automatically go into effect unless suspended by the regulatory agency of each state. (F. 23) These rates which have been collectively formulated and filed with and approved by each state are charged to shippers utilizing the services of intrastate general commodity motor common carriers participating in the respondent's intrastate tariffs within the four states. (F. 12, Respondent's Answer To Complaint ¶ 2)

Agreements among competitors affecting price have long been held to violate the antitrust laws, notwithstanding any argument that may be advanced to justify them. "Any combination which tampers with price structures is engaged in an unlawful activity.... The [Sherman] Act places all such schemes beyond the pale and protects that vital part of our economy against any degree of interference.... [Congress] has not permitted the age-old cry of ruinous competition and competitive evils to be a defense to price-fixing conspiracies." *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 221 (1940) As the Supreme Court stated in *United States v. National Association of Real Estate Boards*, 339 U.S. 485, 489 (1950): "Price-fixing is *per se* an unreasonable restraint of trade. It is not for the courts to determine whether in particular settings price-fixing serves an honorable or worthy end.... [t]hat is the teaching of an unbroken line of decisions."

The Supreme Court's decision in *Arizona v. Maricopa County Medical Society*, 102 Sup. Ct. 2466 (1982) is instructive on the application of the *per se* rule to price-fixing conspiracies. The court applied the *per se* rule to a situation where a group of

foundations for medical care organized by the medical society, by agreement of their member physicians, established maximum fees the physicians might charge for services provided to policyholders of certain insurance plans. In a detailed analysis of the history and meaning of the *per se* rule against price-fixing agreements, the Court beginning with its decision in *U.S. v. Joint Traffic Ass'n*, 171 U.S. 505 (1898), traced the development of and reason for the *per se* rule up to the present. The Court pointed out that "[b]y 1927 the Court was able to state that 'it has ... often been decided and always assumed that uniform price-fixing by those controlling in any substantial manner a trade or business in interstate commerce is prohibited by the Sherman Law.' *United States v. Trenton Potteries*, 273 U.S. 392, 398 (1927)." 102 Sup. Ct. at 2473. Continuing its analysis, the Court noted that in *U.S. v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 218 (1940) "the Court could report that 'for over forty years this Court has consistently and without deviation adhered to the principle that price-fixing agreements are unlawful *per se* under the Sherman Act and that no showing of so-called competitive abuses or evils which those agreements were designed to eliminate may be interposed as a defense.'" *Id.* at 2472. [24]

In conclusion, the Court stated that "[w]e have not waived in our enforcement of the *per se* rule against price-fixing. Indeed, in our most recent price-fixing case we summarily reversed the decision of another Ninth Circuit panel that a horizontal agreement among competitors to fix credit terms does not necessarily contravene the antitrust laws. *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643 (1980)." *Id.* at 2475

Respondent's conduct is virtually identical to that engaged in by a household goods motor carrier association in *Mass. Movers*, which was found by the Commission to violate Section 5 of the FTC Act. The Commission stated: "Plainly, the rate-making activities of the Association are *per se* unlawful under the antitrust laws." 102 FTC at 1225 The Court of Appeals For The First Circuit agreed that collective ratemaking was pricefixing, but remanded the matter for further consideration of the association's *Parker v. Brown* defense. Further, collective rate-making by trade associations of competing railroads repeatedly has been held to constitute price-fixing. *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290, 341 (1897); *United States v. Joint-Traffic Association*, 171 U.S. 505, 575-578 (1898); *Keogh v. Chicago & N.W. Ry.*, 260 U.S. 156, 161-162 (1922); *Georgia v. Pennsylvania R.R.*, 324 U.S. 439, 456-461 (1945).

Respondent's acts and practices prevent all customers from making price comparisons in the initial selection of a motor carrier, and impose respondent's views of costs and benefits on the entire marketplace; therefore, its conduct constitutes a *per se* violation of the Federal Trade Commission Act requiring no rule of reason analysis. See *National Society of Professional Engineers v. U.S.*, 435 U.S. 679, 688-692, 695 (1978); *U.S. v. Southern Motor Carriers Rate Conference, Inc.*, 467 F. Supp. 471 (N.D. Ga. 1979), *aff'd*, 672 F.2d 469 (5th Cir. 1982), *on rehearing*, 702 F.2d 532 (5th Cir. 1983) (en banc), *rev'd on other grounds*, 105 S. Ct. 1721. The Fifth Circuit, in *Southern Motor Carriers*, succinctly set forth the state of the law with respect to collective ratemaking:

Collective formulation clearly tampers with the price structure for intrastate transportation of general commodities; the rate bureau arrangement substitutes concerted pricing decisions among competing carriers for the influence of

impersonal market forces on proposed rates. Such combinations have been condemned as illegal *per se*.

672 F.2d at 478.

Accordingly, unless respondent's rate-making conduct is exempt from the antitrust laws by virtue of state action under the *Parker v. Brown* doctrine, as recently explicated by the [25] Supreme Court in *Southern Motor Carriers*, respondent has violated Section 5 of the Federal Trade Commission Act.

The conclusion reached above applies to collective agreements as to rates. Respondent contends (Respondent's Cross Motion For Summary Decision, at 17-19) that the classification of commodities is not conduct which constitutes a naked restraint designed solely to suppress competition. As complaint counsel contends, the classification of a commodity directly affects the rate to be charged for shipment of that commodity. (F. 36) However, the record at this time contains little information as to whether the collective formulation of commodity classifications by respondent is an activity that almost always tends to restrict competition, or instead is designed to make markets more efficient and competitive. Further evidence on respondent's collective formulation of commodity classifications and the effects of such practices will be received in the record, if proffered.

Conclusion and Order

The facts and conclusions set forth above are deemed established for purposes of this proceeding. The parties are directed to complete necessary discovery and prepare for trial on the remaining issues, the state action exemption to the federal antitrust laws and the nature of the restraint imposed by respondent's formulation of commodity classifications.

ATTACHMENT II

ORDER DENYING RESPONDENT'S CROSS MOTION FOR SUMMARY DECISION

Respondent has moved for summary decision in its favor based on the state action doctrine, as first enunciated in *Parker v. Brown*, 317 U.S. 341 (1943). This doctrine has been confirmed and clarified over the years, most significantly in the recent decisions of the Supreme Court in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), and *Southern Motor Carriers Rate Conf. v. U.S.*, 105 S. Ct. 1721.

To determine whether private conduct falls within the *Parker v. Brown* state action doctrine and is therefore immune from the federal antitrust laws, the Supreme Court has set forth a two prong test: (1) there must be a "clearly articulated and affirmatively expressed state policy" to displace competition, and (2) the policy must be "actively supervised." *Midcal*, 445 U.S. at 105. "A clearly articulated *permissive* policy will satisfy the first prong of the *Midcal* test." *Southern Motor Carriers*, 105 S. Ct. at 1729, n. 23 The Court has made clear that as long as the State as sovereign clearly intends to displace competition in a particular field with a regulatory structure, the first prong of the *Midcal* test is satisfied. The regulatory agencies, acting alone, cannot immunize private anticompetitive conduct. The second prong of the test prevents states from thwarting the national policy in favor of competition by "casting

... a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement." *Midcal*, 445 U.S. at 106 "This active supervision requirement ensures that a state's actions will immunize the anticompetitive conduct of private parties only when the 'state has demonstrated its commitment to a program through its exercise of regulatory oversight.'" *Southern Motor Carriers*, slip op. p. 13, n. 23

As is obvious from the above, a determination of whether respondent's conduct is immune from antitrust challenge depends upon the facts in the four states involved in this proceeding; *i.e.*, has each state clearly articulated a policy to displace competition. Further, does each state actively supervise the conduct here under challenge. A determination in this respect will require at a minimum further legal briefing on state policy in the four states, and, especially as to the second prong of the *Midcal* test, probative evidence on the state supervision issue. The record as presently existing, is devoid of facts sufficient to make a decision one way or the other. Inferences which can be drawn from existing facts are subject to dispute.

The law is clear, summary judgment may not be granted where the facts are disputed, or non-existent in the record, on where one of several inferences may be drawn from the evidence. *See, e.g., Hearst Corp.*, 80 FTC 1011, 1014 (1972). Accordingly, respondent's request for summary decision based on state action immunity is denied.

Respondent's other contentions in its cross motion, inapplicability of the *per se* rule to respondent's ratemaking activities, lack of jurisdiction over respondent, respondent not being in or affecting commerce, *Noerr-Pennington* immunity, and the argument that certain affirmative defenses should not be stricken, have been considered in detail and ruled on in an Order Granting In Part Complaint Counsel's Motion For Partial Summary Decision, filed concurrently with this order. Therefore,

Respondent's Cross Motion For Summary Decision is Denied.

OPINION OF THE COMMISSION

BY OLIVER, *Chairman*:

I. INTRODUCTION

Respondent New England Motor Rate Bureau, Inc. ("NEMRB") appeals from an initial decision finding that it violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, in formulating and filing collective motor carrier rates for its members, in the states of Massachusetts and New Hampshire. The Administrative Law Judge rejected allegations in the complaint regarding NEMRB's similar activities in Vermont and Rhode Island. For the reasons set forth below, we affirm the decision of the ALJ.¹

¹ The following abbreviations are used in this opinion:

- ID - Initial Decision of December 12, 1986
- SD - Partial Summary Decision of March 7, 1986
- FFID - Finding of Fact in the Initial Decision
- FFSD - Finding of Fact in the Partial Summary Decision

(footnote cont'd)

A. *Statement of the Case*

On October 24, 1983, the Commission issued a complaint alleging that the New England Motor Rate Bureau, Inc. ("NEMRB"), its members, officers, and directors, and others were engaged in a conspiracy to fix prices in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, by collectively formulating and filing rates for the transportation of commodities within the states of Massachusetts, New Hampshire, Rhode Island, and Vermont.² NEMRB's conduct is alleged to have deprived carriers, shippers, and consumers of the benefits of free and open competition. [2]

NEMRB responded that the Commission lacked jurisdiction, and denied that it or its members had engaged in any unlawful activities under the federal antitrust laws. NEMRB also contended that its ratemaking activities were exempt from antitrust scrutiny by virtue of both the "state action" and the *Noerr-Pennington* doctrines. In addition, NEMRB interposed several procedural and common law defenses.

On April 29, 1985, complaint counsel moved for partial summary decision, and NEMRB filed a cross-motion for summary decision. Administrative Law Judge Ernest G. Barnes granted in part complaint counsel's motion and denied NEMRB's motion, ruling that the Commission had jurisdiction, and dismissing all of NEMRB's defenses except for the state action defense. The ALJ also concluded that the challenged activities were *per se* unlawful unless the state action defense obtained.

The parties thereafter filed a joint stipulation as to the facts pertaining to the state action defense. On December 12, 1986, the ALJ issued his initial decision, based on the pleadings, stipulations and admissions, proposed findings of fact and conclusions of law, and the briefs submitted by the parties. The ALJ found that NEMRB's collective ratemaking in Massachusetts and New Hampshire was not insulated from antitrust scrutiny under the state action doctrine, but that its conduct in Rhode Island was protected under that doctrine. Accordingly, the ALJ found violations of Section 5 in New Hampshire

In addition, all citations to exhibits refer to those attached to the Stipulation of the parties dated August 28, 1986.

² After the complaint was issued, the State of Vermont deregulated the intrastate transportation of freight, and NEMRB ceased to formulate and file rates applicable to Vermont. On November 17, 1986, complaint counsel moved to dismiss the complaint with respect to NEMRB's activities in Vermont. The Administrative Law Judge granted that motion on December 12, 1986. ID at 19 n.5. NEMRB's ratemaking in Vermont is therefore not involved in this appeal.

and Massachusetts and recommended entry of a remedial order to prevent recurrence of the violations. The ALJ dismissed the complaint with respect to NEMRB's activities in Rhode Island.

This matter is before the Commission on NEMRB's appeal from the initial decision. On appeal, NEMRB argues that its activities are exempt from antitrust enforcement under the state action and *Noerr-Pennington* doctrines, and raises defenses based on Sections 4, 5(a), 6(a), and 11 of the FTC Act, 15 U.S.C 44, 45(a), 46(a), 51, and Sections 10521(b) and 10706(b)(2) of the Interstate Commerce Act, 49 U.S.C 10521(b), 10706(b)(2). By way of defense, NEMRB also points to an alleged failure to join indispensable parties; the doctrines of laches, estoppel, and waiver; and an asserted lack of capacity to conspire. NEMRB further maintains that the challenged activities should be evaluated under the rule of reason, and that the Commission lacks the authority to order the relief recommended by the ALJ.³ [3]

B. Respondent's Activities

The facts are not in dispute and for the most part have been stipulated by the parties. NEMRB's principal function is developing and filing collective tariffs and tariff supplements governing interstate and intrastate rates and commodity classifications within the states of Massachusetts, New Hampshire, Rhode Island, and Vermont. FFSD 3. Collective tariffs and tariff supplements are initiated and developed by the General Rate and Classification Committee ("the Committee"), which is composed of officers or employees of carrier members of NEMRB. FFSD 16. Whenever a tariff proposal is to be considered by the Committee, it is communicated to the general membership of NEMRB. FFSD 18. Shippers, non-member carriers and other interested parties may participate in discussions at meetings of the Committee, but they are not entitled to vote on tariff proposals. FFSD 19. Tariff proposals approved by the Committee are filed with the appropriate state regulatory agencies and sent to all members of NEMRB. FFSD 20. The actions of NEMRB are ratified by the general membership at annual meetings, and the members indicate their formal acquiescence in the collective tariffs by granting NEMRB the power of attorney with respect to tariff filings. FFSD 11, 17.

³ By order dated December 10, 1986, the ALJ granted a motion by the National Association of Regulatory Utility Commissioners (NARUC) for leave to intervene. NARUC has filed a brief supporting dismissal of the complaint on the basis of the state action doctrine.

C. State Regulation

The regulation of motor carriers is quite similar in Massachusetts, New Hampshire, and Rhode Island in several salient respects. First, before a carrier can provide services in any of these states, the carrier must obtain a certificate of public convenience and necessity or its equivalent from the appropriate state agency. FFID 6, 28, 51; FFSD 15. A certificate normally is issued only after a public hearing to determine whether the applicant is qualified and the service needed. *Id.*⁴

Second, carriers are not *required* in any of these states to formulate or file collective tariffs or to adopt uniform rates. [4] Each jurisdiction permits, but does not require, carriers to utilize a filing agent or to adopt and participate in a tariff filed by an agent or another carrier. FFID 17, 38, 61. If a carrier elects to participate in a tariff filed by another carrier or an agent such as NEMRB, the carrier is obliged by law to adhere to the rates specified once the tariff becomes effective. FFID 15, 33, 64.

Third, apart from their roles in reviewing tariff filings, regulators in Massachusetts, New Hampshire, and Rhode Island do not monitor economic conditions in the trucking industry within their respective jurisdictions. FFID 21, 45, 66. Moreover, none of these state agencies has ever undertaken a study of the effects of its regulatory policies on the intrastate trucking business. *Id.*

Notwithstanding these similarities, regulation of intrastate carriers in Massachusetts, New Hampshire, and Rhode Island also differs in several significant ways. A more detailed review of each state's regulatory program is set forth below.

1. Massachusetts

Under Massachusetts law, a carrier or its agent must file a tariff with the Massachusetts Department of Public Utilities (MDPU) containing the carrier's charges for moving goods within the state. FFID 31-33. The policy of the MDPU is to "[p]romote adequate, economical and efficient service by motor carriers, and reasonable

⁴ Of NEMRB's 675 carrier members, 447 hold certificates of public convenience and necessity issued by the State of Massachusetts and participate in NEMRB's intrastate tariff filings in Massachusetts. FFSD 2, 45. Nearly three-quarters of these members also hold certificates of public convenience and necessity issued by the ICC. FFSD 45. Twenty-six of NEMRB's members hold certificates issued by the State of New Hampshire and the ICC and participate in NEMRB's interstate and intrastate tariff filings in New Hampshire. FFSD 46. Eighty of NEMRB's members hold certificates granted by the State of Rhode Island and participate in NEMRB's intrastate tariff filings in Rhode Island. FFSD 47. Of these 80 members, 59 also hold ICC certificates. *Id.*

charges therefor without . . . unfair or destructive competitive practices . . .” Mass. Gen. L. ch. 159B § 1. Every motor carrier is required to “establish, observe and enforce just and reasonable rates,” which automatically “become effective on a date fixed by such carrier . . . unless suspended by the [MDPU] prior to its effective date . . .” Mass. Gen. L. ch. 159B § 6, para. 2. Massachusetts law empowers the MDPU to review rates filed by each carrier to ensure that they are consistent with the policy expressed above and are not unjust or prejudicial. Mass. Gen. L. ch. 159B §§ 1, 6. The law also authorizes the MDPU to reject rates that fail to comply with those criteria. *Id.*⁵

Rates contained in a tariff can become effective automatically 30 days after filing, unless the MDPU suspends or [5] rejects the proposed rates. FFID 33-34. During the six years preceding the stipulation filed by the parties on August 28, 1986, the MDPU did not hold any public hearings either to investigate or to suspend a motor carrier’s rate. FFID 37. The record is silent as to whether MDPU did so at any time prior to that period.

The MDPU employs only one rate analyst to process motor carrier rates. FFID 26, 27. When a tariff is filed, the analyst reviews the tariff to ensure that it is in the proper filing format and that it accurately reflects the rates the carrier intends to charge. FFID 34. The rate analyst has never rejected a rate because of the price to be charged. FFID 31. The analyst does not undertake an audit of the carrier’s records; a tariff will be rejected only if it fails to comply with Massachusetts filing requirements. FFID 34. No one at the MDPU looks behind the filed rates to determine whether they accurately reflect a carrier’s profits and costs. FFID 31. The rate analyst has never requested financial information to support a tariff. *Id.*

NEMRB voluntarily submits ICC rate filings and rate justification statements to the MDPU, and requests that the MDPU take the same action as did the ICC on rates for comparable routes. FFID 39. Carriers who are not members of NEMRB or any other rate bureau do not ordinarily submit ICC data to the MDPU. *Id.*

2. New Hampshire

In New Hampshire, motor common carriers are required to file rates with the state Department of Transportation (NHDOT). FFID 4, 11.

⁵ The MDPU also has authority to establish “reasonable maximum and minimum rates or charges consistent with industry and economic conditions” and consistent with the policy articulated in Chapter 159B. Mass. Gen. L. ch. 159B § 6, para. 5. The MDPU, however, has never exercised this authority with respect to motor carriers of property, except as to dump trucks and petroleum tank trucks. FFID 32.

Rates become effective thirty days after filing unless the NHDOT takes action to investigate, suspend, or reject the proposed rates. FFID 11, 14, 18.

From a period preceding issuance of the complaint, through the time of the ALJ's initial decision, NHDOT's statutory authority to investigate rates was limited to reviewing whether rates unjustly discriminated among similarly situated customers. FFID 12. The record reveals that, at least until January 1, 1988, NHDOT did not have the authority to suspend or reject rates for being unjust or unreasonable. On that date, an amendment to the statute governing the NHDOT took effect.⁶ As amended, New Hampshire law now provides that "[a]ll rates and charges filed by motor carriers shall be just and reasonable." *See* N.H. Rev. Stat. Ann. § 375-B:13 (1988 Supp.). [6]

The NHDOT employs one tariff investigator or rate analyst. FFID 5, 14. During the pendency of this litigation before the ALJ, the rate analyst examined tariffs solely for the purpose of ensuring that they were in compliance with the format prescribed by regulation and that the rates set forth in the tariffs were not discriminatory. FFID 14. The rate analyst was also responsible for ensuring that carriers adhered to the rates they filed. FFID 13. Although the NHDOT has had occasion to suspend the certificates of carriers, the sole ground for its doing so identified by the ALJ was that the carriers had disregarded filed rates. *Id.*

3. Rhode Island

In Rhode Island, carriers are required to file their proposed rates with the Division of Public Utilities and Carriers (DPUC) of the state Public Utilities Commission. FFID 49, 54. Under Rhode Island law, rates must be just and reasonable and reasonably compensatory, and may not be unjustly discriminatory. FFID 54. The DPUC has authority to suspend or reject rates that do not meet these statutory standards. FFID 59.

As in Massachusetts and New Hampshire, proposed rates are subject to a statutory thirty-day waiting period to permit the DPUC to take whatever action may be deemed necessary before the tariff becomes effective. FFID 55. In Rhode Island, however, if the rate analyst cannot complete this review within the thirty-day waiting period, the DPUC suspends the tariff. FFID 56. During the waiting

⁶ On July 31, 1987, the Commission notified the parties that it would take official notice of this amendment.

period, DPUC's rate analyst reviews filings to ensure compliance with format requirements. FFID 56. The rate analyst also examines the proposed rates to determine whether they fall within a "zone of reasonableness," a measure based on the maximum and minimum industry averages of previously approved rates for each category or motor carrier. *Id.* The rate analyst may also consider the percentage rate increase and the date of the carrier's last request. *Id.* Rates found to be within the "zone of reasonableness" are approved without a hearing.⁷ *Id.* However, DPUC does not permit rate increases based solely on inflation, unless a hearing is held and it is determined that the increase is warranted. FFID 60.

After making its initial determination on an individual or an NEMRB tariff proposal, the DPUC staff drafts an order. FFID 58. The staff may also prepare a memorandum recommending that [7] the Administrator of DPUC, who has the final authority in such matters, either approve the proposal or suspend it and conduct a hearing. *Id.* Whichever action is taken, the Administrator issues an order. *Id.*

On at least one occasion in the recent past, the Administrator of the DPUC opted to suspend an NEMRB rate filing and held a formal public hearing on the proposal. FFID 58. On April 21, 1986, the DPUC suspended filed rates that NEMRB had proposed to take effect on April 22. FFID 58; Exhibit I. Following its suspension order, DPUC requested NEMRB to attend an informal conference at the DPUC's offices to answer certain questions about the proposal. FFID 58. After issuing a public notice on June 17, DPUC conducted a formal public hearing on the proposal on July 9, 1986. FFID 58; Exhibit J. The record contains a transcript of this formal public hearing. FFID 58; Exhibit K. Following the hearing, the DPUC granted NEMRB's rate increase in a Report and Order, issued October 24, 1986. ID at 34.

In general, if the DPUC suspends the tariff and determines that a public hearing is necessary, the carrier is required to submit cost information or other financial data to justify the proposed rate increase. FFID 57, 60. Upon finding that the hearing evidence does not justify a proposed rate, DPUC will deny the request and establish a rate that the evidence supports. FFID 60. In determining the appropriate rate, DPUC sets a rate that will afford a carrier a good living and will allow for increased expenses. FFID 60. Once rates have

⁷ NEMRB routinely submits ICC rate justification statements with the tariffs it files with the DPUC. FFID 58. The DPUC staff analyzes these statements and makes use of the information contained therein, in making its initial determination of the lawfulness of NEMRB's rate proposals. *Id.*

been approved by the DPUC, the carrier is obliged to adhere to them strictly. FFID 64.

II. JURISDICTION

In its appeal brief, NEMRB interposes four jurisdictional defenses to this proceeding, based on Sections 4, 5(a), and 6(a) of the FTC Act, 15 U.S.C 44, 45(a), 46(a), and provisions of the Interstate Commerce Act known as the Reed-Bulwinkle Act, codified, as amended, at 49 U.S.C 10521, 10706.

First, NEMRB argues that, as a not-for-profit corporation, it is beyond the reach of the Commission by virtue of Section 4 of the FTC Act, which defines corporations within the Commission's jurisdiction as those that are "organized to carry on business for [their] own profit or that of [their] members . . ." 15 U.S.C 44. However, it is well settled that the Commission has authority to regulate not-for-profit corporations that are not primarily eleemosynary. *American Medical Association*, 94 FTC 701 (1979), *enforced as modified*, 638 F.2d 443, 448 (2d Cir. 1980), *aff'd by an equally divided court*, 455 U.S. 676 (1982); *FTC v. National Comm'n on Egg Nutrition*, 517 F.2d 485, 488 (7th Cir. 1975), *cert. denied*, 426 U.S. 919 (1976); [8] *Community Blood Bank of Kansas City Area, Inc. v. FTC*, 405 F.2d 1011, 1017 (8th Cir. 1969). A not-for-profit organization is subject to Commission jurisdiction under Section 4 if it engages in activities that "engender a pecuniary benefit to its members if that activity is a substantial part of the total activities of the organization, rather than merely incidental to some noncommercial activity." *American Medical Association*, 94 FTC at 983. As the ALJ found, NEMRB's collective ratemaking activities have inured directly to the financial benefit of its carrier members. SD at 14-15, FFSD 16-22. Because NEMRB is operated in substantial part for the benefit of its for-profit carrier members, NEMRB's status as a not-for-profit corporation does not exempt it from Commission jurisdiction. *See Community Blood Bank*, 405 F.2d at 1019.

Second, NEMRB argues that the Commission lacks jurisdiction to regulate or investigate it by virtue of Sections 5(a)(2) and 6(a) of the FTC Act, 15 U.S.C 45(a)(2), 46(a), which exempt common carriers subject to the Interstate Commerce Act. NEMRB, however, is not itself a common carrier as that term is used in the Interstate Commerce Act, because NEMRB does not hold "itself out to the general public to provide motor vehicle transportation for compensa-

tion." 49 U.S.C 10102(14). NEMRB does not possess a certificate of public convenience and necessity issued by the Interstate Commerce Commission and does not provide transportation services. FFSD 43, 44.

Nor does NEMRB come within the "common carrier" exemption simply because some of its members are common carriers subject to the Interstate Commerce Act.⁸ A significant proportion of NEMRB's members do not operate in interstate commerce, and therefore are not subject to the Interstate Commerce Act. FFSD 45-48. It is well established that membership by the entities that do not qualify for a statutory exemption subjects the trade [9] association as a whole to antitrust scrutiny. *E.g., Massachusetts Furniture & Piano Movers Ass'n*, 102 FTC 1176, 1213 (1983), *rev'd on other grounds and remanded*, 773 F.2d 391 (1st Cir. 1985) (hereinafter "*Mass. Movers*"); *Case-Swayne Co. v. Sunkist Growers, Inc.*, 389 U.S. 384 (1967); *Crosse & Blackwell Co. v. FTC*, 262 F.2d 600 (4th Cir. 1959).

Moreover, the price-fixing charges alleged in the complaint concern intrastate shipments, which are beyond the jurisdiction of the ICC. As the Commission determined in *Mass. Movers*, activities of common carriers that are not subject to ICC regulation are subject to the provisions of the FTC Act. 102 FTC at 1213. If we were to hold otherwise, common carriers regulated by the ICC with respect to interstate rates could enter any non-transportation business they desired and engage in anticompetitive behavior without the threat of antitrust liability. *Id.*

In short, we hold that NEMRB is not exempt from the Commission's jurisdiction by virtue of Sections 5(a)(2) and 6(a) of the FTC Act.

A third jurisdictional defense raised by NEMRB is predicated on the provisions of the Interstate Commerce Act known as the Reed-Bulwinkle Act. Under Section 10706 of the Interstate Commerce Act, agreements among motor common carriers on interstate rates are exempt from antitrust scrutiny if the agreements have been approved

⁸ NEMRB erroneously cites *FTC v. Miller*, 549 F.2d 452 (7th Cir. 1977), in support of its contention that activities of its common carrier members are beyond the Commission's jurisdiction by virtue of their status as common carriers. In *Miller*, the Seventh Circuit held that the Commission did not have jurisdiction over advertising by common carriers where the advertising was subject to ICC regulation but was not actively regulated. However, the court expressly declined to decide whether "non-carrier activities of a common carrier" qualify for the exemption under Sections 5 and 6 of the FTC Act. 549 F.2d at 458. Since the *Miller* decision, the First Circuit has explicitly held that the Interstate Commerce Act poses no bar to the application of federal antitrust laws in general, or the FTC Act in particular, to collective intrastate rate making. *Massachusetts Furniture & Piano Movers Ass'n v. FTC*, 773 F.2d 391, 394 (1st Cir. 1985).

by the ICC. 49 U.S.C 10706. The Section 10706 exemption, however, is expressly limited to approved *interstate* ratemaking; the ICC has repeatedly held that it does not extend to intrastate ratemaking. *See, e.g., Alaska Carriers Association*, 321 I.C.C. 7, 10 (1963); *Pacific Motor Tariff Bureau, Inc.*, 313 I.C.C. 406, 407-08 (1961); *Ohio Motor Freight*, 311 I.C.C. 127, 128 (1960). Furthermore, the Reed-Bulwinkle Act should not be construed as an implied repeal of Section 5 of the FTC Act with respect to rate bureau activities. There is no irreconcilable conflict between the statutes; NEMRB is not a common carrier subject to the Interstate Commerce Act, and NEMRB engages in an activity—intrastate ratemaking—that is beyond the scope of the Interstate Commerce Act. *See Mass. Movers*, 773 F.2d at 393-94. We therefore hold that the antitrust exemption of the Reed-Bulwinkle Act does not extend to the collective intrastate ratemaking at issue in this proceeding.

Finally, NEMRB argues that the challenged activity is beyond the jurisdiction of the Commission because it does not affect interstate commerce. Section 5 of the FTC Act prohibits unfair methods of competition and unfair or deceptive trade practices [10] “in or affecting commerce” among the states. 15 U.S.C 45.⁹ In interpreting identical jurisdictional language in the Sherman Act, the Supreme Court has held that a local business practice is deemed to be “affecting” interstate commerce if “it has an effect on some other appreciable activity demonstrably in interstate commerce.” *McLain v. Real Estate Bd. of New Orleans, Inc.*, 444 U.S. 232, 242 (1980). Accordingly, complaint counsel can satisfy the interstate commerce requirement of Section 5 by demonstrating a substantial effect on interstate commerce generated by NEMRB’s ratemaking activities. *Id.*; *see also Hospital Building Co. v. Trustees of Rex Hospital*, 425 U.S. 738, 743 (1976).

The record reveals that NEMRB’s ratemaking has had a substantial effect on interstate commerce. As the ALJ found, the intrastate shipment of general commodities by NEMRB’s members frequently is just one leg of the interstate shipment of such commodities. SD at 21. NEMRB carrier members take delivery of commodities originating

⁹ As originally enacted, the FTC Act limited the Commission’s jurisdiction to business practices “in commerce.” Act of Sept. 26, 1914, ch. 311 § 5, 38 Stat. 717, 719. In 1975, the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act expanded FTC jurisdiction beyond activities merely “in commerce” to include activities “affecting” commerce. Pub. L. No. 93-637, 88 Stat. 2183. The purpose of this amendment was to enable the Commission to regulate activities “which are unfair or deceptive and which, while local in character, nevertheless have an adverse impact upon interstate commerce.” S. Rep. No. 151, 93d Cong. 1st Sess. 26 (1973).

out-of-state at an in-state warehouse or distribution center, then transport the commodities to in-state customers pursuant to the tariff schedules filed by NEMRB. FFSD 52, 55. Commodities thus are shipped in a continuous stream from points out-of-state to in-state destinations, and the rates that NEMRB's members charge for the in-state leg of the shipment have a direct and substantial effect on interstate commerce. Furthermore, NEMRB's members receive substantial sums of money from out-of-state customers in payment for in-state transportation services. FFSD 52-54. The rates charged for these services are determined by NEMRB's tariffs, and thus directly affect the amount of money flowing across state lines. In view of this evidence, we conclude that NEMRB's activities were "in or affecting commerce" within the meaning of the FTC Act.

III. STATE ACTION IMMUNITY

The principal issue on appeal is whether NEMRB's ratemaking activities are beyond the purview of the federal antitrust laws by virtue of the state action doctrine. The state action doctrine attempts to resolve any conflicts that arise between the [11] national policy favoring free competition, as embodied in the federal antitrust laws, and the principle of federalism. Restraints on competition are insulated from antitrust attack if they constitute "state action or official action directed by a state." *Parker v. Brown*, 317 U.S. 341, 351 (1943).¹⁰

The Supreme Court, however, has admonished that a "gauzy cloak of state involvement" in private anticompetitive conduct is not sufficient to confer antitrust immunity. *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 106 (1980). In *Midcal*, the Supreme Court set forth two criteria that anticompetitive conduct by private entities must satisfy to qualify as exempt "state action": (i) the challenged conduct must be undertaken pursuant to a "clearly articulated and affirmatively expressed" state policy to displace competition with regulation; and (ii) the conduct must be "actively supervised" by the state itself. *Id.* at 105-06; accord, *Patrick v. Burget*, 108 S. Ct. 1658, 1663 (1988); *Southern Motor Carriers Rate Conference v. United States*, 471 U.S. 48, 57 (1985). We now apply these criteria to NEMRB's ratemaking activities in Massachusetts, New Hampshire, and Rhode Island.

¹⁰ We note that the complaint alleges only that NEMRB's activities constituted "unfair methods of competition" in violation of Section 5 of the FTC Act, 15 U.S.C. 45. The state action defense is available in Section 5 cases applying Sherman Act standards. See, e.g., *Asheville Tobacco Bd. of Trade, Inc. v. FTC*, 263 F.2d 502, 508-10 (4th Cir. 1959).

A. *Clearly Articulated State Policy*

The ALJ correctly held that the Massachusetts and Rhode Island statutes evince an intent to countenance collective ratemaking among motor common carriers. In *Southern Motor Carriers*, the Supreme Court found that a Mississippi statute similar to those in Massachusetts and Rhode Island expressed a state policy to permit joint setting of rates by motor carriers. 471 U.S. 48, 63-66. Although the Mississippi law did not explicitly authorize private collective ratemaking, it directed the Mississippi Public Service Commission to prescribe "just and reasonable" rates for motor carriers on the basis of several enumerated factors. *Id.* (citing Miss. Code Ann. § 77-7-221). This statutory mandate, the Court concluded, indicated the state's intent to displace rate competition in the intrastate trucking industry with a regulatory program. 471 U.S. at 65 n. 25.

Applying the rationale of *Southern Motor Carriers*, the U.S. Court of Appeals for the First Circuit held in *Mass. Movers* that the Massachusetts statute at issue in this case sanctions collective ratemaking among motor carriers. [12] 773 F.2d 391, 394-97. The court observed that the language of the Mississippi statute at issue in *Southern Motor Carriers* was "remarkably close" to that of the Massachusetts statute governing motor common carriers, which empowers the MDPU to "[p]romote . . . reasonable charges" for transportation services "without . . . unfair or destructive competitive practices . . ." 773 F.2d at 395 & n.6 (quoting Mass. Gen. L. ch. 159B § 1). Consistent with the *Southern Motor Carriers* and *Mass. Movers* decisions, we hold that the Massachusetts statute satisfies the first prong of the *Midcal* test.

Similarly, the Rhode Island statute governing motor carriers provides that moving rates must be "just and reasonable and reasonably compensatory" and authorizes the DPUC to suspend or reject rates that do not meet these statutory criteria. We find this statutory mandate to be indistinguishable from the rate provisions of the Mississippi statute that the Supreme Court in *Southern Motor Carriers* found to satisfy the first prong of the *Midcal* test.

The ALJ also correctly held that the New Hampshire statute did not satisfy the first prong of the *Midcal* test. During the period considered by the ALJ, the New Hampshire statute required only that motor carriers not discriminate in offering rates to similarly situated customers. See N.H. Rev. Stat. Ann. § 375-B:14 (1984 Replacement Ed.). Unlike its Massachusetts and Rhode Island counterparts, the

NHDOT lacked the statutory authority to suspend or reject rates for being unjust or unreasonable. FFID 12. The NHDOT thus had no authority over rate levels; its authority was limited to prescribing the format in which rates were to be filed and enforcing those rates by prohibiting discounts or other forms of discrimination.¹¹

The New Hampshire statute subsequently was amended to empower the NHDOT to suspend or reject rates for being unjust or unreasonable. See note 6, *supra*, and accompanying text. Thus, the New Hampshire statutory scheme now more closely resembles that of Massachusetts and Rhode Island. This amendment, by itself, however, cannot confer state action immunity. At most it satisfies only the first of the two prongs of the *Midcal* test, by providing a clearly articulated state policy to displace competition with regulation. It does not, however, relieve respondent's burden of showing that the second prong of the [13] *Midcal* test was also satisfied, *i.e.*, that New Hampshire authorities are actively supervising rate regulation. See *Mass Movers*, 773 F. 2d 391, 397 (1st Cir. 1985). Moreover, this statutory change cannot immunize conduct that NEMRB engaged in before the amendment went into effect.

B. Active State Supervision

To qualify for state action immunity, private conduct must also have been actively supervised by the state. *Midcal*, 445 U.S. at 105. The active supervision requirement "serves essentially an evidentiary function: it is one way of ensuring that the actor is engaging in the challenged conduct pursuant to state policy. . . . Where a private party is engaging in the anticompetitive activity, there is a real danger that he is acting to further his own interests, rather than the governmental interest of the State." *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 46-47 (1985).

The Supreme Court recently elaborated on the meaning of active state supervision in *Patrick v. Burget*, 108 S. Ct. 1658 (1988). Patrick alleged that competing physicians conspired to terminate his staff privileges at the only hospital in Astoria, Oregon, by initiating and participating in proceedings before the hospital's private peer-review committee. 108 S. Ct. at 1660-61. The Court held that the state action defense did not apply to the challenged conduct because the State of

¹¹ Because the former New Hampshire statute did not evince an "affirmatively expressed state policy" that rate levels be determined by a regulatory agency rather than by the market, it did not satisfy *Midcal*'s first prong. At the time of the ALJ's decision, this provided an independent ground for the conclusion that the state action doctrine did not immunize NEMRB's anticompetitive conduct in New Hampshire.

Oregon did not actively supervise the decisions of hospital peer review committees. The Court stated:

[T]he active supervision requirement mandates that the state exercise ultimate control over the challenged anticompetitive conduct. . . . [This] prong of the *Midcal* test requires that state officials *have and exercise* power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy. Absent such a program of supervision, there is no realistic assurance that a private party's anticompetitive conduct promotes state policy, rather than merely the party's individual interests.

108 S. Ct. at 1663 (emphasis supplied, citations omitted). The Court found that neither Oregon regulatory agencies nor state courts would review the merits of privilege determinations. *Id.* at 1664-65. Inasmuch as the state did not exercise "ultimate authority" over private peer group decisions, the active supervision requirement was not satisfied and the state action defense therefore could not be sustained. *Id.* at 1664-65. [14]

The active supervision requirement thus serves to affirm the state's intent to tolerate private anticompetitive conduct, not merely as a theoretical possibility, but as it is actually undertaken in the marketplace. To establish active state supervision, it is not enough to show, as NEMRB contends, that the statute governing the anticompetitive activity provides some mechanism for regulatory oversight. Under *Patrick*, there must be a showing that the state actually *exercises* its power to review particular anticompetitive acts of private parties. 108 S. Ct. at 1663. It is only through the exercise of its authority that the state's conscious approval or disapproval of the private conduct can be discerned.¹²

The state's involvement in the challenged activity, then, must be more than peripheral to satisfy the active supervision requirement. In *Midcal*, the Supreme Court found no "active supervision" in the state's enforcement of resale price schedules established by wine wholesalers pursuant to state law. The Court emphasized that the state had not established prices, reviewed the reasonableness of price schedules, regulated the terms of fair trade contracts, monitored market conditions, or engaged in any "pointed reexamination" of the program. 445 U.S. at 105-106. Rather, the state's enforcement

¹² The Supreme Court's statement in *Patrick v. Burget* that the state must "exercise" its power to review puts to rest NEMRB's interpretation of lower court decisions that proof of regulatory *authority* alone is sufficient to establish that private anticompetitive conduct has been "actively supervised" by the state.

activities merely had cast a “cloak of state involvement over what [was] essentially a private price-fixing arrangement.” *Id.* at 106.

Similarly, in *Patrick*, the Court, observing that “[t]he mere presence of some state involvement or monitoring does not suffice,” 108 S. Ct. at 1663, held that state action immunity could not be predicated on a showing that Oregon health officials had licensing authority over hospitals or physicians and that Oregon courts had some authority to review private peer group decisions on procedural grounds, 108 S. Ct. at 1663-65. Rather, because the merits of peer review decisions themselves were not “actively supervised” by any state actors, the state action doctrine did not protect the peer review activities challenged in the case. *Id.* at 1663, 1665. The *Patrick* court stated, “Absent such a program of supervision, there is no realistic assurance that a private party’s anticompetitive conduct promotes state policy, rather than merely the party’s individual interests.” *Id.* at 1663.

The *Midcal* and *Patrick* decisions indicate that a state official or agency must engage in a substantive review of the [15] challenged conduct before active supervision can be found. Such a review ensures that the state agency has consciously considered the anticompetitive consequences of the activity for which private parties seek approval. No clear inference of conscious state approval of the product of private collective ratemaking can be drawn from a state agency’s passive acceptance or nonsubstantive review of rate filings.¹³ Thus, we hold that the active supervision requirement is satisfied only where the state agency has reviewed the proposed tariffs or rates on the merits.¹⁴ [16]

¹³ *Cf. Midcal*, 445 U.S. at 104, in which the Supreme Court observed that a majority of the Court had found in *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976), that “no antitrust immunity was conferred when a state agency passively accepted a public utility’s tariff.”

¹⁴ Complaint counsel contend that the active supervision requirement is met only if the state regulator provides notice and an opportunity for public comment prior to the implementation of the filed rates, and issues a written opinion setting forth the grounds for approving the rates. We decline to accept this formulation. A finding that the state engages in substantive review of the private conduct is essential to a finding of “active state supervision.” Thus the test that complaint counsel proposes is overinclusive, because it would permit a finding of state action immunity where the state has merely adopted particular procedures designed to ensure fairness. Such an approach was implicitly rejected by the *Patrick* court’s conclusion that the Oregon scheme of judicial review, designed only to ensure peer review procedures were reasonable, did not constitute active supervision. 108 S. Ct. at 1665. Oversight on merely formal terms does not establish a “pointed reexamination” of private action. On the other hand, we are hesitant to limit to a written opinion the forms of evidence that could be used to show that a state has actually engaged in a substantive review of the merits of a proposal for private conduct. States should be afforded greater latitude in structuring supervisory schemes.

Moreover, we are not aware of any court decision holding that notice, an opportunity to be heard, and a written decision are the *sine qua non* of active state supervision. Several of the decisions cited by complaint counsel state that the challenged activity must be the result of the “considered judgment” of the state

(footnote cont’d)

Apart from the matter of what constitutes active state supervision, there is the question of who has the burden of proving such supervision. The ALJ erred in suggesting that the burden of proof on the active supervision requirement shifts to the government once the respondent demonstrates the existence of latent oversight authority. ID at 30. Language in the Supreme Court's *Patrick* decision clearly implies that the proponent of the state action defense has the burden of demonstrating the exercise of regulatory authority by state officials. See, e.g., 108 S. Ct. at 1664 (stating "respondents have not shown that the [Board of Medical Examiners] in practice reviews privilege decisions," (emphasis added)). The ALJ cited no authority to the contrary. We therefore conclude that NEMRB, as the proponent of the state action defense, had the burden of demonstrating that state officials engaged in a substantive review of NEMRB's rate proposals.¹⁵ See also *Mass. Movers*, 773 F.2d 391, 397 (1st Cir. 1985) ("[T]he Association met its first burden in establishing *Parker* immunity. In order to be immunized from antitrust liability under *Parker*, the Association must also satisfy the second prong of the *Midcal* test—that the anticompetitive activity was 'actively supervised' by the state."); *North Carolina ex rel. Edmisten v. P.I.A. Asheville, Inc.*, 740 F.2d 274, 277 (4th Cir. 1984), cert. denied, 471 U.S. 1003 (1985); *Sollenbarger v. Mountain State Tel.*, 121 F.R.D. 417, 426 (D. N.M. 1988); *Englert v. City of McKeesport*, 637 F. Supp. 930, 932-33 (W.D. Pa. 1986); *Gold Cross Ambulance & Transfer v. City of Kansas City*, 538 F. Supp. 956, 967 (W.D. Mo. 1982), aff'd, 705 F.2d 1005 (8th Cir. 1983), cert. denied, 471 U.S. 1003 (1985) ("A defendant who seeks to invoke the state action exemption must meet a heavy burden.").

We now apply these principles to the Massachusetts, New Hampshire, and Rhode Island regulatory programs. [17]

regulatory agency to be immune from antitrust attack, but none suggests that this result can be achieved only if the regulatory agency provides public notice and an opportunity to be heard and expresses its decisions in writing. See *Jeffrey v. Southwestern Bell*, 518 F.2d 1129, 1134 (5th Cir. 1975) (quoting *Gas Light Co. of Columbus v. Georgia Power Co.*, 440 F.2d 1135, 1140 (5th Cir. 1971)); *Somitrol of Fresno, Inc. v. AT&T*, 629 F. Supp. 1089, 1095-1100 (D.D.C. 1986); *Macom Products Corp. v. AT&T*, 359 F. Supp. 973, 977 (C.D. Cal. 1973).

¹⁵ None of the appeal briefs filed by the parties specifically mentions the ALJ's comment on the burden of proof. Complaint counsel, however, appear to take the position that a private party seeking to avail itself of the state action defense has the burden of proof on both *Midcal* criteria. Complaint Counsel's Answering Brief at 9. NEMRB does not challenge that assertion in its Reply Brief. NEMRB could not, in any event, be prejudiced by our finding of error on this question, because we see nothing in the record to suggest that the parties ever assumed that the burden was *not* on NEMRB.

1. Massachusetts

We see no evidence that the MDPU has engaged in a "pointed reexamination" of rates resulting from NEMRB's ratemaking activities. *Midcal*, 445 U.S. at 106. Although the MDPU has authority to review the reasonableness of motor carrier rates, in practice, the MDPU's review of rate filings has been limited to a determination that the carrier has complied with filing format requirements¹⁶ and that the tariffs accurately reflect the rates the carrier intends to charge. FFID 34. The rate analyst rejects only filed tariffs that do not comply with the filing requirements of the regulations.¹⁷ FFID 34. The rate analyst [18] has never rejected a rate because of the price to be charged. FFID 31. Indeed, the MDPU has never requested financial information to support collectively set rates, and it does not look behind the filed rates to determine whether they accurately reflect the carriers' profits and costs. FFID 31.¹⁸ Nor has the [19] MDPU audited

¹⁶ Included in the record is a true copy of MDPU's rules and regulations governing motor carriers of property. FFID 25. See Mass. Regs. Code tit. 220, § 250-272. These regulations set out procedures of practice before the MDPU Commercial Motor Vehicle Division, general regulations governing the conduct of motor carriers and eligibility for a common carrier certificate, rules involving the leasing of equipment, rates for towing motor vehicles, and rules governing the form and filing of freight rate tariffs and contracts by motor carriers and brokers. These latter regulations, found in Section 260.03, cover such matters as the size of paper of tariff filings, the color of the print, the number of copies to be submitted, the title page, the delineation of various classes of commodities, the appropriate source for determining mileage, designation of units in which to indicate rates, and so forth. In short, these regulations solely concern the formal rather than substantive adequacy of tariff filings. Nothing in the regulations, however, provides any guidance as to what might constitute a "just and reasonable" rate or provides criteria by which MDPU or its staff will determine the merits of a particular rate request.

¹⁷ The only example of an MDPU tariff rejection contained in the record is labeled "Supplement 1 to NMF 103-B," a "Zip Code Tariff" from the National Motor Freight Traffic Association, Inc., that MDPU received on March 28, 1986. Exhibit F. It purports to use zip codes as geographic point designators in determining freight rates. *Id.* On April 3, 1986, MDPU responded to this filing by letter stating:

NMF 103-B and Supplement No. 1 tendered this Department are hereby rejected. NMF 103-B is simply the United States Postal Service Code Guide. It is not issued by your agency. There is no provision in our tariff regulations for the acceptance of such a filing. Further, we would have no idea who is a party to such type publication since it does not contain a list of participating carriers. Also, on the title page of the Supplement No. 1 and on the reverse side thereof, the designation "MADPU" is incorrect. The designation for this Department should read "MDPU." Finally, any tariff filing tendered this Department must be accompanied by a filing fee of \$10.00 up to 30 pages, and 10 cents per page after.

Exhibit F. Clearly, action of this type does not evince substantive review of rates, as required for private parties to establish the active state supervision prong of the state action defense.

¹⁸ Paragraph 62 of Stipulation dated August 28, 1986, which the ALJ adopted as FFID 35, states:

It is the *opinion of the rate analyst* that whenever tariffs become effective without rejection, suspension or hearing, that action *results from a determination* that the proposed rates meet the regulatory criteria of the statute, orders, rules and regulations pertaining to motor carriers of property. (Emphasis added.)

However, this finding does not directly address the central issue in this price-fixing case—whether the rates analyst, or anyone else at MDPU, has formed an opinion that approved rates are just and reasonable. Thus, this stipulated finding does not undercut our conclusion stated above, or the ALJ's finding, that MDPU review is limited to compliance with the format requirements of the statutes and regulations.

(footnote cont'd)

carriers' records or monitored economic conditions within the trucking industry. FFID 34, 45.¹⁹

NEMRB does voluntarily submit to the MDPU rate proposals and rate justification statements that it has filed with the ICC, and it requests the MDPU to take the same action with respect to the intrastate Massachusetts proposal as does the ICC with the [20] interstate proposal. FFID 39. If the ICC suspends the proposal, NEMRB requests the MDPU to postpone the effective date of the proposal in Massachusetts pending the outcome of the ICC investigation. FFID 39. If MDPU does suspend rates under such circumstances, it is at the request of NEMRB, and not based on an examination of the filed rates. Such action solely at the behest of NEMRB does not evince active supervision.²⁰

It is unclear to which regulatory criteria the stipulation refers. As discussed in note 16, *supra*, the regulations applicable to motor carrier tariffs address only the filing format, and do not involve justness and reasonableness of rates. Thus, in Massachusetts, review for meeting the "regulatory criteria" of the rules and regulations does not constitute active supervision of privately set rates. Further, no MDPU "orders" containing "regulatory criteria," alluded to in this finding, are contained in the record. The statutes, on the other hand, do contain, as "regulatory criteria," requirements that rates be just and reasonable. Nonetheless, this stipulation does not show that the second prong of the *Midcal* test is satisfied.

The stipulation states that the effective rates "result[] from a determination," but the stipulation does not indicate who has made such a determination. Specifically, the stipulation does not say that such rates result from an opinion of the rate analyst that the regulatory criteria are satisfied. While we are loathe to parse stipulations too closely, it is important, on the other hand, to remember that stipulations are the product of agreement between the parties to the case. Consequently, it would be erroneous for us to read unstated facts into this stipulation or to assume that a turn of phrase is the product of accident rather than draftsmanship. Indeed, the relevant statute specifically says, "Every such common carrier shall establish, observe and enforce just and reasonable rates . . ." Mass. Gen. Laws Ann. Ch. 159B, § 6, para. 2. Thus, this stipulation may simply mean that the carriers have determined that the rates are reasonable. Active supervision, however, requires that the state interpose its judgment as to whether private conduct furthers state, and not merely private, interests. This stipulation does not indicate that Massachusetts has done so.

Finally, we note that FFID 15 and 63 contain similarly worded findings, based on stipulations, applicable to the states of New Hampshire and Rhode Island. Yet as noted in the text, the factual settings in the three states are vastly different. Thus, this ambiguous stipulation is entitled to less weight than the state-specific stipulations that provide concrete detail.

¹⁹ NEMRB notes that the parties stipulated that MDPU's rate analyst would recommend suspension and investigation "if confronted" with rates that, in his opinion: (1) were out of line with the average rates that had been established for that pricing zone; (2) seemed extraordinarily high, such as a 20% to 50% increase; or (3) appeared to be discriminatory. FFID 31. That an agency employee can hypothesize situations in which he or she *would recommend* that the agency take action is not evidence that an agency *actually exercises* its supervisory authority over private conduct. Moreover, there is no evidence that the MDPU has ever issued regulatory guidelines for determining whether suspension or investigation of rates is appropriate, so we cannot even conclude that this hypothetical recommendation is consistent with agency policy. Finally, that the rate analyst would recommend action "if confronted" with such rates suggests a haphazard approach rather than a "program of supervision."

²⁰ The parties stipulated, and the ALJ found, that the MDPU generally *relies* on the fact that the ICC has already conducted an investigation and reached a conclusion as to the justness and reasonableness of NEMRB rates. FFID 39. (Emphasis supplied.) However, this peculiar word choice in the stipulation of parties does not overcome the general finding that MDPU review is limited to compliance with filing format requirements. There is nothing in the record to indicate that MDPU would suspend ICC-suspended rates, except at the request of NEMRB, or that ICC approval makes MDPU approval more likely. Rather, the record as a whole shows that MDPU review is limited to whether the tariff complies with the format requirements.

We conclude that because MDPU does not review the substance or the merits of collective tariff filings, but merely allows the rates to go into effect as long as the collective tariffs satisfy formalistic format requirements, the second prong of the *Midcal* test is not satisfied. Because MDPU does not exercise its supervisory authority over rates, the state action exemption does not apply, and NEMRB collective ratemaking activity in Massachusetts is subject to antitrust scrutiny.

2. New Hampshire

As noted above, during the period considered by the ALJ, the NHDOT lacked statutory authority to reject or suspend rates for being unjust or unreasonable. By statute, motor common carriers were prohibited only from discriminating in price among similarly situated customers. FFID 16. The NHDOT had no other authority over the development of rates. NHDOT's review of filed rates was limited to ensuring that the rates were submitted in the proper format and were identical for similarly situated customers. FFID 14. Because the NHDOT had no authority over price levels, it could not—and the record shows that it did not—engage in a substantive review, or “pointed reexamination,” of the rates themselves.²¹ See *Midcal*, 445 U.S. at 105-106. The state has [21] displaced competition among private motor carriers without substituting an adequate system of regulation. See *324 Liquor Corp. v. Duffy*, 479 U.S. 335, 345 (1987). Collectively set filed rates in New Hampshire were simply the product of private action furthering private interests.²²

²¹ The NHDOT occasionally has investigated whether motor common carriers were complying with their filed rates. The mere fact that a state may enforce the rates set by private parties, however, is not enough to establish active state supervision. See *324 Liquor Corp. v. Duffy*, 479 U.S. 335, 343-45 (1987); *Midcal*, 445 U.S. at 105-106.

²² As requested by counsel for respondent, the Commission has taken official notice of an amendment to the New Hampshire statutes, effective January 1988, requiring that motor common carriers file just and reasonable rates. See N.H. Rev. Stat. Ann. § 375-B:13. (1988 Supp.) Thus, the facts shown in respondent's request to take official notice suggest that New Hampshire now has an affirmatively expressed policy that rates be set according to regulatory criteria, and not purely through competition. However, respondent has not argued, nor made any showing that, pursuant to this new authority, the NHDOT presently engages in substantive review of the merits of these filed rates. Nor has respondent asked the Commission to consider further information to that effect. See Commission Rules of Practice 3.51(e), 3.43(a) & (c). 16 CFR 3.51(e), 3.54(a) & (c). There will always be changes in fact during the pendency of any appeal. To a large extent, the Commission must rely on the parties to indicate that there has been sufficient change for the Commission to exercise its discretion to obtain more information. Respondent has not done so here. At best, the facts now of record indicate that New Hampshire's scheme, in practice, is like that of Massachusetts, where we also find the state action defense wanting.

A demonstration relating to the first prong of the *Midcal* test simply does not compel any inferences as to the second prong. That is, the existence of supervisory authority does not establish that the authority is

3. Rhode Island

Although the Massachusetts and Rhode Island statutory schemes are quite similar, the states have differed substantially in the exercise of their authority to regulate rates. Unlike its counterpart in Massachusetts, the Rhode Island DPUC reviews [22] proposed rates for their reasonableness and not solely for the purpose of ensuring compliance with format requirements.

The record reveals that the DPUC's rate analyst uses historical rate information to make initial determinations on the reasonableness of rate proposals. Rates are permitted to become effective without a hearing only if they are consciously determined to fall within a "zone of reasonableness," which is based on the maximum and minimum industry averages of previously approved rates for each category of motor carrier. FFID 56, 60. In applying this analysis, the rate analyst may consider the percentage increase and the date of the last request, but general increases cannot be granted based solely on inflation unless there is a hearing. FFID 56, 60.

After making its initial determination on an individual or an NEMRB proposal, the staff drafts an order, which may be accompanied by a memorandum, recommending that the Administrator, who has final authority in such matters, either approve the proposal or suspend it and conduct a hearing. FFID 58. As noted above, on at least one occasion in the recent past, the DPUC suspended an NEMRB rate proposal pending the receipt of further evidence at a formal public hearing. FFID 58. On that occasion DPUC met with NEMRB in an informal conference to ask questions about the proposal. *Id.* After issuing a public notice on June 17, DPUC conducted a formal public hearing on the proposal on July 9, 1986. FFID 58; Exhibit J. The record contains a transcript of this formal public hearing. FFID 58; Exhibit K. Following the hearing, the DPUC granted NEMRB's application for a general rate increase. ID at 34. Irrespective of whether review of a rate proposal is limited to scrutiny under the "zone of reasonableness" standard or entails a formal hearing, the DPUC always issues an order concerning the tariff. FFID 58, 60.

exercised. For example, in Massachusetts, Mass. Gen. L. Ch. 159B, § 6, para. 5 provides, in part, "The [MDPU] shall annually establish reasonable maximum and minimum rates or charges consistent with industry and economic conditions and consistent with the declaration of policy contained in section one." (Emphasis supplied.) However, the ALJ found, "Although MDPU has the authority to establish maximum and minimum rates, ch. 159B, § 6, para. 5, it has not done so as to motor carriers of property, except a minimum rate order was entered many years ago with respect to dump trucks and petroleum tank truck carriers." FFID 32.

Taken together, the evidence establishes that the DPUC conducts a program of supervision and has engaged in a sufficient review of the rates filed by motor carriers and their agents to satisfy the second prong of the *Midcal* test. NEMRB's ratemaking activities in Rhode Island are therefore immune from antitrust liability by virtue of the state action doctrine.

IV. NOERR-PENNINGTON IMMUNITY

NEMRB also argues that its activities are insulated from antitrust liability by virtue of the *Noerr-Pennington* doctrine. That doctrine shields from antitrust scrutiny concerted efforts by competitors to petition government officials to take action that would restrain competition, except in circumstances where the petitioning is a "sham" or an abuse of process. *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657 [23] (1965); *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972).

NEMRB contends that the *Noerr-Pennington* doctrine applies here because the filing of collective tariffs in Massachusetts, New Hampshire, and Rhode Island was part of an effort to persuade regulatory agencies to permit carriers to use the rates contained therein. NEMRB further contends that its activities in formulating the rates to be filed also must be protected, because the right to petition a governmental agency includes the right to formulate the position the group will present to the agency.

The Supreme Court most recently considered the *Noerr-Pennington* doctrine in *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 108 S. Ct. 1931 (1988). Allied was a producer of steel electrical conduit and a member of a private standard-setting organization that publishes the National Electrical Code. The Code listed approved types of electrical conduit. The plaintiff, Indian Head, was a manufacturer of plastic conduit and had asked that its product be included in the new edition of the Code. To prevent approval of Indian Head's product, Allied and other members of the steel industry "packed" the annual meeting of the standard-setting organization with representatives whose sole purpose was to vote against the plaintiff's proposal. 108 S. Ct. at 1935.

Allied did not deny that its actions were anticompetitive, but claimed that because state and local governments routinely adopted the National Electrical Code, its activities within the private standard-

setting meeting were immunized as simply an efficient means to influence governmental action. The Supreme Court disagreed, ruling that “immunity of anticompetitive activity intended to influence the government depends not only on its impact, but also on the context and nature of the activity.” 108 S.Ct. at 1939. Because of its context (private standard-setting) and nature (packing the annual meeting) the Court concluded that Allied’s activity, in essence promoting agreements not to manufacture, distribute, or purchase plaintiff’s product, *id.* at 1937, was “the type of commercial activity that has traditionally had its validity determined by the antitrust laws themselves,” *id.* at 1939. Accordingly, the Court held that *Noerr-Pennington* immunity was not available.

We may assume that NEMRB’s activities in Massachusetts, New Hampshire, and Rhode Island were designed to influence governmental action—specifically, regulatory approval of the privately determined rates. Nevertheless, that fact standing alone is insufficient to confer *Noerr-Pennington* immunity. In addressing an argument similar to NEMRB’s, the Court in *Allied Tube* stated, “We cannot agree with [Allied’s] absolutist position that the *Noerr* doctrine immunizes every concerted effort that is genuinely intended to influence governmental action. If all such [24] conduct were immunized then, for example, competitors would be free to enter into horizontal price agreements as long as they wished to propose that price as an appropriate level for governmental ratemaking or price supports.” 108 S. Ct. at 1938-39. We find this reasoning, specifically applicable here, to be persuasive.

Indeed, where the jointly filed tariffs go into effect without adequate state supervision, any anticompetitive impact is a direct result of the price-setting agreements among the filing competitors, and not of action by the state. To hold that respondent’s price agreements are protected as joint petitioning would virtually eliminate the “active supervision” requirement of the state action doctrine. Under this interpretation of *Noerr*, any competitor conduct would be immunized from antitrust scrutiny so long as it was “proposed” in a collective tariff filing, irrespective of whether state review and approval have been adequate to ensure furtherance of state rather than purely private interests.²³ Such a broad application of *Noerr*

²³ Areeda and Hovenkamp assert that rate filings should presumptively lack *Noerr* protection, and contend that the relationship between the regulatory regime and the antitrust laws is the critical issue “from which *Noerr* immunity for the filing is an undesirable and unnecessary diversion.” P. Areeda & H. Hovenkamp, *Antitrust Law* para. 206.1 (1988 Supp.).

cannot be reconciled with the teaching of *Allied Tube*, that the scope of *Noerr* protection depends “on the source, context, and nature of the anticompetitive restraint at issue.” 108 S.Ct. at 1936.

NEMRB’s collective rates amount to a horizontal agreement on price, an arrangement that “has traditionally had its validity determined by the antitrust laws themselves.” See 108 S. Ct. at 1939. In short, NEMRB’s collective rate setting efforts can “more aptly be characterized as commercial activity with a political impact,” 108 S. Ct. at 1941, than as political activity with a commercial impact. Accordingly, we hold that NEMRB’s collective ratemaking is not immune from the antitrust laws by virtue of the *Noerr-Pennington* doctrine. Such conduct is protected, if at all, by the state action doctrine.²⁴

V. OTHER DEFENSES

NEMRB further argues that the Complaint should be dismissed because of the doctrines of laches, estoppel, and waiver, and an alleged failure to join indispensable parties. The ALJ rejected [25] each of these defenses in the Partial Summary Decision, SD at 18, 20, and we affirm. The ALJ’s findings, analyses, and conclusions with respect to these defenses, as set forth in the Partial Summary Decision, are hereby adopted as the findings of fact and conclusions of law of the Commission.

VI. RESTRAINT OF TRADE

The ALJ ruled that NEMRB’s collective ratemaking was *per se* illegal under the antitrust laws. SD at 23-24. In its appeal brief, NEMRB contends that its conduct should be judged under the rule of reason rather than the *per se* rule. Although we eschew perfunctory application of the *per se* rule, we hold that NEMRB’s collective ratemaking activities constitute an unfair method of competition under Section 5 of the FTC Act.

As we observed in *Massachusetts Board of Registration in Optometry*, 110 FTC 549, 602-04 (1988), the Supreme Court has moved away from the *per se* rule/rule of reason dichotomy in analyzing horizontal restraints.²⁵ In *Broadcast Music, Inc. v. CBS*,

²⁴ We have held that NEMRB’s conduct in Massachusetts and New Hampshire is not entitled to state action protection, but that the state action defense does protect its activities in Rhode Island. See Section III, *supra*.

²⁵ We recognize that the Court has at times continued to invoke the *per se* rule. For example, in the recent past the Court has held that agreements among competitors to establish maximum prices or to fix credit terms are illegal *per se*. *Arizona v. Maricopa County Medical Soc.*, 457 U.S. 332, 351 (1982); *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 648-50 (1980).

441 U.S. 1 (1979) (“*BMP*”), and *NCAA v. Board of Regents of the University of Oklahoma*, 468 U.S. 85 (1984) (“*NCAA*”), the Court declined to apply a traditional antitrust analysis to the restraints at issue. In *BMI*, the Court upheld an agreement among composers to issue a blanket license to CBS to perform the composers’ works even though the agreement was technically a form of price fixing. The Court found that the blanket licensing agreement created a market in the sale of musical compositions and therefore was procompetitive. 441 U.S. at 21-23. Similarly, in *NCAA* the Court declined to invoke the *per se* rule where the NCAA had entered into exclusive contracts with the television networks that restricted pricing and output. The Court ultimately found that the contracts constituted an unreasonable restraint of trade, but only after it considered and rejected the defendants’ purported justifications for them. 468 U.S. at 113-20.

Taken together, recent Supreme Court decisions suggest a method of analysis for determining the legality of a trade restraint that is more functional than the *per se*/rule of reason dichotomy. This analysis entails a series of inquiries: [26]

First, we ask whether the restraint is “inherently suspect.” In other words, is the practice the kind that appears likely, absent an efficiency justification, “to restrict competition and decrease output?” For example, horizontal price-fixing and market division are inherently suspect because they are likely to raise price by reducing output. If the restraint is not inherently suspect, then the traditional rule of reason, with attendant issues of market definition and power, must be employed. But if it is inherently suspect, we must pose a *second* question: Is there a plausible efficiency justification for the practice? That is, does the practice seem capable of creating or enhancing competition (*e.g.*, by reducing the costs of producing or marketing the product, creating a new product, or improving the operation of the market)? Such an efficiency defense is plausible if it cannot be rejected without extensive factual inquiry. If it is not plausible, then the restraint can be quickly condemned. But if the efficiency justification is plausible, further inquiry—a *third inquiry*—is needed to determine whether the justification is really valid. If it is, it must be assessed under the full balancing test of the rule of reason. But if the justification is, on examination, not valid, then the practice is unreasonable and unlawful under the rule of reason without further inquiry—there are no likely benefits to offset the threat to competition.

Mass. Board, 110 FTC at 604. See also *Detroit Auto Dealers Ass’n*, D. 9189, Final Decision and Order, Slip Op. at 20 (February 22, 1989). The restraint at issue in this proceeding is the joint setting of rates for transportation services. Such an agreement is inherently suspect because it “substitutes concerted pricing decisions among

competing carriers for the influence of impersonal market forces on proposed rates." *United States v. Southern Motor Carriers Rate Conference, Inc.*, 672 F.2d 469, 478 (5th Cir. Unit B 1982), *on rehearing*, 702 F.2d 532, 542 (5th Cir. Unit B 1983) (en banc), *rev'd on other grounds*, 471 U.S. 48 (1985).

Having concluded that NEMRB's price-fixing agreement is inherently suspect, we next inquire whether there is any plausible efficiency justification for the agreement. Despite its insistence that the *per se* rule should not apply, NEMRB has offered no efficiency justification for its collective ratemaking, and we can conceive of none. Accordingly, we hold that NEMRB's collective ratemaking activities in Massachusetts [27] and New Hampshire constituted an unfair method of competition in violation of Section 5 of the FTC Act.²⁶

VII. RELIEF

Under the ALJ's order, NEMRB is prohibited from engaging in all activities related to collective rate setting in Massachusetts and New Hampshire, including providing information or helping to facilitate the establishment and maintenance of rates among competing carriers. Further, NEMRB would be required to cancel all tariffs currently in effect and to notify its members of entry of the order. Under the order, NEMRB must also notify the Commission within thirty days of any proposed change, such as dissolution, assignment or sale, and must file a compliance report within six months of the order and annually for the next five years. We believe that these provisions are warranted and have included them in the final order.

We have modified the ALJ's order in one salient respect. The ALJ determined that the prohibition against collective rate setting should apply only in Massachusetts and New Hampshire, where the violations actually occurred. He declined to extend the order to all of the states where NEMRB operates, because the record was silent regarding the availability of the state action defense in states including Connecticut, Maine, New York, and New Jersey. We believe that the order should apply to all of the states in NEMRB's operating area.

The Commission has broad discretion to choose a remedy so long as

²⁶ Alternatively, under a traditional analysis, NEMRB's liability could be predicated on a *per se* theory. In *Mass. Movers*, the Commission declared that collective ratemaking falls squarely within the rubric that "agreements among competitors to set price levels or price ranges are *per se* illegal under the antitrust laws." 102 FTC at 1224. *Accord*, *Georgia v. Pennsylvania R.R.*, 324 U.S. 439, 456-61 (1945); *Keogh v. Chicago & N.W. Ry.*, 260 U.S. 156, 161-62 (1922). The ratemaking activities of NEMRB are indistinguishable from those held to be illegal *per se* in *Mass. Movers*.

the remedy has a reasonable relation to the unlawful practices. *American Medical International, Inc.*, 104 FTC 1, 222 (1984), citing *Jacob Siegel Co. v. FTC*, 327 U.S. 608 (1946). Extending the order to the entire operating area of NEMRB will simplify enforcement and serve as a safeguard against future violations in the other states where the state action defense is not available. Courts have recognized that where the business operations of a violator are not restricted to the areas where the unlawful acts occurred, the possibility of future violations is a sufficient basis for rendering a Commission order applicable to the entire operating area of a respondent. See, e.g., [28] *National Dairy Products Corp. v. FTC*, 395 F.2d 517, 529 (7th Cir. 1968), cert. denied, 393 U.S. 977 (1968).

The record shows that NEMRB collective rate setting activities are conducted centrally. The NEMRB's members, operating in several states, elect the officers and directors who control the direction and management of the organization, and a single chief administrative officer supervises the affairs of the bureau. FFSD 3, 6. The bureau has a Cost Research Department and an Accounting & Finance Department, which gather financial information concerning motor carriers, and a Legal Department. FFSD 7, 8. The bureau's carrier members from several states use the General Rate and Classification Committee to collectively formulate intrastate rates. FFSD 16. The tariffs and supplements published by the bureau are filed by the NEMRB's Tariff Publishing Department, which mails an "advice of disposition" to all carrier members and subscribers after each General Rate and Classification Committee meeting, advising as to the action taken on proposals considered. FFSD 20, 21. Thus, NEMRB rate setting conduct is not limited to the four states discussed extensively above, and its activities affecting the remaining states covered by this order are intertwined with its rate setting in New Hampshire and Massachusetts. See Exhibit K. (Transcript of hearing before Rhode Island DPUC, generally describing NEMRB organization and rate setting procedures).

In deference to state action, the order does not extend to NEMRB's collective ratemaking activities in states, such as Rhode Island, where such activity is conducted pursuant to a clearly articulated and affirmatively expressed state policy to displace competition and is actively supervised by a state regulatory body.

SEPARATE STATEMENT OF COMMISSIONER MARY L. AZCUENAGA,
CONCURRING IN PART AND DISSENTING IN PART,

I agree with the majority that the collective ratemaking of the New England Motor Rate Bureau ("NEMRB") is unlawful price fixing and that in the state of New Hampshire NEMRB's price fixing is not protected by the state action doctrine from Section 5 of the Federal Trade Commission Act. I also agree with the majority that the state legislatures in Massachusetts and Rhode Island have clearly articulated their intent to displace competition with regulation and, therefore, that the first part of the *Midcal* test for state action has been met in both states. *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980); see *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 64-65 (1985).

I disagree with the opinion of the majority insofar as it distinguishes between Massachusetts and Rhode Island in assessing active supervision, the second part of the *Midcal* test for state action, because the facts relating to active supervision are virtually identical in these states. The majority is able to reach different results in Massachusetts and Rhode Island only by a highly selective review of the evidence, picking and choosing among the stipulated facts and rejecting those inconsistent with its preferred result, with no discernible purpose except to create a distinction between Massachusetts and Rhode Island. This distinction simply does not emerge from a straightforward reading of the record. I also disagree with the majority's analysis of active supervision. As discussed below, I conclude that Massachusetts, like Rhode Island, actively supervises the rates proposed by NEMRB and that NEMRB's collective ratemaking is protected in both states by the state action doctrine from Section 5 of the Federal Trade Commission Act.

In general, the majority appears to be guided by the mistaken notion that the state action doctrine is to be narrowly construed as an exemption to the federal policy favoring competition. The conclusion of the Administrative Law Judge that the state action doctrine of *Parker v. Brown* is "an implied exemption to the antitrust laws," to be narrowly construed, I.D. at 20, should be explicitly rejected, because it confuses preemption with exemption.¹ The state action

¹ The following abbreviations are used in this statement:

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(footnote cont'd)

doctrine involves principles of preemption. *Community Communications Co., Inc. v. [2] City of Boulder*, 455 U.S. 40, 60-70 (1982) (Rehnquist, J., dissenting);² accord, *324 Liquor Corp. v. Duffy*, 479 U.S. 335, 345-46 n.8 (1987); *Fisher v. City of Berkeley*, 475 U.S. 260, 264-65 (1986). Principles of exemption, on the other hand, apply when two enactments of a single sovereign conflict. Exemption is not a question of federalism or state sovereignty. Although we may earnestly believe that state regulation of common carrier rates is anticompetitive and wrong, this is a question of state policy, not federal law enforcement.

It is not our role to question the correctness of a state agency's decision that proposed prices are reasonable or unreasonable but rather to examine whether a state agency in fact exercises its authority to review privately fixed prices. As an agency concerned with promoting competition, the Commission generally prefers to see prices set by the competitive forces of the market. We have no authority, however, to impose this preference for competition on unwilling states that choose instead to regulate certain industries. To do so would establish the Commission as the arbiter of state policy, a result that the principle of federalism underlying the state action doctrine precludes.

Active Supervision

Active supervision exists when "state officials have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy." *Patrick v. Burget*, 108 S. Ct. 1658, 1663 (1988). Such a "program of active supervision" is necessary to ensure "that a private party's anticompetitive conduct promotes state policy, rather than merely the party's individual interests." *Id.*; accord, *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 47 (1985).

As the majority concludes, the responsible agencies in Massachusetts and Rhode Island have the requisite authority to review private common carrier rate proposals to ensure that they are consistent with

I.D.F. Initial Decision Finding
Stip. Stipulation of the Parties (August 28, 1986)
Slip op. Slip Opinion of the Majority.

² Justice (now Chief Justice) Rehnquist pointed out that *Parker v. Brown* "is clearly the language of federal pre-emption under the Supremacy Clause": "In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress." 455 U.S. at 62-63. *quoting Parker*. 317 U.S. at 351

state policy and to disapprove those prices that are not. I agree with the majority that the authority to review and to disapprove is necessary but not sufficient to establish active supervision. We also must consider whether the [3] state agency exercises the authority delegated to it, whether the state in fact actively supervises the anticompetitive conduct. *See Patrick v. Burget*, 108 S. Ct. at 1663.

We know from *Patrick* that active supervision requires a review sufficient to ascertain consistency with state policy. I therefore agree with the majority's holding that "the active supervision requirement is satisfied only where the state agency has reviewed the proposed tariffs or rates on the merits." Slip op. at 15.³ The majority appears to suggest, however, that the state agency must take some visible action to evidence its review, so "that the state's conscious approval or disapproval of the private conduct can be discerned." Slip op. at 14. The majority's statement that "[n]o clear inference of conscious state approval . . . can be drawn from a state agency's passive acceptance or nonsubstantive review of rate filings," slip op. at 15, also suggests that the majority would find active supervision only when the agency engages in some visible activity.

Negative Option Procedures

The majority's apparent requirement of some visible activity to evidence state agency supervision of tariff proposals seems to require more of the states than the Supreme Court required in *Patrick*, where the Court said that "state officials [must] have and exercise power to review [private acts] and disapprove" those that are inconsistent with state policy. 108 S. Ct. at 1663. By suggesting that evidence of visible activity is required and that "passive acceptance" is equivalent to a "nonsubstantive review," the majority apparently excludes as a basis for active supervision the use of so-called negative option procedures, pursuant to which a proposed tariff is deemed approved if it is not rejected or suspended by the state agency.⁴ This approach may be too facile and may overlook a genuine review on the merits. [4]

Review of proposed tariffs pursuant to negative option procedures,

³ The merits that the state agency must examine are equivalent to consonance with state policy, however ill-advised or anticompetitive that policy might be. *See Patrick*, 108 S. Ct. at 1663. The majority's statement that an acceptable review on the merits "ensures that the state agency has consciously considered the anticompetitive consequences of the activity" (slip op. at 15; emphasis added) seriously misperceives the gravamen of the state action doctrine.

⁴ Consistent with this approach, the majority rejects the stipulated fact that the Massachusetts rate analyst believes that rates permitted to become effective without a hearing have been determined to be consistent with statutory standards, apparently because the state agency did not engage in any visible acts of review. *See Stip.* 62, discussed below at 10-11.

such as those provided by statute in Massachusetts and Rhode Island,⁵ may provide less tangible evidence of active supervision than, for example, the notice and hearing procedures that complaint counsel propose or the evidence of visible activity that the majority apparently would require. But review pursuant to negative option procedures can be sufficient to constitute active supervision, unless we equate administrative silence with the abandonment of administrative duty. See *Washington Gas Light Co. v. Virginia Electric & Power Co.*, 438 F.2d 248, 252 (4th Cir. 1971) ("It is just as sensible to infer that silence means consent, *i.e.*, approval.").⁶ When a state agency reviews private proposals and permits them to become effective because they are consistent with state policy, nothing in *Patrick* or *Midcal* or *324 Liquor Corp.* appears to require some more visible activity to demonstrate active supervision.

It would be the epitome of a double standard and inaccurate to presume that the use of negative option procedures by a state agency implies "nonsubstantive review" of proposed tariffs.⁷ The Commission also uses negative option procedures. When it does so, the Commission retains "ultimate authority and control" over the proposed course of action and can be presumed to believe that the proposed action is consistent with Commission policy unless a majority acts to disapprove it within a specified period of time. The evidence of substantive review is more clear when the Commission issues a written opinion, but the fact that the evidence is less clear when review is pursuant to a negative option does not mean that review does not occur. Judged by the majority's standard, the Commission's approval of a course of action considered under negative option procedures apparently would be considered "passive acceptance" equivalent to a [5] "nonsubstantive review." If this were true, then it also would be true that the Commission routinely sits as a passive observer to certain major law enforcement decisions made in its name.⁸

⁵ In both states, a proposed tariff is effective 30 days after filing, unless suspended and set for a hearing by the state agency. Mass. Ann. Laws ch. 159B, § 6 (1979) (Ex. D, Tr. 1057-59); R.I. Gen. Laws ch. 12, §§ 39-12-12 & -13 (1984) (Ex. G, Tr. 1146-47).

⁶ The majority's approach disregards the usual presumption that official actions by public officers have been regularly performed. C. McCormick, *Law of Evidence* § 343, at 807 (2d ed. 1972). See I.D. at 30.

⁷ The Supreme Court seems to share this view. In *Southern Motor Carriers*, 471 U.S. at 50-51, the Court said, in *dicta*, that state agencies implementing negative option regulatory schemes similar to those in Massachusetts and Rhode Island "thus have *and exercise* ultimate authority and control over all intrastate rates." (Emphasis added.)

⁸ One example refutes this suggestion. When the Director of the Commission's Bureau of Competition informs the Commission that he intends after a certain time has elapsed to close a merger investigation, unless

The state's choice of procedure to implement its regulatory programs ought not be dispositive of the active supervision issue, nor should the Commission through application of the state action doctrine impose procedural requirements on the states.⁹ The majority's apparent requirement of visible activity to evidence review belies its disclaimer of any intent to impose such requirements. *See slip op.* at 15 n.14. Certainly it is true that if the negative option procedures used in Massachusetts and Rhode Island were merely described in the statutes but not implemented, then the exercise of active supervision would be absent. But the record shows that both Massachusetts and Rhode Island used their procedures, and the manner in which they were used is virtually identical in both states.

Comparison of the Evidence for Massachusetts and Rhode Island

In their discussion of the facts concerning active supervision in Massachusetts and Rhode Island, the majority's preference for some visible activity to evidence state review of proposed rates becomes clear. The majority finds active supervision in Rhode Island, where the state agency's review is evidenced by visible acts of approval (written orders) and a visible act of suspension (a single, post-complaint hearing), but the majority finds no active supervision in Massachusetts, where the state agency issued no written orders and held no hearings in the six years before the complaint was issued.¹⁰ These are the [6] only plausibly significant factual differences between the two states in this record and, as discussed below, even these differences, on examination, are not meaningful. The slightly more visible activity in Rhode Island does not by itself demonstrate a review on the merits, and the absence of similar activity in Massachusetts does not demonstrate the absence of review.

In both Massachusetts and Rhode Island, the rate analyst¹¹ reviews proposed tariffs for compliance with formal requirements that are

otherwise directed, it is not my view (and presumably not the view of my colleagues) that he has informed us only so that we may check the grammar and spelling in his closing letter.

⁹ State agency decisions to suspend proposed tariffs and hold hearings are in the nature of prosecutorial decisions, traditionally a matter of agency discretion. If use of negative option procedures is insufficient supervision for purposes of the state action doctrine, then the state will be forced to make a show of exercising its discretion to keep the Commission from interfering with the implementation of its regulatory policy. This in turn would reduce the state's discretion in a manner probably inconsistent with the state action doctrine.

¹⁰ The Massachusetts agency held a hearing to consider minimum rates "many years ago." Stip. 52.

¹¹ Rhode Island and Massachusetts each has a single rate analyst to review proposed tariffs. The record provides no basis for judging the "adequacy" of either agency's staffing decisions, and the finding of the Administrative Law Judge that Massachusetts "does not have a staff adequate to monitor the reasonableness of filed rates," I.D. at 31, should be rejected.

unrelated to the price proposed, although no tariffs have been rejected for this reason in Rhode Island. In both states, the rate analyst also reviews proposed tariffs to ensure that they are consistent with the statutory standards for price levels. Stip. 51, 62 & 103-05.

The majority emphasizes that "the Rhode Island DPUC reviews proposed rates for their reasonableness and not solely for the purpose of ensuring compliance with format requirements," slip op. at 21-22, and that the Massachusetts Department of Public Utility ("MDPU") "rejects only filed tariffs that do not comply with the filing requirements of the regulations." Slip op. at 17. The record does not support this distinction between the two states. Instead, the stipulated record shows that the Massachusetts rate analyst also would recommend suspension and investigation of a proposed tariff if the proposed rates "in his judgment are out of line with the average rates that have been established in the involved pricing zone, . . . extraordinarily high" or discriminatory. Stip. 51.¹²

Because in the six years of his tenure the Massachusetts rate analyst has never recommended suspension of a proposed rate on the basis of the price level, and because the parties have stipulated that he would reject a proposed tariff "out of line" with industry averages or "extraordinarily high," we can infer that in those six years no proposed tariffs in his judgment have [7] been "out of line" with historical rates. Instead, the majority chooses to reject the second stipulated fact on the theory that what the rate analyst has said he would recommend is merely hypothetical and "is not evidence that an agency actually exercises its supervisory authority over private conduct." Slip op. at 19 n. 19 (emphasis omitted).¹³

The majority mistakenly treats a stipulated fact, which must be accepted at face value, as ordinary evidence, which can be weighed or rejected.¹⁴ The stipulated record establishes not that the Massachusetts rate analyst hypothetically might recommend suspension and investigation of a tariff but that he "would" in fact do so. Despite the

¹² Although we are not free to weigh or reject stipulated facts, in drawing our conclusions based on an entire stipulated record, we must accept the tableau that is internally consistent. Stipulation 57, on which the majority apparently relies to conclude that MDPU does only a technical review, must be read in the context of other facts that bear on the same issue, here those set forth in Stipulations 51 and 62. See note 21 *infra*.

¹³ The majority also points to the absence of "regulatory guidelines for determining whether suspension or investigation of rates is appropriate" to attempt to discredit the stipulated fact that the Massachusetts rate analyst would reject proposed tariffs in certain situations. Slip op. at 19 n.19. Nothing in the state action doctrine requires such "regulatory guidelines." Inexplicably, the majority does not register similar concern about the identical regulatory void in Rhode Island.

¹⁴ C. McCormick, *Law of Evidence* § 262, at 630 (2d ed. 1972); see also Note, "Judicial Admissions," 64 Colum. L. Rev. 1121 (1964).

record showing that the rate analyst in Rhode Island never during the relevant period of time rejected or suspended a tariff for any reason, the majority does not cry “hypothetical” but rather infers that the rate analyst in Rhode Island does review tariffs.¹⁵

The review in Rhode Island is no different from that in Massachusetts. The Rhode Island rate analyst reviews tariffs to ensure that they are within a “zone of reasonableness,” which is a measure developed by the rate analyst based on averages of previously approved rates. Stip. 103 & 104. The rates that fall within the “zone of reasonableness,” like those in Massachusetts that are not “out of line” with established average rates, are approved without a hearing. Stip. 105. In Rhode Island, as in Massachusetts, because the rate analyst did not in the six years preceding the complaint recommend suspension of a proposed rate because of the price to be charged, and because the parties have stipulated that unreasonable tariffs are suspended pending a [8] hearing, we can infer that in those six years no proposed tariffs in his judgment were unreasonable. The term “zone of reasonableness” may sound more professional than “out of line,” but the standard is essentially the same: in both states, the rate analyst relies on historical rate averages to assess the reasonableness of proposed rates.

In assessing the reasonableness of a proposed rate, the Rhode Island rate analyst “may also consider the percentage of the rate increase.” Stip. 106. The majority recites this fact, slip op. at 22, but inexplicably omits the fact that the Massachusetts rate analyst also considers the percentage increase, implicit in the stipulated fact that he would recommend suspension of proposed rates that were 20% to 50% higher than previously approved rates. Stip. 51.¹⁶ The record does not tell us what percentage increase the Rhode Island rate analyst might consider unreasonable. For all that we know, in Rhode Island, an increase of 60% to 80% might be deemed reasonable. The point is, of course, that in both Massachusetts and Rhode Island, the state agencies do have standards that they apply in assessing the reasonableness of proposed rates.

¹⁵ Although the facts are precisely the same in the two states—neither rate analyst in the six years preceding the complaint recommended suspension of a proposed tariff because of price—the stipulation for Rhode Island is written in the present tense (“DPUC rejects . . . unreasonable tariffs,” Stip. 110) while that for Massachusetts is written in the conditional (“he would recommend suspension,” Stip. 51).

¹⁶ Although we may, and I assume do, disagree strongly with the pricing latitude permitted by the Massachusetts rate analyst, this is no reason to misconstrue the state action doctrine. We can examine whether the state’s policy is clearly articulated and actively supervised, but we cannot second guess the substantive standards applied by the state to implement its regulatory policy.

For the purpose of assessing active supervision, the most conspicuous factual difference between Massachusetts and Rhode Island in this record is that the Rhode Island agency has held one hearing on a proposed tariff. That hearing, to consider a tariff proposed by NEMRB, was held in July 1986, more than two and one-half years after the complaint was issued.¹⁷ On reading the transcript of the Rhode Island hearing, the Administrative Law Judge wryly observed that "this may be the first and only formal hearing on any tariff" in Rhode Island. I.D. at 34.¹⁸ Had the hearing occurred during the period of time that is the subject of the complaint, it could have been significant evidence of active supervision. Because of the timing, the Commission should not give the fact of this hearing weight in determining whether Rhode Island actively supervised the respondent's collective ratemaking during the period at issue. The record [9] also shows that one minimum rate order was entered in Massachusetts "many years ago," although Massachusetts, like Rhode Island, held no hearings in the six years before the complaint was issued. Stip. 52. The majority unaccountably credits the Rhode Island hearing but ignores the Massachusetts hearing.

A second potentially important difference is the matter of written orders. In Rhode Island, the agency issues an order approving a proposed tariff. Stip. 108. The record does not tell us whether the Massachusetts agency issues an order with respect to each tariff proposal. The majority notes that the Rhode Island agency issues orders (slip op. at 7 & 22) but does not discuss the significance, if any, of this practice and does not discuss what the practice is in Massachusetts. A discussion by the state agency on the merits of a tariff proposal would provide evidence of active supervision, and it is safe to assume that if the Rhode Island orders contained such discussion, that fact would be reflected in the record. In the absence of such a discussion, it is of little if any import whether the agency issues a form order stating that the rate is approved, uses a rubber stamp or simply allows the rate to become effective by declining to suspend it.

The other supposed differences on which the majority relies to distinguish between Massachusetts and Rhode Island are not in fact differences. The majority emphasizes that the Massachusetts agency has not requested financial information to support proposed rates. Slip op. at 18. This does not distinguish Massachusetts from Rhode Island.

¹⁷ The complaint was issued on October 24, 1983.

¹⁸ The majority more generously albeit accurately states that Rhode Island held a hearing "on at least one occasion in the recent past." Slip op. at 7 & 22.

The Rhode Island agency requests financial data to justify proposed tariff changes only if the matter is set for a hearing. Stip. 107. Because Rhode Island did not set any tariffs for a hearing during the period relevant to the complaint, the record shows that Rhode Island, like Massachusetts, did not request financial information to support proposed rates.

The majority also notes that the Massachusetts agency has not "audited carriers' records or monitored economic conditions within the trucking industry." Slip op. at 19. These facts apparently are important to the majority's conclusion that Massachusetts did not actively supervise private ratemaking, for reasons that are not explained. But the majority inexplicably fails to note that Rhode Island, like Massachusetts, has not audited carriers' financial records or monitored economic conditions in the industry. Stip. 107, 120 & 123.

In its rate filings in both Massachusetts and Rhode Island, NEMRB submits rate justification data previously filed with the Interstate Commerce Commission. The Rhode Island agency "makes use" of the information in the ICC filing "to make its initial determination of the lawfulness of the NEMRB [rate] proposals." [10] Stip. 108. In Massachusetts, the MDPU "relies on the fact that the ICC has already conducted an investigation and reached a conclusion as to the justness and reasonableness of the NEMRB proposals." Stip. 66. No significant difference between the two states flows from these facts. The majority, however, declines to credit Massachusetts' reliance on the ICC data, because, they say, the word "relies" is a "peculiar word choice" that "does not overcome the general finding that MDPU review is limited" to formal requirements. Slip op. at 20 n.20. The real peculiarity is the majority's attempt to distinguish between Massachusetts and Rhode Island on this record.

In both Massachusetts and Rhode Island, the parties have stipulated that the state rate analysts believe that "whenever tariffs become effective without rejection, suspension or hearing, that action results from a determination that the proposed rates meet the regulatory criteria of the statute, orders, rules and regulations" of the state. Stip. 62 (Massachusetts); stip. 117 (Rhode Island). The majority, in an extraordinary and lengthy footnote, concludes that Stipulation 62 (Massachusetts) does not directly address the "central issue," namely, "whether the rate analyst, or anyone else at MDPU, has formed an opinion that approved rates are just and reasonable." Slip op. at 18 n.18.

The majority reasons that the reference in Stipulation 62 to regulatory criteria is "unclear," making it impossible to discern whether the state considered the reasonableness of proposed rates. In fact, nothing could be more clear than the reference to the "regulatory criteria of the statute," which require rates to be "just and reasonable." The majority acknowledging that the statute does contain such a standard, concludes that Stipulation 62 "[n]onetheless" fails to show a review on the merits, because the stipulation is written in the passive voice and, therefore, "does not say that such rates result from an opinion of the rate analyst that the regulatory criteria are satisfied." Although professing to be "loathe to parse stipulations too closely" and reluctant to "read unstated facts" into the stipulation, the majority proceeds to the remarkable interpretation that "this stipulation may simply mean that the *carriers* have determined that the rates are reasonable." (Emphasis added.)¹⁹ By such fallacious reasoning, the majority distorts the plain meaning of the stipulation. [11]

The real problem the majority has with Stipulation 62 is that the facts it contains are inconsistent with the result the majority reaches. Stipulation 62 tells us that the person in Massachusetts who has direct knowledge believes that he conducts a review on the merits. In attempting to discredit this stipulation, the majority elevates the importance of visible yet meaningless acts (pieces of paper that mark the end of uneventful negative option periods and a post-complaint hearing) over evidence that actually shows a review on the merits.²⁰

The majority's final assault on Stipulation 62 (Massachusetts) stems from the fact that the record contains virtually identical stipulations for New Hampshire and Rhode Island. The majority's solution to this inconvenience is to conclude that Stipulation 62 is "ambiguous" and entitled to "less weight than the state-specific stipulations that provide concrete detail." Slip op. at 18-19 n.18. There are three problems with this conclusion. First, Stipulation 62 is unambiguous. Second, the stipulation is "state-specific" and provides no less concrete detail than any other stipulations in the record. Third, the majority once again mistakenly treats a stipulated fact, which

¹⁹ The majority also uses the passive voice in their statement that rates in Rhode Island are effective "only if they are consciously determined" to be reasonable. Slip op. at 22. If the majority applied their own rules to their own prose, presumably they would find no active supervision in Rhode Island.

²⁰ Under complaint counsel's theory of the case, the absence of hearing and notice proceedings in both states would be dispositive of the active supervision issue, and the rate analyst's opinion about the reasonableness of proposed rates would be irrelevant.

must be accepted at face value, as ordinary evidence, which can be weighed or rejected.²¹

Because I share the majority's apparent distaste for regulated price fixing, I sympathize with their apparent inclination to require some greater justification before allowing it. But the evidence on which the majority relies simply does not show what they want it to show. Although minimal, the essential evidence is clear: the Massachusetts agency performs a substantive review of privately set tariffs through implementation of a negative option procedure.

Conclusion

The stipulated record plainly shows that the rate analysts in Massachusetts and in Rhode Island believe that rates allowed to become effective without challenge in fact meet the [12] applicable statutory standards of "just and reasonable." These facts in turn imply a review on the merits in both states, an implication that the majority prefers to ignore, at least in Massachusetts. This cavalier treatment of stipulated facts is unwarranted and inconsistent with the Commission's obligation to decide adjudicative matters on the record before it.

Two discernible rules of law emerge from the opinion of the majority. The first principle that necessarily follows from the opinion is that the implementation of negative option procedures to carry out a substantive review of state policy is not enough, without more, to demonstrate active state supervision. The second principle that we can derive is that the Commission will infer active supervision when the state agency (1) issues written orders (although the orders need not explain the agency's decision) and (2) convenes a hearing some time after a Commission complaint issues. In practical effect, these "rules of law" may ignore the reality of state agency review and probably will spawn a plethora of *pro forma* orders of approval. Any state agency that wants to preserve its regulatory program from federal interference can observe these minimal requirements and stay in business. The principles of the majority, however, do nothing to ensure that a finding of active supervision will correspond to an actual review on the merits.

Given the stipulated record here, the only reasonable conclusion is that the degree of active supervision in Massachusetts and Rhode

²¹ Indeed, to support their conclusion of an absence of active supervision in Massachusetts, the majority rejects this stipulated fact and Stipulation 51, discussed above at 6-8, both of which are "state-specific," stipulated facts that tend to demonstrate that the state agency does in fact supervise private price fixing.

Island is virtually the same and that the decision concerning NEMRB's liability should be the same in both states. In both states, the record shows that the state agency reviews NEMRB's collective ratemaking on the merits, that is, to ascertain consistency with state policy. This review, in turn, shows that the agencies in both states engage in active supervision and, therefore, the complaint allegations of violations in Massachusetts and Rhode Island should be dismissed. To the extent that the majority reaches a different result, I dissent.

FINAL ORDER

This matter has been heard by the Commission upon the appeal of respondent New England Motor Rate Bureau, Inc. ("NEMRB") from the initial decision and upon briefs and oral argument in support of and in opposition to the appeal. For the reasons stated in the accompanying opinion, the Commission has determined to deny the respondents' appeal. Accordingly,

It is ordered, That the initial decision of the Administrative Law Judge be adopted as Findings of Fact and Conclusions of Law except to the extent inconsistent with the accompanying opinion. Other Findings of Fact and Conclusions of Law of the Commission are contained in the accompanying opinion.

I.

It is further ordered, That NEMRB, 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:

1. Entering into, 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 carriers that compete for the intrastate transportation of property or related services, goods or equipment within any of the states in which NEMRB operates.
2. Knowingly preparing, developing, disseminating, or filing a proposed or existing tariff provision that contains collective rates for the intrastate transportation of property or other related services, goods, or equipment.
3. Providing information to any carrier about rate changes ordered

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

4. Inviting, coordinating, or providing a forum for (including by publication of an informational bulletin) any discussion or agreement between or among competing carriers concerning intrastate rates charged or proposed to be charged by carriers for the intrastate transportation of property or related services, goods or equipment.

5. Suggesting, urging, encouraging, persuading, or influencing in any way members to charge, file, or adhere to any existing or proposed tariff provision that affects rates, or otherwise to charge or refrain from charging any particular price for any services rendered or goods or equipment provided.

6. Agreeing with any carrier to institute automatic changes to rates on file for that carrier.

Provided, however, that except as to the states of New Hampshire and Massachusetts, nothing in this order shall prohibit NEMRB from jointly setting or adhering to rates charged for intrastate transportation of property in any state where such joint activity is engaged in pursuant to a policy, clearly articulated and affirmatively expressed by the state legislature, to displace competition with respect to those prices and where such joint activity is actively supervised by a state regulatory body.

II.

It is further ordered, That NEMRB shall, within six (6) months after service upon it of this order:

1. Take such action as may be necessary to effectuate cancellation and withdrawal of all tariffs and any supplements thereto on file with any state or commonwealth that it was involved in preparing, developing, or filing that establish rates for transportation of property or related services, goods or equipment by common carriers within such state or commonwealth.

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 any state or commonwealth.

Provided, however, that except as to the states of New Hampshire

and Massachusetts, nothing in this order shall require NEMRB to cancel and withdraw tariff filings, powers of attorney, or rate and tariff service agreements in any state where joint setting of rates charged for intrastate transportation of property is engaged in pursuant to a policy, clearly articulated and affirmatively expressed by the state legislature, to displace competition with respect to those prices and where such joint activity is actively supervised by a state regulatory body.

III.

It is further ordered, That NEMRB shall within thirty (30) days after service upon it of this order, mail or deliver a copy of this order, under cover of the letter attached hereto as "Appendix," to each current member, and for a period of three (3) years from the date of service of this order, to each new member within ten (10) days after the member's acceptance by NEMRB.

IV.

It is further ordered, That NEMRB notify the Commission at least thirty (30) days prior to any proposed change in the 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.

V.

It is further ordered, That NEMRB 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 years thereafter, and at such other times as the Commission may require by written notice to respondent, setting forth in detail the manner and form in which it has complied with this order.

Commissioner Azcuenaga concurring in part and dissenting in part, and Commission Machol not participating.*

* Prior to leaving the Commission, former Chairman Oliver registered his vote in the affirmative for the Final Order and the Opinion of the Commission in this matter. Chairman Steiger therefore did not register a