ANALYSIS OF PROPOSED CONSENT ORDER TO AID PUBLIC COMMENT IN *INDIANA HOUSEHOLD GOODS AND WAREHOUSEMEN, INC.*, FILE NO. 021-0115

The Federal Trade Commission has accepted for public comment an Agreement Containing Consent Order with Indiana Household Movers and Warehousemen, Inc. ("IHM&W" or "Respondent"). The Agreement is for settlement purposes only and does not constitute an admission by IHM&W that the law has been violated as alleged in the Complaint or that the facts alleged in the Complaint, other than jurisdictional facts, are true.

I. The Commission's Complaint

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

Respondent is an association organized for and serving its members, which are approximately 70 household goods movers that conduct business within the State of Indiana. One of the primary functions of Respondent is preparing, and filing with the Indiana Department of Revenue, tariffs and supplements on behalf of its members. These tariffs and supplements contain rates and charges for the intrastate and local transportation of household goods and for related services.

The proposed Complaint alleges that Respondent is engaged in initiating, preparing, developing, disseminating, and taking other actions to establish and maintain collective rates, which have the purpose or effect of fixing, establishing or stabilizing rates for the transportation of household goods in the State of Indiana. The Respondent files uniform rates that are agreed upon by all of its members.

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

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

II. Terms of the Proposed Consent Order

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

Paragraph II of the proposed Order bars Respondent from filing a tariff that contains collective intrastate rates. This provision will terminate Respondent's current practice of filing tariffs that contain intrastate rates that are the product of an agreement among movers in the State of Indiana. This paragraph also prohibits Respondent from engaging in activities such as exchanges of information that would facilitate member movers in agreeing on the rates contained in their intrastate tariffs. It also bars Respondent from maintaining a tariff committee or agreeing with movers to institute any automatic intrastate rate increases.

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

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

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

III. Opportunity for Modification of the Order

Respondent can seek to modify the proposed Order to permit it to engage in collective rate-making if it can demonstrate that the "state action" defense would immunize its conduct.[1] The state action doctrine dates back to the Supreme Court's 1943 opinion in *Parker v. Brown*, which held that, in light of the States' status as sovereigns, and given basic principles of federalism, Congress would not have intended the Sherman Act to apply to the activities of States themselves.[2] The defense also has

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[1] 16 C.F.R. § 2.51. Because of this possibility, and because the issues raised by this case frequently arise, it is appropriate to address the state action defense in some detail.

[2] 317 U.S. 341 (1943).

been interpreted in limited circumstances to immunize from antitrust scrutiny private firms' activities that are conducted pursuant to state authority. States may not, however, simply authorize private parties to violate the antitrust laws.[3] Instead, a State must substitute its own control for that of the market.

Thus, the state action defense would be available to Respondent only if it could demonstrate that its conduct satisfied the strict two-pronged standard the Supreme Court set out in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*: "the challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy'" and "the policy must be 'actively supervised' by the state itself."[4]

Under the first prong of *Midcal's* two-part test, Respondent would be required to show that the State of Indiana had "clearly articulated and affirmatively expressed as state policy" the desire to replace competition with a regulatory scheme. With regard to this prong, it appears that Indiana law specifically contemplates common carriers' entering into "joint rates" under certain circumstances that do not appear to be applicable to the conduct at issue here.[5] Respondent would meet its burden only if it could show that this or some other provision of Indiana law constitutes a clear expression of state policy to displace competition and allow for collective rate-making among competitors.

Under the second prong of the *Midcal* test, Respondent would be required to demonstrate "active supervision" by state officials. The Supreme Court has made clear that the active supervision standard is a rigorous one. It is not enough that the State grants general authority for certain business conduct or that it approves private agreements with little review. As the Court held in *Midcal*, "The national policy in favor of competition cannot be thwarted by casting such a gauzy cloak of state

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[3] *Parker v. Brown*, 317 U.S. 341, 351 (1943) ("[A] state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or declaring that their action is lawful.").

[4] 445 U.S. 97, 105 (1980) ("*Midcal*") (*quoting City of Lafayette v. Louisiana Power & Light*, 435 U.S. 389, at 410 (1978)). The "restraint" in this instance is the collective rate-setting. This articulation of the state action doctrine was reaffirmed by the Supreme Court in *FTC v. Ticor Title Insurance Co.* ("*Ticor*"), where the Court noted that the gravity of the antitrust violation of price fixing requires exceptionally clear evidence of the State's decision to supplant competition. 504 U.S. 621, 633 (1992).

[5] *See* IND. CODE ANN. § 8-2.1-22-18(a) (Michie 2001). The state administrative code defines "joint rate" to mean "a rate that applies over the lines or routes of two or more carriers and that is made by arrangement or agreement between such carriers." 45 IAC 16-3-2(3). This definition suggests that the term "joint rate" refers only to situations where more than one carrier is used to perform a single move rather than to situations where competing movers file collective rates.

involvement over what is essentially a private price-fixing arrangement."[6] Rather, active supervision is designed to ensure that a private party's anticompetitive action is shielded from antitrust liability only when "the State has effectively made [the challenged] conduct its own."[7]

In order for state supervision to be adequate for state action purposes, state officials must engage in a "pointed re-examination" of the private conduct.[8] In this regard, the State must "have *and* exercise ultimate authority" over the challenged anticompetitive conduct.[9] To do so, state officials must exercise "sufficient independent judgment and control so that the details of the rates or prices have been established as a product of deliberate state intervention, not simply by agreement among private parties."[10] One asserting the state action defense must demonstrate that the state agency has ascertained the relevant facts, examined the substantive merits of the private action, assessed whether that private action comports with the underlying statutory criteria established by the state legislature, and squarely ruled on the merits of the private action in a way sufficient to establish the challenged conduct as a product of deliberate state intervention rather than private choice.

IV. General Characteristics of Active Supervision

At its core, the active supervision requirement serves to identify those responsible for public policy decisions. The clear articulation requirement ensures that, if a State is to displace national competition norms, it must replace them with specific state regulatory standards; a State may not simply authorize private parties to disregard federal laws,[11] but must genuinely substitute an alternative state policy. The active supervision requirement, in turn, ensures that responsibility for the ultimate conduct can properly be laid on the State itself, and not merely on the private actors. As the Court explained in *Ticor*:

> States must accept political responsibility for actions they intend to undertake. . . . Federalism serves to assign political responsibility, not to obscure it. . . . For states which do choose to displace the free market with regulation, our insistence on real compliance with both parts of the

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[6] *Midcal*, 445 U.S. at 105-06.

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

[8] *Midcal*, 445 U.S. at 106. *Accord*, *Ticor*, 504 U.S. at 634-35; *Patrick v. Burget*, 486 U.S. 94, 100-01 (1988).

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

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

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

Midcal test will serve to make clear that the State is responsible for the price fixing it has sanctioned and undertaken to control.[12]

Through the active supervision requirement, the Court is furthering the fundamental principle of "accountability" that underlies federalism, by ensuring that, if allowing anticompetitive conduct proves to be unpopular with a State's citizens, the state legislators will not be "insulated from the electoral ramifications of their decisions."[13]

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

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

V. Standard for Active Supervision

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

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

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[12] 504 U.S. at 636.

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

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

To meet the test for active state supervision, in this case Respondent would need to show that the State had in place an administrative body charged with the necessary review of filed tariffs and capable of developing an adequate factual record to do so.[14] In *Ticor,* the Court quoted language from earlier lower court cases setting out a list of organizational and procedural characteristics relevant as the "beginning point" of an effective state program:

> [T]he state's program is in place, is staffed and funded, grants to the state officials ample power and the duty to regulate pursuant to declared standards of state policy, is enforceable in the state's courts, and demonstrates some basic level of activity directed towards seeing that the private actors carry out the state's policy and not simply their own policy . . . .[15]

Moreover, that body would need to be capable of compiling, and actually compile, an adequate factual record to assess the nature of and impact of the private conduct in question. The precise factual record that would be required would depend on the substantive norm that the State has provided; the critical question is whether the record has sufficient facts for the reviewing body sensibly to determine that the State's substantive regulatory requirements have been achieved. In the typical case in which the State has articulated a criterion of consumer impact, obtaining reliable, timely, and complete economic data would be central to the board's ability to determine if the State's chosen criterion has been satisfied.[16] Timeliness in particular is an ongoing concern; if the private conduct is to remain in place for an extended period of time, then periodic state reviews of that private conduct using current economic data are important to ensure that the restraint remains that of the State, and not of the private actors.

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

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

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

Additionally, in assembling an adequate factual record, the procedural value of notice and opportunity to comment is well established. These procedural elements, which have evolved in various contexts through common law, through state and federal constitutional law, and through Administrative Procedure Act rulemakings,[17] are powerful engines for ensuring that relevant facts – especially those facts that might tend to contradict the proponent's contentions – are brought to the state decision-maker's attention.

B. A Written Decision

A second important element the Commission will look to in determining whether there has been active supervision is whether the state board renders its decision in writing. Though not essential, the existence of a written decision is normally the clearest indication that the board (1) genuinely has assessed whether the private conduct satisfies the legislature's stated standards and (2) has directly taken responsibility for that determination. Through a written decision, whether rejecting or (the more critical context) approving particular private conduct that would otherwise violate the federal antitrust laws, the state board would provide analysis and reasoning, and supporting evidence, that the private conduct furthers the legislature's objectives.[18]

C. Qualitative and Quantitative Compliance with State Policy Objectives

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

> Our decisions make clear that the purpose of the active supervision inquiry is not to determine whether the State has met some normative standard, such as efficiency, in its regulatory

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

[18] A record preserved by other means, such as audio or video recording technology, might also suffice, provided that it demonstrated that the board had (1) genuinely assessed the private conduct and (2) taken direct responsibility. Such an audio or video recording, however, will be an adequate substitute for a written opinion only when it provides a sufficiently transparent and decipherable view of the decision-making proceeding to facilitate meaningful public review and comment.

> practices. Its purpose is to determine whether the State has exercised sufficient independent judgment and control so that the details of the rates or prices have been established as a product of deliberate state intervention, not simply by agreement among private parties. Much as in causation inquiries, the analysis asks whether the State has played a substantial role in determining the specifics of the economic policy. The question is not how well state regulation works but whether the anticompetitive scheme is the State's own.[19]

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

If the State has chosen to include in its statute a requirement that the regulatory body evaluate the impact of particular conduct on "competition," or "consumer welfare," or some similar criteria, then – to meet the standard for active supervision – there should be evidence that the State has closely and carefully examined the likely impact of the conduct on consumers. Because the central purpose of the federal antitrust laws is also to protect competition and consumer welfare,[20] conduct that would run counter to those federal laws should not be lightly assumed to be consistent with parallel state goals. Especially when, as here, the underlying private conduct alleged is price fixing – which, as the *Ticor* Court noted, is possibly the most "pernicious" antitrust offense[21] – a careful consideration of the specific monetary impact on consumers is critical to any assessment of an overall impact on consumer welfare. That consideration, to the maximum extent practicable, should include an express quantitative assessment, based on reliable economic data, of the specific likely impact upon consumers.

It bears emphasizing that States need not choose to enact criteria such as promoting "competition" or "consumer welfare" – the central end of federal antitrust law. A State could instead enact a criterion such as maximizing the profits of members of a particular industry. Then, the State's

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

[20] Indeed, consideration of consumer impact is at the heart of "[a] national policy" that preserves "the free market and . . . a system of free enterprise without price fixing or cartels." *Ticor*, 504 U.S. at 632.

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

decision would need to assess whether that objective had been met.

On the other hand, if a State does not disavow (either expressly or through the promulgation of wholly contrary regulatory criteria) that consumer welfare is state regulatory policy, it must address consumer welfare in its regulatory analysis. In claiming state action immunity, a Respondent would need to demonstrate that the state board, in evaluating arguably anticompetitive conduct, had carefully considered and expressly quantified the likely impact of that conduct on consumers as a central element of deciding whether to approve that conduct.[22]

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

> In the exercise of its power to prescribe just and reasonable rates, fares and charges for the transportation of passengers and household goods . . . the department shall give due consideration, among other factors, to:
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> (3) The need, in the public interest, of adequate and efficient transportation service by such carrier at the lowest cost consistent with the furnishing of service.[23]

Thus, to establish active supervision, Respondent would be obligated to show that the State, when approving the rates at issue, performed an analysis and quantification of whether the rates to consumers were "at the lowest cost consistent with the furnishing of service."

VI. Opportunity for Public Comment

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

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

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

[23] IND. CODE ANN. § 8-2.1-22-21(a) (Michie 2001).

public record. After 30 days, the Commission will again review the Agreement and comments received, and will decide whether it should withdraw from the Agreement or make final the Order contained in the Agreement.

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