

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 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

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

² 317 U.S. 341 (1943).

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. Titor Title Insurance Co.* ("*Titor*"), 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

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 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.

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.

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, *Titor*, 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 *Titor*, 504 U.S. at 634-35.