

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

### III. Opportunity for Modification of the Order

Respondent can seek to modify the proposed Order to permit it to engage in collective rate-making if it can demonstrate that the "state action" defense would apply to its conduct.<sup>2</sup> 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.<sup>3</sup> The defense also has been interpreted in limited circumstances to shield from antitrust scrutiny private firms' activities that are conducted pursuant to state authority. States may not, however, simply authorize private parties to violate the antitrust laws.<sup>4</sup> 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."<sup>5</sup>

Under the first prong of *Midcal's* two-part test, Respondent would be required

to show that the State of Minnesota had "clearly articulated and affirmatively expressed as state policy" the desire to replace competition with a regulatory scheme. With regard to this prong, a Minnesota statute in effect until recently specifically addressed collective rates:

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

On June 8, 2003 this statute was repealed.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 With this statute repealed, Respondent would meet its burden only if it could show that some other provision of Minnesota law constitutes a clear expression of state policy to displace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

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

Act. If a state chooses to compel such facially anticompetitive private conduct, the private parties are free from Federal antitrust liability only when the requirements of the state action doctrine have been met, including active supervision by the state of the private collective rate-setting.<sup>10</sup>

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."<sup>11</sup> 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."<sup>12</sup>

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.<sup>13</sup> In this regard, the State must "have and exercise ultimate authority" over the challenged anticompetitive conduct.<sup>14</sup> 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."<sup>15</sup> 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

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

<sup>3</sup> 317 U.S. 341 (1943).

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

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

<sup>6</sup> MINN. STAT. ANN. section 221.165.

<sup>7</sup> H.F. 1214, 83rd Leg. (MINN. 2003-2004).

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

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

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

<sup>11</sup> *Midcal*, 445 U.S. at 105-06.

<sup>12</sup> *Patrick v. Burget*, 486 U.S. 94, 106 (1988).

<sup>13</sup> *Midcal*, 445 U.S. at 106. *Accord*, *Ticor*, 504 U.S. at 634-35; *Patrick v. Burget*, 486 U.S. at 100-01.

<sup>14</sup> *Patrick v. Burget*, 486 U.S. at 101 (emphases added).

<sup>15</sup> *Ticor*, 504 U.S. at 634-35.