

## 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.<sup>23</sup>

## C. Qualitative and Quantitative Compliance with State Policy Objectives

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

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

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

If the State has chosen to include in its statute a requirement that the regulatory body evaluate the impact of particular conduct on "competition," "consumer welfare," or some similar criterion, then—to meet the standard for active supervision—there should be evidence that the State has closely and carefully examined the likely impact of the conduct on consumers. Because the central purpose of the Federal antitrust laws is also to protect competition and consumer welfare,<sup>25</sup> 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<sup>26</sup>—a careful consideration of the specific monetary impact on consumers is critical to any assessment of an overall impact on consumer welfare. To the maximum extent practicable, that consideration should include an express quantitative assessment, based on reliable economic data, of the specific likely impact upon consumers.

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

On the other hand, if a State does not disavow (either expressly or through the promulgation of wholly contrary regulatory criteria) that consumer welfare is state regulatory policy, it

must address consumer welfare in its regulatory analysis. In claiming the state action defense, a respondent would need to demonstrate that the state board, in evaluating arguably anticompetitive conduct, had carefully considered and expressly quantified the likely impact of that conduct on consumers as a central element of deciding whether to approve that conduct.<sup>27</sup>

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

## VI. Opportunity for Public Comment

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

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

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

<sup>23</sup> 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.

<sup>24</sup> *Ticor*, 504 U.S. at 634–35.

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

<sup>26</sup> *Id.* at 639 ("No antitrust offense is more pernicious than price fixing.").

<sup>27</sup> 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.

<sup>28</sup> Minn. Stat. Ann. section 221.161(Subd. 1).

<sup>29</sup> Minn. Stat. Ann. section 221.161(Subd.2).