

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."⁶

Under the first prong of *Midcal's* two-part test, Respondent would be required to show that the State of Mississippi 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 under Mississippi law tariffs must be "just and reasonable."⁷ Respondent would meet its burden if it could show that these or some other provision of Mississippi law constitutes a clear expression of state policy to displace competition and allow for collective rate-making among competitors.⁸

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."⁹ 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."¹⁰

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.¹¹ In this regard, the State must "have and exercise ultimate authority" over the challenged anticompetitive conduct.¹² 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."¹³ 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,¹⁴ 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 *Midcal* test will serve to make clear that the State is responsible for the price fixing it has sanctioned and undertaken to control.¹⁵

Through the active supervision requirement, the Court furthers 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."¹⁶

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 the state action defense.

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.

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

Sherman Act by authorizing them to violate it, or declaring that their action is lawful.").

⁶ 445 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.

⁷ Miss. Code Ann. § 77-7-151; Miss. Code Ann. § 77-7-221.

⁸ *United States v. Southern Motor Carriers Rate Conference*, 471 U.S. 48, 63-65 (1985).

⁹ *Midcal*, 445 U.S. at 105-06.

¹⁰ *Patrick v. Burget*, 486 U.S. 94, 106 (1988).

¹¹ *Midcal*, 445 U.S. at 106. Accord, *Ticor*, 504 U.S. at 634-35; *Patrick v. Burget*, 486 U.S. at 100-01.

¹² *Patrick v. Burget*, 486 U.S. at 101 (emphases added).

¹³ *Ticor*, 504 U.S. at 634-35.

¹⁴ *Parker*, 317 U.S. at 351.

¹⁵ 504 U.S. at 636.

¹⁶ See *New York v. United States*, 505 U.S. 144, 168-69 (1992).