

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.<sup>17</sup> 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 \* \* \*.<sup>18</sup>

Moreover, that body would need to be capable of compiling, and actually compile, an adequate factual record to assess the nature 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 regulatory board's ability to determine if the State's chosen criterion has been satisfied.<sup>19</sup> 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.

In Mississippi, the State had in place rules and regulations pertaining to, and had staff assigned to review, household goods tariffs. In connection with a recent tariff increase request,

Respondent sent to the State very general written assertions that movers' costs had increased as well as some assertions regarding specific cost increases. The staff did undertake some review including, for example, checking to see if the cost of packaging material had increased as asserted by movers. In addition, the State monitored Bureau of Labor Statistics printouts giving the national consumer price index and Department of Labor's notices of increases in the national minimum wage.

Nevertheless, Respondent made no showing that the State had done the necessary research into the economic conditions of the moving industry in Mississippi that would enable it to assess the impact of the Respondent's proposal.<sup>20</sup> Moreover, there was no showing that the State sought independently to verify the accuracy of the financial information submitted by the movers.<sup>21</sup>

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,<sup>22</sup> 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. In Mississippi, the Public Service Commission did give notice to the public that a hearing was to take place to consider increases in rates and it did hold hearings where witnesses

testified about their increased costs.<sup>23</sup> For reasons discussed throughout, however, the mere fact of a hearing will not establish active supervision. To show active supervision, Respondent would need to establish that the State takes additional steps to ensure that it makes the rates its own.

## 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>24</sup>

In Mississippi, the State issued written orders granting requests for price increases.<sup>25</sup> These written orders simply announced the State's decision. The orders did not discuss evidence supporting the increases nor did they provide the State's analysis or reasoning when the State granted rate increases.

## 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

<sup>20</sup> Cf. *New England Motor Rate Bureau, Inc.*, 112 F.T.C. 200, 233, 266, 279–80 (1989) (active supervision not found because, *inter alia*, the State had "never conducted an economic study of the intrastate trucking industry nor of the effects of its regulatory policy on the intrastate trucking industry within the state"). Although the First Circuit reversed the Commission's decision, *New England Motor Rate Bureau v. FTC*, 908 F.2d 1064 (1st Cir. 1990), the First Circuit's standard for active supervision was later found to be "insufficient" in *Ticor*, 504 U.S. at 637.

<sup>21</sup> Cf. *United States v. Southern Motor Carriers Rate Conference*, 467 F. Supp. 471, 477 (N.D.Ga. 1979), *aff'd*, 702 F.2d 543 (5th Cir. Unit B 1983) (active supervision found where, among other things, the State undertook "on-site review and verification of motor carrier books and records"), *rev'd on other grounds*, 471 U.S. 48 (1985).

<sup>22</sup> 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).

<sup>23</sup> See, e.g., August 8, 1995, Notice, Public Service Commission of the State of Mississippi, 95–MC–0329, *In Re: Application of Mississippi Movers Conference Filing Supplement No. 2 to Mississippi Movers Conference Tariff No. 2*; October 10, 1995, Public Hearing before the Public Service Commission of the State of Mississippi, 95–MC–0329, *In Re Application of Mississippi Movers Conference Filing Supplement No. 2 to Mississippi Movers Conference Tariff No. 2*.

<sup>24</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>25</sup> See, e.g., December 19, 1995, Order, Public Service Commission of the State of Mississippi, 95–MC–0329, *In Re Application of Mississippi Movers Conference Filing Supplement No. 2 to Mississippi Movers Conference Tariff No. 2*.

<sup>17</sup> 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.

<sup>18</sup> *Ticor*, 504 U.S. at 637 (citations omitted).

<sup>19</sup> 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.