

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>26</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>27</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>28</sup>—a careful consideration of the specific monetary impact on consumers is critical to any assessment of an overall impact on consumer welfare. 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 should address consumer welfare in its regulatory analysis. In claiming the state action defense, a respondent should demonstrate that the state board, in evaluating arguably anticompetitive conduct, had carefully considered and quantified the likely impact of that conduct on consumers as a central element of deciding whether to approve that conduct.<sup>29</sup>

In the present case, Mississippi has expressly chosen to give significant consideration to, among other state interests, the interests of consumers when determining whether rates are “just and reasonable”:

In the exercise of its power to prescribe just and reasonable rates for the transportation of passengers or household goods \* \* \* the commission shall give due consideration, among other factors, to:

\* \* \* \* \*

the need, in the public interest, of adequate and efficient transportation service by such carriers at the lowest cost consistent with the furnishing of such services.<sup>30</sup>

Thus, to establish active supervision, Respondent would be obligated to show that the State, when approving the rates at issue, performed an analysis and quantification of whether the rates to consumers were “at the lowest cost consistent with the furnishing of

service.” Here, however, Respondent did not produce any substantial evidence that the State had done such an analysis or that the State had adopted a method for evaluating movers’ rates against the statutory criteria.<sup>31</sup>

In fact, during one Public Service Commission hearing held to consider movers’ request for an increase in rates, a mover opposed the proposed increase on the grounds that he and other movers could continue to profitably move customers at the existing rates.<sup>32</sup> The Public Service Commission approved the requested increase in rates without explaining why it rejected this testimony or how it decided that the higher rates were at the “lowest cost consistent with the furnishing of [moving] services.”

#### 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.

These review techniques may also help to show active state supervision in

<sup>31</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 established where, among other things, the State reviewed a request for an increase in motor carrier rates by analyzing motor carriers’ operating ratios), *rev’d on other grounds*, 471 U.S. 48 (1985).

<sup>32</sup> The mover testified as follows:

“I think the majority of movers here are making fairly decent money doing this business, some an exception, and I can’t answer why because you can make money doing this and there’s no problem with that. Any time you buy a box for 50 cents and sell it for \$2.20, you’re going to make money on that box. \* \* \* I was basically going to say that my company can currently operate profitably based on these rates and provide a good service to the average consumer \* \* \*

“I don’t know how many of my customers have said, even at church when I’m talking to some of my friends and I tell them how much I sell a box for, they just look at me and say you’re robbing us, you’re just stealing us blind. And granted this is a hard business to make a profit. I’m not one to make a big profit; I just make a steady living, feed my kids, take care of my house, and give my guys good employment. That’s all I do. I’m not out to make a million dollars.”

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, at transcript pages 40, 42, 45.

<sup>26</sup> *Ticor*, 504 U.S. at 634–35.

<sup>27</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>28</sup> *Id.* at 639 (“No antitrust offense is more pernicious than price fixing.”).

<sup>29</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>30</sup> Miss. Code Ann. § 77–7–211.