

IN THE MATTER OF
SHARP ELECTRONICS CORPORATION

SET ASIDE ORDER IN REGARD TO ALLEGED VIOLATION
OF THE FEDERAL TRADE COMMISSION ACTS

Docket C-2574. Consent Order, Oct. 9, 1974—Set Aside Order, Aug. 21, 1989

The Federal Trade Commission has set aside a 1974 consent order with Sharp Electronics Corporation, (84 FTC 743), because respondent satisfactorily demonstrated that changes in the law required such action, thus enabling respondent to maintain favorable relations with its full service dealers, and thereby develop and promote an efficient distribution system to compete more effectively with other electronic calculator manufacturers; as a result, consumers are likely to benefit.

ORDER REOPENING AND SETTING ASIDE ORDER
ISSUED ON OCTOBER 9, 1974

On April 25, 1989, Sharp Electronics Corporation ("Sharp") filed a "Request To Reopen The Proceeding And Set Aside The Order" ("Request"), pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), and Section 2.51 of the Commission's Rules of Practice and Procedure, 16 CFR 2.51. The Request asks the Commission to reopen the proceeding and set aside the order issued by the Commission on October 9, 1974, in Docket No. C-2574, 84 FTC 743. The order prohibits Sharp from restricting in any manner the territories in which, or the customers to whom, its dealers may sell Sharp electronic calculators. In support of its request, Sharp argues that the order should be set aside to reflect changed conditions of law and fact and "to promote considerations of fairness and the public interest." Request at 6, 9. Sharp's request was placed on the public record for thirty days, pursuant to Section 2.51(c) of the Commission's Rules. No comments were received.

For the reasons discussed below, the Commission has concluded that Sharp has made a satisfactory showing of changed conditions of law that require reopening the proceeding and warrant modifying the order in the manner requested by Sharp. The Commission has therefore determined to reopen the proceeding and set aside the order in its entirety.

I.

The Commission issued its complaint in this matter on October 9, 1974. 84 FTC at 743-45. The complaint alleged that Sharp violated Section 5 of the Federal Trade Commission Act, by, among other things, prohibiting its dealers from selling Sharp electronic calculators outside of their "allotted" territories, and imposing restrictions "as to the persons or classes of persons" to whom Sharp dealers may sell such calculators. 84 FTC at 744. Sharp's distribution practices, as alleged in the complaint, "actually hindered, restricted, restrained and prevented competition . . .," and constituted "unfair acts . . . and methods of competition . . ." within the meaning of Section 5 of the FTC Act. *Id.*

The Commission's order, entered by consent, prohibits Sharp from imposing any territorial restrictions on its dealers, or defining the class of customers to whom they are permitted to sell Sharp electronic calculators. The order also prohibits Sharp from using any mandatory fixed schedules for the division of profit between any selling dealers and a dealer in whose territory the product is serviced that has the effect of restricting the territory in which electronic calculators may be sold. 84 FTC at 746.¹ However, the order explicitly permits Sharp to designate for its dealers geographical areas within which a dealer may agree to devote its best efforts to the sale of electronic calculators, engage in activities specifically rendered lawful by legislation enacted by Congress, require a dealer to undertake obligations of installation and warranty service, and require its dealers to comply with any voluntary profit passover program made available by Sharp. *Id.* at 746-47.

II.

Section 5(b) of the FTC Act, 15 U.S.C. 45(b), provides that the Commission shall reopen an order to consider whether it should be modified if the respondent "makes a satisfactory showing that changed conditions of law or fact" require such modification. A satisfactory showing sufficient to require reopening is made when a request to reopen identifies significant changes in circumstances and shows that the changes eliminate the need for the order, bring the

¹ For a period that expired in 1979, paragraph 5 of the order prohibited Sharp from establishing mandatory fixed schedules for the division of profit between any selling dealer and a dealer in whose territory the product is serviced, regardless of effects. *Id.*

order into conflict with current law, or make continued application of it inequitable or harmful to competition. *Louisiana-Pacific Corp.*, Docket No. C-2956, Letter to John C. Hart (June 5, 1986), at 4. See S. Rep. No. 96-500, 96th Cong., 2d Sess. 9 (1979) (significant changes or changes causing unfair disadvantage); *Phillips Petroleum Co.*, Docket No. C-1088, 78 FTC 1573, 1575 (1971) (no modification for changes reasonably foreseeable at time of consent negotiations); *Pay Less Drug Stores Northwest, Inc.*, Docket No. C-3039, Letter to H. B. Hummelt (Jan 22, 1982) (changed conditions must be unforeseeable, create severe competitive hardship, and eliminate dangers that the order sought to remedy); see also *United States v. Swift & Co.*, 286 U.S. 106, 119 (1932) (modification warranted by "clear showing" of changes that eliminate reasons for order or such that the order causes unanticipated hardship).

The language of Section 5(b) plainly anticipates that the burden is on the petitioner to make the requisite satisfactory showing of changed conditions to obtain reopening of the order. The legislative history also makes clear that the petitioner has the burden of showing, other than by conclusory statements, why changed circumstances require that the order should be modified.² If the Commission determines that the petitioner has made the necessary showing, the Commission must reopen the order to consider whether modification is required and, if so, the nature and extent of the modification. The Commission is not required to reopen the order, however, if the petitioner fails to meet its burden of making the satisfactory showing required by the statute. The petitioner's burden is not a light one given the public interest in the finality of Commission orders. See *Federated Department Stores, Inc. v. Moitie*, 425 U.S. 394 (1981) (strong public interest considerations support repose and finality).

III.

Based on the information provided by Sharp and other available information, the Commission has determined that Sharp has made a satisfactory showing that changes in law require reopening the proceeding and warrant setting aside the order. Having reopened and set aside the order on the basis of change of law, the Commission does

² The Commission may properly decline to reopen an order if a request is "merely conclusory or otherwise fails to set forth specific facts demonstrating in detail the nature of the changed conditions and the reasons why these changed conditions require the requested modification of the order." S. Rep. No. 96-500, 96th Cong., 1st Sess. 9-10 (1979).

not reach the issue whether reopening is also warranted based upon the changes of fact or the public interest considerations asserted by Sharp.

In 1974, when this consent order was issued, all vertical restraints were considered *per se* unlawful, based on *U.S. v. Arnold Schwinn & Co.*, 388 U.S. 365 (1967). Three years after the order was issued, the Supreme Court overruled *Schwinn* in *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977), stating that territorial restrictions and other nonprice vertical restraints are not inherently anticompetitive, and should be analyzed under the rule of reason.³ The Court said that nonprice vertical restraints had the potential to “promote interbrand competition by allowing the manufacturer to achieve certain efficiencies in the distribution of his products.” 433 U.S. at 54. One such efficiency that the Court expressly recognized was the use of such restraints to permit suppliers “to induce retailers to engage in promotional activities or to provide service and repair facilities necessary to the efficient marketing of their products.” *Id.* at 55. Subsequent cases have reaffirmed that nonprice vertical restraints, in the absence of further agreement on price or price levels to be charged by distributors, are to be analyzed under the rule of reason. See *Business Electronics Corp. v. Sharp Electronics Corp.*, 108 S. Ct. 1515 (1988); *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 762-63 (1984).

Sharp has identified *Sylvania* as a change in the law of nonprice vertical restraints from a *per se* to a rule of reason analysis. However, this showing alone, without a further showing that the order’s prohibitions cannot be justified under current law, would be insufficient to require reopening. This is because the challenged vertical restrictions, although not *per se* unlawful, may nonetheless be unreasonable. If so, the order’s prohibitions would be consistent with existing law.

The Commission has previously relied upon *Sylvania* to conclude that only nonprice vertical restraints having “a probable adverse effect on *interbrand* competition” at either the manufacturer or dealer level are unlawful.⁴ The Commission has also stated that “[w]hen the exercise of market power in a properly defined relevant market is unlikely, the Commission considers non-price vertical

³ *Sylvania* did not change the *per se* rule against resale price maintenance.

⁴ *TEAC Corp. of America*, 104 FTC 634, 635 (1984) (emphasis in original), citing *Bellone Electronics Corporation*, 100 FTC 68, 208 (1982).

restraints to be efficiency-enhancing in purpose and effect, and therefore lawful, without further inquiry.”⁵

In its request, Sharp has shown that, under the rule of reason analysis that the Commission applies to nonprice vertical restraints, there is no basis for continuing the order’s prohibitions. Competitive conditions in the electronic calculator industry today make it unlikely that nonprice vertical restraints could be used to create or enhance market power or facilitate collusion. Today, more than twenty major calculator suppliers compete in the United States, none of which appears to have a controlling share of the market.⁶ The structure of the distribution and retailing segments appears to be even more diffuse. There also appear to be no significant impediments to entry into the market for the supply of electronic calculators. Sharp has shown that, since 1974, at least ten new suppliers have entered the calculator market. Similarly, there is no evidence of impediments to entry into the distribution or retailing of electronic calculators. In general, the market today appears to be competitive. The number of available model types has increased substantially, and retail prices⁷ and supplier profit margins have decreased, since the order was issued.⁸ Given existing levels of concentration, the absence of significant entry impediments, and the apparent competition in the sale of electronic calculators, it appears unlikely that Sharp’s use of nonprice vertical territorial or customer restraints would significantly restrict interbrand competition and reduce output. Therefore, Sharp has made a sufficient showing to justify reopening the order.

As to relief on the merits, the Commission is not aware of any facts or of any public interest considerations that weigh against setting aside the order in this matter. The petitioner has demonstrated that

⁵ *TEAC Corp. of America*, 104 FTC 634, 635-36 (1984).

⁶ Assuming the United States electronic calculator industry to be a relevant market, Sharp’s estimated current share is less than twelve percent; its largest competitor is estimated to have no more than fifteen percent of such a market. Maul Affidavit at ¶ 6.

⁷ The prices of Sharp’s calculators ranged from \$500 to \$1,000 in 1972, and from \$150 to \$300 in 1982 when it became involved in the *Business Electronics* litigation. *Business Electronics Corp. v. Sharp Electronics Corp.*, 780 F.2d 1212, 1221 n.2 (5th Cir. 1986), *aff’d*, 108 S. Ct. 1515 (1988).

⁸ These changes in the market were acknowledged in Judge Jones’ concurring opinion in *Business Electronics* as follows:

Only atavistic devotees of the abacus or slide rule could fail to recall the remarkable history of the electronic calculator market during the last fifteen years. The range of available models, variety of functions that can be performed, and myriad optional enhancements have multiplied rapidly while the average prices have plummeted. The number of competing manufacturers has increased. To maintain their market position and profitability, manufacturers like Sharp have obviously been required to react quickly and imaginatively to changes in the marketplace.

relief is appropriate. Elimination of the order's prohibitions will enable Sharp to maintain and promote an efficient distribution system. Sharp's inability to ban transshipping and to require its dealers to observe territorial restrictions could cause Sharp significant competitive injury by, among other things, lessening the efficiency of Sharp's distribution system and discouraging it from making necessary investments to promote sophisticated products and provide application support and training to potential customers.⁹ Setting aside the order will allow Sharp to compete more effectively with other electronic calculator manufacturers, and consumers are likely to benefit.

IV.

Accordingly, *it is ordered*, that this matter be reopened and that the Commission's order in Docket No. C-2574, issued on October 9, 1974, be, and it hereby is, set aside, as of the date of service of this order. Commissioner Strenio did not participate by reason of absence.

⁹ According to Sharp, its competitors are able to prevent free-riders from "disturbing the orderly distribution of their products" by full service dealers through such restraints as prohibiting mail order sales and sales to

IN THE MATTER OF
MOTOR TRANSPORT ASSOCIATION OF CONNECTICUT, INC.
FINAL ORDER, OPINION, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket 9186. Complaint, Sept. 18, 1984—Final Order, Aug. 25, 1989

This final order dismisses the complaint against the respondent, which represents approximately 585 competing motor carriers and files collective rates for its common carrier members with the state regulatory agency.

Appearances

For the Commission: *Michael E. Antalics, Phoebe D. Morse, Jerry A. Philpott and John H. Seesel.*

For the respondent: *Gerald A. Joseloff, Joseloff, Joseloff & Cramer, Wethersfield, Ct.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Motor Transport Association of Connecticut, Inc., a corporation, hereinafter sometimes referred to as "respondent," has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges as follows:

For the purposes of this complaint the use of the present tense includes the past tense and the following definitions apply:

"*Carrier*" means a common carrier of property by motor vehicle.

"*Intrastate transportation*" means the pickup or receipt, transportation and delivery of property for compensation wholly within any state of the United States by a carrier authorized by that state to engage therein.

"*Tariff*" means a publication and any supplements thereto stating the rates of a carrier for the intrastate transportation of property, excluding general rules and regulations.

"*Member*" means any carrier or other person that pays dues or belongs to Motor Transport Association of Connecticut, Inc., or to any successor corporation.

"*Rate*" means a charge, payment or fixed price according to a ratio, scale or standard for direct or indirect transportation service.

"*Collective rate*" means any rate or charge established under any contract, agreement, understanding, plan, program, combination or conspiracy between two or more competing carriers, or between any carrier and respondent.

PARAGRAPH 1. Respondent, Motor Transport Association of Connecticut, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of Connecticut, with its office and principal place of business located at 508 Tolland Street, East Hartford, Connecticut. Respondent publishes and issues tariffs containing rates for the intrastate transportation of property on behalf of its member carriers.

PAR. 2. Carriers engaging in intrastate transportation of property within Connecticut do so under certificates of public convenience and necessity granted by the Connecticut Department of Public Utility Control. Such carriers are subject to rate regulation by the Department and are required to charge just and reasonable rates. Carriers in Connecticut are required to charge the rates filed once they have been accepted by the Department.

PAR. 3. The statute which provides for regulation of carriers engaged in the intrastate transportation of property within Connecticut does not compel, command, authorize or otherwise provide for the establishment, operation or continuation of collective rates among carriers or others on their behalf.

PAR. 4. Except to the extent that competition has been restrained as herein alleged, respondent's members are now in competition among themselves and with other carriers.

PAR. 5. Respondent's membership consists of approximately 360 carriers engaging in intrastate transportation of property within Connecticut. Respondent's members are entitled to and do, among other things, vote for and elect the officers and directors of respondent. The control, direction and management of respondent are vested in the Board of Directors, which employs a general manager who acts as chief administrative officer of the corporation with direct charge of and supervision over the affairs of the corporation.

PAR. 6. The acts and practices of respondent set forth in paragraph

eight are in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, as amended, and respondent is subject to the jurisdiction of the Federal Trade Commission. Respondent's acts and practices:

(A) Affect the flow of substantial sums of money across state lines from businesses and other private parties to respondent's members for rendering intrastate transportation services;

(B) Affect respondent's members' purchase and use of equipment and other goods and services which are shipped across state lines; and

(C) Are supported by the receipt of dues and fees which are sent across state lines.

PAR. 7. Shippers use the intrastate services of respondent's members to transport property from warehouses and distribution centers in Connecticut to customers in Connecticut, which property was originally shipped into Connecticut from other states. For such intrastate deliveries of property from warehouses and distribution centers, carriers charge shippers or shippers' customers the intrastate rates published by respondent. These intrastate shipping charges are factors which influence the prices of such property. The intrastate delivery services of these carriers are an essential and integral part of the interstate business transactions of such shippers. Thus, the activities of these carriers have a substantial and direct effect upon interstate commerce.

PAR. 8. Respondent, its members, officers, directors, and others are engaging in a combination, conspiracy, agreement, concerted action or unfair and unlawful acts, policies and practices, the purpose or effect of which is to unlawfully hinder, restrain, restrict, suppress or eliminate competition among carriers engaged in the intrastate transportation of property within Connecticut.

Pursuant to and in furtherance thereof, respondent, its members and others engage in the following acts, policies and practices, among others:

(A) Initiating, preparing, developing, disseminating, and taking other actions to establish and maintain collective rates for the intrastate transportation of property within Connecticut;

(B) Participating in the collective rates; and

(C) Filing collective rates with the Connecticut Department of Public Utility Control.

PAR. 9. The acts and practices of respondent, its members and others as alleged in paragraph eight have the effect of:

(A) Fixing, stabilizing, raising, maintaining, or otherwise interfering or tampering with the rates charged by carriers for the intrastate transportation of property within Connecticut;

(B) Restricting, restraining, hindering, preventing or frustrating rate competition among carriers for the intrastate transportation of property within Connecticut;

(C) Depriving shippers patronizing carriers for intrastate transportation of property within Connecticut of the benefits of free and open competition in the provision of said services; and

(D) Depriving consumers in Connecticut of the benefits of free and open competition in the intrastate transportation of property.

PAR. 10. The acts, policies and practices of respondent, its members and others, as herein alleged, are all to the prejudice and injury of the public and constitute unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, as amended. The acts and practices of respondent, as herein alleged, are continuing and will continue in the absence of the relief herein requested.

INITIAL DECISION BY

JAMES P. TIMONY, ADMINISTRATIVE LAW JUDGE

JANUARY 9, 1987

I. INTRODUCTION

Respondent Motor Transport Association of Connecticut, Inc., ("MTAC") is a rate bureau¹ engaged in collective ratemaking for its motor carrier members. It submits to the Connecticut regulatory agency joint rate proposals on trucking prices for hauls within Connecticut of four types of commodities: general commodities, household goods, bulk commodities in dump trucks and liquid bulk products in tank trucks.

II. SUMMARY OF PROCEEDINGS

On September 18, 1984, the Commission issued its complaint charging respondent, its members, and others with an unlawful

¹ For a general description of the nature of the industry, see *Southern Motor Carriers Rate Conference, Inc. v. United States*, 105 S.Ct. 1721 (1985); and *Massachusetts Furniture & Piano Movers, Inc.*, 102 FTC 1176, 1209 (1983), *rev'd on other grounds*, 773 F.2d 391 (1st Cir. 1985), (referred to herein as "*Mass. Movers*").

combination involving the developing and filing of collective rates with the state regulatory agency.

Respondent's answer dated October 31, 1984, admitted certain corporate facts but denied all jurisdictional facts and substantive allegations of the complaint. In addition, respondent raised thirteen defenses to the complaint. Respondent moved to amend its Answer to add a fourteenth defense but the motion was denied on May 1, 1985.

Complaint counsel moved to stay this matter pending the disposition of *Mass. Movers*, and the motion was granted on June 17, 1985. This case was assigned to me on October 1, 1986. By order dated October 9, 1986, trial was set for January 5, 1987. Respondent moved to stay proceedings pending the disposition by the Commission of *New England Motor Rate Bureau, Inc.*, Docket No. 9170. The motion was denied on November 18, 1986. The parties thereafter agreed to stipulate the record, filing a stipulation of facts and exhibits. The trial was therefore cancelled and the record closed. Order of November 24, 1986. [3]

III. FINDINGS OF FACT

A. Respondent

1. Motor Transport Association of Connecticut, Inc., is a corporation organized, existing and doing business under the laws of the State of Connecticut. Stipulation filed November 17, 1986, paragraph number 1.²

2. MTAC's members engage in the intrastate transportation of property by motor vehicle in Connecticut. (S. 2)

3. MTAC has approximately 585 competing motor carrier members. Answer ¶¶ 9, 10.

4. Intrastate common carriers of property by motor vehicle in Connecticut operate under certificates of public convenience and necessity granted by the State of Connecticut. (S. 3)

5. MTAC was formed in 1920 and incorporated in 1930. Its purpose was to promote and preserve the advantage of highway transportation; promote economical and efficient service by motor truck; promote safety of operation on the highways; promote and support necessary and beneficial legislation; and engage in any other activities that will benefit the welfare of highway transportation and the public generally. (S. 4)

²The stipulation will be referred to as "S." followed by a number designating the paragraph of the stipulation.

6. MTAC issues tariffs and supplements thereto ("MTAC tariffs") in which it publishes intrastate rates on behalf of some of its motor common carrier members engaged in intrastate transportation of property within the State of Connecticut. (S. 5)

7. Any motor carrier may become an active member of MTAC. (S. 6)

8. MTAC's active members are entitled to, and do, among other things, vote for and elect the directors of MTAC. The control, direction and management of MTAC is vested in its Board of Directors. The President is the chief executive officer of MTAC. (S. 7)

9. At its annual meeting MTAC's membership approves and ratifies the actions of MTAC, its directors and officers, since the last annual membership meeting. (S. 8) [4]

10. Officers and directors of MTAC must be representatives of active members. (S. 9)

11. MTAC's President is John E. Blasko. Prior to becoming President, Mr. Blasko was Executive Vice President and General Manager of MTAC for 16 years. His duties in all three capacities were the same: complete control of MTAC's office, employees, records, and property; managing the day-to-day operations of MTAC; and lobbying for the industry. (S. 10)

B. *FTC Jurisdiction*

12. MTAC does not possess a certificate of public convenience and necessity from the Interstate Commerce Commission. (S. 22) MTAC does not engage in the transportation of goods. (S. 23)

13. MTAC actively promotes the economic benefit of its members. (Findings 25-39)³

C. *Commerce*

14. Seventy-five to 100 of MTAC's active members are located outside the State of Connecticut. The majority of these are motor carriers. (S. 11)

15. MTAC renders its out-of-state members services for which it charges a fee. (S. 12)

16. MTAC's out-of-state members pay substantial amounts of money for dues and for fees for services performed by MTAC. These monies are transmitted across state lines to MTAC's offices in Connecticut. (S. 13)

³ Findings are referred to herein as "F." followed by the number of the finding.

17. MTAC purchases goods and services from people or firms located outside Connecticut. (S. 14)

18. MTAC holds some of its conventions of its membership outside Connecticut and expends funds for that purpose. (S. 15)

19. Carrier members of MTAC transport substantial numbers of shipments that originate and terminate within Connecticut for private shippers or receivers with headquarters and principal places of business located outside Connecticut. The rates charged for these shipments are governed by MTAC tariffs. (S. 16)

20. Some of MTAC's carrier members transmit bills for intrastate transportation services to private shippers or receivers at their headquarters and principal places of business outside Connecticut. (S. 17)

21. The private shippers or receivers for whom property is transported within Connecticut by carrier members of MTAC under rates in MTAC tariffs, which shippers or receivers have their headquarters and principal places of business outside Connecticut, transmit to said carrier members of MTAC substantial sums of money in payment for the intrastate transportation services rendered. (S. 18)

22. MTAC members located in Connecticut transport substantial quantities of general commodities of property from warehouses and distribution centers located within Connecticut to customers located within Connecticut, which property had been transported from origin points outside Connecticut to such warehouses and distribution centers for distribution within Connecticut or distribution in other states. In many cases MTAC members charge shippers or shippers' customers the intrastate rates contained in the MTAC tariffs for the intrastate transportation of these general commodities of property from warehouses and distribution centers. (S. 19)

23. Some MTAC members located in Connecticut purchase substantial amounts of equipment and other goods for use in their transportation business, including their intrastate transportation business, from private businesses with headquarters and principal places of business located outside of Connecticut, and the equipment and other goods are transported into Connecticut. (S. 20)

24. Some MTAC members located in Connecticut transmit substantial sums of money in payment for equipment and other goods purchased for use in their transportation business, including their intrastate transportation business, to private businesses from whom the equipment and other goods were purchased, whose headquarters

and principal places of business are located outside Connecticut. (S. 21)

D. Conduct

25. MTAC files proposed tariffs with the Connecticut Department of Public Utility Control ("DPUC") on behalf of its members. (S. 24) [6]

26. Subsequent to DPUC approval, rates published in a MTAC tariff are charged for intrastate shipments within Connecticut to shippers using the services of MTAC members that participate in that MTAC tariff. (S. 28)

27. MTAC acts on behalf of its members pursuant to written powers of attorney. DPUC requires that a carrier desiring to have an agent issue and file its tariffs execute a document citing such appointment. (S. 29; Joint Exhibit 1)⁴

28. MTAC files four different tariffs: (1) the Local and Joint Tariff of Class and Commodity Rates Applying Between Points in Connecticut ("General Commodities Tariff"), which the New England Motor Rate Bureau, Inc. ("NEMRB"), issues and files in conjunction with MTAC; (2) the Local Commodity Tariff Applying On Transportation of Liquid Commodities in Bulk, in Tank Trucks, Between All Points In Connecticut ("Bulk Liquid Tariff"); (3) the Motor Freight Tariff of Local Commodity Rates Applying On Dump Truck Service Between Points Within Connecticut ("Dump Truck Tariff"); and (4) the Motor Freight Tariff of Local Commodity Rates Applying On Household Goods Between All Points in Connecticut ("Household Goods Tariff"). (S. 30; JX 2, JX 3, JX 4, JX 5)

29. The Bulk Liquid Tariff, Dump Truck Tariff and Household Goods Tariff are issued by MTAC without the involvement of NEMRB. (JX 3a, JX 4a, JX 5a)

30. At all relevant times, two or more members of MTAC have participated in the rates set by each of the MTAC tariffs. (S. 31)

31. In general, each MTAC tariff sets out rules and definitions for computing the rates applicable to any given movement of freight covered by the tariff, contains tables standardizing distance computations, and contains tables of rates applicable to movements and to ancillary services. For example, a rule in the General Commodities Tariff defines what collection and delivery services are included in the basic movement rates and specifies a minimum charge and a per

⁴ The Joint Exhibits attached to and incorporated by reference into the Stipulation filed November 17, 1986 are referred to herein as "JX" followed by the exhibit number.

pound rate for collection or delivery beyond the defined area under various specified conditions. Other rules govern the applicability of waiting time, demurrage, storage and other special charges and set minimum or standard charges for these and other ancillary services. (S. 32)

32. The General Commodities Tariff specifies rates per pound and minimum charges for commodities grouped by "class" and [7] by standardized distance "scale numbers." There are five basic classes, as defined in the Coordinated Freight Classification issued by NEMRB, over which MTAC has no control or authority. There are also several "levels" of class rates, which are multiples of class rates. Thus, for any given quantity of any given product covered by the Coordinated Freight Classification there is a specific rate per pound corresponding to the standardized distance between the pickup and delivery points, unless the specified minimum charge applies. To illustrate, effective February 15, 1980, for movements of any less-than-truckload shipment of 500 to 1,999 pounds of any class 5 product between Hartford and New Haven the rate was \$2.89 per hundred pounds over the line of any participating carrier. At that time 14 of the approximately 174 carriers that participated in that tariff took exception to this rate and, as shown in the tariff itself, applied a higher rate of \$3.61 per hundred pounds to the same shipment. At 500 pounds, minimum charges do not appear to be a factor. (S. 33; JX 2)

33. The Household Goods Tariff specifies three or more different sets of rates to be charged by all participating carriers. First, for ancillary services such as packing and unpacking, a rate is specified for each type of service. Second, for moves of twenty miles or less, each participating carrier elects one of several tables of transportation rates per hour for a truck of a certain size with a driver and with or without helpers, with separate tables for normal business hour rates and overtime hour rates. To illustrate, in the tariff effective February 21, 1983, 28 carriers elected table VI which listed a rate of \$22.55 per hour during normal business hours for a vehicle not exceeding 700 cubic feet and a driver and \$11.50 per hour for each helper. At that time, ten carriers elected table VII and three elected table VIII, which had higher rates for vehicle and driver of \$26.20 and \$31.30 per hour, respectively, and for helper of \$13.40 and \$15.00 per hour, respectively. Eleven carriers elected lower priced tables. Third, for moves of over twenty miles, mileage rates applicable to all participating carriers are

specified. To illustrate, to load and unload one ton of household goods valued at no more than \$.60 per pound and move it 105 miles within Connecticut, the rate in the tariff effective February 21, 1983, was \$17.17 per hundred pounds or \$343.40 over the lines of all participating carriers. (S. 34; JX 3)

34. The Bulk Liquids Tariff specifies rates per gallon for particular classes of bulk liquids transported by participating carriers between named points in Connecticut or per mile between any other points in Connecticut. To illustrate, in the tariff effective March 15, 1983, in which eleven carriers participated as to gasoline, exclusive of dedicated continuous service, the rate for hauling gasoline between Bridgeport and Hartford was \$.0235 per gallon, subject to a minimum of 7500 gallons per truck [8] or a minimum charge of not less than \$70.80 for a smaller truck. Different rates applied to different bulk liquids. (S. 35; JX 4)

35. The Dump Truck Tariff specifies rates per mile or hour, minimum shipments, demurrage charges and other rules for specific materials to be hauled by participating carriers. To illustrate, the regular time rate for hauling six ton or larger loads of commercial crushed stone, commercial sand or commercial gravel between any two points in Connecticut in the tariff effective May 12, 1986, was \$1.35 per ton for the first four miles and \$.17 per ton for each additional mile for 79 of the 105 carriers participating. (S. 36; JX 5)

36. Starting in 1959, pursuant to Connecticut law and in response to a petition by MTAC and others, DPUC has periodically issued minimum rate orders pertaining to rates that may be charged for the carriage of general commodities. Under the minimum rate orders, carriers whose tariffs are below the minimum rates are required to increase their rates unless they successfully petition for an exemption. Over 50 carriers have filed petitions for exemption from a minimum rate order. Competing carriers may protest any exemption. The function of a minimum rate order is to set a floor on rates. (S. 38; JX 6, JX 7)

37. MTAC petitioned DPUC to impose a minimum rate order on general commodities in 1958, seeking "a stabilization of rates and charges for motor common carriers authorized to transport general commodities between points in Connecticut." (JX 6d) It further requested that the Commission prescribe a "single hourly rate schedule for the purpose of obtaining uniformity in rates to be applied by carriers performing intrastate transportation service in Connecticut." (JX 6p)

38. MTAC has petitioned DPUC from time to time on behalf of some of MTAC's general commodity carrier members to increase the minimum rate order that sets a floor on intrastate general commodity rates. (JX 7b, i, j) For example, on August 18, 1983, MTAC petitioned DPUC for an increase in minimum rates of approximately 25%. (S. 39; JX 7a-b)

39. MTAC has intervened in opposition to petitions by individual carriers to seek permission to charge less than the minimum rate order. (JX 16q)

E. Active State Supervision

40. Effective in October 1986, DPUC had appointed Edward Regan, formerly head of the Transportation Division, the head and [9] supervisor of the Tariff Division (JX 12) and reporting to him are two rate analysts who review tariffs filed by MTAC and others, Thomas J. Brookman and Joseph Bystrowski. (S. 46, 55)

41. All common carriers are required to file a tariff with DPUC. When a proposed tariff is received by DPUC, it is reviewed by one of these rate analysts, who stamps it as received, ascertains that powers of attorney for the carriers participating are correct, compares the requested rates to the previous ones, assures that they are above the ones in the minimum rate orders, if applicable, and places the tariff on the public record for 30 days unless it is merely a carrier adopting a bureau tariff, in which case only one day's notice is required. The rate analyst may also refuse to place it on the public record if it does not satisfy these and other requirements set forth herein. Other than DPUC regulations, there are no published standards for review of tariffs. If the increases are less than 5% and there are no errors or corrections, the tariff is approved without a hearing unless there is a protest. If there is a protest, the tariff is suspended and a public hearing may be held. Except for hearings on minimum rate orders and petitions for exemption for the minimum rate orders, there have been few public hearings in the last sixteen years. When a hearing is held, witnesses for the tariff proponent testify as to the need for an increase. Normally, there is little opposition and the hearing takes one day. Frequently, the petitioner refiles in an effort to satisfy the DPUC rate analyst. (S. 46, 56, 60, 69; JX 8g)

42. Between 1980 and 1983, DPUC's accounting division reviewed a tariff filing only if a rate analyst requested such a review. Since 1983, as a result of an internal policy review, the accounting division has taken a larger role. (S. 47)

43. If the tariff becomes effective without a rejection, suspension or hearing, that action results from an opinion of the rate analyst that the proposed rates meet the requirements of the statutes and regulations. (S. 49)

44. If a rate increase is for more than 5%, DPUC requires that it be accompanied by financial information designed to justify the reasonableness of the increase, consisting of the proponent's operating revenues, operating expenses, tonnage and revenue to be generated, a *pro forma* operating statement and net operating income. DPUC generally regards an operating ratio (operating expenses divided by operating revenues) of 93% as reasonable. If a tariff affects more than one carrier, a cross section of carriers affected may be used for purposes of analyzing operating ratios. (S. 50, 62, 68; JX 9, JX 10)

45. Since 1957 DPUC has not initiated a minimum rate order review. It has responded to carrier petitions to initiate or increase minimum rates, all of which have been submitted by NEMRB [10] jointly with MTAC. Since then it has issued about twelve additional minimum rate orders in response to carrier petitions. (S. 51; JX 6, JX 7)

46. The Minimum Rate Order issued in 1959 (JX 6) pertains to General Commodities and does not affect the Bulk Liquid Tariff, Dump Truck Tariff or Household Goods Tariff. (JX 6d, m)

47. DPUC does not review carrier decisions to move from one table to another in the Household Goods Tariff, but it does review any change in the tables themselves. (S. 52)

48. Aside from its role in reviewing proposed rate increases, DPUC does not monitor conditions in the intrastate trucking industry in Connecticut (except for safety, insurance, and issuance of stamps (license fees)). (S. 53)

49. DPUC has permitted tariffs to become effective without suspension or hearing. (S. 64; JX 7a)

50. If a tariff rate, charge or rule is set down for a hearing, a legal notice is issued by the DPUC and published in selected Connecticut newspapers of general circulation. (S. 65)

51. Rate analysts in the DPUC submit written recommendations with respect to applications for changes in tariff on all matters that go to a hearing. A written recommendation is also submitted when a matter is not set down for a hearing. (S. 66; JX 15)

52. Any change in the rates and charges filed with DPUC must be held in abeyance for 30 days to permit DPUC to review the rate filings

and permit public comment, except that a shorter period is permissible when such change is to enable the carrier to meet the rate of a competing carrier. (S. 67)

53. If the tariff submitted to DPUC is below the minimum rate order or orders, the carrier must file a petition for exemption in which event the tariff is suspended. (JX 16) A hearing may be held to justify the proposed rate. (S. 69)

54. When a proposal for a general rate increase is submitted by a rate bureau such as MTAC, it must be accompanied by an elaborate justification statement. (F. 44) This justification statement is thoroughly analyzed by the tariff section as well as the audit section of the Commission and a written recommendation is prepared for submission to the Commission. (S. 70)

55. There are about 400 carriers having intrastate rights in Connecticut. If each were to file individual tariffs, in the opinion of DPUC it would be impossible for DPUC to process them without a tremendous increase in its staff and a substantial increase of its budget. (S. 74) [11]

56. The DPUC has the power to prescribe minimum rates and does prescribe them, either on its own motion or upon petition by an interested party. (S. 57, S. 58; JX 8w)

57. When a tariff is filed it is always checked to determine whether it is the same, below or above the minimum rate orders and whether it should be suspended, rejected, returned for errors or corrections or set down for a hearing. The DPUC has rejected some tariffs filed by independent carriers. (S. 59; JX 13d, e)

58. The tariff is processed initially by the tariff section of the DPUC. It always refers a carrier with new authority to the audit section to consider and analyze the financial information submitted. (S. 60)

59. An application for operating rights must be accompanied by a proposed tariff, and its rates are always checked by the tariff section to determine if they are at least equal to or above the minimum rate order at the time. (S. 61)

60. The DPUC has issued several citations for charging rates different than the rate in the tariff. (S. 63; JX 14)

61. If a tariff submitted is above the minimum rate order and the increase is substantial (over 5%) the tariff is checked, the carrier is notified, and the tariff is suspended pending a conference or hearing. If the carrier makes corrections or adjustments satisfying to the tariff section, it is accepted and no hearing is required. (S. 68)

62. Whenever operating rights are transferred, an informal conference is required between the tariff section of the DPUC and the selling carrier at which conference the rates of the selling carrier are checked for compliance with the statutes and regulations. (S. 71)

63. Whenever a complaint by a shipper or another carrier affecting rates is filed, the matter is investigated. If any violation is found the carrier is required to cease and desist immediately and to make the required corrections or rebates if that is indicated. The shipper is always kept informed. (S. 72; JX 17)

64. If a carrier does not obey an order to cease and desist violations of the statutes or regulations, a citation is issued requiring compliance. Penalties are usually imposed if a violation is found. (S. 73)

65. DPUC, in a formal opinion dated February 9, 1975, approved a petition to increase rates for transportation of general commodities, after a hearing. (JX 7z-4) In an opinion dated December 5, 1977 another rate increase on transportation of [12] general commodities was granted after a hearing. (JX 7v) In an opinion dated March 3, 1979 another petition for rate increase was denied after hearing. (JX 7r) In an opinion dated December 14, 1979, a petition for rate increase was granted after hearing. (JX 7r) The next petition for a rate increase was not filed until August 18, 1983, and it was approved on October 5, 1983, without a hearing, since it involved only the smallest carriers, who continually have cash flow problems, and because many of the carriers had gone bankrupt in the past several years or had relinquished their certificates. (S. 38; JX 7a, c)

F. *Legislative Intent*

66. The DPUC is empowered to prescribe maximum and minimum rates and may prescribe reasonable regulations therefor; rates and charges "shall be just and reasonable and reasonably compensatory, except that a rate may be established to meet the existing rate of a competing rate of a motor common carrier or a common carrier not subject to this chapter." (JX 8g Sec 16-287(a))

67. Motor common carriers of freight may agree to establish joint rates. If the carriers fail to agree, the DPUC shall, after hearing, establish by order such a division. (JX 8g Sec 16-287(b))

68. Discrimination in rates is prohibited, "nor shall any carrier refund or remit in any matter any portion of a rate so specified, nor give any unreasonable preference or advantage to any person—nor subject any person to any unreasonable prejudice or discrimination." (JX 8u Sec 16-288)

69. Rates may be changed only after a thirty day notice to the public; the DPUC may on its own initiative or upon protest hold a hearing on any rate changes and "may allow or disallow or prescribe the rate or rates." This statute further provides that the change in rate may become effective upon the effective date of the rate of the competing motor common carrier. (JX 8v Sec 16-289)

70. Any motor carrier who charges less than the regular rates on file shall be fined not more than \$500.00 for each offense. (JX 8x, y Sec 16-306)

71. The DPUC has been granted wide regulatory authority over the rates, certification, routes, speed, service, financial responsibility, insurance, liability, accounting and record keeping, safety and equipment of motor carriers, and has exercised that authority by rule making. (JX 8w, x Sec 16-304, JX 9a-i) [13]

IV. DISCUSSION

In its Answer to the Complaint, respondent raised thirteen affirmative defenses. All of these defenses were raised by the respondent in a very similar case, *The New England Motor Rate Bureau, Inc.*, Docket No. 9170, and were dismissed by Chief Judge Ernest G. Barnes in his Initial Decision dated December 12, 1986 and Order dated March 7, 1986. Furthermore, except for arguments that respondent is not engaged in price fixing and that the state action doctrine applies, these other defenses have not been briefed and, therefore, need not be decided. *Hospital Corporation of America v. Federal Trade Commission*, — F.2d — (7th Cir. 1986) (decided December 18, 1986), slip opinion at pp. 19-20.

A. Price Fixing

Respondent MTAC is a rate bureau composed of competing common carriers operating in the State of Connecticut. (Answer ¶ 6) The rate bureau, on behalf of 585 competing carriers (Answer ¶¶ 9, 10), submits joint rate proposals to the Connecticut Department of Public Utility Control which has authority over motor carrier rates within the State of Connecticut. (Answer ¶ 6) The members elect the directors of MTAC and the directors control and direct MTAC. (F. 8) Officers and directors are representatives of members of MTAC. (F. 10) MTAC acts on behalf of its members. (F. 27) MTAC has petitioned DPUC on behalf of its members to increase the rates charged for transportation of commodities in the State of Connecticut. (F. 36-38, 65)

MTAC initiates minimum rate orders by petitioning the state. (F. 37) The function of a minimum rate order is to set a floor on rates. (F. 36) Carriers can petition for exemptions from the minimum rate order (F. 53), and competing carriers can protest the exemption. (F. 36) MTAC can also protest. (F. 39)

The general commodities tariff states the rates at which commodities may be transported within Connecticut. (JX 2; F. 32) MTAC publishes three other tariffs: the Bulk Liquid Tariff (JX 4), the Dump Truck Tariff (JX 5), and the Household Goods Tariff (JX 3). (F. 28, 29) These tariffs specify rates at which participating carriers will move these categories of goods. (F. 33, 34, 35) Participating carriers charge only a rate in the tariff. (F. 26) The effect of these tariffs is to fix the price charged for intrastate transportation of each of these categories. (F. 26, 60, 64, 70) At least two members of MTAC have participated in each rate set in each MTAC tariff. (F. 30) MTAC's active members control MTAC. (F. 8, 9, 10) MTAC acts as an agent on behalf of its members. (F. 27) [14]

Respondent's collective rate-making activities violate Section 5 of the Federal Trade Commission Act. The stipulated evidence establishes that the challenged conduct constitutes price-fixing and, in the absence of valid defense, is *per se* illegal. An agreement among competitors to eliminate price competition violates the antitrust laws, notwithstanding any argument that may be advanced to justify it. *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 647 (1980) (*per curiam*).

Respondent's conduct is virtually identical to that engaged in by the household goods carriers association in *Mass. Movers* which was found to violate Section 5 of the FTC Act. As in that case, respondent MTAC and its competing carrier members (F. 3), in cooperation with the New England Motor Rate Bureau (NEMRB), prepare tariffs pertaining to the intrastate transportation of commodities, approve them and participate in these collectively set rates. (F. 6, 9, 25-39). These activities, as well as the Bureau's publication and dissemination to its members of tariffs (JX 2-5) and tariff revisions containing collectively-set rates and classifications, constitute price-fixing. *Georgia v. Pennsylvania Railroad*, 324 U.S. 439, 460-61 (1945). In *Mass. Movers*, the Commission found that the Association's development of joint tariffs that were formally adopted and adhered to by its members was "*per se* unlawful under the antitrust laws." 102 FTC at 1225

The fact that individual member carriers are free to file rates

independently from the collectively agreed upon rates is irrelevant. An agreement to fix prices that does not coerce adherence is nevertheless illegal price-fixing. *Arizona v. Maricopa County Medical Society*, 457 U.S. 332, 345 (1982); *United States v. Container Corp.*, 393 U.S. 333, 337 (1969); "The continuation of some price competition is not fatal to the Government's case."

Respondent argues that the record does not establish that the carrier members initiated, prepared, developed and disseminated rates and collectively agreed on the rates, and that MTAC merely copies tariff proposals already filed with DPUC. While the stipulated record does show that MTAC relies on NEMRB for help in developing the general commodities tariff (F. 28, 32, 45), it also establishes that MTAC issues other tariffs without the involvement of NEMRB. (F. 29) Furthermore, there is overwhelming evidence of an unlawful combination of MTAC and its members, as well as NEMRB, with respect to the tariff and rates charged for transportation of general commodities. (F. 8-10, 26, 27, 30, 65), *United States v. Container Corp.*, 393 U.S. at 335. Moreover, respondent's argument is based on deposition testimony which was not offered or received as evidence in this case. Order Setting Briefing Schedule, filed November 24, 1986. The stipulation filed November 17, 1986, and the joint exhibits referred to therein, are the entire factual record of this case. *Ibid.* [15]

B. State Action Defense

1. Law

Parker v. Brown, 317 U.S. 341, 344-45 (1943) held that federal antitrust law was not intended to apply to certain state action. To be exempt, the acts must be clearly authorized and supervised by the sovereign state. *Hoover v. Ronwin*, 466 U.S. 558, 568-69 (1984). To determine whether the respondent's acts are exempt, the facts must be analyzed under the standard of *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980).

The Court in *Midcal* set out the controlling two part test: "First, the challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy'; second, the policy must be 'actively supervised' by the State itself." *Ibid.*

The second prong of the *Midcal* test prevents the state from "casting . . . a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement." 445 U.S. at 106. This active supervision requirement ensures that a state's actions will

immunize the anticompetitive conduct of private parties only when the state has demonstrated its commitment to a program through its exercise of regulatory oversight. *Southern Motor Carriers Rate Conf. v. United States*, 105 S.Ct. 1721, 1729 n. 23 (1985).

The parties have joined issue on the second prong of the *Midcal* test of the state action defense. Complaint counsel argues that the state regulatory commission does not actively supervise the proposed collectively formulated rates through hearings to review the reasonableness of proposed tariffs. Hearings by a regulatory commission on proposed rates do, of course, constitute evidence that such applications are not "rubberstamped" or approved *pro forma* without hearing or change, and that the state agency actively supervises the anticompetitive conduct. *Sonitrol of Fresno, Inc. v. AT&T*, 629 F. Supp. 1089, 1094-95 (D.D.C. 1986). The requirement that applicants file extensive and detailed memoranda with the regulatory commission is also evidence that the state commission supervises heavily the rate approval process. *Id.* at 1095. The facts here show that respondent participates in both such hearings and filings, *infra*.

Complaint counsel, however, argues that in order to meet the state action exemption, the state regulatory agency must hold hearings, or at least give public notice and opportunity to comment, and publish a reasoned decision in every ratemaking decision.⁵ The basis for this argument is the policy cited in Areeda & Turner, *Antitrust Law*, Vol. 1 at ¶ 213f (1978) [16]

. . . [I]naction evades statutory approval procedures designed to (1) to accord opponents the opportunity to present facts and arguments against the challenged act, (2) to assure conscious consideration by those particular state officials charged with the power and responsibility for approval, and (3) to allow judicial review of the agency record.

Complaint counsel implies that the procedure described in the Areeda & Turner treatise should be used in reviewing all acts by a state regulatory commission under *Parker v. Brown*, to ensure that adequate state approval is contemplated.⁶ To support this argument, counsel relies on cases where statutes required an administrator to support an act by a written statement of reasons, *Dunlop v. Bachowski*, 421 U.S. 560, 573 (1975), or where hearings by the agency, upon application for rate approval, were cited as evidence of

⁵ Memorandum of Law dated December 5, 1986 at pp. 53-58.

⁶ Memorandum of Law dated December 5, 1986. at n. 58.

state supervision leading to immunity for anticompetitive conduct. *Sonitrol, supra*.

Chief Judge Barnes answered this argument in the Initial Decision in *The New England Motor Rate Bureau, Inc.*, Docket No. 9170, decided December 12, 1986, slip opinion at p. 30:

This Areeda-Turner idea would permit not only judicial review of agency decisions, but would compel the agencies to scrutinize more closely the basis for their decisions. Thus, much can be said for [its] adoption and implementation by the states. However, where the state by statute has granted the regulatory commission clear oversight authority to review rates for reasonableness, to suspend rates found to be unreasonable, and to establish just and reasonable rates when necessary, the existence of this latent oversight authority and the presumption of official regularity should shift the burden to the party challenging the ratemaking process to demonstrate that the regulatory commission in fact has never engaged in any active supervision of the ratemaking process. A mere showing that a state supervisory agency has not followed the Areeda-Turner suggested procedures is not sufficient to establish a lack of active supervision. The agency must be given some discretion as to its method and manner of supervision. Instead of concentrating on an agency's failure to follow [17] theoretical and desirable procedures, the record must concentrate on what the agency actually did.⁷

Furthermore, the Areeda-Turner proposal applies only where the regulatory agency has failed to act, *Areeda & Turner* at ¶ 213f.⁸ When the agency shows some regulatory activity and the issue is "how rigorous the supervision," the Professors suggest an entirely different theory, *id.* at ¶ 213c:

213c. **How rigorous the supervision?** When state agencies act within their authority, should the manner in which they exercise their discretion ordinarily be reviewed by the antitrust court? Should the court scrutinize the rigor with which the state supervises the challenged activity to ensure that supervision is more than *pro forma*? We answer in the negative, with the proviso that an outright attempt by a state to simply evade the antitrust laws should not be countenanced. We recognize that our approach may make such evasion easier, but we see no suitable way around this.

. . . There simply is no way to tell if the state has "looked" hard enough at the data,

⁷ The burden of proof rests on the party asserting the affirmative of an issue in the pleadings. *Koehler v. Marcona Mining Co.*, 391 F. Sup. 1158, 1160 (N.D. Cal. 1973), *aff'd*, 518 F.2d 696 (9th Cir. 1975). The procedure suggested by Judge Barnes therefore involves a shifting of the burden of proceeding rather than a shifting of the burden of persuasion. *A General Discussion of the Theory of Presumptions*, 45 Geo. L.J. 410, 417-21 (1957). *But see Ticor Title Ins. Co.*, Docket 9190, Initial Decision issued on January 6, 1987, slip opinion at p. 94, which apparently adopts a shifting of the burden of persuasion.

⁸ The total absence of activity by a state agency will not be active supervision within the meaning of *Midcal State of Northern Carolina v. P.I.A. Asheville, Inc.*, 740 F.2d 274, 279 (7th Cir. 1984) (en banc). Where the state does not monitor market conditions or engage in any pointed reexamination of the program, the second prong of the state action immunity test will not be met. *Id.* at 279.

and there certainly are no manageable judicial standards by which a court may weigh the various elements of a "public interest" judgment in order to determine whether the legislature or agency decision was correct. . . . Those are political judgments and ought to be made by the legislature and its delegates. [18]

The facts of this case show that the state has demonstrated its commitment to a program exempt from the antitrust laws through statutory delegation and the exercise of regulatory oversight and active supervision of rates by the DPUC.

2. Facts

The state legislature clearly intended to create a program of regulatory oversight of transportation of commodities by motor carrier. (F. 66-71) And that program has been active. Effective in October, 1986, DPUC appointed Edward Regan, formerly head of the Transportation Division, the head and supervisor of the tariff division, and reporting to him are two rate analysts who review tariffs filed. (F. 40) Since 1983, the DPUC's accounting division has taken a larger role in reviewing tariff filings. (F. 42)

All carriers are required to file their rates with the DPUC. (F. 41) Rate analysts review the tariffs to check, among other matters, if rates are above the minimum rate orders. (F. 41) Tariffs are filed and held in abeyance on the public record for thirty days, unless to meet a competing carrier's tariff in which even a shorter period is permissible. (F. 52) Rate analysts can refuse to file the tariff on the public record if it does not satisfy the tariff regulations and requirements. (F. 41)

If the increases are less than five percent and there are no errors or corrections, there is a presumption that the request is reasonable and the tariff is approved without a hearing unless there is a protest. (F. 41, F. 43, F. 49) If there is a protest, a public hearing may be held. (F. 41) Frequently, rejected tariffs are refiled to satisfy the requirements of a DPUC rate analyst. (F. 41)

If a rate increase is for more than five percent, it must be accompanied by financial information to justify the reasonableness of the increase consisting of proponent's operating revenues, operating expenses, tonnage and revenue to be generated, a *pro forma* operating statement, relationship of proposed rates to class rates, net operating income. A net operating ratio of 93% is considered reasonable. (F. 44; JX 9d).

The DPUC has the power to prescribe minimum rates and does

prescribe them, either on its own motion or upon petition by an interested party. (F. 56) The Commission initiated a minimum rate order in 1959 and about twelve additional minimum rate orders since that time in response to carrier petitions. Several of these orders were based on records developed in adversary hearings and were accompanied by a formal published opinion and explication. (F. 45, F. 65) [19]

When a tariff is filed it is always checked to determine whether it is the same, below or above the minimum rate orders and whether it should be suspended, rejected, returned for errors or corrections or set down for a hearing. The DPUC has rejected some tariffs filed by independent carriers. (F. 57) The tariff is processed initially by the tariff section of the DPUC. It always refers a carrier with new authority to the audit section to consider and analyze the financial information submitted. (F. 58) An application for operating rights must be accompanied by a proposed tariff, and its rates are always checked by the tariff section to determine if they are at least equal to or above the minimum rate order at the time. (F. 59) The DPUC has issued several citations for charging rates different than the rate in the tariff. (F. 60) When a tariff rate change or rule is set down for a hearing, a legal notice is issued to the public by DPUC and published in selected Connecticut newspapers of general circulation. (F. 50)

Rate analysts in DPUC submit written recommendations with respect to applications for tariff changes on all matters that go to hearing. Written recommendations are also submitted at times when a matter is not set down for hearing. (F. 51) If a tariff submitted is above the minimum rate order and the increase is substantial (over 5%) the tariff is checked, the carrier is notified, and the tariff is suspended pending a conference or hearing. If the carrier makes corrections or adjustments satisfying to the tariff section, it is accepted and no hearing is required. (F. 61)

If a tariff submitted is below the minimum rate order, the carrier must file a petition for exemption, in which event, the tariff is suspended. A hearing may be held to justify the proposed rate. (F. 41) When a general rate increase is proposed, it must be accompanied by an elaborate justification statement. This statement is thoroughly analyzed by the tariff and audit sections and a written recommendation is prepared. (F. 54)

Whenever operating rights are transferred, an informal conference is required between the tariff section of the DPUC and the selling carrier at which conference the rates of the selling carrier are checked

