

Complaint

102 F.T.C.

IN THE MATTER OF

MASSACHUSETTS FURNITURE AND PIANO MOVERS
ASSOCIATION, INC.FINAL ORDER, OPINION, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket 9137. Complaint, June 12, 1980—Final Order, Sept. 28, 1983*

This order requires a Massachusetts association of common carriers certified to move household goods and office equipment, among other things, to cease entering into, maintaining or adhering to any agreement or plan to fix rates charged for the intrastate transportation of goods and equipment; and to cease providing non-public information relating to changes in any carrier's transportation rates to competing firms. The order also bars the association from knowingly preparing or filing tariff provisions containing collective rates for transportation services; influencing member carriers to file or adhere to any existing or proposed tariff provision affecting intrastate transportation rates; and maintaining a tariff committee or similar entity to consider, pass upon or discuss intrastate transportation rate proposals. Additionally, respondent is required to cancel all tariffs and tariff supplements presently in effect or on file with the Massachusetts Department of Public Utilities; terminate all previously executed powers of attorney and agreements with carriers utilizing its services; cancel provisions in its articles of incorporation, by-laws, policy statements and other relevant documents that do not conform with the terms of the order; and amend its by-laws to require members to observe provisions of the order as a condition of membership.

Appearances

For the Commission: *Harold F. Moody, Charles E. Yon and Janet H. Gilbert.*

For the respondent: *David Brodsky and James C. McMahon, Jr., Brodsky, Linett, Altman & Schechter, New York City and Thomas E. Andresen, Jr., Salem, Mass.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act (15 U.S.C. 41, et seq.) and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Massachusetts Furniture and Piano Movers Association, Inc., (hereinafter sometimes referred to as "respondent," "Mass. Movers" or the "Association"), a corporation, has violated and is now violating the provisions of Section 5 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 purposes of this complaint the term *tariff* means a publication stating the rates and charges of a common carrier for the transportation of property within the Commonwealth of Massachusetts and all rules, terms and conditions which the common carrier applies in connection therewith.

PARAGRAPH 1. Respondent Massachusetts Furniture and Piano Movers Association, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Massachusetts, with its office and principal place of business located at 635 Washington Street, Canton, Massachusetts.

PAR. 2. Respondent is an association organized for, and serving its members' interests, including their economic interests, by promoting, fostering and advancing the household goods and office equipment moving industry in the Commonwealth of Massachusetts. One of the primary functions of respondent is the initiation, preparation, development, dissemination and filing of tariffs and supplements thereto on behalf of and as agent for its members with the Massachusetts Department of Public Utilities. Said tariffs and supplements contain rates and charges for the transportation of household goods and office equipment and for related services including, *inter alia*, hoisting and lowering; piano or organ carrying; loading and unloading bulky articles; auxiliary services; overtime loading and unloading; elevator, stair and distance carrying; and reweighing at the request of the shipper.

PAR. 3. Pursuant to Massachusetts state law, each common carrier is required to file a tariff with the Massachusetts Department of Public Utilities containing the carrier's rates, fares or charges for the intrastate transportation of household goods and office equipment. By Massachusetts law, a common carrier is not permitted to charge a different rate, fare or charge other than those contained in its tariff or supplements thereto once the Department of Public Utilities has accepted it.

PAR. 4. Members of respondent are engaged, *inter alia*, in the business of providing transportation and other services for compensation as common carriers for intrastate moves of household goods and office equipment in the Commonwealth of Massachusetts. Except to the extent that competition has been restrained as herein alleged, members of respondent have been and are now in competition among themselves and with other common carriers.

PAR. 5. The membership of the Association consists of approximately 300 common carriers of property by motor vehicle, and other per-

sons engaged in the household goods and office equipment moving industry and allied industries who conduct business within the Commonwealth of Massachusetts. In 1977 the Association's members received more than \$60 million in compensation for intrastate moves. Members of the Association are entitled to and do, among other things, vote for and elect the officers and directors of the Association. The control, direction and management of the Association is vested in the officers and directors who employ or appoint an executive director to carry on the day-to-day administration and management of the Association. [3]

PAR. 6. The acts and practices of respondent set forth in Paragraph Seven have been and are now 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. Among other things, the aforesaid acts and practices:

(A) Affect the flow of substantial sums of money from the federal government, business and other private parties to the respondent's members for rendering transportation services, which money flows across state lines;

(B) Affect the purchase and utilization of equipment and other goods and services by respondent's members which are shipped in interstate commerce;

(C) Include the use of the United States mail and other instruments of interstate commerce in furthering the agreements described below; and

(D) Are supported by the receipt of dues, advertising revenues and fees for publications and services from out-of-state members and others.

PAR. 7. For many years and continuing up to and including the date of the filing of this complaint, respondent, its members, officers and directors and others have agreed to engage, and have engaged, in a combination and conspiracy, an agreement, concerted action or unfair and unlawful acts, policies and practices, the purpose or effect of which is, was or may be, to unlawfully hinder, restrain, restrict, suppress or eliminate competition among common carriers in the household goods and office equipment moving industry.

Pursuant to, and in furtherance of, said agreement and concert of action, respondent, its members and others have engaged and continue to 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, which have the purpose or effect of fixing, establishing, stabilizing or otherwise

tampering with rates and charges for the transportation of household goods and office equipment in Massachusetts; [4]

(B) Participating in and continuing to participate in the collectively set rates;

(C) Filing with the Massachusetts Department of Public Utilities collectively set rates; and

(D) Initiating, organizing, coordinating and conducting meetings or providing a forum for any discussion or agreement between competing carriers concerning or affecting intrastate rates charged or proposed to be charged for the intrastate transportation of property; or otherwise influencing its members to raise their rates, charge the same or uniform rates, participate in or continue to participate in the collectively set rates.

PAR. 8. The acts and practices of respondent, its members and others as alleged in Paragraph Seven, have been and are now having the effects, among others, of:

(A) Raising, fixing, stabilizing, pegging, maintaining, or otherwise interfering or tampering with the prices of household goods and office equipment moves;

(B) Restricting, restraining, hindering, preventing or frustrating price competition in the household goods and office equipment moving industry; and

(C) Depriving consumers of the benefits of competition.

PAR. 9. The acts, policies and practices of respondent, its members and others, as herein alleged were and are to the prejudice and injury of the public and constituted and constitute unfair acts and practices or 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, as herein alleged, are continuing and will continue in the absence of the relief herein requested.

INITIAL DECISION BY

MORTON NEEDELMAN, ADMINISTRATIVE LAW JUDGE

DECEMBER 1, 1981

I.

STATEMENT OF THE CASE

The complaint in this matter, which was issued on June 12, 1980, alleges that Massachusetts Furniture and Piano Movers Association,

Inc., and its members have engaged in a price-fixing conspiracy by collectively initiating, preparing, developing, participating in, and filing joint tariffs for moving household goods and office equipment within the Commonwealth of Massachusetts. The complaint further charges that respondent's members have met for the illegal purpose of assuring that moving rates within certain specific geographic zones are adhered to uniformly. These practices are said to violate Section 5 of the Federal Trade Commission Act.

Respondent's answer denies that it or its members have committed any substantive violations, and advances the affirmative defenses that its rate-making activities are: (a) exempt from the federal anti-trust laws and Section 5 of the Federal Trade Commission Act by reason of *Parker v. Brown* and the related line of "state action" cases; and (b) political petitioning of a government agency protected under the *Noerr-Pennington* doctrine. [3]

In the prehearing stage both sides moved for summary decision on the *Parker v. Brown* and *Noerr-Pennington* issues. In Prehearing Order No. 18, complaint counsel's motion was granted, the defenses were stricken, and a trial on the merits was ordered to be held in Boston, Massachusetts, on October 5, 1981. At that time both sides introduced exhibits, but no witnesses were called. Main briefs were filed on November 5, 1981;¹ reply briefs on November 20, 1981.

After reviewing all the pleadings, stipulations,² admissions,³ exhibits, proposed findings, conclusions, and briefs submitted by the parties, and based on the entire record, I make the following findings of fact: [4]

II.

FINDINGS OF FACT

Respondent and Its Members

1. Respondent, Massachusetts Furniture and Piano Movers Association, Inc. (hereinafter "Mass Movers"), is an association of some 300 common carriers certified by a state agency, Massachusetts Department of Public Utilities (hereinafter "MDPU"), to move household goods and office equipment within the Commonwealth of

¹ Respondent's Main Brief is in the form of a Post-Hearing Memorandum In Support of Its Renewed Motion For Summary Decision which essentially renews its "state action" defense.

² Prehearing Order No. 13 incorporated into the record two stipulations, hereinafter identified as "Stip. 1" (undated, and consisting of 33 paragraphs) and "Stip. 2" (dated March 26, 1981, and consisting of one paragraph).

³ Complaint counsel filed two sets of requested admissions. The first request (dated March 20, 1981) and the responses thereto (dated April 1, 1981) are hereinafter referred to as "Adm. 1." The second request (dated April 14, 1981) and the responses thereto (dated April 24, 1981) are hereinafter referred to as "Adm. 2."

Massachusetts.⁴

2. Approximately 80 percent of all movers doing business in Massachusetts are members of Mass Movers.⁵ [5]

3. The members of Mass Movers ostensibly compete amongst themselves to provide moving services.⁶

4. The parties have stipulated to the truth and accuracy of Paragraph Six of the complaint, which charges that the acts and practices of respondent and its members, as alleged in Paragraph Seven of the complaint, are in or affect commerce, as "commerce" is defined in the Federal Trade Commission Act. Thus, respondent has stipulated that the practices of Mass Movers—

(A) Affect the flow of substantial sums of money from the federal government, business and other private parties to the respondent's members for rendering transportation services, which money flows across state lines; (B) Affect the purchase and utilization of equipment and other goods and services by respondent's members which are shipped in interstate commerce; (C) Include the use of the United States mail and other instruments of interstate commerce in furthering the agreements [respecting joint-tariff submissions]; and (D) Are supported by the receipt of dues, advertising revenues and fees for publications and services from out-of-state members and others.⁷ [6]

5. Mass Movers performs no moving services, and does not possess a certificate of public convenience and necessity issued by either the Interstate Commerce Commission or the MDPU;⁸ accordingly, the association is not a "common carrier" subject to the Interstate Commerce Act, and has no exemption under Sec. 5(a)(2) of the Federal Trade Commission Act.

6. The day-to-day affairs of Mass Movers are carried out by an Executive Director who is in the employ of the association, and a Board of Directors elected by the members. All persons serving on respondent's Board of Directors are officers and employees of member firms.⁹

Joint Tariff Activity of Respondent

7. Under Massachusetts law, a mover must file a tariff containing the mover's charges for moving household goods and office equipment. A mover is not permitted to depart from the [7] filed tariff (or a filed supplement to the tariff) once the tariff or the supplement has

⁴ Stip. 1, ¶ 1.

⁵ Stip. 1, ¶ 1.

⁶ Complaint and Answer, ¶ 4.

⁷ Stip. 2; *see also* Stip 1, ¶¶ 27-32.

⁸ CX110Z-8; RX10B. About half of respondent's members do not have ICC licenses. CX's 107A-107H. At least 50% of the members are engaged solely in intrastate moving (Stip. 1, ¶ 33), and almost all members are engaged in some intrastate moving (CX's 108A-108F).

⁹ Complaint and Answer, ¶ 5; CX71B.

been accepted by MDPU.¹⁰

8. The main purpose of Mass Movers is to prepare, sponsor, and file with MDPU a joint tariff on behalf of its members.¹¹ The first such joint tariff was filed by respondent in September 1938;¹² the last, Number 14, was filed on May 1, 1971, and was subsequently revised on six occasions.¹³ In filing a joint tariff, respondent acts as the agent for its members.¹⁴

9. There is no Massachusetts law requiring or compelling movers to file a joint tariff. Moreover, there is no Massachusetts law requiring or compelling uniform moving rates among competing movers. Joint tariffs, however, are authorized by the following regulation promulgated by MDPU:

(a) Whenever a carrier or a broker desires to give authority to an agent to issue and file tariffs and supplements thereto in its stead, an appropriate power of attorney . . . shall be used, . . . [8]

(b) Carriers and brokers may become participants in such tariffs which are issued and filed by another carrier or his agent by the giving of a proper concurrence.¹⁵

10. Most of the groundwork involved in preparing joint tariffs is done by respondent's Tariff Committee (renamed "Cost Study Committee" in 1978, and "Governmental Committee" in 1980) appointed from the membership of Mass Movers by the President of the association.¹⁶

11. The Tariff Committee members meet either on their own initiative, or at the direction of the Executive Director or the Board of Directors, to prepare and develop proposals and recommendations respecting a joint tariff.¹⁷

12. The Tariff Committee's proposals for a joint tariff are submitted to respondent's Board of Directors for discussion at the monthly meetings of the board.¹⁸ Thereafter, the Executive Director disseminates the recommendations of the [9] Tariff Committee to the general membership of Mass Movers through the association's monthly bulletin.¹⁹ The membership, in turn, submits comments on the proposed joint tariff to the Board of Directors.²⁰

¹⁰ Mass. Gen. Laws Ann. Ch. 159B § 6A; Complaint and Answer, ¶ 3; Stip. 1, ¶ 22.

¹¹ Stip. 1, ¶ 2(c); Adm. 1, ¶ 2; CX's 71A, 92, 93, 109D, 110D.

¹² Stip. 1, ¶ 3; CX's 102A, 102B; RX12D.

¹³ Stip. 1, ¶¶ 4-7.

¹⁴ Stip. 1, ¶ 7.

¹⁵ MDPU 10405(1), Part III, Sec. 6; Stip. 1, ¶ 17.

¹⁶ Adm. 1, ¶¶ 3-6; Adm. 2, ¶¶ 1-3; CX's 10B, 20A, 32, 33, 35, 36, 109F, 110E-F, 110H, 111M, 112B, 112D.

¹⁷ Adm. 1, ¶ 9; Adm. 2, ¶ 2; CX's 11B, 19, 20A, 22, 27, 32, 33, 70, 109H, 109J, 110F, 110Z-2, 110Z-10, 112R; RX 61.

¹⁸ Stip. 1, ¶¶ 10, 11, 12, 14; Adm. 1, ¶¶ 8-12, 17; CX's 2, 4A, 5-8, 11B, 12, 14, 17, 19-21, 25A, 28, 29, 35, 50A, 54A, 68; RX 89.

¹⁹ Stip. 1, ¶ 13; CX's 4A, 46A, 53A.

²⁰ CX's 69, 70, 94, 95, 109L, 111S, 111T, 112R.

13. From these internal deliberations of the Tariff Committee, the Board of Directors, and the general membership of Mass Movers, there eventually emerges a joint tariff or revisions of existing joint tariffs which the Board of Directors files with MDPU on behalf of the members.²¹ The tariff decisions of the Board of Directors are ratified by respondent's general membership at annual meetings,²² and the members indicate their formal acquiescence in the joint tariff by filing powers of attorney and concurrence forms with the MDPU.²³

14. As in the case of an individual tariff (*see* Finding 7), once the joint tariff is filed by respondent, the members of the association are required under Massachusetts law to charge the [10] rates specified in the tariff unless the tariff is suspended by MDPU, or a mover files an entirely separate tariff, or a mover files for an exception to the joint tariff.²⁴

15. Although there is no state statute or regulation requiring a joint tariff from competing movers in Massachusetts, respondent has been encouraged in the past by MDPU officials to file such tariffs on behalf of its members.²⁵ Moreover, MDPU staff members have consulted with officials of respondent about including, excluding, or clarifying certain provisions in proposed joint tariffs.²⁶

16. The joint tariffs filed by respondent association automatically go into effect on a date specified by respondent unless suspended by MDPU.²⁷ [11]

17. The latest joint tariff submitted by respondent, MDPU tariff No. 14 (effective May 1, 1971), consists of three main sections: Section I contains two tables of rates and charges for packing and unpacking; Section II contains 10 tables of hourly rates for moves up to and including 25 miles; Section III contains a weight/mileage table for moves in excess of 25 miles. In addition to the three main sections, the tariff contains rates for 27 different types of boxes, overtime, claim settlement fees, and for such special services as hoisting and lowering pianos and other extra pick up and delivery charges.²⁸

18. Since May 1, 1971, Mass Movers, its members and directors have initiated, prepared, developed, and filed six revisions of Tariff No. 14 which have been accepted by MDPU. The six revisions of MDPU No. 14 were discussed by the Tariff Committee and submitted to respondent's Board of Directors who, in turn, reported these proposed in-

²¹ Stip. 1, §§ 7, 14, 20; Adm. 1, §§ 10-12, 17; CX's 2, 6, 7A, 14, 17, 27, 110B, 110Q, 110Z-2, 111Z-11, 112M.

²² Adm. 1, § 16.

²³ Stip. 1, §§ 18, 19, 21; CX's 111Z-4, 111Z-5.

²⁴ Stip. 1, § 22.

²⁵ RX's 65B, 67A, 73A, 80B.

²⁶ RX's 1A, 1B, 62B, 66A, 70A, 78B, 79B, 83B, 85B, 87A, 88, 91.

²⁷ Mass. Gen. Laws Ann. Ch. 159B § 6A.

²⁸ Complaint and Answer, § 2; Adm. 1, § 29; CX's 113E-113Z-16; RX12E.

creases to the membership in the association's monthly bulletin.²⁹ [12]

19. While the members of the association have the right to file an independent tariff, there is overwhelming acceptance by the members of the basic joint tariffs filed by respondent,³⁰ as shown in Table 1 below.

TABLE 1: Member Participation in MDPU Tariff No. 14 Filed by Mass Movers:

Date	% Participation in one of 10 hourly rate tables	% Participation in one of two Packing Rate Schedules
2/1/72	99	99
2/15/73	99	99
10/15/73	99	99
2/14/74	99	100
11/30/74	99	N.A.
2/12/75	99	100
2/18/76	99	100
2/28/77	99	100
6/16/77	99	100
2/28/78	97	97
11/30/78	95	N.A.
1/31/79	95	N.A.
1/31/80	95	N.A.
8/14/80	85	96
3/12/81	91	98

Sources: CX's 38B, 40B, 43A, 45B, 49B, 52B, 57B, 59C, 60C, 103, 104A-104K, 105A-H, 106A-F, 111Z-7, 111Z-8. [13]

Other Activity of Respondent Aimed at Higher Uniform Rates

20. Even apart from the filing of joint tariffs, almost from its inception respondent has been engaged in activity aimed at eliminating price competition amongst movers. Thus as early as March 1939, respondent's Board of Directors voted to require that the members submit all supplements to the board for its approval.³¹ In 1957, the President of respondent announced that the association had made considerable progress in stabilizing rates.³² At a Board of Directors meeting in April, 1961, there was a discussion about moving all the members to a higher rate. At this meeting the President of respondent asked how many movers then charging \$16 per hour (for a truck and three men) would raise their rates to \$18; and how many charging \$14 would raise their rates to \$16. All movers charging \$16 agreed to

²⁹ Stip 1, ¶¶ 5-6. See also Findings 12, 13.

³⁰ To these basic tariffs, however, about 50% of the members filed various exceptions in 1980 (CX's 105A-105H), and about 30% filed exceptions in 1981 (CX's 106A-106F).

³¹ RX51B.

³² RX84A.

charge \$18, and all but two movers charging \$14 agreed to raise their rates to \$16.³³ In 1975, prospective members of the association were told that a [14] principal objective of respondent was to obtain uniformity of rates.³⁴

21. The multiple tables appearing in respondent's joint tariff M.D.P.U. No. 14 might conceivably result in some price competition among members; respondent, however, has taken steps to eliminate this eventuality. In fact, the use of multiple tables was designed by respondent for the very purpose of *reducing* the price differences which had occurred prior to 1971 when the association filed a single hourly rate, only to be followed by the widespread use of supplements with the result that "[t]here was an absolute hodge-podge of rates lacking any degree of uniformity."³⁵ Moreover, respondent has used zone meetings (the membership was organized into six zones in 1955³⁶) to obtain agreement amongst competing movers to charge a uniform rate (*i.e.*, to adopt uniformly *one* of the published rate tables), or to move uniformly to higher tables. That this is the purpose of zone meetings was made clear in a March 6, 1970, memorandum from respondent's Executive Director—[15]

It has been my experience that Zone meetings have been very successful if only a good turnout of members can be obtained. The most recent Zone meeting I had was on January 29th among the movers on Cape Cod. We had almost 100% attendance by the movers. It is especially interesting to observe that these competitors have developed growing confidence in each other—they have gotten to know each other. They are all now moving from Table 4 (\$25 per hour) to Table 5 (\$27 per hour). . . .³⁷

Prior to another 1970 Zone meeting, respondent's Executive Director asked the movers to—

. . . give some real thinking to increasing your hourly rates by one Table. School St. Stg. & Worcester Stg. have just jumped their rates from 2 to 4. In Greenfield area, Sitterly & Westcott are jumping up one table and looks like others there will do the same. If just one would make the same move in Springfield and then let the others know—you could all move up. Same in other areas.³⁸

22. Respondent association also acts as a fire brigade which at the first sign of a price reduction rushes into action to discourage such competitive activity. Thus on February 16, 1973, the Executive Director of Mass Movers wrote:

³³ RX's 86A, 86B.

³⁴ CX's 92, 93.

³⁵ CX102D. The use of multiple tables in order to reduce the number of supplements was endorsed by MDPU officials. See RX's 1B, 80B.

³⁶ RX 79B.

³⁷ CX72. See also CX1.

³⁸ CX 73.

I was able to stop the reduction filings of Walsh and Seeeney so they will remain on Table 3.³⁹ [16]

Another mover in this area was told:

Was successful in holding the change to Table 2 of Walsh and Sweeney. They are still on Table 3. Looks like you're finally going to get rate uniformity.⁴⁰

Once the defection to a lower rate table was contained, the Executive Director then directed his efforts to raising the movers up to Table 3. He reported that the movers in the Fall River area "are agreed on maintaining a rate level of *Table 3*," and to one mover in this area he wrote:

In the interest of rate stability in the Fall River area I hope that you will also go along with this rate.⁴¹

Apparently this effort was successful since on March 22, 1973, the Executive Director reported to respondent's Board of Directors:

Fall River area has stabilized their rates and are now all on Table 3.⁴² [17]

The Executive Director did not rest on his laurels, and by 1975 he was organizing a zone meeting in Fall River for the purpose of moving the members up to Table 4.⁴³

23. Not only does respondent actively work to eliminate price competition in specific zones, but it serves as a constant source of inspirational messages to the members which have as their dominant theme that movers should increase prices to consumers.⁴⁴ [18]

³⁹ CX79.

⁴⁰ CX81.

⁴¹ CX82. This letter was apparently sent to several Fall River area movers with the notation that respondent "will hold returns in Assoc. office until rate changes received from all." CX's 83-88.

⁴² CX13.

⁴³ CX's 26A, 89B.

⁴⁴ See, e.g., CX37A ("If your pretax profit margin is shrinking then, as a certificated carrier with an obligation to service the public, you should [almost must] apply for a rate increase to maintain your financial integrity . . . call your association office if you feel in need of further information"); CX38A ("Your association office realizes that many of our carrier members are in need of rate increases and we are prepared to continue to file rate increases with the M.D.P.U. . . . [i]f YOUR company needs a rate increase - CONTACT your association office and file the increase NOW so you will not encounter a time lag . . ."); CX43A ("Your association office is receiving a number of inquiries concerning hourly rates mostly having to do with competitor's rates and what are the averages in each Zone and statewide. This is unusual for this time of year and would seem to indicate that the bottom line [the profit line] is not measuring up to what it should be."); CX44B ("Your association office urges all of our carrier members to take a hard look at your hourly rates—call the office if you want to just talk about this. If your decision is to move up a Table or two it is a very simple matter for us to proceed and we will do all the work . . . Remember—just drop a note or call your association office if you have a need to increase your hourly rate Table."); CX45B (" . . . we have an unusual number of hourly rate increases being filed . . . Call your association office if you have a need to increase your hourly rate Table."); CX50B ("[t]he lesson is taught over and over again that undercutting [prices], while it brings apparent transient prosperity, eats out the vitals of the company practicing it. But it is taught in vain."); CX60C ("DO YOU NEED TARIFF RELIEF? If any of your DPU rates are inadequate, contact your association office.")

24. On the basis of the record before me, I am unable to make a definitive factual finding as to how vigorously the MDPU exercises its statutory power to review proposed joint tariffs for reasonableness. As indicated in the Discussion (Part III, *infra*), proof on this point is not germane to my decision since respondent has failed to meet the threshold requirement of showing that the Massachusetts legislature intended to suspend competition in the moving industry. In the interest of completeness, however, I find that there is some evidence that MDPU does not automatically accept all proposals of respondent, and some joint tariffs have been suspended, or respondent has been asked on occasion to file additional data in support of a joint tariff.⁴⁵ But even assuming that joint tariffs are [19] reviewed, the pervasiveness of MDPU regulation is open to serious question given the importance of the multiple-table schedule in the tariff sponsored by Mass Movers, and MDPU's [20] policy of not requiring movers to justify the reasonableness of their rates as they graduate from table to table.⁴⁶

Finally, there is no clear proof that the joint ratemaking process itself is subject to regulation or supervision by the MDPU. The record evidence relating to this point (on which respondent has the burden of proof) is sketchy. In an affidavit attached to complaint counsel's Motion for Summary Decision, James S. Simpson, Director of Rates Division of MDPU says:

The initiation, development, compilation, preparation, and drafting of the Association's agency tariff schedules, and the revisions thereof, are undertaken solely by the

⁴⁵ Respondent relies heavily on the investigation and eventual rejection by MDPU of Mass Movers' proposed revision of Tariff No. 14 during the period July 14, 1978 to June 14, 1979 (RX's 9A-12V). But this 1979 review may reflect in part MDPU awareness of the challenge by the FTC staff to respondent's claim of immunity by reason of the state action defense. See RX12o. In any event, there is little evidence of similar adversarial review by MDPU of respondent's proposed joint tariffs. A 1966 filing was suspended and hearings were held because of a disagreement between Mass Movers and MDPU over the commodity description, declared value provisions, and determination of running time (RX's 2A-2F, 3A-3D, 27, 28, 29, 30A, 30B, 31). Between 1939 and 1975, however, justifications for rates were established normally by informal meetings with MDPU, and suspensions were so rare that faced with one in 1975, respondent withdrew its rate filing "because we were not prepared to go to hearing by reason of just not knowing how to proceed." CX102B.

The record contains several requests for information from MDPU in support of tariff increases and suggestions as to the form of tariff proposals. See, e.g., CX18 (fuel surcharge would be accepted by MDPU if filed in form of tariff supplement); RX's 1A, 1B (MDPU orders organization of tariff in proper form with table of contents; in addition, multiple tables were accepted by MDPU, and hearing was scheduled on "agreed value"); RX's 3A-3D (MDPU orders revisions in standard bill of lading); RX's 4, 5A, 6 (MDPU calls for additional testimony and exhibits in support of tariff); RX26 (proposed supplement not accepted because it omitted a required change in definition of covered commodities). See also the following suggestions by MDPU to Mass Movers: RX62B (omit tariff pages devoted to transportation of crated furniture from docks and railroad terminals); RX83B (change the definition of a barrel to include the use of so-called "square dish barrels"). I have no basis for concluding one way or the other whether these requests for information, scheduling of hearings, and suggestions are indicative of an independent evaluation of the economic necessity for tariff increases or are merely examples of a bureaucracy fussing over form while ignoring substance. As for the 1978 statement by an MDPU commissioner that his agency does not rubber-stamp proposals (RX's 40A-40G), this must be viewed warily as an observation from an interested source. Moreover, it is noteworthy that this same state official characterized the close scrutiny of tariff submissions as "a change over what you who have been in this business a long time have come to expect from a state regulatory agency" (RX40D).

⁴⁶ RX's 12H, 12I.

Association prior to the filing of said tariffs with M.D.P.U.⁴⁷

While respondent raised a question about Mr. Simpson's authority to speak for MDPU (a doubt, incidentally, that did not deter respondent from adopting certain paragraphs of the Simpson affidavit which it believed were favorable to its cause),⁴⁸ there was no factual evidence presented by respondent which seriously challenges Mr. Simpson's observation of the lack of regulation or supervision of the pre-filing joint rate-making [21] process itself. The affidavit of respondent's Executive Director argues nebulously that the "development and filing" of respondent's joint tariffs "have been subject to M.D.P.U. scrutiny,"⁴⁹ but neither the meaning of "subject" nor "scrutiny" is fleshed out. At most, respondent introduced evidence that some officials of MDPU may have encouraged the process,⁵⁰ and that these same officials may have made some suggestions about what to include in the association's tariffs.⁵¹ But this hardly amounts to regulation or supervision of respondent's Tariff Committee, or its Board of Directors, or its membership, as they prepare collusively a joint tariff which is sufficiently high so as to satisfy the collective self-interest of these supposedly competing firms. [22]

III.

DISCUSSION

The Parker v. Brown Defense

Before granting summary decision on the *Parker v. Brown* defense in Prehearing Order No. 18, both sides were given ample opportunity to submit proof relating to a crucial aspect of this defense—the issue of state intent to suspend the federal antitrust laws. Moreover, although technically the *Parker v. Brown* defense had been removed from this proceeding by the summary decision in Prehearing Order No. 18, during the formal hearing respondent was allowed to supplement its earlier submissions and introduce still additional exhibits relating to the issue of state intent. This late evidence was carefully considered, but nothing in respondent's exhibits or posthearing brief convinces me that I should depart from my earlier decision denying the defense.

⁴⁷ Affidavit of James D. Simpson, ¶ 3 (in Appendix to Complaint Counsel's Cross Motion for Summary Decision).

⁴⁸ Respondent's Reply Memorandum in Support of Its Motion for Summary Decision and Answering Memorandum to Complaint Counsel's Cross Motion for Summary Decision at 17.

⁴⁹ Affidavit of Daniel W. Dunn, ¶ 5 (attached to Respondent's Memorandum In Support of Motion For Summary Decision Dismissing Complaint).

⁵⁰ Finding 15.

⁵¹ Finding 15.

It was noted in Prehearing Order No. 18 that the state action exemption derives from the policy favoring a spirit of accommodation within our federal system in order to avoid unnecessary conflict between the mandates of national law [23] governing interstate commerce, and state regulation of intrastate activity which may have interstate implications. The exemption also derives from the Tenth Amendment reservation of state sovereignty, as well as the belief that the states perform the useful function of serving as economic laboratories in which diverse forms of regulation (and indeed non-regulation) may be tested without interference by the federal government.⁵²

Notwithstanding the large measure of discretion which the states enjoy under the principles of federalism inherent in the state action defense, the strong national policy favoring competition and the free market is not easily displaced.⁵³ Before any restrictive practice which departs from the competitive norm can qualify for the state action exemption, first it must be demonstrated that the state's intention to grant antitrust immunity to the questioned practice is clearly articulated and affirmatively expressed as a matter of state policy, and second, that the state actively supervises the process chosen to replace the competitive market.⁵⁴ The state [24] action defense is denied here because respondent failed to meet the threshold requirement of proving that Massachusetts intended to displace the competitive moving market by granting it an immunity from the federal antitrust laws.

Neither in its prehearing motion nor in its brief submitted at close of the record, does respondent even purport to identify any provision in the Massachusetts Motor Carrier Act which expressly suspends competition among movers in a "clearly articulated and affirmatively expressed" manner.⁵⁵ Instead, Mass Movers relies mainly on the MDPU regulation which allows but does not compel movers to cooperate in working up rates through the use of a joint or "agency" tariff.⁵⁶ [25]

⁵² *Parker v. Brown*, 317 U.S. 341 (1943).

⁵³ A claim of exemption must be considered "in light of the presumption against implied exclusions from coverage under the antitrust laws." *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 at 398 (1978).

⁵⁴ *California Liquor Dealers v. Midcal Aluminum*, 445 U.S. 97 (1980).

⁵⁵ *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 439 U.S. 96, 109 (1978).

⁵⁶ D.P.U. 10405(1) Part III 6 provides:

a. Whenever a carrier or a broker desires to give authority to an agent to issue and file tariffs and supplements thereto in its stead, an appropriate power of attorney . . . shall be used,

b. Carriers and brokers may become participants in such tariffs which are issued and filed by another carrier or his agent by the giving of a proper concurrence.

MDPU regulations are generally authorized by the Massachusetts Motor Carrier Act which provides that "The department may establish from time to time such reasonable rules and regulations as it may deem necessary pertaining to the form of tariff schedules, the time and manner of filing thereof, the suspension of rates before the same become effective, and hearings upon the validity of any filed or existing rate." Mass. Gen. Law Ann. Ch. 159B § 6.

To begin with, however, respondent argues from the provision in the Massachusetts Motor Carrier Law for retention by the state of the right to review and authority to suspend any tariff, including a joint tariff, that all tariffs actually are being promulgated by the state itself rather than private parties, and accordingly the state action exemption applies automatically, irrespective of any state intention to immunize the pre-filing activities of respondent's members. This argument cannot survive in the face of the plain language of the Massachusetts Motor Carrier Law which says it is not the state but the *movers*—

... who shall establish, observe and enforce just and reasonable rates . . . which shall become effective on a date fixed by such carrier, which shall be at least thirty days after the filing of the tariff containing the same, unless suspended by the department prior to its effective date upon complaint of any person, organization or body politic, or by the department on its own motion;⁵⁷

From the foregoing it is patently clear that the statute does not relegate movers to the roles of passive onlookers who are helplessly waiting on tenterhooks for [26] decision-making by the state. By the very terms of the Motor Carrier Act the setting of moving rates in Massachusetts is initiated by the movers, and irrespective of how zealously or passively the state exercises its reserve power to review and reject a particular filing,⁵⁸ there would be nothing to review unless respondent and its members engaged in the discrete and efficacious act of originating a proposed tariff. More important, the *collective* nature of the tariff, which is the point at issue here, is not compelled by the state, and comes about as a result of a choice exercised by respondent's members for which they should be held fully accountable.⁵⁹ [27]

Equally unpersuasive is the argument that merely from the statutory grant to a state commission of a right to review tariffs for reasonableness, it follows that the state intends to replace the competitive market in the tariff-preparation process with a state-controlled re-

⁵⁷ Mass. Gen. Law Ann. Ch. 159B, § 6.

⁵⁸ See Finding 24.

⁵⁹ See *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 593 (1976) for an analysis of the ratemaking process as a "mixture of private and public decisionmaking." Following *Cantor* the lower courts have consistently held that even firms closely regulated by federal or state public utility commissions are responsible under federal antitrust law for the anticompetitive aspects of their ratemaking proposals notwithstanding subsequent review, investigation, modification, or acceptance of their proposed rates by public utility commissions. See, e.g., *Sound, Inc. v. American Tel. and Tel. Co.*, 631 F.2d 1324 (8th Cir. 1980); *In re Ocean Shipping Antitrust Litigation*, 500 F.Supp. 1235 (S.D.N.Y. 1980); *Northeastern Tel. Co. v. American Tel. & Tel. Co.*, 497 F.Supp. 230 (D. Conn. 1980); *Hecht Co. v. Southern Co.*, 474 F.Supp. 1022 (D.N.M. 1979); *United States v. Southern Motor Carriers Rate Confer., Inc.*, 467 F.Supp. 471, 483 (N.D. Ga. 1979); *Interconnect Planning v. American Tel. & Tel. Co.*, 465 F.Supp. 811 (S.D.N.Y. 1978); *City of Mishawaka, Indiana v. American Elec. Power Co., Inc.*, 465 F.Supp. 1320 (N.D. Ind. 1979), modified, 616 F.2d 976 (7th Cir. 1980), cert. denied, 101 S.Ct. 892 (1981); *MCI Communications Corp. v. American Tel. & Tel. Co.*, 462 F.Supp. 1072 (N.D. Ill. 1978), aff'd, 594 F.2d 594 (7th Cir. 1978); *City of Groton v. Connecticut Light & Power Co.*, 456 F.Supp. 360 (D. Conn. 1978).

view procedure. Without a clear indication by the state of such a purpose—that is, to shield the 300 Massachusetts movers from competition—the reservation of a right to review and suspend unreasonable tariffs (even assuming vigorous application by the state of such supervisory authority) signifies no more than the creation of an option to veto, an option which may be invoked should the competitive market (perhaps for reasons of structural change or illegal collusion) not produce rates within a “zone of reasonableness.”⁶⁰ That is to say, the creation by the state of a [28] safety mechanism in the event competition fails, does not mean that the state affirmatively intends to deny its citizens the benefits to be realized from a free market which does not fail.⁶¹ Moreover, the adoption of an ultimate standard of “reasonableness”⁶² does not connote a state decision that [29] in the first instance the determination of what is a reasonable rate is to be left to the collective self-interest of the industry itself.

As for the MDPU regulation authorizing but not requiring an agency rate, I believe that the most that can be derived from this is that the agency charged with reviewing tariffs has found that while agency rates may be inoffensive to state policy and convenient for administrative reasons, they are not affirmatively required by any

⁶⁰ In holding that agency review for reasonableness precludes neither competition nor application of the federal antitrust laws, the Supreme Court has said that a “zone of reasonableness exists between maxima and minima within which a carrier is ordinarily free to adjust its charges for itself.” *United States v. Chicago, M., St. P. & P.R. Co.*, 294 U.S. 499, 506, quoted in *Georgia v. Pennsylvania R. Co.*, 324 U.S. 439, 461 (1945). In *Georgia v. Pennsylvania* the Supreme Court denied an antitrust exemption to a rate-fixing combination notwithstanding the substantial powers to review vested in the Interstate Commerce Commission by the Hepburn Act and the Transportation Act (“The first granted the Commission power to fix the maximum reasonable rate; the second extended its authority to the prescription of a named rate, or the maximum or minimum reasonable rate, or the maximum, and minimum limits within which the carriers’ published rate must come.” *Arizona Grocery v. Atchison Ry.*, 284 U.S. 370, 385–386 (1932), cited in *Georgia v. Pennsylvania R. Co.*, 324 U.S. 456, 457).

⁶¹ See, e.g., *Sound, Inc. v. American Tel. and Tel. Co.*, 631 F.2d 1324, 1335 (8th Cir. 1980) (“By requiring just and reasonable rates and charges, the statute provides a means of preventing the abuse of monopoly power by public utilities; it does not purport to aid an industry by giving it a competitive advantage as did the State of California in *Parker v. Brown*, *supra*. We thus are unable to find in the state statutes any clearly articulated or affirmatively expressed policy of replacing competition with regulation in the telephone terminal equipment market.”)

⁶² This standard appears in Section 1 of the Motor Carrier Law—

It is hereby declared to be the policy of the commonwealth to regulate transportation of property by motor carriers upon its ways in such manner as to recognize and preserve the inherent advantages of such transportation, and to foster sound economic conditions in such transportation and among carriers engaged therein in the public interest; and in connection therewith to: (1) Promote adequate, economical and efficient service by motor carriers, and reasonable charges therefor, without unjust discriminations undue preferences or advantages or unfair or destructive competitive practices, (2) improve the relations between, and co-ordinate transportation by and regulation of, motor carriers and other carriers, (3) develop and preserve a highway transportation system properly adapted to the needs of the commerce of the commonwealth, and (4) promote safety upon its ways in the interests of its citizens. [Emphasis added.]

and Section 6 of the Motor Carrier Law which provides in part:

In the exercise of the power to prescribe just and reasonable rates for the transportation of property by common carriers by motor vehicle and to disallow rates filed by any such carrier, the department shall give due consideration, among other factors, to the inherent advantages of transportation by such carrier, to the effect of any rates under consideration upon the movement of traffic by such carriers, to the need in the public interest of adequate and efficient transportation service by such carriers, to the cost of service and to the need of revenues sufficient to enable such carriers under honest, economical and efficient management to provide such service. [Emphasis added.] Mass. Gen. Law Ann. Ch. 159B § 6.

identifiable Massachusetts interest. Indifference, or neutrality on the part of the state, or even enthusiastic support of cooperation by the state bureaucracy, are not adequate grounds for suspending the federal antitrust laws. The exemption only applies if there has been a [30] positive election by the legislature to remove competition in order to effectuate a state regulatory objective which could not be accomplished if normal competitive decision-making were permitted.⁶³ Such a purpose has been found in those cases in which the state action exemption has been granted, whereas a determinative consideration in denying the exemption has been that the state has not clearly articulated as an objective the elimination of competition, or may only have been neutral on the question of competition.

The threshold issues then are state intention to suspend the competitive market, and how that intention is proven. In *Parker v. Brown*⁶⁴ itself, the intention of the state respecting the federal antitrust laws was never in doubt since the challenged California statute had as its indisputable [31] purpose keeping produce off the market in order to raise prices. The "legislative command"⁶⁵ by California for accomplishing this blatantly anticompetitive objective involved both private producers and state officials. The process was initiated by a proposal from growers who were authorized to act in concert to draw up a plan to limit production. In response to the growers' proposal, a state official assembled a committee of producers and processors which was required to formulate a restrictive plan. The plan of the committee was forwarded to a state commission for review for possible agricultural waste and unreasonable profits. If approved by the state commission, and after a favorable referendum of growers, the plan had to be followed by all growers at the risk of incurring penal sanctions.

In upholding the California plan for limiting production in order to raise prices, the Supreme Court said that Congress did not intend to apply the antitrust laws to state action regulating economic activity within its own borders, and while some state action may be invalid—for example, a naked authorization by a state that its citizens violate the federal antitrust laws without regard to state supervision—the California scheme did not fit into this category. There is nothing in *Parker* to suggest that the result would have been [32] different had

⁶³ The distinction between legislative expressions of policy and support for a course of action which administrators may find convenient is shown at the federal level by the fact that prior to 1948 there was no antitrust immunity for cooperative rate-setting by interstate carriers notwithstanding the view of the Interstate Commerce Commission that cooperation was useful, and that without such cooperation the intricate task of railroad rate-making (involving the complexities of interlocking systems not at issue here) would be virtually crippled. *Railroad Rate Bureaus and The Anti-Trust Laws*, 46 Col. L. Rev. 990 (1946). It was not until Congress specifically allowed for such cooperation that immunity from the antitrust laws was available. *Pan American World Airways v. United States*, 371 U.S. 296, 306 n.11 (1963).

⁶⁴ 317 U.S. 341 (1943).

⁶⁵ *Id.* at 350.

the suit been brought against the private growers rather than a state official; hence, for purposes of this discussion, I start from the premise that the state action exemption is available to private organizations acting pursuant to state regulatory policy, notwithstanding some recent doubt on this subject raised by the plurality opinion in *Cantor v. Detroit Edison Co.*,⁶⁶

The crucial difference between the state action in *Parker* and the alleged collusive promulgation of tariffs at stake here is that in *Parker* California had clearly intended to suspend the workings of the competitive market, and to rely instead upon the pooled self-interest of the producers to produce a plan which would limit production and raise prices. Inherent in the California plan was the state policy that competitive decision-making respecting prices and production would yield to a form of cartel-like planning which by definition required cooperation among producers. Respondent, in contrast, has identified no expression of policy by the Massachusetts legislature which requires that competition among movers be restricted for the purpose of raising the cost of moving services to its citizens, or for any other purpose that can be identified with suspension of the federal antitrust [33] laws. Moving, unlike certain utilities, is not inherently monopolistic, nor has a convincing case been made for cooperation on the basis that the interlocking nature of the service rendered requires combinations. As it happens, to the limited extent that Massachusetts has spoken on the subject, the state legislature has said that it favors rather than opposes competition among movers. The Motor Carrier Act provides that "unfair and destructive competitive practices"⁶⁷ are banned, an endorsement, albeit weak, of fair and non-destructive competition. Perhaps even more significant than what the Act does say, is the fact that it does *not* say that it is Massachusetts policy to have uniform rates among competing movers, which at least presumptively would tend to be a natural consequence of collective rate-setting.

That the state must affirmatively and decisively intend to suspend the operation of the free market before there can be immunity was confirmed in *Goldfarb v. Virginia State Bar*,⁶⁸ where a minimum fee schedule was established by the Fairfax County Bar Association and enforced by the Virginia State Bar Association. The Fairfax County Bar Association is a private group but the Virginia State Bar Association is the official [34] agency for administering the ethical code adopted by the Virginia Supreme Court. Notwithstanding the direct involvement in *Goldfarb* of a state agency, the Supreme Court held

⁶⁶ 428 U.S. 579, 585-592 (1976).

⁶⁷ Mass. Gen. Law Ann. Ch. 159B § 1.

⁶⁸ 421 U.S. 773 (1975).

that there was no state action exemption because there was no ruling of the state (that is, a decision of the Virginia State Supreme Court which had jurisdiction over lawyers) compelling the adoption of minimum fee schedules and thereby showing an intention to suspend the operation of the competitive market in the setting of legal fees. The Court said that the existence of a state policy requiring the alleged anticompetitive activity was a threshold consideration in determining whether the state intended to suspend the antitrust laws. If a unit of the state merely authorizes the questionable anticompetitive activity, but there is no clearly announced state directive requiring it, then there is no federal antitrust exemption even though an official agency of the state joined in the questioned action. As the Court put it:

It is not enough that . . . anticompetitive conduct is "prompted" by state action; rather, anticompetitive activities must be compelled by direction of the State acting as a sovereign.⁶⁹ [35]

After *Goldfarb*, the state action exemption was next considered in *Cantor v. Detroit Edison Co.*,⁷⁰ which is especially instructive as to what constitutes an adequate evidentiary showing of state intent to suspend the federal antitrust laws. In *Cantor* an electric public utility was sued for providing its customers with a limited number of light bulbs at no separate charge as part of its sale of electric power. *Cantor*, a retail druggist, alleged that the joint sale of light bulbs and electric power was a tie-in proscribed by Section 3 of the Clayton Act and Section 2 of the Sherman Act. Detroit Edison defended the practices by saying that it was done under a tariff filed by the utility (and approved by the Michigan Public Service Commission) which provided for the inclusion of light bulbs in the sale of electricity. As in this case, the Michigan Public Service Commission retained the right to review the combined electricity-bulb tariff and had full authority to investigate any aspect of the tariff for reasonableness. The tariff was originally proposed by Detroit Edison but it only became effective after full consideration and affirmative approval by the Michigan Public Service Commission. Detroit Edison could at any time file a new tariff to become effective [36] upon Commission approval, but as long as the old tariff was in effect the utility was compelled by law to follow it, including the provisions respecting light bulbs.

The majority of the Supreme Court held that there was no antitrust immunity for Detroit Edison's distribution of light bulbs. The Court observed that while the state had approved a tariff with the light bulb

⁶⁹ *Id.* at 791. In *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), the challenged restraint on lawyer advertising reflected an affirmative command of the Arizona Supreme Court and a clear articulation of the state's policy with regard to professional behavior, with the result that there was no antitrust liability.

⁷⁰ 428 U.S. 579 (1976).

provision, apparently it would be equally receptive to the abolition of the tie-in. Michigan in effect was neutral on the subject of light bulbs tied to the sale of electric power, and the fact that the state had tolerated (and indeed authorized the sale after the tariff was approved) was not an adequate showing of affirmative intent to suspend the application of the antitrust laws. Crucial to the decision in *Cantor* was the determination that unlike the price-stabilization scheme in *Parker*, the party claiming the exemption could point to no clearly articulated Michigan policy requiring anticompetitive conduct in the sale of light bulbs. Similarly, Mass Movers has identified no clearly articulated state policy which logically can be fulfilled only by allowing collusion among respondent's members in the rate-making process.

Although *Cantor* rests on the absence of any clearly articulated state policy requiring the suspension of competition in the sale of light bulbs, respondent argues that the case also [37] teaches that immunity for private conduct required by state law might be justified on the grounds of fairness if a private citizen has done no more than obey the command of the sovereign. In *Cantor* itself, however, this "fairness" defense was only considered on an *arguendo* basis since the state had not ordered that light bulbs be tied to electricity distribution, but had merely required adherence to a tariff which incidentally included the light bulb tie-in which had been initiated by the public utility. Here, too, a distinction must be drawn between what the sovereign has ordered (that tariffs be obeyed) and the practices which are authorized but not ordered by the state (joint rate-making activity by respondent's members). In the language of *Cantor*, respondent's members had "an option to have, or not to have"⁷¹ a joint rate-making program, and it is not unfair to hold it responsible for the antitrust consequences of its own decision which was not compelled by the state.

Also arguing from language in *Cantor*, respondent says that since Massachusetts is already regulating the moving industry, it is likely that Congress would not have intended to superimpose the federal antitrust laws as an additional, and perhaps conflicting, regulatory mechanism. But in this part of its decision, the Supreme Court concluded that an exemption will [38] be implied only if one is necessary to make the regulatory act work "and even then only to the minimum extent necessary."⁷² This brings us back full circle to the proposition that respondent must identify a policy of Massachusetts which requires suppression of the federal antitrust laws because the state's regulatory scheme would be frustrated if the exemption were denied. Again, respondent has failed to meet this standard.

⁷¹ *Id.* at 594.

⁷² *Id.* at 597.

Following *Cantor*, the Supreme Court returned to the problem of proof of state intention to suspend the antitrust laws in *City of Lafayette v. Louisiana Power & Light Co.*,⁷³ There the Court cited with approval the Fifth Circuit's cautionary warning against rushing to unjustified conclusions about whether restrictive practices by a municipality engaged in the electric utility business are directed by the state as part of a policy to substitute regulation or government-supplied service for competition. In its opinion, the Fifth Circuit had specifically rejected the notion that in the case of a municipality an express statutory mandate is required, and instead directed an inquiry along the following lines—

Thus, a trial judge may ascertain, from the authority given a governmental entity to operate in a particular [39] area, that the legislature contemplated the kind of action complained of. On the other hand, as in *Goldfarb*, the connection between a legislative grant of power and the subordinate entity's asserted use of that power may be too tenuous to permit the conclusion that the entity's intended scope of activity encompassed such conduct.⁷⁴

Respondent seizes on this language of the Fifth Circuit, cited approvingly by the Supreme Court, as indicative of a relaxation of *Goldfarb* to the point that state policy may be inferred from the mere authorization of the agency tariff by MDPU. *City of Lafayette* does not support this argument since the case only addresses the special problem of determining whether the practices of a political subdivision are contemplated by the state. What both the Fifth Circuit and the Supreme Court were saying is that in examining the activity of a political subdivision of the state, it may be proper to look at other indicia of state intention besides a statutory command directly addressing the questioned conduct, because historically state legislatures do not spell out the exact metes and bounds of what a city may do when it is given authority to operate in a particular area.⁷⁵ But as the Fifth Circuit made plain, even in the case of a city authorized by statute to run a business, [40] the basic rule of *Goldfarb* applies, and although the authorization need not appear in the statute itself, the restrictive conduct must nevertheless be linked to a clear and affirmative indication of intent by the state legislature to suspend the antitrust laws.

It is significant that the Fifth Circuit in *City of Lafayette* indicated that its resolution of the state intention issue was in accord with *Duke & Company Inc. v. Foerster*, 521 F.2d 1277 (3d Cir. 1975) where the state action immunity was claimed by Allegheny County (Pa.) as a

⁷³ 435 U.S. 389 (1978).

⁷⁴ *City of Lafayette, La. v. La. Power & Light Co.*, 532 F.2d 431, 434 (1976), quoted at 435 U.S. 394.

⁷⁵ *The Supreme Court, 1977 Term*, 92 Harv. L. Rev. 57, 282 (1978).

defense to a charge of alleged boycott of a beer manufacturer at Three River Stadium. The court in *Duke & Company* said:

We read *Goldfarb* as holding that, absent state authority which demonstrates that it is the intent of the state to restrain competition in a given area, *Parker*-type immunity or exemption may not be extended to anti-competitive government activities. Such an intent may be demonstrated by explicit language in state statutes, or may be inferred from the nature of the powers and duties given to a particular government entity. We proceed to an analysis of the statutory authority of those defendants-appellees in the light of the foregoing principles.⁷⁶ [41]

The analysis undertaken by the Third Circuit established that while Allegheny County had been authorized to grant a food and drink concession in the course of operating the stadium, there was no proof of state intent to allow the county to engage in illegal boycotts, and therefore there was no *Parker v. Brown* immunity.

While *City of Lafayette's* evidentiary standard for determining state intent has been used in cases involving the business operations of governmental subdivisions such as counties and municipalities,⁷⁷ in recent decisions the lower courts have returned to the "compulsion" language of *Goldfarb* and *Cantor* whenever private persons have purported to operate under the cloak of the state action immunity. To avail themselves of the exemption, claimants have been required to prove that there is a clearly and affirmatively articulated intention to displace competition as shown by the fact that the private party is given no choice but to engage in the anticompetitive conduct.⁷⁸ But even if *City of Lafayette*, [42] *Goldfarb*, and *Cantor* can be harmonized and treated as standing for the proposition that state intent to suspend the federal antitrust laws may be shown by a statute compelling the anticompetitive conduct being considered *or some other convincing evidence of intent*,⁷⁹ respondent's claim to the exemption would nevertheless fail. For not only has Massachusetts failed to compel joint rate-making, but respondent has not even identified a statutory objective which can only be carried out by such activity, and thus inferentially requiring a suspension of the federal antitrust laws. As a matter of fact, respondent has not even advanced a convincing reason why movers *should* be insulated from competition, or why the

⁷⁶ 521 F.2d at 1280.

⁷⁷ See, e.g., *Corey v. Look*, 641 F.2d 32 (1st Cir. 1981); *Affiliated Capital Corp. v. City of Houston*, 519 F.Supp. 991 (S.D. Tex. 1981); *Guthrie v. Genesee Cty., N.Y.*, 494 F.Supp. 950 (W.D.N.Y. 1980); *Highfield Water Co. v. Public Service Com'n.*, 488 F.Supp. 1176 (D. Md. 1980).

⁷⁸ See, e.g., *Virginia Academy of Clinical Psy. v. Blue Shield of Va.*, 624 F.2d 476 (4th Cir. 1980); *United States v. Title Ins. Rating Bur. of Arizona*, 517 F.Supp. 1053 (D. Ariz. 1981); *Litton Systems, Inc. v. American Tel. & Tel. Co.*, 487 F.Supp. 942 (S.D.N.Y. 1980); *United States v. Southern Motor Carriers Rate Confer., Inc.*, 467 F.Supp. 471 (N.D. Ga. 1979); *Woolen v. Surtran Taxicabs, Inc.*, 461 F.Supp. 1025 (N.D. Texas 1978).

⁷⁹ See Areeda and Turner, *Antitrust Law* ¶ 215b (1980).

state legislature might conceivably contemplate such an extreme departure from the competitive norm.

In lieu of a clear and authoritative statement from the Massachusetts legislature that it intends to displace competition in the moving industry, respondent next turns to the generalizations of Section 7 of the Massachusetts Antitrust Act, [43] which provides for an exemption from the *state* antitrust law for

... (b) Any activities which are subject to regulation or supervision by state or federal agencies; or (c) Any activities authorized or approved under federal, state or local law.⁸⁰

As respondent would have it, this statutory language overrules by implication the federal antitrust laws, notwithstanding the Supreme Court's aversion for implied antitrust exemptions,⁸¹ and the equally clear precedent that state exemption to the federal antitrust laws only comes about when the state has given an unambiguous indication of its intent. Here, even the state's intention with respect to a possible exemption for joint rate-making under state law (let alone federal law) is ambiguous. In the first place, since there is no federal, Massachusetts, or local law authorizing or approving joint rate-making, Subparagraph (c) of Section 7 is irrelevant. Furthermore, there is no proof that the pre-filing joint rate-making activity itself is subject "to regulation or supervision by state or federal agencies" as required by Subsection (b).⁸² What is subject to "regulation or supervision" are the tariffs [44] themselves which when duly filed with the MDPU may be reviewed for reasonableness.⁸³ Thus Subsection (b) may represent nothing more than a limitation on the right of customers of movers to bring a treble damage suit (or to have a *parens patriae* suit brought on their behalf) challenging a tariff which had been accepted by MDPU. Such immunity already exists as part of federal antitrust law under the *Keogh*⁸⁴ doctrine which limits the right of customers to assert an antitrust claim in support of damages allegedly flowing from a tariff approved by a regulatory commission. The *Keogh* doctrine, however, does not restrict the power of the federal government to seek equitable relief against continuation of an illegal practice, including the joint rate-making activity which produced the otherwise immune tariff.⁸⁵ And while Section 7 of the Massachusetts Antitrust Act may be adequate for granting the limited antitrust exception contemplated by *Keogh*, this provision does not meet the *Parker, Goldfarb, Cantor* standard for total federal antitrust immuni-

⁸⁰ Mass. Gen. Laws Ann. Ch. 93, § 7.

⁸¹ See, e.g., *United States v. Philadelphia Nat. Bank*, 374 U.S. 321, 348 (1963).

⁸² Finding 24.

⁸³ See, however, Finding 24 for an assessment of the pervasiveness of this regulation and supervision.

⁸⁴ *Keogh v. C. & N.W. Ry. Co.*, 260 U.S. 156, 162-63 (1922).

⁸⁵ *Georgia v. Pennsylvania R. Co.*, 324 U.S. 439 (1945).

ty which requires a clearly articulated and affirmatively expressed statement that the legislature intends [45] to suspend the operation of the free market as it applies to the moving industry. No such statement appears in this record.

Equally unavailing is respondent's argument that the federal anti-trust laws do not apply here because of 49 U.S.C. 10706.⁸⁶ By its terms, this federal statute allowing joint rate-making before the Interstate Commerce Commission under certain conditions does not apply to intrastate movers. Congress has the option to exempt certain combinations from the antitrust laws, and where it has done so there is created an immunity even for organizations formed for no other purpose than to fix prices. See, *Northern California Supermarkets, Inc. v. Central California Lettuce Producers Cooperative*, 580 F.2d 369 (9th Cir.), cert. denied, 439 U.S. 1090 (1979).⁸⁷ Massachusetts has a similar option, but it must state its policy [46] affirmatively so that all doubts about its intentions are removed, and public attention can be focused on how actively it supervises the replacement it has chosen for the competitive market.

Noerr-Pennington

In addition to its claim of immunized state action, respondent has from time to time advanced the argument that its tariff activity consists of nothing more than joint petitioning of a state agency which is protected by the *Noerr-Pennington* doctrine. This defense is rejected for the same reasons expressed in Prehearing Order No. 18.

In *Eastern R. Conf. v. Noerr Motors*,⁸⁸ defendants conducted a deceptive publicity campaign designed to encourage the legislature and governor of Pennsylvania to act against the interests of truckers. While there was no question that the campaign was the result of a combination among a group of railroad presidents, and that its purpose—to limit severely the ability of truckers to compete with railroads for long-distance [47] freight—was anticompetitive, the Supreme Court said that the railroad's anticompetitive motive was not controlling, and the public interest of encouraging a free flow of ideas to policy-makers and the railroad's First Amendment rights of petition and association were not to be abridged by antitrust considerations. The decision, however, removes Sherman Act liability solely

⁸⁶ 49 U.S.C. 10706 is the recodification of Section 5a of the Interstate Commerce Act, also known as the Reed-Bulwinkle Act. The act, which was passed in 1948 to counteract *Georgia v. Pennsylvania R. Co.*, see notes 60 and 63 *supra*, provides that interstate carriers may apply to the Interstate Commerce Commission for approval of a joint rate-making agreement.

⁸⁷ As it happens, at the federal level, congressional tolerance for joint rate-making amongst competing interstate movers has diminished. The Motor Carrier Act of 1980 (Pub. L. No. 96-296, 94 Stat. 793) provides for an end to antitrust immunity for the collective setting of single line rates as of January 1, 1984. This provision of the Motor Carrier Act of 1980 also applies to the interstate moving industry. H.R. Rep. No. 96-1372, 96th Cong., 2d Sess. 3 reprinted in [1980] U.S. Code Cong. & Ad. News 4271, 4273.

⁸⁸ 365 U.S. 127 (1961).

from attempts to influence policy through lobbying, publicity, advocacy, and petitioning, and does not address the legality of any underlying conspiracies which have commercial implications.

That *Noerr* is confined to the use of political activity to influence policy was confirmed in *Mine Workers v. Pennington*.⁸⁹ A union and a group of large coal mine operators, as part of a conspiracy to ruin small coal mine operators, petitioned the Secretary of Labor to establish a high level of minimum wages under the Walsh-Healey Act. The Supreme Court said that the act of petitioning the Secretary of Labor in his capacity as a policy-maker was protected political activity, notwithstanding the anticompetitive purposes of any underlying agreement between the union and large operators. [48]

More recently in *California Transport v. Trucking Unlimited*,⁹⁰ the Supreme Court extended *Noerr-Pennington* to concerted attempts to influence an administrative body. But, again, the Court made plain that the doctrine only protects political advocacy—broadly interpreted as attempts to influence the legislature, the executive, or an administrative agency in the making of policy.

To argue, as respondent does, that the complaint's challenge to the alleged joint fixing of prices by respondent's members somehow interferes with Mass Movers' right of political advocacy, is analogous to saying that contractors should be allowed to conspire to fix prices on government road-building contracts so long as the results of the conspiracy are wrapped in the trappings of a "petition" or proposal which may be said to convey policy information to official decision-makers. Nothing said before or after *Noerr* and *Pennington* allows for such a bizarre distortion of the concept of political advocacy, and the cases have rejected similar extensions and attempted misuse of the doctrine. Thus in *Cantor*, the Court indicated that *Noerr* had nothing to do with the filing of tariffs.⁹¹ [49]

Merits

In the absence of an exemption by reason of the state action defense and without the protection of the *Noerr-Pennington* doctrine, the practices of respondent and its members cannot survive a challenge under federal antitrust law. The members of the association, acting through the Board of Directors and the Tariff Committee, arrive at

⁸⁹ 381 U.S. 657 (1965).

⁹⁰ 404 U.S. 508 (1972).

⁹¹ 428 U.S. 579, 601-602. See also *George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc.*, 424 F.2d 25 (1st Cir. 1970) (activity of attempting to influence a public official's purchase of products under a competitive bidding statute was not political activity within *Noerr-Pennington*); *United States v. Southern Motor Carriers Rate Confer., Inc.*, 467 F.Supp. 471, 485 (N.D. Ga. 1979) (collusive filing of rates constitute "independently cognizable acts outside the scope of the *Noerr-Pennington* doctrine").

a mutually satisfactory price schedule to be submitted to MDPU.⁹² Such an agreement by competitors respecting price is a *per se* violation of Section 1 of the Sherman Act and Section 5 [50] of the Federal Trade Commission Act. *FTC v. Cement Institute*, 333 U.S. 683 (1948); *Georgia v. Pennsylvania R. Co.*, 324 U.S. 439 (1945); *United States v. Joint Traffic Association*, 171 U.S. 505 (1898); *United States v. Freight Association*, 166 U.S. 290 (1897); *United States v. Southern Motor Carriers Rate Confer., Inc.*, 467 F.Supp. 471 (N.D. Ga. 1979).

It is of no moment that the rates agreed upon may in fact be reasonable or may be reviewed for reasonableness. *Georgia v. Pennsylvania R. Co.*, 324 U.S. 439 (1945); *United States v. Freight Association*, 166 U.S. 290 (1897). As noted earlier, agency review for reasonableness does not preclude aggressive competition by firms subject to that review.⁹³ Nor can an agreement respecting joint tariffs be justified on the grounds that the association or its members have not fixed a uniform price to consumers because movers are free to select one of 10 rate schedules, or alternatively may file exceptions to the agency schedule, or may file an independent schedule. While any one of these options may result in price variations, concerted activity to influence or tamper with the *level* of prices, which putative competitors may either accept or reject, is as violative of the antitrust laws as a conspiracy aimed at absolute uniformity. *Goldfarb v. Virginia State Bar*, 421 U.S. 421 U.S. 773 (1975); *United States v. Container Corp.*, 393 U.S. [51] 333 (1969); *Nationwide Trailer Rental System, Inc. v. United States*, 355 U.S. 10 (1957); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940); *Plymouth Dealers' Ass'n of No. Cal. v. United States*, 279 F.2d 128 (9th Cir. 1960). Besides, the record shows that price variations in the Massachusetts moving industry are largely illusory: respondent is the moving force behind the effort to achieve price identity, and is the organizer of zone meetings which are held to ensure that movers located in a particular geographic area uniformly adopt one of the rate schedules.⁹⁴

Relief

On the question of relief, *FTC v. Mandel Brothers*, 359 U.S. 385 (1959) and *FTC v. National Lead Co.*, 352 U.S. 419 (1953) allow the Commission wide discretion so long as the order is reasonably related to the proven violations, or can be justified as an appropriate degree of "fencing in." But even this expansive standard for relief may be exceeded by complaint counsel's proposal to prohibit respondent from—[52]

⁹² Findings 10-13.

⁹³ See text at notes 60 and 61, *supra*.

⁹⁴ Findings 20-23.

Communicating any information concerning or affecting intrastate rates charged or proposed to be charged by carriers for the intrastate transportation of property or related services, goods or equipment. . . .

In support of this proposed relief, complaint counsel would undoubtedly cite to the exhibits which show that respondent uses its bulletin and other communications to apprise members of the rates being charged by others.⁹⁵ These rates, however, are a matter of public record once they are filed with the MDPU, and the efficacy of an order against compiling and publishing public information is extremely doubtful. For immediately after such an order became final, it could become a complete nullity should an interested mover record the published rates and circulate this information to his fellows. Besides, publication by respondent of public information about rates is not at the heart of the issue here. The crux of the matter is the conspiracy (*i.e.*, the deliberations of the Tariff Committee, the filing of joint tariffs, the zone meetings, and the exhortations to raise prices uniformly) which produces these rates. If these prices are eliminated, it may even be in the [53] public interest to have non-collusive rates publicized since this may stimulate competitive responses.

All other objections which respondent has raised to the proposed order are ill-founded.⁹⁶ Thus, with good cause the scope of the order is defined as "transportation and delivery of property," rather than "transportation of household goods and office equipment," as respondent urges: the former accurately describes what respondent's members do, while the latter would be an open invitation to definitional hassles over whether a particular item constitutes "household goods and office equipment."

Provisions of the order (especially Sections II(2) and III) are properly directed at *all* members of the association, whether they are movers, suppliers, manufacturers, attorneys, or insurers. As it happens, respondent's reply brief reinforces the need for a comprehensive definition of "member" for it intimates that so-called "associate members" may be called upon to perform certain chores (vaguely described as circulating "cost data or any other information") which the "carrier members" would be prohibited from doing. [54]

Respondent also requests a proviso to the "tariff" definition in the order allowing the association to circulate

rate item language for particular services or materials which may be completed by members by the insertion of independently established rates.

⁹⁵ CX's 37A, 38C, 39B, 40B, 41B, 42B, 43B, 44B, 45B, 46B, 47B, 48B, 49B, 50B, 51B, 53A, 54B, 55B, 56A, 58A, 60C, 61C.

⁹⁶ See Respondent's Reply Memorandum at pp. 6-9.

This proposal is rejected since the underlying purpose of the order—to instill competition into a Massachusetts moving industry which has been enmeshed in collusive arrangements—may be frustrated by the circulation of association-sponsored “rate item language” which could have the practical effect of discouraging the offer of alternative and perhaps more attractive services or materials.

Respondent’s request to be excused from the standard order coverage of “successors and assigns” as well as the prohibitions against committing illegal acts “through any corporation, subsidiary, division, or other device” is denied. In a word, the movers of Massachusetts should not be allowed to fix prices whether they call themselves “Mass Movers” or decide to reorganize and adopt a new name, say, “Bay State Movers.” The record reflects respondent’s ingenuity in changing the name [55] of the Tariff Committee (its principal price fixing entity), and I would not allow such an obvious loophole to exist.⁹⁷

Respondent would also change the language in Paragraph One of the order from a prohibition against conspiracy amongst “carriers who compete” to a prohibition against a conspiracy among the “association’s common carrier members.” Again, this is an obvious invitation for members to engage in an evasive ploy which should not be encouraged. Respondent’s additional request for a proviso exempting activity “authorized” by MDPU is denied for the reasons explained in the discussion of the state action defense.

In addition, I have denied respondent’s request to amend proposed Paragraph Four of the order in order to allow the association to suggest, urge, encourage, persuade, or influence members to adopt lawful tariffs. Given respondent’s track record of using its powers of persuasion for the purpose of fixing rates uniformly, and particularly its proclivity for first obtaining a commitment to a price increase from one member which is then used to persuade others,⁹⁸ this relief is an [56] appropriate way of preventing a conspiracy of the “wheel and spokes” variety.⁹⁹

Respondent’s objections to Paragraph Five of the order, which bans a rate or tariff committee, must be considered in the light of the record evidence proving that the tariff committee has been a hotbed of price fixing activity.¹⁰⁰ Against this background, I would not allow these competitors to get together in any forum in which tariffs are on the agenda.

As for the objection to Part II of the order which requires that Mass Movers cancel its present tariff, this relief is justified since the

⁹⁷ Finding 10. See *P.F. Collier & Son Corp. v. FTC*, 427 F.2d 261 (6th Cir.), cert. denied, 400 U.S. 926 (1970).

⁹⁸ See Finding 22 n.41, Finding 23.

⁹⁹ See, e.g., *Interstate Circuit v. United States*, 306 U.S. 208 (1939).

¹⁰⁰ See Finding 10.

present tariff was collusively arrived at, and non-collusive tariffs are, therefore, in order. Certainly, there is no need to delay this relief until such time as MDPU sees fit to call for a new tariff: under Massachusetts law MDPU may never call for a new tariff since tariff changes are initiated by the movers themselves.

The order provision requiring the respondent to amend its bylaws to require members to observe the provisions of the Order as a condition of membership in the association is opposed [57] on the grounds that somehow this imposes liability on respondent for the acts of members. The provision has no such effect. It merely requires respondent to use the act of enrollment as a way of obtaining an acknowledgment that members will comply with the provisions of the order. Considering the fact that respondent has enrolled members in the past on the basis of the representation that one of the benefits of membership is that prices will be fixed,¹⁰¹ it is entirely appropriate that movers are now told that this particular privilege of membership has been abolished, and that the association may no longer be used for this purpose.

Respondent objects generally to Part III of the order and the Appendix which require the membership be informed of results of this proceeding. This is appropriate relief in a price fixing case, and the draft letter to the membership accurately reflects the provisions of the order.

Finally, Part IV of the order requires that respondent notify the Commission thirty days before any proposed change in the organization of respondent. This is standard relief which is necessary in order to prevent attempted evasion. [58]

IV.

CONCLUSIONS

1. The Federal Trade Commission has jurisdiction over the subject matter of this proceeding and over respondent.
2. The acts and practices charged in the complaint took place in or affected commerce within the meaning of the Federal Trade Commission Act.
3. Respondent and its members, officers, and directors have engaged in a conspiracy to restrain price competition amongst movers of household goods and office equipment. This conspiracy is an unfair method of competition and an unfair act and practice in commerce or affecting commerce in violation of Section 5 of the Federal Trade Commission Act.

¹⁰¹ See Finding 20.

4. This conspiracy is not exempt from Section 5 of the Federal Trade Commission Act by reason of the "state action" defense or the *Noerr-Pennington* defense.

Accordingly, the following order will be issued: [59]

ORDER

Definitions

For purposes of this Order the following definitions shall 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 within the Commonwealth of Massachusetts by a carrier authorized by the Massachusetts Department of Public Utilities to engage therein.

Member means any carrier or other person which pays dues or belongs to the Massachusetts Furniture and Piano Movers Association, Inc.

Tariff means the publication stating the rates and charges of a carrier for the transportation of property within the Commonwealth of Massachusetts, excluding general rules and regulations. [60]

I

It is ordered, That Massachusetts Furniture and Piano Movers Association, Inc., a corporation, its successors and assigns, and its officers, agents, representatives, directors and employees directly or through any corporation, subsidiary, division or other device shall forthwith cease and desist from:

1. Entering into, adhering to or maintaining, directly or indirectly, any contract, agreement, understanding, plan, program, combination or conspiracy to fix, stabilize, raise, maintain or otherwise interfere or tamper with the rates or prices charged by carriers that compete for the intrastate transportation of property or related services, goods or equipment.

2. Preparing, developing, disseminating or filing a proposed or existing tariff provision which establishes, maintains or influences rates or charges for the intrastate transportation of property or other related services, goods or equipment in the Commonwealth of Massachusetts; *provided, however* this provision does not prohibit the Association from preparing and furnishing to its members a tariff format which sets forth general rules and regulations which members may use in preparing and filing individual [61] tariffs with the Massa-

chusetts Department of Public Utilities which contain their own independently established rates and charges.

3. Coordinating or providing a forum for any discussion or agreement between competing carriers concerning intrastate rates charged or proposed to be charged by carriers for the intrastate transportation of property or related services, goods, or equipment.

4. Suggesting, urging, encouraging, persuading or influencing in any way member carriers to charge, file or adhere to any existing or proposed tariff provision which affects rates, or otherwise to charge or refrain from charging any particular price for any services rendered or goods or equipment provided.

5. Maintaining any rate or tariff committee or other entity to consider, pass upon or discuss intrastate rates or rate proposals. [62]

II

It is further ordered, That Massachusetts Furniture and Piano Movers Association, Inc. shall:

1. Within three months after service upon it of this order, cancel all tariffs and any supplements thereto on file with the Massachusetts Department of Public Utilities which establish rates or charges for transportation of property or related services, goods or equipment by common carriers in Massachusetts and take such action as may be necessary to effectuate cancellation and withdrawal.

2. Amend its by-laws to require members of the Association to observe the provisions of the Order as a condition of membership in the association.

III

It is further ordered, That respondent shall within thirty (30) days after service upon it of this Order, mail or deliver a copy of this Order, under cover of the letter attached hereto as "Appendix," to each current member of respondent, and for a period of three (3) years from the date of service of this Order, to each new member within ten (10) days of each such member's acceptance by respondent. [63]

IV

It is further ordered, That respondent notify the Commission at least thirty (30) days prior to any proposed change in the respondent, such as dissolution, assignment or sale resulting in the emergence of

a successor corporation, or any other proposed change in the corporation which may affect compliance obligations arising out of the Order.

V

It is further ordered, That the respondent herein shall, within four (4) months after service upon it of this Order, file with the Commission a written report setting forth in detail the manner and form in which it has complied with this Order. [64]

APPENDIX

(Letterhead of Massachusetts Furniture and Piano Movers Association, Inc.)

Dear Member:

The Federal Trade Commission has ordered Massachusetts Furniture and Piano Movers Association, Inc. to cease and desist its tariff and collective rate-making activities.

In order that you may readily understand the terms of the Order, we have set forth its essential provisions although you must realize that the Order itself is controlling rather than the following explanation of its provisions:

(1) The Association is prohibited from engaging in any collective rate-making activities including the proposal, development or filing of tariffs which contain any rates for intrastate transportation services. Member carriers must file their own independently-set rates for transportation of property or related services, goods or equipment within Massachusetts.

(2) The Association is prohibited from providing a forum for its members for the purpose of discussing such rates.

(3) The Association is prohibited from urging, suggesting, encouraging or attempting to influence in any way the rates members charge for their intrastate transportation services.

(4) The Association is prohibited from maintaining any rate or tariff committee which discusses or formulates intrastate rate or rate proposals.

(5) The Association is required to cancel all tariffs and tariff supplements currently in effect and on file at the Massachusetts Department of Public Utilities which were prepared, developed or filed by the Association.

(6) The Association is required to amend its by-laws to require its members to observe the provisions of the order as a condition of membership in the Association.

Sincerely yours,

Daniel W. Dunn
Executive Director

Enclosure

OPINION OF THE COMMISSION

BY BAILEY, *Commissioner*:

On June 12, 1980, the Federal Trade Commission (Commission) issued a complaint alleging that the Massachusetts Furniture and Piano Movers Association, Inc. (Association) and its members were engaged in an antitrust conspiracy to fix prices in violation of Section 5 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. 45, by collectively formulating and filing joint tariffs for moving household goods and office equipment within Massachusetts and by engaging in additional concerted activity to eliminate price competition among its members.

The Association asserted that the Commission lacked jurisdiction over the Association, and denied that it or its members had committed any violations of Section 5 or the federal antitrust laws. The Association also contended that its rate-making activities were exempt from the antitrust laws and Section 5 of the FTC Act by reason of *Parker v. Brown*, 317 U.S. 341 (1943), and the related line of "state action" cases, and because their activities constituted political petitioning of a government agency protected under the *Noerr-Pennington* doctrine.¹ [2]

Both parties moved for summary judgment on the *Parker v. Brown* and *Noerr-Pennington* issues. Administrative Law Judge Morton Needelman (ALJ) granted complaint counsel's motion and the defenses were stricken. At a hearing on October 5, 1981, both sides introduced documentary exhibits, but no witnesses were called.

On December 1, 1981, ALJ Needelman issued an Initial Decision, based on the pleadings, stipulations and admissions, proposed findings and conclusions, and the briefs submitted by the parties.² The ALJ made findings of fact (ID 4-21), rejected the *Parker v. Brown* (ID 22-46) and *Noerr-Pennington* defenses (ID 46-48), held that the concerted activities of the Association and its members violated the federal antitrust laws and Section 5 of the FTC Act (ID 49-51), and recommended entry of a remedial order to prevent recurrence of the violations (ID 51-64).

This matter is before the Commission on the Association's appeal from ALJ Needelman's Initial Decision. The Association's principal contention on this appeal is that its activities are immune from anti-

¹ *Eastern R. Presidents Conf. v. Noerr Motor Freight Inc.*, 365 U.S. 127 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965).

² The following abbreviations are used in this opinion:

ID - Initial Decision
FF - Finding of Fact in the Initial Decision
CX - Complaint Counsel's Exhibit No.
RX - Respondent's Exhibit No.

trust prosecution under the state action and *Noerr-Pennington* doctrines; the Association also asserts that the rates in question were set by the Massachusetts Department of Public Utilities (MDPU), rather than by the Association or its members. In its reply brief on this appeal, the Association purports to raise defenses based on the Interstate Commerce Act, [3] 49 U.S.C. 10706 and on Section 5(a)(2) of the FTC Act, 15 U.S.C. 45(a)(2).³

For the reasons set forth below, we affirm the ALJ's decision.

Respondent's Activities

The facts found by the ALJ are not disputed by the Association and in any event are fully supported by the record evidence. Respondent is an association of some 300 common carriers which transport household goods and office equipment within Massachusetts. FF 1. Approximately 80 percent of such carriers in Massachusetts belong to the Association. FF 2. The Association performs no moving services, and does not possess a certificate of public convenience and necessity issued by either the Interstate Commerce Commission or the MDPU. At least half of the Association's members are engaged solely in intrastate commerce, and more than half neither hold ICC licenses nor are agents of interstate van lines with interstate authority. FF 5 & n.8. [4]

The principal function of the Association is the initiation, development, dissemination, and filing of joint tariffs and tariff supplements with the MDPU on behalf of and as agent for the Association's members. FF 8. Joint tariffs and tariff supplements are initiated and developed by the Association's Tariff Committee. The Tariff Committee's proposals and recommendations for joint tariffs or revisions are submitted to the Association's Board of Directors for approval, and then are communicated to the general membership for comment. FF 10-12.

Joint tariffs and tariff revisions are filed with the MDPU by the Association's Board of Directors, on behalf of the Association's members. Tariff decisions of the Board are ratified by the Association's

³ The method of briefing followed by the Association on this appeal is not in compliance with Rule 3.52 of the Commission's Rules of Practice, and while we have not rejected the Association's appeal on that account, it has hindered and made more time-consuming our evaluation of the issues presented.

The Association's Appeal Brief consists of a 9-page memorandum, stating "questions intended to be urged on this appeal" and generally discussing certain aspects of those questions, together with an "Appendix." The "Appendix" consists of a 38-page Post-Hearing Memorandum filed with the ALJ in November 1981 and a 9-page Reply Memorandum filed with the ALJ in January 1982. Moreover, the two memoranda forming the "Appendix" in turn incorporate by reference still other memoranda filed by the Association with the ALJ: a 41-page principal memorandum and a 20-page reply memorandum supporting the Association's motion for summary judgment filed in May 1981 and July 1981 respectively. The Association also filed a 7-page Reply Brief on this appeal.

The cumulative total of 117 pages purportedly incorporated as part of the Association's appeal brief greatly exceeds the page limitation set forth in Rule 3.52 of the Commission's Rules of Practice. In order to review the issues the Association apparently wishes to raise on this appeal the Commission had to undertake an unnecessarily time-consuming and laborious search through the various involuted submissions.

general membership at annual meetings, and the members indicate their formal acquiescence in the joint tariff by filing powers of attorney and concurrence forms with the MDPU. FF 13.

Under Massachusetts law, a mover must file a tariff with the MDPU containing the mover's charges for moving household goods and office equipment. Once the tariff or tariff supplement has been accepted by the MDPU, Massachusetts law requires the mover to adhere to the tariff or supplement until a new tariff or supplement is filed and becomes effective. FF 7.

No Massachusetts statute or regulation requires or compels movers to formulate or file a joint tariff, or to adopt uniform moving rates. The Massachusetts Motor Carrier Law, Mass. Gen. Laws Ch. 159B, does not require joint formulation of rates included in tariffs filed with the MDPU, and does not otherwise contain any expression of state policy that motor carriers should jointly formulate rates.⁴

The statute expressly requires each common carrier to "establish . . . rates [and] charges," which automatically "become effective on a date fixed by such carrier . . ., unless suspended by the [MDPU] prior to its effective date * * *." Chapter 159B empowers the MDPU to review the rates filed by each motor carrier to ensure that those rates are consistent with the policy expressed in Section 1 and are not unjust or prejudicial, and empowers the MDPU to reject rates that fail to comply with those criteria. The MDPU also is to establish each year "reasonable maximum and minimum rates or charges consistent with industry and economic conditions and consistent with the declaration of policy contained in Section 1."

MDPU regulations do not require motor carriers jointly to agree upon the rates to be included in the tariffs filed with the MDPU. A regulation promulgated by the MDPU, however, does permit [5] any individual mover to utilize an agent to file for it, or to adopt and become a participant in a tariff filed by another mover:

(a) Whenever a carrier . . . desires to give authority to an agent to issue and file tariffs and supplements thereto in its stead, an appropriate power of attorney . . . shall be used * * *

(b) Carriers . . . may become participants in such tariffs which are issued and filed by another carrier or his agent by the giving of a proper concurrence. FF 9.

Significantly, this regulation does not in terms authorize the joint formulation of rates, but merely allows a carrier to elect to participate in a tariff that has been previously filed by another carrier.

Neither the MDPU nor the Commonwealth of Massachusetts has sought to participate in this proceeding. The record reflects that the

⁴ The text of the relevant portions of Ch. 159B is set forth in the Appendix to the opinion.

MDPU concluded that it would be inappropriate for it to intervene. (Prehearing Order No. 10, entered December 10, 1980, enclosing communication from the General Counsel of the MDPU).

Once a mover elects to participate in a tariff or supplement filed by another mover, or in a tariff filed by an agent (as here by the Association), the mover must adhere to the rates specified in the tariff, unless the tariff is suspended by the MDPU or the mover subsequently files a separate tariff or files for an exception to the tariff which the other mover or agent has filed. FF 14.

Tariffs automatically go into effect on whatever date is specified as the effective date of the tariff, unless the MDPU suspends the tariff prior to that date. FF 16.

The Association filed its first joint tariff in September 1938. Its most recent joint tariff filed prior to the issuance of the complaint was Number 14, filed in May 1971 and subsequently revised on six occasions. FF 8.

While the members of the Association are not required by Massachusetts law or regulation to participate in joint tariffs filed by the Association, and can file independent tariffs, in fact there is overwhelming acceptance by the members of the basic joint tariffs filed by the Association. For example, from 1972 until the filing of the Commission's complaint, 98 percent of the membership participated in the hourly rate tables and 99 percent participated in the packing schedules. FF 19. [6]

The Association has directly acted to eliminate rate competition and obtain uniform and higher rates. For example, the Association held meetings at which members agreed to specified rate increases and exhorted members to adopt uniform rates and rate increases. FF 20-23. In 1961 the Association's members voted at a meeting to increase rates charged for a truck and three men: those that had been charging \$16 agreed to charge \$18, and all but two of those that had been charging \$14 agreed to charge \$16. RX 86A, 86B. In 1970, the Association's Executive Director wrote to Association members in Zones I and II (Western and Central Massachusetts) to announce a general Zone meeting. He reported that a Zone meeting among Cape Cod members had been successful and that all of those members were increasing their rates from \$25 to \$27 an hour. He added that "it is possible to achieve rate uniformity in your area, but somebody must make the first effort." CX 72. In 1973, the Executive Director advised several Association members in the Fall River area that he had been "able to stop" two movers from reducing their rates from Level 3 to Level 2. He wrote other movers in the area: "in the interest of rate stability . . . I hope that you will also go along with this rate" (CX 82) and held all subsequent Level 3 filings until he had received rate

changes from all of the movers in the area. CX 83-88. A month later, he reported to the Association's Board of Directors that the "Fall River area has stabilized their rates and are now all on Table 3." CX 13, CX 79-88. In 1975, the Executive Director wrote to two prospective members that the "prime function" of the Association is to provide its members with a tariff "with the objective of creating uniformity in rates." CX 92, 93.

The Association periodically sends a Bulletin to its members. The Bulletins identify each mover who has increased its rates and specify the extent of the rate increase; many of the Bulletins also analyze, by Zone, the rate levels being charged by movers throughout Massachusetts. See CX 38B, 40B, 43A, 45C, 49B, [7] 52B, 57B, 60A. The Bulletins regularly exhort members to increase their rates.⁵

Jurisdiction

In its reply brief on this appeal,⁶ the Association disputes the Commission's jurisdiction over the Association, based on Section 5(a)(2) of the FTC Act, 15 U.S.C. 45(a)(2), which establishes the Commission's jurisdiction over corporations, with [8] various exceptions including common carriers subject to the Interstate Commerce Act, 49 U.S.C. 10706. The Association of course is not an exempt common carrier: it is not engaged in the transportation of goods or property and does not have a certificate of public convenience and necessity as required of all motor carriers subject to the Interstate Commerce Act. Thus the Association, a Massachusetts corporation, is within the Commission's jurisdiction. The fact that the Association operates as an agent for common carriers, some of which are subject to the ICC, does not qualify it for a common carrier exemption. See *Breen Air Freight, Ltd.*

⁵ E.g., CX 37A (Jan. 1972): "If your pretax profit margin is shrinking then . . . you should (almost must) apply for a rate increase to maintain your financial integrity"; CX 43A (Oct. 1973): "Your association office is receiving a number of inquiries concerning hourly rates mostly having to do with competitor's rates and what are the averages in each Zone and statewide. This . . . would seem to indicate that the bottom line (the profit line) is not measuring up to what it should be. . . . You will note in the above [hourly rate] analysis that 82% are on the rate of \$25 or more and 63% are on the rate of \$27 or more. How do you stand and how does your bottom line look?"; CX 44A (Jan. 1974): "We have always been a firm believer that a mover cannot provide quality service unless his rates compensate him enough. . . . The recent increases would appear to confirm this belief. . . . The association office urges all of our carrier members to take a hard look at your hourly rates—call the office if you want to just talk about this. If your decision is to move up a Table or two it is a very simple matter for us to proceed and we will do all the work. . . . Remember—just drop a note or call your association office if you have a need to increase your hourly rate Table"; CX 50B (Nov. 1975): Comment on "the practice of some members . . . to submit 'flat bids,' 'not to exceed bids,' and 'low balling.' The industry seems to be especially plagued with this practice during this slow economic period we are in. We are sorry that some of our members are tempted to indulge [in] this practice as it does compromise our tariff, weakens the solidarity of our association and is unethical. The lesson is taught over and over again that undercutting, while it brings apparent transient prosperity, eats out the vitals of the company practicing it. But it is taught in vain"; CX 55A (Oct. 1976): transmits forms for members to fill out and send to the Association: "BEAR IN MIND: WE ARE NOT JUST AFTER INCREASED HOURLY RATES BUT ALSO PACKING AND WEIGHT RATES. WE ARE ALL INVOLVED, LET'S ALL COOPERATE"; CX 60B (Jan. 1980): "DO YOU NEED TARIFF RELIEF? If any of your DPU rates are inadequate, contact your association office".

⁶ Contrary to Commission Rule of Practice 3.52(b)(3), the Association did not specify (or even mention) these issues in its principal Appeal Brief.

v. Air Cargo, Inc., 470 F.2d 767, 771-73 (2d Cir. 1972), *cert. denied*, 411 U.S. 932 (1973), where a corporation formed solely to act as agent for airlines for terminal and cartage services was deemed not an "air carrier" under the Federal Aviation Act for purposes of federal antitrust jurisdiction; *see also Official Airline Guides, Inc. v. FTC*, 630 F.2d 920, 923 (2d Cir. 1980), *cert. denied*, 450 U.S. 917 (1981).

Respondent argues that the Association derives immunity from the fact that some of its members are interstate carriers that are subject to ICC jurisdiction. It is questionable whether the status of the Association's membership is relevant to this case: the carrier members are not named in the complaint and the challenged conduct is that of the Association. However, since at least 50% of the Association's members are wholly intrastate carriers, its derived jurisdictional status can just as easily be characterized as non-immune. In fact, cases construing analogous exemptions listed in FTCA Section 5(a)(2) have held that membership by non-qualifying entities subjects an association to antitrust scrutiny. *See, e.g., Case Swayne Co. v. Sunkist Growers, Inc.*, 389 U.S. 384 (1967), *rehearing denied*, 390 U.S. 930 (1968); *Crosse & Blackwell Co. v. FTC*, 262 F.2d 600 (1959).

An additional factor supporting Commission jurisdiction is the fact that the challenged activities lie outside the ICC's jurisdiction, even if engaged in by an interstate carrier. For example, were an ICC-regulated common carrier to engage in activities unrelated to interstate transportation, such as real estate or manufacturing, which could not be regulated by the ICC, those other activities would not be exempt from FTC jurisdiction merely because they were undertaken by a common carrier subject [9] to the ICA.⁷ Intrastate ratemaking, the challenged activity in the instant case, is plainly outside the ICC's jurisdiction: the Interstate Commerce Act expressly "does not . . . authorize the [Interstate Commerce] Commission to prescribe or regulate a rate for intrastate transportation provided by a motor carrier." 49 U.S.C. 10521 (b)(2).⁸

Thus, the nature of the Association, as distinguished from the status of some of its members, and the fact that the challenged conduct is beyond the review of the ICC, both support Federal Trade Commission jurisdiction over this matter.

⁷ It is important to note the difference between activities which are not subject to ICC jurisdiction and activities which merely have not been regulated by the ICC. In *FTC v. Miller*, 549 F.2d 452 (7th Cir. 1977) the court held that the FTC did not have the authority to investigate advertising for an ICC-regulated common carrier business, even though the advertising was not actively regulated by the ICC. While *Miller* contains some language that suggests indirectly that the status of a common carrier may exempt all of its activities from FTC scrutiny, that dictum is undercut because the Court expressly declined to decide whether "non-carrier activities of a common carrier" qualify for exemption from the FTC Act. 549 F.2d at 458. The conduct challenged here is plainly not associated with the interstate business of a common carrier since it is wholly beyond the reach of the ICC.

⁸ The ICC's jurisdiction over motor carriers is more limited than its jurisdiction over railroads, which extends to rates that affect intrastate commerce. *Houston, E.&W. Tex. Ry. Co. v. United States*, 234 U.S. 342 (1942).

State Action Defense

The Association's principal defense is the claim that its activities fall within the state action exception to the antitrust laws under *Parker v. Brown*, 317 U.S. 341 (1943), and its progeny.

ALJ Needelman rejected the Association's defense, concluding, *inter alia*, that the Commonwealth of Massachusetts had not expressed an intention to eliminate rate competition among movers and that neither Massachusetts nor the MDPU had required the Association and its members to engage in the activities challenged here. ID 22-46. For the reasons set forth below, we agree that the state action doctrine does not immunize the challenged activities. [10]

The Supreme Court has issued a number of recent decisions concerning the state action doctrine. *Rice v. Norman Williams Co.*, 102 S.Ct. 3294 (1982); *Community Communications Co. v. City of Boulder*, 455 U.S. 40 (1982); *California Retail Liquor Dealers v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980); *New Motor Vehicle Board v. Orrin W. Fox Co.*, 439 U.S. 96 (1979); *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978); *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977); *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976); *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975). The fissiparous opinions in these cases present a shifting emphasis on the operative elements of the state action doctrine, and total reconciliation among them is not immediately obvious.⁹ One key question concerns the interrelationship between the private action analysis of *Cantor* and *Goldfarb* and the standards of later cases, typified by *Midcal*, which deal with the doctrine as applied to anticompetitive conduct by public parties. Moreover, even if the analysis for private parties is shaped solely by the *Cantor* and *Goldfarb* precedents, those two cases may not conclusively establish that private action must always be compelled by the state as a prerequisite to application of the state action doctrine.

Fortunately, to reach a decision in this case it is not necessary for us to resolve these issues, because in the situation here the activities of the Association clearly do not qualify for antitrust immunity under any of the current constructions of the state action doctrine. When reviewing the caselaw, the following key, undisputed facts in the instant case must be kept in mind: (1) the Association is a wholly

⁹ Each Supreme Court decision has given rise to new commentaries chronicling the development of the doctrine and offering thoughts on how to harmonize its various precedents—or replace them altogether. *See, e.g.*, Areeda and Turner, *Antitrust Law*, Section 212 (1978); Sullivan, *Antitrust Law*, 731-40 (1977); Posner, *The Proper Relationship Between State Regulation and the Federal Antitrust Laws*, 49 N.Y.U.L. Rev. 693 (1974); Kennedy, *Of Lawyers, Lightbulbs and Raisins: An analysis of the State Action Doctrine under the Antitrust Laws*, 74 NW. U.L. Rev. 31 (1979); Page, *Antitrust, Federalism, and the Regulatory Process: A Reconstruction and Critique of the State Action Exemption after Midcal Aluminum*, 61 B.U.L. Rev. 1099 (1981); Areeda, *Antitrust immunity for "state action" after Lafayette*, 95 Harv. L. Rev. 435 (1981); Easterbrook, *Antitrust and the Economics of Federalism*, XXVI Journal of Law and Economics, 23-50 (1983); Antitrust symposium: "State Action" antitrust immunity—a doctrine in search of definition, 1982 BYU L. Rev. 809-918 (1982).

private organization; (2) no Massachusetts statute or regulation requires movers to formulate or file a joint tariff, or to adopt uniform moving rates; (3) the record contains no evidence that the state [11] statutory scheme authorizes or contemplates joint formulation of tariffs or that joint tariffs are essential to effective functioning of the state regulatory scheme.

Our analysis starts with *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), the first Supreme Court decision to reexamine the state action doctrine first enunciated in *Parker v. Brown*, 317 U.S. 341 (1943). In *Goldfarb*, the plaintiff sought both monetary and injunctive relief from the Fairfax County Bar Association (a private group) for fixing and adhering to minimum-fee schedules, and from the Virginia State Bar (described as a state agency by Virginia law) for encouraging such fee schedules by various means. It is not altogether clear whether the Court considered the Virginia State Bar to be a private party or a state agency, or what characteristics were deemed essential to either characterization.¹⁰ However, we need not attempt to clarify this issue in order to find an analogy to the matter before us: the second defendant in *Goldfarb* was undisputedly a private party, as is the Association here, and the rationale and holding of *Goldfarb* applied without distinction to both defendants in that case. 491 U.S. at 790-791. The Court stated that "the threshold inquiry in determining if an anticompetitive activity is state action of the type the Sherman Act was not meant to proscribe is whether the activity is required by the State acting as sovereign." *Id.* at 790.¹¹ Since neither a Virginia statute nor a Virginia Supreme Court rule¹² required attorneys to adopt minimum-fee schedules, the Court concluded that the activity was not required by the state. *Id.* at 790-91. [12]

The following year the Court again emphasized that a private party wishing to raise the state action shield must demonstrate that it acted under state compulsion. *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976). *Cantor* is the only Supreme Court decision applying the state action doctrine in a wholly private context, and the case most similar to this one on the facts. Accordingly, *Cantor* and *Goldfarb* must be read together for guidance in this matter.

In *Cantor*, a private electric utility (the sole supplier of electricity

¹⁰ The State Bar was found, without elucidation, to be a state agency only "for some limited purposes," which were not described. *Id.* at 791. Three years later the nature of the State Bar was still an issue among the Justices. The plurality opinion in *Lafayette v. Louisiana Power and Light Co.*, *supra*, describes *Goldfarb* as involving the actions of a state agency, the Virginia State Bar, and not exclusively the actions of private persons. 435 U.S. at 411-412 n. 41. In contrast, the dissenting opinion of Justice Stewart argues that *Goldfarb* should be treated as involving only private parties because the actions of the state bar were essentially those of a private group. 435 U.S. at 431-32.

¹¹ The Court also stated the test to be whether the anticompetitive conduct is "compelled [as opposed to "prompted"] by direction of the State acting as sovereign." *Id.* at 791.

¹² The Virginia legislature had authorized the state Supreme Court to regulate the practice of law. *Id.* at 790, n. 18.

in the region) furnished light bulbs to its residential customers without separate charge, under a longstanding program approved by the Michigan Public Service Commission as part of the utility's rate structure. Once the tariff was approved, the utility was required by law to adhere to the program until the Commission approved a change. A retail seller of light bulbs sued the utility, but not the Public Service Commission, seeking a halt to the replacement bulb program as well as damages. The plaintiff alleged that the utility was improperly using its monopoly power in the distribution of electricity to restrain competition in the sale of light bulbs. The district court granted summary judgment in favor of the utility, holding that the Public Service Commission's approval of the light bulb program rendered the practice exempt under the state action doctrine. The Court of Appeals affirmed.

The Supreme Court reversed. A majority of the Court¹³ explicitly stated that the issue was whether "private conduct required by state law is exempt from the Sherman Act." 428 U.S. at 592. The court went on to explore two different reasons which might support such a rule. The first was the state compulsion situation explored in *Goldfarb*: "if a private citizen has done nothing more than obey the command of his state sovereign, it would be unjust to conclude that he has thereby offended federal law." 428 U.S. at 592. The meaning of state command was negatively defined: it could not be merely state authorization, approval, encouragement or participation in the restrictive private conduct. *Id.* at 592-93. *Goldfarb* was quoted directly for the proposition that "anticompetitive activities must be compelled by direction of the State acting as a sovereign" in order to demonstrate state action for Sherman Act purposes. *Id.* n. 28. [13]

After considering the actual operation of the replacement bulb program, a majority of the Court¹⁴ determined that the utility was not acting under state command. The utility's independence from the state was highlighted by the fact that it, and not the state, initiated the light bulb program. Although the Public Service Commission approved the program, it did so only at the request of the utility, and had not "'put its own weight on the side of the proposed practice by ordering it.'" *Id.* at 578, n. 31, quoting *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 357 (1974). The fact that the rate structure became mandatory until a change was approved was simply a characteristic of the general statutory procedure for ratemaking. In other words, all tariffs were made binding until a new one was approved; the state had

¹³ Justice Stevens' plurality opinion, in which Justices Brennan, White and Marshall joined, was also joined by Chief Justice Burger as to Part III of the opinion, which deals with the application of the state action doctrine to private conduct.

¹⁴ The balance of power between Detroit Edison Company and the Michigan Public Service Commission was assessed in Parts I and III of the Opinion, both joined by Chief Justice Burger.

not taken the stand that the utility's light bulb program, as such, should be continued: "Respondent's participation in the decision is sufficiently significant to require that its conduct implementing the decision . . . conform to applicable federal law." *Id.* at 594.

In our case the State of Massachusetts has in no way compelled the challenged conduct: the collective setting of rates. The pertinent MDPU regulation permits a carrier to adopt a tariff previously filed by another carrier; it does not require or even authorize carriers to agree upon uniform rates, as members of the Association have done. As *Cantor* shows, the fact that a tariff once filed can only be changed with approval of the state agency does not demonstrate state compulsion. In *Cantor* the tariff itself incorporated the challenged lightbulb program. The Court nevertheless concluded that:

neither Michigan's approval of the tariff filed by respondent, nor the fact that the lamp-exchange program may not be terminated until a new tariff is filed, is a sufficient basis for implying an exemption from the federal antitrust laws for that program. 428 U.S. at 598.

Here, however, the tariff is neutral on its face; the collective ratemaking practices at issue antedate the actual tariff which the state agency approves. Therefore the imputation of state [14] command from the state's filing procedures is even more tenuous than in *Cantor*.¹⁵

Thus, an express state command to engage in the challenged conduct arguably represents a prerequisite for applying the state action doctrine to private parties. Respondent has failed to get over that threshold issue in its defense, and our analysis therefore arguably need go no further. However, the question may not be completely closed because only a plurality of the *Cantor* court specifically characterized the state command issue as a threshold question, relying upon *Goldfarb*. 428 U.S. at 600. This plurality is strengthened by both the concurring opinion of Justice Blackmun (*Id.* at 609) and the dissenting opinion of Justice Stewart (in which Justices Powell and Rehnquist joined) (*Id.* at 623-24, 637), which construe *Goldfarb* as limiting application of the doctrine to situations where private action is re-

¹⁵ The situation is analogous to that presented to the Supreme Court in *Georgia v. Pennsylvania R. Co.*, 324 U.S. 439 (1945), a suit brought by the State of Georgia charging that a group of railroad carriers had engaged in a price-fixing conspiracy to fix rates for transportation to and from Georgia. The carriers argued, *inter alia*, that the antitrust laws could not be applied to the conduct of the carriers because the rates in question had been filed with and approved by the ICC as reasonable and non-discriminatory. The Supreme Court rejected that argument, holding that there was not such repugnancy between the regulatory scheme of the Interstate Commerce Act and the application of the antitrust laws as to repeal the antitrust laws by implication (324 U.S. at 456-457) and that the allegation of a conspiracy to fix rates stated a cause of action even though the ICC had approved the rates and found them to be reasonable. 324 U.S. at 458-462.

The court noted that a "zone of reasonableness exists between maxima and minima" in which the carrier is ordinarily free to select its own rates, and that unlawful agreements among carriers might raise rates to the maxima. 324 U.S. at 460-461. Similarly, within limits set by the MDPU in accordance with Chapter 159B, carriers are free to select their own rates; the agreement among competitors challenged here eliminates or reduces the zone of competition envisioned by the Massachusetts regulatory scheme.

quired, not merely authorized, by state law.¹⁶ Nevertheless, [15] the *Cantor* majority, though referencing *Goldfarb* for the substantive compulsion standard (*Id.* at 592-593, n. 28), in addition seems to suggest that the state action exemption could be invoked to shield private conduct when that conduct is necessary—but only to the degree to which it is actually necessary—to make the state regulatory system work. *Id.* at 596-97.¹⁷

In considering this suggestion, the court expressly rejected the argument that the antitrust laws should be automatically suspended in areas of the economy pervasively regulated by state agencies, and indicated the outer boundaries of any “implied exemption” from the antitrust laws by reason of state regulation as follows:

The mere possibility of conflict between state regulatory policy and federal antitrust policy is an insufficient basis for applying an exemption from the federal antitrust laws. Congress could hardly have intended state regulatory agencies to have broader power than federal agencies to exempt private conduct from the antitrust laws. Therefore, assuming that there are situations in which the existence of state regulation should give rise to an implied exemption, the standards for ascertaining the existence and scope of such an exemption surely must be at least as severe as those applied to federal regulatory legislation.

The Court has consistently refused to find that regulations give rise to an implied exemption without first determining that exemption was necessary in order to make the regulatory Act work, “and even then only to the minimum extent necessary.” 428 U.S. at 596-597 (footnotes and citations omitted). [16]

The Court rejected the utility’s exemption claim because application of the antitrust laws to outlaw the utility’s light bulb program clearly would not impair the effective functioning of Michigan’s regulation of electric utilities. *Id.* at 598. No Michigan statute authorized the regulation of the sale of light bulbs. Nor did other utilities regulated by the Public Service Commission follow the practice of providing lightbulbs to their customers. *Id.* at 584-585. The Court inferred that the state’s policy was neutral on the question whether a utility should or should not have such a program. *Id.* at 584-585.

Similarly, in our case nothing in the record suggests that the regulation of motor carriers by Massachusetts will be impaired if motor carriers set their rates individually, rather than by agreement among

¹⁶ Accord, *U.S. v. Southern Motor Carriers Rate Conf. Inc., et al.*, 1983-1 Trade Cas. ¶65,320 (5th Cir., 1983); *Litton Systems, Inc. v. Southwestern Bell Tel. Co.*, 539 F.2d 418, 422-424 (5th Cir. 1976); *United States v. Title Ins. Rating Bur. of Arizona*, 517 F.Supp. 1053, 1059 (D. Ariz. 1981). But see *Turf Paradise, Inc. v. Arizona Downs*, 670 F.2d 813, 823 n.8 (9th Cir.), cert. denied, 102 S.Ct. 2208 (1982).

¹⁷ We note that the Fifth Circuit has recently held that state compulsion is a threshold requirement for private defendants asserting the state action shield. *U.S. v. Southern Motor Carriers Rate Conf. Inc., et al.*, 1983-1 Trade Cas. ¶65,320 (5th Cir. 1983) at 69,891-92, petition for cert. filed, No. 82-1922 (May 27, 1983), 602 CCH Trade Reg. Reports ¶60,021 (June 27, 1983). The Massachusetts statutory scheme involved in the instant proceeding provides far less basis for state action immunity than do the state statutory schemes involved in *Southern Motor Carriers*. See 467 F.Supp. at 473-478; 672 F.2d at 475-476, 484-485.

competing carriers. That neither the Massachusetts legislature nor the MDPU specifically requires collective rate-making strongly indicates that collective rate-making is not an essential part, or indeed any part, of the Massachusetts regulatory scheme. On the contrary, Massachusetts law and regulation clearly permits motor carriers individually to formulate rates for inclusion in their tariffs, and presumably some motor carriers (at least those not members of the Association) do so. Moreover, there is nothing in the record that indicates that Massachusetts has otherwise expressed a judgment that concerted agreement on motor carrier rates or concerted efforts to increase rates and make them more nearly uniform are essential to the State's regulation of motor carriers, or even that they are desirable activities.¹⁸ Massachusetts has not asserted any State interest in immunizing the conduct challenged here.

There is no reason to believe that the regulation of motor carriers will be interfered with if the Association is required to discontinue the challenged activities. Individual motor carriers will decide what rates they wish to include in tariffs they file with the MDPU. They will remain free to participate in the tariff filed by another motor carrier, but may not agree on rates in advance with their competitors. They may even use the services of a tariff publishing agent, as long as the rates filed [17] are formulated unilaterally. The MDPU will continue to have the authority to review rates contained in tariffs and to suspend or disallow rates the MDPU finds unreasonable or otherwise not in conformity with Massachusetts law.

For our purposes *Cantor* and *Goldfarb* are the key precedents, since the calvalcade of subsequent state action opinions has not included private parties as defendants, and, as we noted before, respondent is clearly an association of private parties and the challenged conduct is clearly private conduct. The Court has twice indicated that a defendant's status as a public or a private entity calls for different approaches under the state action doctrine.¹⁹ Assuming, however, that the standards evolved in cases involving public defendants were applied to this matter, the result would be the same because the Associa-

¹⁸ In 1948, Congress passed the Reed-Bullwinkle Act, granting antitrust immunity for collective rate-making by interstate carriers subject to the approval and supervision of the ICC. 49 U.S.C. 10706. As noted above, this immunity was subject to strict limitations and required express ICC approval, and did not apply to *intrastate* rates. Significantly, Congress has acted to eliminate the limited antitrust immunity for interstate rate bureaus. Under 49 U.S.C. 10706(b)(3)(D), as amended by the Motor Carrier Act of 1980, antitrust immunity will not be available for interstate agreements that "provide for the discussion of or voting upon single-line rates on or after January 1, 1984."

¹⁹ The Court stated in *Bates* (in a portion of the plurality opinion joined by all of the Justices) that "*Cantor* would have been an entirely different case if the claim had been directed against a public official or public agency, rather than against a private party. Here, the appellants' claims are against the State." 433 U.S. at 361. Similarly, in *Lafayette* both the plurality opinion (435 U.S. at 410-11 n.40) and the dissenting opinion of Justice Stewart (435 U.S. at 431-432) distinguished *Cantor* as having involved "purely private parties".

tion's conduct could not meet the requirements of the state action doctrine articulated in those cases.

After effectively narrowing the state action immunity of private parties in *Goldfarb* and *Cantor*, the Court's attention turned to public officials and agencies in a series of decisions starting with *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977). Such defendants, in order to raise the state action shield, must show that their actions were taken under a delegation of state sovereign power. The first requirement for such a showing is proof that the legislature or highest court of the state has laid down a clear declaration of policy on the challenged action. In *Bates*, a disciplinary rule which restricted advertising by attorneys did not violate the Sherman Act because it was incorporated in the Rules of the Supreme Court of Arizona and subject to pointed reexamination by that court in enforcement proceedings. The U.S. Supreme Court stated, "we deem it significant that the state policy is so clearly and affirmatively expressed and that the state supervision is so active." 433 U.S. at 362. Later cases built on this language, establishing that the challenged restraint must be "clearly articulated and affirmatively expressed as state policy" in order for respondent's conduct to be considered state action. *City of Lafayette, supra*, at 410; *New Motor Vehicle Board, supra* at 109; *Midcal, supra*, at 105; *City of Boulder, supra* at 51. The test was satisfied, as we saw in *Bates*, by a specific rule of a state [18] Supreme Court. In *New Motor Vehicle Board* it was met by a detailed system of regulation laid out by the state legislature, which, among other things, directed the state New Motor Vehicle Board to consider effects upon competition of every decision to let a new automobile franchisee enter a geographic market already occupied by a franchisee of the same auto manufacturer. In *Midcal* the test was met by a forthrightly stated and clear legislative purpose to allow resale price maintenance, embodied in the California Business and Professions Code. The test has *not* been met where municipalities, acting "on their own recognizances", or under only the general grant of self-government, undertake restraints of trade. *City of Lafayette, supra*; *City of Boulder, supra*.

Comparing these cases with the one before us, it is clear that collective rate-setting activities of the Association do not follow any "clearly articulated and affirmatively expressed" declaration of state policy. Neither the MDPU, in its program for rate filing, nor the State of Massachusetts, in its establishment of the MDPU, has expressed a policy that motor carrier rates should be jointly formulated. Moreover, it is possible that, for a private defendant, compulsion is still a factor which must be present before the question of a clearly articulated and affirmatively expressed state policy can be resolved. At

present there is a division in the Circuit Courts as to the need for establishing compulsion as a required element when a claim of state action is raised by a private party.²⁰ Again, however, we need not attempt to resolve this question since it is clear that the collective rate-setting activities of the Association do not follow a “clearly articulated and affirmatively expressed” declaration of state policy with or without compulsion.²¹

Furthermore, in order to use the state action doctrine, public defendants must establish that the State actively supervises the conduct at issue. *Bates*, *City of Lafayette*, and *New Motor Vehicle Board* all noted the presence or absence of continuing state supervision of the competitively disruptive [19] activity which the state had originally authorized. *Midcal* raised this concern to the level of a requirement for antitrust immunity, coequal with the clear articulation of state policy standard:²²

[Previous] decisions establish two standards for antitrust immunity under *Parker v. Brown*. 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. 455 U.S. at 105.

Although the MDPU is empowered to review the reasonableness of charges contained in tariffs filed by motor carriers, the MDPU does not “actively supervise” rates that fall within the “zone of reasonableness [that] exists between maxima and minima” (*Pennsylvania R. Co.*, *supra*, 324 U.S. at 460–61) in which motor carriers are free to set prices in competition with one another. Within that zone of reasonableness, the MDPU is a passive recipient of the charges set by purely private rate-making, similar to the role of the state in *Midcal* and the utility commission in *Cantor*. *See also Miller v. Oregon Liquor Control Commission*, 1982 CCH Trade Cas. ¶64862 [688 F.2d 1222] (9th Cir. 1982) at 72302–03. Accordingly, the challenged actions of the Association clearly meet neither the ‘active supervision’ nor the ‘clearly articulated and affirmatively expressed state policy’ requirements of the *Midcal* standard.

²⁰ See note 16, *supra*.

²¹ The Association notes that from time to time various MDPU officials have condoned and encouraged the Association to formulate and submit joint tariffs, and have discussed changes in joint tariffs with Association officials. *See* ID at 10, 21. We do not understand the Association to contend that the MDPU ever ordered or required the Association to engage in the concerted rate-filing activities challenged here, and in any case there is no evidence that this was ever done. In 1939, the Association petitioned the MDPU to prescribe the Association's tariff as the minimum rate for all carriers but later withdrew its petition. RX 51A, RX 58.

²² In the subsequent case of *City of Boulder*, the Supreme Court, having found no clearly articulated and affirmatively expressed state policy, expressly declined to answer the question of whether the active state supervision test “must or could” be met by the challenged municipal ordinance. Thus, whether active state supervision is an element of state action immunity has become an open question, at least for local governments. Again, we do not need to answer this question to decide our case; for whether or not the standard is relevant, it has not been met.

Noerr-Pennington Defense

The Association also argues that its activities are protected from antitrust attack under the "Noerr-Pennington" doctrine.²³ That doctrine establishes that concerted private efforts to persuade governmental authorities to take action to [20] restrain competition are not subject to the Sherman Act, absent circumstances where such concerted petitioning is essentially a "sham" or an abuse of process.

The Association argues that the *Noerr-Pennington* doctrine protects the Association's action in presenting a joint tariff to the MDPU, since that action is merely an effort to persuade the MDPU to approve the tariff and permit the members of the Association to utilize the rates contained in the tariff. The Association further argues that the activities of the Association in formulating the rates to be included in the tariff by agreement among competing motor carriers also must be protected, because the right of a group to petition a government agency includes the right of a group to formulate the position the group will present to the agency.

We do not think that the protection of the *Noerr-Pennington* doctrine extends to the circumstances presented here. We are not asked to consider the legitimacy of joint activity of motor carriers attempting to persuade the MDPU to require concerted rate-making. Rather, the challenged activities constitute private collective rate-making by the Association and its members. In *Noerr* the Court distinguished collective lobbying activities from the kinds of combinations normally condemned by the antitrust laws describing the latter as "combinations ordinarily characterized by an express or implied agreement or understanding that the participants *will jointly give up their trade freedom . . . through the use of such devices as price-fixing agreements, boycotts, market-division agreements, and other similar arrangements.*" 365 U.S. at 136 (emphasis added). More recently, the Court explained that the First Amendment right to petition the government cannot be used to insulate that type of demonstrably anticompetitive conduct from the antitrust laws. In *California Motor Transport*, the Supreme Court concluded:

It is well settled that First Amendment rights are not immunized from regulation when they are used as an integral part of conduct which violates a valid statute . . . First Amendment rights may not be used as the means or the pretext for achieving "substantive evils" (see *NAACP v. Button*, 371 U.S. 415, 444) which the legislature has the power to control. Certainly the constitutionality of the antitrust laws is not open to debate. . . .

²³ The "Noerr-Pennington" doctrine is based on three Supreme Court cases: *Eastern R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965); and *California Motor Transport Co. v. Trucking, Unlimited*, 404 U.S. 508 (1971).

California Motor Transport v. Trucking Unlimited, 404 U.S. 508, 514-15 (1972).

We drew upon these instructions in our recent decision in *Michigan State Medical Society*, Docket No. 9129 (February 17, 1983) [101 F.T.C. 191]. In that case a professional association of directly competing physicians informed the state legislature that its members had resolved not to participate in the state Medicaid [21] program unless reimbursement levels were raised. (Slip Op. 14-19). [101 F.T.C. at 275-279] We found that such action went beyond the process of influencing legislative or administrative decisions and encompassed efforts that interfered directly with the competitive process. Accordingly, *Noerr-Pennington* protection was not appropriate. (Slip Op. at 41-44). [101 F.T.C. at 297-300] The restraint on competition in the present case—actual agreements to charge specific rates—is even more direct than the threatened refusal to deal in *Michigan State Medical Society* and even more remotely linked to influencing state action. The boycott in *Michigan State* took place in the context of ongoing and otherwise legitimate discussions between the association and state officials on ways to contain rising Medicaid costs. By contrast, in this case rates collectively formulated by Association members have routinely been presented to the MDPU for approval over the last forty-five years and are not collateral to any issues being considered by the state legislature. The language of the Second Circuit in *Litton Systems, Inc. v. AT&T Co.*, 1982-83 CCH Trade Cas. ¶65,194 (2d Cir. 1983) applies these principles within the specific context of tariff filings:

AT&T erroneously assumes that a mere incident of regulation—the tariff filing requirement—is tantamount to a request for governmental action akin to the conduct held protected in *Noerr and Pennington*. . . . The decision to impose and maintain the interface tariff was made in the AT&T boardroom, not at the FCC. . . . The fact that the FCC might ultimately set aside a tariff filing does not transform AT&T's independent decisions as to how it will conduct its business into a "request" for governmental action or an "expression" of political opinion. Similarly, the FCC's failure to strike down a tariff at the time of its filing does not make the conduct lawful. . . . 1982-83 Trade Cas. ¶65,194 at 71,777.

Moreover, the concerted rate-making activities of the Association and its members are not necessary to the exercise of the carriers' right to petition the MDPU. Motor carriers can petition the MDPU to accept higher or lower tariff rates without first agreeing with their competitors on rates. See *Commerce Tankers Corp. v. National Maritime U. of America*, 553 F.2d 793, 800 (2d Cir.), cert. denied, 434 U.S. 923 (1977) (filing court action to enforce a group boycott does not immunize the boycott); *George R. Whitten, Inc. v. Paddock Pool Builders, Inc.*, 424 F.2d 25 (1st Cir. 1970) (bid-rigging not immunized merely

because presented to government agency). *See also Motor Carriers Traffic Ass'n, Inc. v. United States*, 559 F.2d 1251, 1255 (4th Cir. 1977), *cert. denied*, 435 U.S. 1006 (1978) (ICC may condition approval of proposed rate agreement under Reed-Bullwinkle Act [22] upon rate bureau agreement not to petition the ICC to protest independent rate-setting by the bureau's members).

Furthermore, the Association's argument is inconsistent with the result in *Georgia v. Pennsylvania R. Co.*, *supra*. The Supreme Court in that case emphasized that the Interstate Commerce Act (like the Massachusetts regulatory scheme here) "was designed to preserve private initiative in rate-making as indicated by the duty of each common carrier to initiate its own rates" (324 U.S. at 459),²⁴ and that it was immaterial that the rates created by the price-fixing conspiracy would be reviewed by the ICC (324 U.S. at 460-461). Although that case was decided prior to *Noerr*, the Court has never suggested that *Pennsylvania R. Co.* is no longer viable, and has continued to cite it with approval.²⁵

The *Noerr-Pennington* doctrine affords protection to certain joint efforts by private parties to influence governmental action, even where the motive of the private parties is to obtain an anticompetitive result. The anticompetitive conduct challenged here, however, cannot be characterized as a joint effort by the Association and its members to induce the MDPU to require collective ratemaking; the conduct challenged is the concerted behavior of the Association and its members in agreeing on the rates that they would include in their tariff and would charge the public. Such conduct, which is neither an effort to influence government action nor required in order to make such an effort, is not encompassed within the doctrine.

Substantive Violation

The Association does not appear to dispute the ALJ's conclusion that the challenged activities violate the antitrust laws, unless they are exempt therefrom by reason of the "state action" or *Noerr-Pennington* doctrines. *See* ID 49-51. In any event, it is clear beyond cavil that agreements among competitors to set price levels or price ranges are *per se* illegal under the antitrust laws. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 222 (1940); *see also Arizona v. Maricopa County Med. Soc.*, 457 U.S. 332, 102 S.Ct. 2466, 73 L. Ed. 2d 48 (1982); *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 647 (1980) [23] (*per curiam*). The Association has developed joint tariffs for its members,

²⁴ Compare Mass. Gen. Law Ch. 159B, § 6, requiring each motor vehicle common carrier to "establish, observe and enforce just and reasonable rates" and to publish and file tariffs containing those rates. *See* ID 25.

²⁵ *E.g.*, *TVA v. Hill* 437 U.S. 153, 189-190 (1978); *Gordon v. New York Stock Exchange*, 422 U.S. 659, 684 (1975); *Morton v. Mancari*, 417 U.S. 535, 550 (1974); *Ricci v. Chicago Merchants Exchange*, 409 U.S. 289, 300 n.12 (1973); *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 259-260 (1972).

which the members have both formally adopted by vote at annual meetings and adhered to with almost 100 percent participation. In addition, the Association has conducted meetings where members agree to specific rate increases, and has in a variety of ways exhorted members to adopt uniform rates and rate increases. Plainly, the rate-making activities of the Association are *per se* unlawful under the antitrust laws. *Georgia v. Pennsylvania R. Co.*, *supra*; *Atchison, Topeka & Santa Fe R. Co. v. Aircoach Transport Ass'n, Inc.*, 253 F.2d 877, 886 (D.C. Cir. 1958), *cert. denied*, 361 U.S. 930 (1960).

Remedy

The ALJ issued an order which, *inter alia*, prevents the Association from continuing to engage in its collective rate-making activities and its efforts to induce higher and more uniform rates. The order also requires the Association to cancel all tariffs currently in effect, to amend its by-laws to require compliance with the order as a condition of membership in the Association, and to notify its members of entry of the order. We have modified this order in a number of respects. The prohibition against collective ratemaking has been expanded somewhat. In addition to provisions directly banning collusive rate formulation, we have added provisions designed to prohibit practices which, although not in themselves unlawful, could be used to facilitate price fixing. For example, Paragraph II.4. prohibits publication of an informational bulletin on rates. Since filed rates are a matter of public record, their dissemination is not illegal. But, in the past, such rate bulletins from the Association have been used to exhort members to match the published rates. Historically, members have perceived such bulletins as directives for change rather than as neutral information, and it is likely that that perception would attach to any future rate bulletins appearing under the Association's letterhead. Similarly, Paragraph II.7 prohibits arrangements whereby the Association makes automatic changes in the rates on file for any carrier. Given nearly half a century of joint tariff filing in Massachusetts, a certain amount of "fencing in" is necessary to break the carriers' habit of following the Association's lead on rates to be filed. Of course, the order does not prevent the Association from acting as a tariff publishing agent for the unilaterally-developed rates of individual carriers.

The Association did not raise any issue concerning the ALJ's order in its identification of "Questions Intended to be Urged Upon this Appeal" (Appeal Brief at 7). In its Reply Brief on this appeal, however, the Association noted (at p. 6) that it had proposed to the ALJ that the Association be permitted to circulate among its members a "tariff format," into which individual members could insert their own rates.

The Association stated [24] that the MDPU supported this proposal and that the MDPU would so indicate in a letter to be submitted to the Commission prior to oral argument of the appeal.

As of the date of this Order and Opinion, the Commission had not received any communication from the MDPU, directly or indirectly, concerning support of the Association's proposal. Under these circumstances, we are not persuaded on this record that allowing the Association to continue to circulate tariffs among its membership would be so beneficial as to outweigh the risk that such tariffs might be utilized as a vehicle whereby competitors might agree among themselves as to various terms and conditions affecting the charges ultimately borne by the consumer.²⁶ Therefore, we have deleted from our order the ALJ's proviso allowing the Association to prepare and circulate a tariff format among its members. Of course the Association remains free to provide assistance in formulating tariffs to members on an individual basis; however, the Association must take care not to pass on non-public information concerning competitors.²⁷ We have also changed the order to require five annual compliance reports after the initial report, instead of the single compliance report ordered by the ALJ. [25]

APPENDIX

The relevant portions of Ch. 159B are Sections 1, 6, and 6A:

§ 1. Policy

It is hereby declared to be the policy of the commonwealth to regulate transportation of property by motor carriers upon its ways in such manner as to recognize and preserve the inherent advantages of such transportation, and to foster sound economic conditions in such transportation and among carriers engaged therein in the public interest; and in connection therewith to: (1) promote adequate, economical and efficient service by motor carriers, and reasonable charges therefor, without unjust discriminations, undue preferences or advantages or unfair or destructive competitive practices, (2) improve the relations between, and co-ordinate transportation by and regulation of, motor carriers and other carriers, (3) develop and preserve a highway transportation system properly adapted to the needs of the commerce of the commonwealth, and (4) promote safety upon its ways in the interests of its citizens.

* * * * *

§ 6. Rates and charges; tariffs; rules and regulations

Every common carrier by motor vehicle shall publish and file with the department

²⁶ The final judgment rendered by the District Court in *Southern Motor Carriers* permits the defendant rate bureaus to file tariffs independently arrived at by individual carriers and to issue tariffs in which such independent rates are published. We do not understand that the rate bureaus are authorized to circulate proposed tariffs in the manner proposed by the Association here.

²⁷ As the ALJ noted, the record establishes that respondent often orchestrated uniform rates by first obtaining a commitment to a specific price increase from one member which was then used to persuade others. (ID 55-56) Such a "wheel and spoke" conspiracy is prohibited under this order.

and keep open for public inspection tariffs containing all the rates and charges for transportation of property and all services in connection therewith between points on its own routes, and between points on its own routes and points on the routes of any other such carrier or on the route of any common carrier by railroad, express or water when a through route and joint rate shall have been established. Such rates and charges shall be stated in lawful money of the United States. The department may reject any tariff filed with it which is not consistent with this section and with its orders, rules and regulations under this chapter.

Every such common carrier shall establish, observe and enforce just and reasonable rates, charges and classifications and reasonable regulations and practices relating thereto, which shall become effective on a date fixed by such carrier, which shall be at least thirty days after the filing of the tariff containing the same, unless suspended by the department prior to its effective date upon complaint of any person, organization or body politic, or by the department on its own motion; provided, that a rate may be established to become effective within said thirty days in order to meet the then existing rate of any competing common carrier, in which case it may become effective upon the effective date of the rate of such competing common carrier or at any time thereafter if established thereafter, upon the filing of a tariff or supplement thereto consistent with such reasonable rules and regulations as may be prescribed by the department.

The department may establish from time to time such reasonable rules and regulations as it may deem necessary pertaining to the form of tariff schedules, the time and manner of filing thereof, the suspension of rates before the same become effective, and hearings upon the validity of any filed or existing rate.

The department, in its discretion and for good cause shown, may allow publication of rates or of changes therein, upon notice less than that herein specified, or may modify the requirements of this section with respect to posting and filing of tariffs, either in particular instances or by general order applicable to special or peculiar circumstances or conditions.

The department, upon complaint of any common carrier by motor vehicle or of any other person, or upon its own motion, after hearing, may allow or disallow any filed or existing rates and may alter or prescribe the rates of common carriers in connection with the transportation of any or all classes of property to any and all points within the commonwealth and any service connected therewith, in accordance with the legal standards provided in this chapter. Whenever, upon complaint or in an investigation on its own initiative, the department, after hearing, shall be of the opinion that any rate or charge demanded, charged or collected by any common carrier by motor vehicle, or any classification, rule, regulation or practice whatsoever of such carrier affecting such rate, charge or the value of the service thereunder, is or will be unjust or prejudicial, it shall determine and prescribe the lawful rate of charge, or the lawful classification, rule, regulation or practice thereafter to be made effective. The department shall annually establish reasonable maximum and minimum rates or charges consistent with industry and economic conditions and consistent with the declaration of policy contained in section one.

In the exercise of the power to prescribe just and reasonable rates for the transportation of property by common carriers by motor vehicle and to disallow rates filed by any such carrier, the department shall give due consideration, among other factors, to the inherent advantages of transportation by such carrier, to the effect of any rates under consideration upon the movement of traffic by such carriers, to the need in the public interest of adequate and efficient transportation service by such carriers, to the cost of service and to the need of revenues sufficient to enable such carriers under honest, economical and efficient management to provide such service.

No common carrier by motor vehicle, unless otherwise provided by this chapter, shall

Final Order

102 F.T.C.

engage in the transportation of property upon any way, unless the rates and charges upon which the same is transported by said carrier shall have been filed and published in accordance with this chapter.

* * * * *

§ 6A. Excessive rates; refunds; rebates; separate payment of owner-operators of leased equipment for services as employees of prime contractors to qualify for welfare funds

No common carrier by motor vehicle shall charge, demand, collect or receive a different compensation for transportation or for any service in connection therewith between the points enumerated in such tariffs than the rates and charges specified in the tariffs in effect at the time; and no such carrier shall refund or remit in any manner or by any device, directly or indirectly, or through any agent or broker or otherwise, any portion of the rates or charges so specified, or extend to any person any privilege or facility for transportation except such as are specified in its tariffs.

* * * * *

FINAL ORDER

This matter, having been heard by the Commission upon the appeal of respondent from the Initial Decision, and upon briefs and oral argument thereof and opposition thereto, and the Commission for the reasons stated in the accompanying Opinion having determined to deny the appeal of respondent Massachusetts Furniture and Piano Movers Association, Inc.,

It is ordered, That the Initial Decision of the administrative law judge be adopted as Findings of Fact and Conclusions of Law except to the extent inconsistent with the accompanying Opinion. Other Findings of Fact and Conclusions of Law of the Commission are contained in the accompanying Opinion.

It is further ordered, That the following Order to Cease and Desist is hereby entered.

I

It is ordered, That the following definitions shall apply in this order:

Carrier means a common carrier of property by motor vehicle.

Intrastate transportation means the pickup or receipt, transportation and delivery of property for compensation within the Commonwealth of Massachusetts by a carrier authorized by the Massachusetts Department of Public Utilities to engage therein. [2]

Member means any carrier or other person which pays dues or belongs to the Massachusetts Furniture and Piano Movers Association, Inc., or any successor corporation.

Tariff means the publication stating the rates of a carrier for the transportation of property within the Commonwealth of Massachusetts, excluding general rules and regulations.

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

Collective Rates 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.

II

It is further ordered, That Massachusetts Furniture and Piano Movers Association, Inc., a corporation, its successors and assigns, and its officers, agents, representatives, directors and employees directly or through any corporation, subsidiary, division or other device shall forthwith cease and desist from:

1. Entering into, adhering to or maintaining, directly or indirectly, any contract, agreement, understanding, plan, program, combination or conspiracy to fix, stabilize, raise, maintain or otherwise interfere or tamper with the rates charged by carriers that compete for the intrastate transportation of property or related services, goods or equipment.

2. Knowingly preparing, developing, disseminating or filing a proposed or existing tariff provision which contains collective rates for the intrastate transportation of property or other related services, goods or equipment.

3. Providing information to any carrier about rate changes ordered by any other carrier employing the publishing services of the respondent prior to the time at which such rate change becomes a matter of public record.

4. Inviting, coordinating or providing a forum for, including publication of an informational bulletin, any discussion or agreement between or among competing carriers concerning intrastate rates charged or proposed to be [3] charged by carriers for the intrastate transportation of property or related services, goods or equipment

5. Suggesting, urging, encouraging, persuading or influencing in any way members to charge, file or adhere to any existing or proposed tariff provision which affects rates, or otherwise to charge or refrain from charging any particular price for any services rendered or goods or equipment provided.

6. Maintaining any rate or tariff committee or other entity to consider, pass upon or discuss intrastate rates or rate proposals.

7. Agreeing with any carrier to institute automatic changes to rates on file for said carrier.

FEDERAL TRADE COMMISSION DECISIONS

Final Order

102 F.T.C.

III

It is further ordered, That Massachusetts Furniture and Piano Movers Association, Inc. shall, within six (6) months after service upon it of this order:

1. Cancel all tariffs and any supplements thereto on file with the Massachusetts Department of Public Utilities that establish rates for transportation of property or related services, goods or equipment by common carriers in Massachusetts and take such action as may be necessary to effectuate cancellation and withdrawal.

2. Terminate all previously executed powers of attorney and rate and tariff service agreements, between it and any carrier utilizing its services, authorizing the publication and/or filing of intrastate collective rates within the Commonwealth of Massachusetts.

3. Cancel those provisions of its articles of incorporation, by-laws and procedures and every other rule, opinion, resolution, contract or statement of policy that has the purpose or effect of permitting, announcing, stating, explaining or agreeing to any business practice enjoined by the terms of this Final Order. [4]

4. Amend its by-laws to require members of the Association to observe the provisions of the Order as a condition of membership in the association.

IV

It is further ordered, That respondent shall within thirty (30) days after service upon it of this Order, mail or deliver a copy of this Order, under cover of the letter attached hereto as "Appendix," to each present member of respondent, and for a period of three (3) years from the date of service of this Order, to each new member within ten (10) days of each such member's acceptance by respondent.

V

It is further ordered, That respondent notify the Commission at least thirty (30) days prior to any proposed change in the respondent, such as dissolution, assignment or sale resulting in the emergence of a successor corporation, or any other proposed change in the corporation which may affect compliance obligations arising out of the Order.

VI

It is further ordered, That respondent shall file a written report within six (6) months of the date of service of this Order, and annually on the anniversary date of the original report for each of the five years thereafter, and at such other times as the Commission may require by written notice to respondent, setting forth in detail the manner and form in which it has complied with this Order.

APPENDIX

(Letterhead of Massachusetts Furniture and Piano Movers Association, Inc.)

Dear Member:

The Federal Trade Commission has ordered Massachusetts Furniture and Piano Movers Association, Inc. to cease and desist its tariff and collective rate-making activities. A copy of the Commission Opinion and Order is enclosed.

In order that you may readily understand the terms of the Order, we have set forth its essential provisions, although you must realize that the Order itself is controlling, rather than the following explanation of its provisions:

(1) The Association is prohibited from engaging in any collective rate-making activities, including the proposal, development or filing of tariffs which contain any collectively formulated rates for intrastate transportation services. Each member carrier must independently set its own rates for transportation of property or related services, goods or equipment within Massachusetts, but may use the Association as a tariff publishing agent.

(2) The Association is prohibited from providing a forum for its members for the purpose of discussing rates.

(3) The Association is prohibited from urging, suggesting, encouraging or attempting to influence in any way the rates members charge for their intrastate transportation services; the Association may not provide non-public information to any carrier about rate changes ordered by another carrier.

(4) The Association is prohibited from maintaining any rate or tariff committee which discusses or formulates intrastate rates or rate proposals.

(5) The Association is given six months to cancel all tariffs and tariff supplements currently in effect and on file at the Massachusetts Department of Public Utilities which were prepared, developed or filed by the Association.

(6) The Association is required to amend its by-laws to require its members to observe the provisions of the order as a condition of membership in the Association.

Sincerely yours,

Daniel W. Dunn
Executive Director

Enclosure

IN THE MATTER OF
STATE VOLUNTEER MUTUAL INSURANCE COMPANY, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF
THE FEDERAL TRADE COMMISSION ACT

Docket C-3115. Complaint, Sept. 28, 1983—Decision, Sept. 28, 1983

This consent order requires a Brentwood, Tenn. physician-owned medical malpractice insurance company, among other things, to cease failing to apply the same underwriting criteria to both physicians affiliated with self-employed nurse midwives as supervisors or otherwise, and those physicians who employ nurse midwives; and refrain from adopting any underwriting criterion, or taking any other action that would discriminate between those physicians who are affiliated with nurse midwives and those who are not, absent a reasonable underwriting basis for doing so. For a period of ten years from the effective date of the order, respondent is required to supply rejected physicians having affiliations with nurse midwives with written notice of specific reasons for the rejection; afford them a reasonable opportunity to respond; provide them with reasons for any final adverse determination; and maintain records of all relevant data. The insurer is further required to alter its Underwriting Manual so as to conform with requirements of the order; make its best efforts to have an announcement published in the *Journal of Tennessee Medical Association* in the form specified; and mail a copy of the announcements to its members, and to others upon request.

Appearances

For the Commission: *Toby Singer.*

For the respondent: *Jack R. Bierig, Sidley & Austin, Chicago, Ill.*

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 respondent State Volunteer Mutual Insurance Company, Inc. has violated and is violating Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues this complaint stating its charges as follows:

1. Respondent State Volunteer Mutual Insurance Company, Inc. ("SVMIC") is a corporation organized, existing and doing business under and by virtue of the laws of the State of Tennessee. SVMIC's

principal office and place of business is at 5200 Maryland Way, Suite 100, Brentwood, Tennessee.

2. SVMIC is now, and has been since 1976, a mutual insurance company, engaged in the offering for sale and sale of medical malpractice insurance to Tennessee physicians. In 1980 SVMIC had premium income of about \$13 million.

3. SVMIC is now, and at all times relevant herein has been, a corporation organized for the profit of its members within the meaning of Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44, whose business is in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

4. The physicians whom SVMIC insures are its members and elect its Board of Directors. Members of SVMIC are now and have been in competition among themselves and with other health care practitioners in the provision of health care services in Tennessee.

5. Malpractice insurance protecting physicians against certain types of loss is a valuable business service, essential for most physicians to be able to practice. For various reasons, SVMIC has substantial market power as the dominant malpractice insurer in Tennessee. In 1980, SVMIC insured about 80 percent of the Tennessee physicians with malpractice insurance.

6. In Spring 1980, two nurse-midwives licensed by the State of Tennessee and certified by the American College of Nurse-Midwives established Nurse-Midwifery Associates ("Nurse-Midwifery") in Nashville, to provide their services as self-employed nurse-midwives to women whose incomes were too high for them to be eligible for government-subsidized gynecological and obstetrical care. Nurse-Midwifery was in competition with obstetricians, gynecologists and other physicians in Tennessee who were members of SVMIC.

7. As required by Tennessee law, a licensed physician was Nurse-Midwifery's medical consultant and back-up physician under a written protocol for medical supervision setting forth the relationship and responsibilities of the nurse-midwives and the physician in the care of patients.

8. The physician who contracted to provide medical supervision for Nurse-Midwifery was board-certified by the American Board of Obstetricians and Gynecologists and was a SVMIC policyholder and member.

9. Nurse-Midwifery was established and operated in conformity with the policy statement on maternal health approved by the American College of Obstetricians and Gynecologists and the American College of Nurse-Midwives.

10. Nurse-Midwifery and its supervising physician received and treated a substantial number of patients from other states; received

substantial sums of money from private insurance companies for rendering health care services, which money flowed across state lines; and utilized or prescribed substantial quantities of drugs, medicines, supplies, equipment and other products which were shipped in interstate commerce.

11. SVMIC refused to continue insuring Nurse-Midwifery's supervising physician effective January 1, 1981, manifesting a policy against insuring physicians who agree to provide ongoing medical supervision to self-employed nurse-midwives, in contrast, for example, to those physicians, whom it continues to insure, who employ nurse-midwives. Certain of SVMIC's member physicians and officials who participated in this decision were actual or potential competitors of Nurse-Midwifery in the provision of obstetric or gynecological care.

12. SVMIC did not review the medical supervision protocol or policy statement on maternal health described in paragraphs 7 and 9, did not consult physicians familiar with the practice of nurse-midwifery, did not consult other insurers to discover if practices such as Nurse-Midwifery's have resulted in malpractice claims, and did not compare the actual operation of Nurse-Midwifery to those situations where nurse-midwives are employed by physicians or where physicians supervise other nonphysician practitioners. SVMIC based its decision on the purported ground that undue risk would be an inherent result of the economic relationship created by the consulting contract between the nurse-midwives and the supervising physician. Pursuant to its standard policy, SVMIC did not provide Nurse-Midwifery's supervising physician with any explanation of the reasons or basis for its refusal to continue to insure his practice, beyond stating that his practice presented an undue risk, and did not allow a record to be kept of the informal hearing it held on his termination.

13. SVMIC has no reasonable justification or substantial basis for the actions described in paragraph 11.

14. In adopting the policies and engaging in the acts and practices described in paragraphs 11 through 13, SVMIC has acted as a combination of its physician members or in conspiracy with some of them or others.

15. The policies, acts or practices of SVMIC and its member physicians described in paragraphs 11 through 13 constitute a boycott of or concerted refusal to deal with self-employed nurse-midwives and physicians who supervise them.

16. The purposes or effects and the tendency and capacity of the policies, acts and practices described in paragraphs 11 through 15 are and have been unreasonably to restrain trade and hinder competition in the provision of health care services in Tennessee, and to deprive

consumers, including pregnant women, of the benefits of competition in the following ways, among others:

a) physician members of SVMIC who wish to compete through supervision or affiliation with independent nurse-midwives are hindered from doing so;

b) nurse-midwives in Tennessee who wish to engage in independent practices are restrained in their ability to do so, because they have great difficulty finding physicians to supervise their practices, as required by state law;

c) patients are unreasonably limited in their ability to choose among a variety of alternative providers of health care services competing on the basis of price, service and quality;

d) Nurse-Midwifery lost its supervising physician and has been driven out of business; and its founders, as well as other nurse-midwives who could establish independent practices, are deterred and prevented from treating patients in competition with physicians on the basis of price, service and quality;

e) barriers to entry in the delivery of health care services have been raised; and

f) the development of a competitive, efficient, cost-effective, and innovative form of health care delivery has been hindered.

17. The policies, acts and practices described in paragraphs 11 through 16 are in or affect commerce within the meaning of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45.

18. The policies, acts and practices and combination or conspiracy described in paragraphs 11 through 16 constitute a group boycott or agreement to boycott, or other unreasonable restraint of trade, within the meaning of Section 1 of the Sherman Act, 15 U.S.C. 1, and unfair methods of competition or unfair acts or practices in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45. The alleged conduct is continuing in nature and will continue in the absence of the relief requested.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; and

The respondent, its attorneys, and counsel for the Commission hav-

ing thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent State Volunteer Mutual Insurance Company, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Tennessee, with its office and principal place of business located at 5200 Maryland Way, Suite 100, in the City of Brentwood, State of Tennessee.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

I

It is ordered, That respondent State Volunteer Mutual Insurance Company, Inc., and its committees, officers, representatives, agents, employees, successors, and assigns, shall cease and desist from, directly or indirectly:

1. failing to apply the same underwriting criteria to all physicians who employ, supervise, or are affiliated in any manner with one or more nurse midwives;

2. adopting any underwriting criterion or taking any other action that has the purpose or effect of discriminating between physicians who supervise or are affiliated in any manner with one or more self-employed or otherwise economically independent nurse midwives and physicians who employ nurse midwives;

3. adopting any underwriting criterion or taking any other action that has the purpose or effect of discriminating between physicians who employ, supervise, or are affiliated in any manner with one or more nurse midwives and physicians who do not employ or supervise or are not affiliated in any manner with nurse midwives, without a reasonable underwriting basis at the time the action is taken; and

4. for a period of ten (10) years after this Order becomes final, if respondent determines not to insure a physician who employs, supervises, or is affiliated in any manner with one or more nurse midwives, failing to:

a. provide to the physician clear written notice of the reasons for the determination, specifying the underwriting criteria not met by the physician and explaining in what manner the criteria are not met;

b. provide to the physician a reasonable opportunity to respond;

c. provide to the physician a written statement of the reasons and bases for the final decision; and

d. keep written records of the reasons provided to the physician, the physician's response thereto, if any, and the reasons and bases for the final decision.

II

It is further ordered, That respondent State Volunteer Mutual Insurance Company, Inc. shall:

1. incorporate the requirements of this Order into its Underwriting Manual and make such other changes in its Underwriting Manual as are necessary to make it consistent with the provisions of this Order;

2. within thirty (30) days after this Order becomes final make its best efforts to have an announcement in the form shown in Appendix A published in the *Journal of the Tennessee Medical Association*; and

3. disseminate the announcement promptly by mail to its members and to anyone else upon request.

III

It is further ordered, That respondent State Volunteer Mutual Insurance Company, Inc. shall:

1. within sixty (60) days after this Order becomes final submit a written report to the Federal Trade Commission setting forth in detail the manner and form in which the respondent has complied with this Order;

2. for a period of five (5) years after this Order becomes final main-

tain in a separate file and make available to the Federal Trade Commission staff for inspection and copying, upon reasonable notice, the records required to be kept by Part I of this Order and all documents that discuss, refer or relate to the decisions reflected in those records; and

3. notify the Federal Trade Commission at least thirty (30) days prior to any proposed change in the respondent, such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of this Order.

APPENDIX A

Announcement

Pursuant to the provisions of a Federal Trade Commission consent order, State Volunteer Mutual Insurance Company makes the following announcement:

State Volunteer Mutual Insurance Company will insure any otherwise insurable physician at non-discriminatory rates regardless of whether he or she has a contractual or other particular financial arrangement with nurse-midwives. It will evaluate each physician's insurability on an individual basis based on sound, non-discriminatory underwriting criteria. SVMIC will apply the same underwriting criteria to all physicians who are affiliated with nurse-midwives, regardless of the particular form of the arrangement between the physician and the nurse-midwives.

If SVMIC determines not to insure a physician who is affiliated with nurse-midwives, it will notify the physician in writing of the reasons for the determination. The notice will specify the underwriting criteria not met by the physician and explain in what manner the criteria were not met. It will advise that upon written request, SVMIC will provide a hearing at which the physician will have an opportunity to respond to the preliminary determination. SVMIC will also notify the physician in writing of its final determination and, if a decision not to insure the physician has been made, the specific reasons for the determination.

IN THE MATTER OF

FLAGG INDUSTRIES, INC., ET AL.

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE
FEDERAL TRADE COMMISSION ACT

Docket C-2903. Consent Order, Sept. 27, 1977—Modifying Order, Sept. 29, 1983

This order modifies the Commission's order issued on Sept. 27, 1977 (90 F.T.C. 226), by eliminating Flagg Industries, Inc. as a respondent in this proceeding at such time as it contributes \$3,500,000 to the capital of Queen Creek Land and Cattle Corp., who would then be responsible for compliance with the terms of the 1977 order.

ORDER REOPENING THE PROCEEDING AND
MODIFYING CEASE AND DESIST ORDER

On June 3, 1983, Flagg Industries, Inc. and Queen Creek Land and Cattle Corporation, respondents in the above captioned matter, filed a petition pursuant to Rule 2.51 of the Commission's Rules of Practice to reopen the proceeding and modify the Consent Order that was issued on September 27, 1977. By letter, dated August 25, 1983, petitioners agreed to modify their original proposal.

The petition asked that the Commission reopen the proceeding in this matter and modify the Consent Order that was issued in 1977 so that Flagg Industries, Inc. (Flagg) would no longer be a respondent under that Order. The purpose of this change would be to permit a sale of those portions of the business of Flagg that are not related to the land sales operation of its subsidiary Queen Creek Land and Cattle Corporation (Queen Creek). In return for releasing Flagg from further obligations under the 1977 Order, Flagg would make a contribution of \$3,500,000 to the capital of Queen Creek and certain obligations would be placed on Queen Creek to assure compliance with the essential terms of the 1977 Order. The petition was on the public record for thirty (30) days and no comments were received.

After reviewing the petition, the Commission has concluded that the public interest warrants reopening and modifying the Order in the manner requested by the petitioners.

The modification shall take effect at such time as Flagg makes its contribution of \$3,500,000 to the capital of Queen Creek. The Commission's approval is expressly conditioned on the petitioners' representations that the sum received by Queen Creek will be invested promptly in government securities, qualified corporate securities, certificates of deposit, and savings and other bank accounts, so as to

assure Queen Creek's ability to comply with the terms of this modified Order.

In view of the contribution that Flagg will make to the capital of Queen Creek, and the manner in which Queen Creek will invest that capital, there is no longer any need to retain Flagg as a respondent under the Order. Accordingly,

It is ordered, That:

At such time as Flagg Industries, Inc., contributes \$3,500,000 to the capital of Queen Creek Land and Cattle Corporation pursuant to an agreement between the companies conforming to the terms of Exhibit B-2 of the petition presented to the Commission, and so long as the contribution is made on or before December 31, 1983,

(1) Flagg Industries, Inc., shall be deemed to have fulfilled the obligations imposed by the Commission's Order of September 27, 1977;

(2) the Order of September 27, 1977, shall be deemed to be modified to eliminate Flagg Industries, Inc., as a respondent in this proceeding; and

(3) as modified, the Order shall read as follows:

ORDER

I

It is ordered, That respondent Queen Creek Land and Cattle Corporation, a corporation, its successors and assigns, and respondent's officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, or sale of land or other real property in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Misrepresenting, directly or by implication, the financial strength, size, and diversity or extent of assets of respondent.

2. Representing, either orally or in writing, directly or by implication:

a. That the vacant lots which respondent is offering for sale constitute a good or excellent investment, that significant monetary gain can be achieved, or that there is little or no financial risk involved in the purchase of respondent's lots.

b. That the resale of a vacant lot purchased from respondent is not difficult.

c. That the value of land at respondent's subdivisions is rising or will rise in the future.

d. That the prices of respondent's lots periodically rise or that prices are increasing, have increased, or will increase, without clearly and conspicuously disclosing at the same time, and by the same medium by which the price increases are communicated, that the price increases do not in any way relate to the value of land, and that the value of land to purchasers does not appreciate proportionately with the price rises.

e. That the purchase of a lot in one of respondent's subdivisions is a way to achieve financial security, to deal with inflation, or to become wealthy.

f. That the value of, or demand for, any land, including lots being offered for sale or previously sold by respondent, has increased, or will or may increase, or that purchasers have made, or will or may in the future make, a profit by reason of having purchased respondent's land.

g. That the growth in land values or potential growth in land values at respondent's subdivisions corresponds to or will correspond to the growth in land values of any other locality, or in any way comparing land values or potential growth in land values at respondent's subdivisions to land values or potential growth in land values in any other locality. The word "locality" includes, but is not limited to, cities, towns, counties, townships, boroughs, states and regions.

h. That land in respondent's subdivisions will soon be unavailable or otherwise scarce, or that land in any particular subdivision of respondent will soon be unavailable.

i. That prospective purchasers must purchase a lot immediately to ensure that a particular location will be available.

j. That respondent's subdivisions offer the comforts of suburban living, or that respondent's subdivisions are other than isolated, sparsely populated areas.

k. That jobs for purchasers who decide to move to any of respondent's subdivisions will be obtainable, without specifying exactly which jobs are currently available for people with the prospective purchasers' qualifications and salary requirements.

l. That new industry is moving to any of respondent's subdivisions, unless the industry is actually moving onto the subdivision itself, and unless respondent describes exactly what industry or industries is or are moving to the subdivision or subdivisions, when such moves are to take place, and the number and types of jobs which will be made available.

m. That new industry is moving near respondent's subdivisions, unless the industry is actually moving and unless respondent de-

scribes exactly which subdivision or subdivisions, the mileage from the subdivision or subdivisions, to the site of the industry or industries, when such moves are to take place, and the number and types of jobs which will be made available.

n. That any of respondent's subdivisions will prosper in any way by virtue of its location.

o. That persons being solicited to purchase respondent's property are not entering into a legally binding obligation, merely making a refundable deposit, reserving the property, not making a final decision regarding purchase of property, or in any manner whatsoever obscuring the legal or practical significance of signing a land sale contract, promissory note or any other instrument.

Provided, however, That respondent may make those representations in the sale of land for which there is a documented reasonable basis to believe that such representations are true. Said documentation shall be made available to Commission staff upon request to review during reasonable business hours.

3. Making any statements or representations which in any manner refer to or concern investments in stocks, annuities or any other form of investment.

4. In any way discouraging prospective purchasers from obtaining the assistance of counsel or other professionals in order to understand the provisions of respondent's land sales contracts, promissory notes, or other documents or make other determinations as to the advisability of purchasing respondent's land.

5. Using any motion pictures, still pictures, or other depictions in any type of sales presentation or promotional material unless such motion pictures, still pictures, or depictions are in fact genuine and accurate representations of the material or location presented therein.

6. From the date this order becomes final, including in any contract for the sale of land, or in any other document shown or provided to purchasers or prospective purchasers of land, whether or not signed by such purchasers or prospective purchasers, language to the effect that verbal representations have not been made in connection with the sale, or that no express or implied representations have been made in connection with the sale or offering for sale of land.

7. From the date this order becomes final, including in any contract for sale of the land, or in any document shown or provided to purchasers or prospective purchasers of land, whether or not signed by such purchasers or prospective purchasers, language to the effect that upon failure of the purchaser to pay an installment due under the contract or otherwise to perform any obligation under the contract,

the seller shall be entitled to retain sums previously paid thereunder by the purchaser in excess of the seller's actual damages.

8. Using site visits afforded purchasers in connection with a right of cancellation to vitiate in any way that right or attempt to sell additional land.

9. Misrepresenting or obscuring the right of a purchaser under any provision of respondent's contract or of this order, or under any applicable statute or regulation, to cancel a transaction or receive a refund.

10. Misrepresenting that financing for the construction of dwellings on subdivision lots is available or that respondent offers design or construction services.

11. Misrepresenting orally or in writing the present or future extent of development in any of respondent's subdivisions.

12. a. Representing that respondent will provide, or that respondent's subdivisions will have available, any facility or improvement, other than the utilities treated separately in paragraph 2 of Section III of this order, unless respondent's contracts or promissory notes at the time of the representation contain (i) a legal obligation on the part of respondent to provide or make available said facilities and improvements at a date certain, not later than 10 years from the date of purchase, set out clearly and conspicuously in the document, and (ii) a statement as to the cost to the purchaser, if any, for such facilities or improvements.

b. Failing to express the aforesaid contractual obligations set out in subparagraph (a) above in the contract or promissory note with the purchaser in the following manner:

(i) A complete description of each improvement or facility to be provided or made available;

(ii) A provision that in the event any of the improvements or facilities specified in the instrument are not completed within six months of the time provided in the contract, respondent will immediately, upon the expiration of said six-month period, provide the purchaser by certified mail, return receipt requested, with notice of such unavailability of or failure to complete the aforesaid improvements or facilities, and of the purchaser's right to exercise within 30 days of receipt of said notice his option to exchange his lot or to cancel and receive a full refund as set out in subparagraph (iii) below;

(iii) An option to the purchaser stated substantially as follows:

In the event that any of the improvements or facilities specified by the seller in this instrument are not available to the lot which is the subject of this instrument, or are not completed within six months of the time provided in this instrument, the purchaser may elect, at his option, to (1) receive, at no additional expense to the purchaser, an

exchange acceptable to the purchaser of other property of at least equal price, equivalent size, and with those improvements contracted for, or (2) cancel this instrument and receive from the seller a full refund of all monies paid hereunder plus the legal rate of interest, compounded annually. To exercise this option, the purchaser must give notice to the seller by registered or certified mail within 30 days after receipt of notice from the seller of such unavailability of or failure to complete the aforesaid improvements or facilities.

(iv) Where Acts of God delay the construction of improvements, a reasonable extension of the six-month time period in the instrument does not violate this order and the purchaser's option does not operate until said reasonable time has elapsed. *Provided, however,* respondent shall notify purchaser of said Act of God in accordance with the above.

Subsections (a) and (b) above shall apply to all contracts, promissory notes, or other binding documents executed after the date this order becomes final.

c. Failing to make the exchange or refund requested by a purchaser under the terms of this paragraph or the order within seventy-five (75) days of receipt of notification from the purchaser.

d. Soliciting or obtaining the purchaser's assent to a waiver or limitation or otherwise imposing any condition upon the right of a purchaser to an exchange or a refund as set out in this paragraph.

II

It is further ordered, That respondent, its successors and assigns, and respondent's officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, or sale of land or other real property in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, shall forthwith:

1. Include, clearly and conspicuously, in any written or oral invitation or other communication concerning any event or activity, dinner parties or other gatherings, awards of free or low cost gifts, sightseeing tours, or any other goods or services, which invitation or other communication is in any manner related to the sale of land, the following statement: "The purpose of [the event or activity] is to persuade you to sign a contract for the purchase of undeveloped land in [name of state in which land is located] at a cost of approximately [average contract price in the subdivision during previous year rounded off to nearest \$500 or, in the case of a new subdivision, average offering price rounded off to nearest \$500]."

If said invitation or communication is in writing, such disclosure

shall be in writing and shall be made clearly and conspicuously in the invitation or communication; if the invitation or communication is oral, such disclosure shall be made orally during the telephone invitation or communication, and in writing by mail to be received by the prospective purchaser at least three days prior to the event or activity; *provided, however*, that in the case of consumers already within the state within which the subdivision is located, such disclosure may be made one day prior to a tour, or site visit, so long as (a) all written materials given to such consumers make such a disclosure in print as large as the largest print in such materials, and (b) all agents of respondent who promote the tour and all employees of respondent who in any way attempt to influence consumers' decisions orally inform consumers of the purpose of the tour or site visit.

2. a. Include, clearly and conspicuously, in all sales presentations, promotion materials, and advertising, other than TV or radio advertisements, in the same size type as that which is predominantly used in such material, the following statement:

YOU SHOULD CONSIDER THE PURCHASE OF OUR LAND TO BE RISKY. THE FUTURE OF THIS LAND IS UNCERTAIN—DO NOT COUNT ON AN INCREASE IN ITS VALUE. IT HAS NOT GENERALLY BEEN POSSIBLE FOR PURCHASERS OF LAND FROM [SELLING RESPONDENT] TO RESELL THE LAND AT A PROFIT. PURCHASERS GENERALLY HAVE BEEN UNABLE TO RESELL THE LAND AT ALL. IT IS SUGGESTED THAT YOU DISCUSS ANY POSSIBLE PURCHASE WITH A LAWYER, BANKER OR OTHER QUALIFIED PROFESSIONAL.

b. Include, clearly and conspicuously, in all TV and radio advertisements, the following statement:

YOU SHOULD CONSIDER THE PURCHASE OF ANY OF OUR LAND RISKY.

3. Set forth on the first page of any contract for the sale of land in 24-point type, "CONTRACT FOR THE PURCHASE OF LAND." with no other writing except that required by the following paragraph and paragraph 2 of Section III of this order.

4. Print the following in 12-point boldface type as the only writing in addition to that required by paragraph 3 of Section II and paragraph 2 of Section III of this order, on the first page of all contracts for the sale of land:

THIS IS A CONTRACT BY WHICH YOU AGREE TO PURCHASE LAND. YOU SHOULD NOT CONSIDER THIS PURCHASE AS AN INVESTMENT. THE FUTURE VALUE OF THIS LAND IS UNCERTAIN—DO NOT COUNT ON AN INCREASE IN ITS VALUE. IN FACT, THERE IS GENERALLY NO RESALE MARKET FOR THIS

Modifying Order

102 F.T.C.

LAND; PREVIOUS PURCHASERS HAVE, FOR THE MOST PART, FOUND IT IMPOSSIBLE TO SELL THE LAND AT ALL, MUCH LESS AT A PROFIT.

IT IS THEREFORE SUGGESTED THAT YOU CONSIDER YOUR NEEDS CAREFULLY, AND HAVE BOTH THIS CONTRACT AND THE PROPERTY REPORT REVIEWED BY A LAWYER, BANKER OR OTHER QUALIFIED PROFESSIONAL.

WHILE YOU HAVE 10 DAYS IN WHICH TO RECONSIDER YOUR DECISION AND CANCEL THIS CONTRACT WITH FULL REFUND, WE RECOMMEND THAT YOU NOT SIGN UNTIL EXERCISING THE CARE SUGGESTED IN THE PREVIOUS PARAGRAPH.

Signature

Date

No contract or other legally binding instrument for the sale of respondent's land shall be valid unless this statement is signed and dated by the purchaser after he has had a reasonable amount of time to read the whole page.

5. a. Furnish each purchaser, at the time the purchaser signs a contract or other document for the sale of land, with a copy of the contract or other document and two copies of the following form. The title of the form shall be "NOTICE OF RIGHT OF CANCELLATION" printed in 12-point type and the form shall contain in 10-point bold-face type the following information and statements.

(_____)

Date of Transaction

(_____)

Contract Number

NOTICE OF CANCELLATION

YOU MAY CANCEL THIS TRANSACTION, WITHOUT ANY PENALTY OR OBLIGATION, AT ANY TIME PRIOR TO MIDNIGHT OF THE TENTH BUSINESS DAY AFTER THE DATE SHOWN ON THE CONTRACT.

IF YOU CANCEL, ANY PAYMENT MADE BY YOU UNDER THE CONTRACT AND ANY NEGOTIABLE INSTRUMENT EXECUTED BY YOU WILL BE RETURNED WITHIN TEN BUSINESS DAYS FOLLOWING RECEIPT BY THE SELLER OF THE CANCELLATION NOTICE.

TO CANCEL THIS TRANSACTION, MAIL OR DELIVER A SIGNED COPY OF THIS CANCELLATION NOTICE OR ANY OTHER WRITTEN NOTICE, OR SEND A TELEGRAM TO [*name of selling respondent*] AT [*address of respondent's place of business*] NOT LATER THAN MIDNIGHT OF

[Date]

I (WE) HEREBY CANCEL THIS TRANSACTION. (EACH PURCHASER MUST SIGN THIS NOTICE.)

 [Date] [Signature of Purchaser]

b. Complete both copies before furnishing this "Notice of Right of Cancellation" to the purchaser, by entering the name of the selling respondent, the address of the respondent's place of business, the date of the transaction, the contract number, and the date, not earlier than the tenth business day following the date of transaction, by which the purchaser may give notice of cancellation. The term "selling respondent" as required by this order shall mean Queen Creek Land and Cattle Corporation, its successors or assigns or any other dba used in selling land.

c. Where a timely notice of cancellation is received and said notice is not properly signed and respondent does not intend to honor the notice, respondent shall immediately notify the purchaser by certified mail, return receipt requested, enclosing the notice, informing the purchaser of his error, and stating clearly and conspicuously that a notice signed by the purchaser must be mailed to respondent by midnight of the seventh business day following the purchaser's receipt of the mailing if the purchaser is to obtain a refund.

d. Where the signature of a prospective purchaser is solicited during the course of a sales presentation, inform each person orally, at the time he signs the contract, or other legally binding instrument, of his right to cancel as stated above.

6. Include, clearly and conspicuously, in each contract or other document for the sale of land the following statement in 12-point boldface type.

PURCHASER HAS THE RIGHT TO CANCEL THE CONTRACT WITHOUT ANY PENALTY OR OBLIGATION AT ANY TIME PRIOR TO MIDNIGHT OF THE TENTH BUSINESS DAY AFTER THE DATE OF THIS CONTRACT.

SHOULD PURCHASER CHOOSE TO CANCEL PURSUANT TO THIS PROVISION, ANY PAYMENTS MADE BY PURCHASER UNDER THIS CONTRACT AND ANY NEGOTIABLE INSTRUMENT EXECUTED BY PURCHASER WILL BE RETURNED WITHIN TEN BUSINESS DAYS FOLLOWING RECEIPT BY THE SELLER OF THE CANCELLATION NOTICE.

TO CANCEL THE TRANSACTION, PURCHASER MUST MAIL OR DELIVER A SIGNED COPY OF THE NOTICE OF RIGHT OF CANCELLATION FURNISHED BY SELLER, A TELEGRAM, OR ANY OTHER WRITTEN NOTICE TO [selling re-

spondent] AT [*selling respondent's place of business*] NOT LATER THAN MIDNIGHT OF THE TENTH BUSINESS DAY AFTER THE DATE OF THIS CONTRACT.

7. Honor any signed and timely notice of cancellation by a purchaser, and within 10 business days after the receipt of such notice (a) refund all payments made under the instrument, and (b) cancel and return any negotiable instrument executed by the purchaser in connection with the contract.

8. Send to prospective purchasers (1) copies of all reports required by either federal or state law and (2) copies of all materials required by this order, along with any invitation or other communication inviting the prospective purchaser to attend a land sales dinner.

9. If the land is to be sold other than at a land sales dinner, furnish (1) copies of all reports required by federal or state law to be furnished to a purchaser of respondent's land at or before the signing of a legally binding instrument and (2) copies of all materials required to be furnished by this order, with the first written materials or during the first contact which the prospective purchaser has with respondent or any of its agents or employees.

10. Inform orally and in writing all prospective purchasers of vacant land that home financing may not be available, and that a bank located near the subdivision should be consulted prior to the purchase of land if the purchaser intends to build or purchase a house on that land.

11. Whenever respondent offers a refund contingent upon the purchaser taking a company-guided inspection tour or making a registered inspection of the property in which the purchaser's lot is located:

a. Provide the purchaser three business days after taking tour or making said inspection within which to request a refund;

b. Include in any contract, or other legally binding instrument, in immediate proximity to the provision setting forth the availability of a refund upon completion of a company-guided inspection tour or registered inspection of the property, the following statement:

YOU, THE PURCHASER(S), HAVE AN ADDITIONAL RIGHT TO CANCEL THE TRANSACTION IF YOU TAKE THE COMPANY-GUIDED TOUR OR MAKE A REGISTERED INSPECTION OF THE PROPERTY AND NOTIFY THE COMPANY OF YOUR INTENTION TO EXERCISE THE RIGHT TO CANCEL PRIOR TO MIDNIGHT OF THE THIRD BUSINESS DAY AFTER THE DATE OF SUCH TOUR OR INSPECTION.

c. Orally inform the purchaser at the time the instrument is signed

and at the time the tour is taken or the inspection is registered of this cancellation right.

d. Furnish each purchaser at the completion of the tour or inspection a completed form in duplicate, captioned "NOTICE OF CANCELLATION," which shall contain in boldface type of a minimum size of 10 points the following statements:

NOTICE OF CANCELLATION

[*Date of company-guided
inspection tour of property*]
[*Contract number*]

YOU MAY CANCEL YOUR CONTRACT OR PROMISSORY NOTE WITHOUT ANY PENALTY OR OBLIGATION, AT ANY TIME PRIOR TO MIDNIGHT OF THE THIRD BUSINESS DAY AFTER THE ABOVE DATE.

IF YOU CANCEL, ANY PAYMENTS MADE BY YOU UNDER THE CONTRACT WILL BE RETURNED WITHIN 10 BUSINESS DAYS FOLLOWING RECEIPT BY THE SELLER OF YOUR CANCELLATION NOTICE:

TO CANCEL YOUR CONTRACT OR PROMISSORY NOTE, MAIL OR DELIVER A SIGNED COPY OF THIS CANCELLATION NOTICE OR ANY OTHER WRITTEN NOTICE, OR SEND A TELEGRAM TO: [*Name of selling respondent*], [*address of selling respondent's place of business*], NOT LATER THAN MIDNIGHT OF _____.

I (WE) HEREBY CANCEL THE CONTRACT. (EACH PURCHASER MUST SIGN THIS NOTICE.)

(Date)

(Purchaser's signature)

(Purchaser's signature)

e. Before furnishing the purchaser copies of the "Notice of Cancellation" set forth in subparagraph (d) above, complete both copies by entering the name of the selling respondent and the address of its place of business, the date of the company-guided inspection tour or the registered inspection of the property, and the date, not earlier than the third business day following the date of the last contract in connection with said tour or inspection by which the purchaser may give notice of cancellation.

f. If respondent conditions the right of cancellation referred to above upon a tour or registered inspection, respondent shall insure

that a representative is on site during reasonable daylight hours to register inspections.

g. Where a timely notice of cancellation is received from a purchaser purportedly in accordance with the requirements of this paragraph of the order, but where said notice is not properly signed, and respondent does not intend to honor the notice, respondent shall immediately notify the purchaser by certified mail, return receipt requested, enclosing the notice, and a new cancellation form; said notice shall inform the purchaser of his error and state clearly and conspicuously that a notice signed by the purchaser must be mailed by midnight of the seventh day following the purchaser's receipt of the mailing if the purchaser is to obtain a refund.

III

It is further ordered, That respondent, its successors and assigns, and respondent's officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, or sale of land or other real property in or affecting commerce, as defined in the Federal Trade Commission Act, do forthwith cease and desist from advertising for sale, offering for sale, contracting to sell, or selling any interest in:

1. Any land represented in any manner as being usable now or in the future as a homesite, unless either:

a. At the time of sale all of the conditions set forth below are met, or

b. The selling respondent's contract with the purchaser contains a legal obligation on the part of respondent to meet the conditions set forth below within five years of the date of the sale.

The conditions to be met by respondent are as follows:

(1) The purchaser must have available an adequate sewage system by means of:

(a) A septic tank, or

(b) A central sewage system, the hook-up to which will cost the purchaser only a reasonable and customary branch-line extension fee;

provided, that respondent must include in the contract whether a septic tank will be necessary or whether a central sewage system will be available, and the approximate amount which a septic tank would cost to install or a central sewage system would cost to hook up to,

1239

Modifying Order

including an estimate of the amount said fee will increase over the next five years.

(2) The purchaser must be able to obtain potable water by hooking up to a central water system solely by payment of a reasonable and customary branch-line extension fee; *provided*, that respondent must include in the contract the approximate amount of said extension fee, including an estimate of the amount said fee will increase over the next five years.

(3) The purchaser must be able to obtain standard electricity and telephone service from a local utility authorized to do business in the state in which the land is located, which service will cost the lotholder only nominal hookup and installation fees and customary and usual rates; *provided*, that respondent must include in the contract the approximate amount of said hook-up and installation fee, including an estimate of the amount said fee will increase over the next five years.

If respondent fails for any reason to meet the conditions required by this paragraph, it shall refund to each purchaser to whom the obligations are not fulfilled all monies paid by such purchaser to respondent under the terms of the land sales contract, plus the legal rate of interest, compounded annually.

2. Any lot not covered in paragraph 1 above of this order provision, unless there shall appear as described in paragraph II 4, as additional paragraphs required by paragraph II 4, such of the following statements as are applicable:

a. For contracts for the sale of lots as to which neither respondent nor any other party is legally obligated to make a central sewer system available, add the following, including the third sentence only where applicable:

A CENTRAL SEWER SYSTEM WILL NOT BE AVAILABLE WHEN YOU HAVE COMPLETED YOUR CONTRACT PAYMENTS. INSTALLATION OF A SEPTIC TANK WOULD BE AT YOUR EXPENSE. HOWEVER, THE USE OF A SEPTIC TANK ON YOUR LOT IS CONTINGENT ON APPROVAL BY GOVERNMENTAL AUTHORITIES.

b. (i) For contracts for the sale of lots to which neither respondent nor any other party is legally obligated to make available a central potable water system, and where water is not available on an aid-in-construction basis, add the following, including the third sentence only where applicable:

A CENTRAL SYSTEM FOR POTABLE WATER WILL NOT BE AVAILABLE WHEN

YOU HAVE COMPLETED YOUR CONTRACT PAYMENTS. INSTALLATION OF A WELL WOULD BE OF CONSIDERABLE EXPENSE TO YOU. MOREOVER, IT MAY NOT BE POSSIBLE TO OBTAIN POTABLE WATER FROM A WELL IN SOME AREAS.

(ii) For contracts for the sale of lots to which neither respondent nor any other party is legally obligated to make a central water system available, and where water is available on an aid-in-construction basis, add the following, including the fourth sentence only where applicable:

A CENTRAL WATER SYSTEM WILL NOT BE AVAILABLE WHEN YOU HAVE COMPLETED YOUR CONTRACT PAYMENTS. IT MAY BE IMPOSSIBLE OR IMPRACTICAL TO OBTAIN WATER FROM A CENTRAL SYSTEM DUE TO THE HIGH COST OF MAKING THIS SERVICE AVAILABLE TO THIS AREA. INSTALLATION OF A WELL WOULD BE OF CONSIDERABLE EXPENSE TO YOU. MOREOVER, IT MAY NOT BE POSSIBLE TO OBTAIN POTABLE WATER FROM A WELL IN SOME AREAS.

(iii) For contracts for the sale of lots to which neither respondent nor any other party is legally obligated to make a central system for potable water available, where water is available on an aid-in-construction basis, and there are legal restrictions on drilling for water, add the following, including the third sentence only where applicable:

A CENTRAL WATER SYSTEM WILL NOT BE AVAILABLE WHEN YOU HAVE COMPLETED YOUR CONTRACT PAYMENTS. IT MAY BE IMPOSSIBLE OR IMPRACTICAL TO OBTAIN WATER DUE TO THE HIGH COST OF MAKING THIS SERVICE AVAILABLE TO THIS AREA. INSTALLATION OF A WELL IS PROHIBITED IN SOME AREAS.

c. For contracts for the sale of lots to which electricity and telephone service will only be available to the purchaser on an aid-in-construction basis, add the following:

IT MAY BE IMPOSSIBLE OR IMPRACTICAL TO OBTAIN ELECTRICITY AND TELEPHONE SERVICE DUE TO THE HIGH COST OF MAKING THESE SERVICES AVAILABLE TO THIS AREA.

d. For contracts for the sale of lots to which respondent or any other party is legally obligated only to provide unpaved roads with no maintenance obligations, add the following in lieu of all of the above:

THIS COMPLETELY UNDEVELOPED LAND IS BEING SOLD "AS IS." ELECTRICI-

TY, WATER, SEWER AND TELEPHONE SERVICE ARE NOT PLANNED FOR THIS SUBDIVISION AND MAY BE IMPOSSIBLE FOR YOU TO OBTAIN AT A REASONABLE COST. YOUR LOT WILL BE ACCESSIBLE, IF AT ALL, ONLY BY UNPAVED ROADS WHICH WILL NOT BE MAINTAINED. THE USE OF SUCH ROADS MAY BE IMPOSSIBLE WITHOUT MAINTENANCE. YOUR LOT HAS VIRTUALLY NO USE AT PRESENT OR IN THE FORESEEABLE FUTURE.

e. For contracts for the sale of lots to or on which neither respondent nor any other party is legally obligated to provide any improvements, add the following in lieu of all of the above.

THIS COMPLETELY UNDEVELOPED LAND IS BEING SOLD "AS IS." ELECTRICITY, WATER, SEWER, AND TELEPHONE SERVICE ARE NOT PLANNED FOR THIS SUBDIVISION AND MAY BE IMPOSSIBLE FOR YOU TO OBTAIN AT A REASONABLE COST. NO ROADS ARE PLANNED AND YOUR LOT IS PROBABLY INACCESSIBLE BY CONVENTIONAL TRANSPORTATION. YOUR LOT HAS VIRTUALLY NO USE AT PRESENT OR IN THE FORESEEABLE FUTURE.

f. For contracts for the sale of lots in any of respondent's properties in which purchasers are required to join an improvement association which is obligated to spend accumulated funds for improvements to and services for lots such as, but not limited to, central water and sewer systems, telephone and electrical services, road maintenance and paving, add the following:

YOU ARE OBLIGATED BY THIS CONTRACT TO JOIN AND MAKE REGULAR PAYMENTS ESTIMATED TO BE [estimated *annual* cost] TO [name of association]. THE [name of association] IS LEGALLY OBLIGATED TO [name of selling respondent], BUT NOT TO YOU, TO USE SUCH FUNDS TO PROVIDE UTILITIES AND OTHER IMPROVEMENTS TO AND SERVICES FOR YOUR LOT. HOWEVER, YOU MUST MEET CERTAIN ADDITIONAL PAYMENTS, AS SET FORTH IN THE CONTRACT, BEFORE YOU REQUEST THESE UTILITIES, IMPROVEMENTS, AND SERVICES.

g. For purposes of providing additional information to purchasers, respondent may advise purchasers of which governmental approvals have been granted in the past for private wells and septic tanks. This subsection, (g), shall be in addition to disclosures required by Sections 2(a) and (b), and not in lieu thereof.

If respondent fails for any reason to make the disclosures required by this paragraph, it shall refund to each purchaser to whom the disclosures were not made all monies paid by such purchaser under the terms of the land sales contract when requested to do so by such purchaser.

IV

It is further ordered, That respondent, its successors and assigns, and respondent's officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the sale of land in its three subdivisions, shall provide all improvements, amenities, and facilities described in the HUD Property Reports in effect on the date of sale and the additional improvements described below. Said requirements shall include both new construction and repair of existing improvements which are in a state of disrepair or were improperly constructed.

Improvements and amenities to be constructed at the respective subdivisions shall include, but not be limited to, the following:

1. Cordes Lake

a. All subdivision roads, culverts and other drainage structures shall be constructed to minimum Yavapia County specifications, as those specifications required at the time construction began.

b. A low water crossing and an alternative access road for emergency use by residents of Units 5 and 6 to reach the main highway during flood stages of Big Bug Creek. The location of this access road shall be mutually agreed upon by respondent and the property owners' association.

c. All water lines shall be placed underground.

d. Drain, de-weed, and re-fill Crystal Lake. Crystal and Bass Lakes shall be filled and maintained at the highest level attained since their construction. Where modification of the water supply system is required to maintain this level, said modifications shall be accomplished.

e. All improvements and amenities set out in the Property Report, Notice and Disclaimer by Office of Interstate Land Sales Registration, U.S. Department of Housing and Urban Development, OILSR No. 0-0162-02-27(A) dated September 10, 1973, shall be completed using accepted construction standards for Yavapai County.

f. All construction shall be completed at Cordes Lake not later than April 30, 1977. All amenities constructed or still under construction by respondent shall not be conveyed to the property owners' association until these facilities are brought to a reasonable standard agreed to by respondent and the property owners' association. All improvements to be accepted for maintenance by the county shall be completed and accepted not later than April 30, 1977.

g. Title to all lots which have been designated as property to be dedicated for public use shall remain in respondent until such time

as title is accepted by the appropriate Yavapai County or other public entity.

2. Verde Village

a. All roads in the subdivision shall be brought to Yavapai County standards for asphalt paved roads, as those standards existed when the roads were initially constructed.

b. All drainage channels, ditches, culverts and other structures and facilities shall conform to Yavapai County standards and shall be consistent with accepted engineering and construction standards for the topography of the subdivision.

c. All lots on which the owner indicates to respondent that he intends to build shall be rough graded so as to require only normal filling and grading for construction of a residential structure. This requirement terminates when the improvements are accepted by the Yavapai County Engineer.

d. The existing water distribution system shall be checked, modified and upgraded where necessary to assure reasonably uniform line pressure and discharge rates to all occupied units and those units in which lots have been offered for sale. All water lines shall be placed underground.

e. Grade and restore recreation areas, and lots along Verde River. The owners of lots adjacent to the Verde River which have been damaged by respondent's employees or agents and which have not been restored within 60 days after this order becomes final shall be offered a full refund plus the legal rate of interest, or the right of exchange, at the owner's option.

f. Respondent shall contact, within 60 days of acceptance of this order by the Commission, the owner of each occupied lot in the subdivision to determine if said owner had to bear the cost of extending water, telephone, or electrical service to his property line. Where owners had to bear the cost, respondent shall reimburse that owner for those costs in a lump sum within ten days of notification and furnishing of proof by the lot owner.

g. All improvements and amenities set out in the Property Report, Notice and Disclaimer by Office of Interstate Land Sales Registration, U.S. Department of Housing and Urban Development, OILSR NO. 0-1024-02-144(G) Amendment No. 1 dated September 10, 1973, shall be completed and accepted by Yavapai County Engineer not later than June 30, 1979.

h. All construction shall be completed at Verde Village not later than June 30, 1979. All amenities constructed or still under construction by respondent shall not be conveyed to the property owners' association until these facilities are brought to a reasonable standard

agreed to by respondent and the property owners' association. All improvements to be accepted for maintenance by the county shall be completed and accepted not later than June 30, 1979.

i. Title to all lots which have been designated as property to be dedicated for public use shall remain in respondent until such time as title is accepted by the appropriate Yavapia County or other public entity.

3. Valle Vista

a. All subdivision roads shall be constructed to match existing roads in Unit One and shall meet Mojave County specifications for paved roads, as those specifications are interpreted by the Mojave County Engineer.

b. All culverts, drainage channels and ditches shall be constructed to Mojave County Specifications, or other required governmental flood control standards.

c. All lots on which the owner has indicated to respondent his intent to build shall be rough graded so as to require only normal filling and grading for construction of a residential structure. This requirement shall terminate on December 31, 1978.

d. Where future lots are approved for sale by the appropriate State of Arizona agency, respondent shall assure that Truxton Canyon Water Company, Inc., or another state approved water company can provide sufficient potable water to satisfy the expected demand.

e. All subdivision water lines shall be underground and shall supply potable water within standards established by the Arizona Health Department and Water Commission for Total Dissolved Solids (TDS) fluorides and other impurities.

f. Respondent shall complete the 18-hole golf course, tennis court, swimming pool, shuffle board, park and other amenities as set out in the Property Report, Notice and Disclaimer by Office of Interstate Land Sales Registration, U.S. Department of Housing and Urban Development, dated December 17, 1974, not later than December 31, 1978.

g. Respondent shall maintain the roads, culverts and other drainage facilities, lakes, golf course, community center, swimming pool, and any other common facilities until such time as these facilities have been accepted by the County of Mojave or the subdivision property owners' association: *provided, however*, that under no circumstances shall respondent convey to the property owners' association any facility prior to those facilities meeting standards mutually agreed upon by respondent and the property owners' association. All roads, culverts and other drainage facilities, and other improvements

shall be completed and accepted for maintenance by the Mojave County Engineer not later than December 31, 1978.

4. Funds advanced by respondent to the trust fund established under paragraph V of this order shall under no circumstances be used for maintenance of any common facility included in the Property Reports referred to in this paragraph prior to acceptance by the association.

5. Failure to complete construction and secure acceptance by the appropriate county engineer within the time limits set out above at each of the subdivisions constitutes a continuing violation of this order.

V

It is further ordered, That respondent, its agents, representatives and employees shall:

1. Place in three separate trusts, for the benefit of each respective subdivision, Twenty Thousand Dollars (\$20,000) per year for five years, to be divided among the three property owners' associations as follows:

- a. Cordes Lake: Eight Thousand Dollars (\$8,000) per year.
- b. Verde Village: Eight Thousand Dollars (\$8,000) per year.
- c. Valle Vista: Four Thousand Dollars (\$4,000) per year.

Expenditures by the associations shall be limited to physical improvements and maintenance of common facilities for the general benefit of each subdivision as a whole. The trustee of these funds shall be chosen by the respective property owners' association.

2. Within sixty (60) days after this order is final, withdraw from membership in the Cordes Lake and Verde Village property owners' associations. With respect to the Valle Vista property owners' association, respondent, its agents, representatives and employees shall, within sixty (60) days after this order is final, take or cause to be taken, such action as may be necessary, including but not limited to amendments to existing articles and/or by-laws of the association, which will embody the following conditions:

- a. Respondent, its agents, representatives and employees shall not control, directly or indirectly, the determination as to the use of funds placed in trust under this order, other than advising the association as to what uses said funds might be put;
- b. No present, past or future agent, representative or employee of respondent may serve as a director of the association;
- c. Respondent, its agents, representatives and/or employees shall

cause to be elected as directors of the association such owners within the subdivision who are not, nor have ever been, employees, agents, or representatives of respondent, and do not have, nor have had, any relationship with respondent, its agents, representatives and employees which might tend in any way to influence and/or control, directly or indirectly, the actions of such elected director, or the independent judgment of such elected directors in carrying out their fiduciary responsibilities, nor shall respondent, its agents, representatives and employees use the articles, by-laws or general corporation law to influence and/or control, directly or indirectly, the actions of such elected directors; and

d. Respondent, its agents, representatives and employees shall withdraw from membership in the association as soon as is practicable and reasonable under the circumstances, and in no event later than one year after the date on which this order becomes final.

VI

It is further ordered, That respondent, its successors and assigns, for purposes of future litigation arising out of their land sale activities, shall forbear from relying upon or asserting as a defense, the clause in the contract or other binding instrument containing language to the effect that no express or implied representations have been made in connection with the sale or offering for sale of respondent's land, other than those set forth in the contract or other instrument. Further, respondent, its successors and assigns, shall cease and desist from enforcing those provisions in their contracts or other binding instruments which operate to cause the purchaser to forfeit sums paid in installments upon default of any one installment payment. This section shall apply to contracts or other binding instruments presently in force and those to be used in future land sales transactions.

VII

It is further ordered, That respondent, its successors and assigns, agents, representatives and employees shall cease and desist from endorsing, discounting, assigning or in any other manner negotiating contracts, promissory notes, or other evidences of indebtedness by purchasers of lots in their subdivisions in such a manner or to such parties as to jeopardize or cloud the title or render the title unmarketable to the purchaser upon satisfaction of the mortgage.

VIII

It is further ordered, That respondent, its successors and assigns, and agents, representatives and employees shall:

1. Deliver a copy of this decision and order to each of their present or future salesmen and other employees, independent brokers, and all others who sell or promote the sale of lots in respondent's subdivisions.

2. Provide each person so described in the preceding paragraph with a form, returnable to the respondent clearly stating his intention to be bound by and to conform his business practices to the requirements of this order.

3. Inform all such present and future salesmen and other employees, independent brokers, and all others who sell or promote the sale of lots in respondent's subdivisions that respondent shall not use any person, or the services of any person, to sell or promote the sale of real estate unless such person agrees to and does file notice with the respondent that he will be bound by the provisions contained in this order. If any such person does not agree to so file notice with the respondent and be bound by the provisions of the order, the respondent shall not use such person, or the services of such person, to sell or promote the sale of real estate.

4. Institute a program of continuing surveillance adequate to reveal whether the business operations of each of said persons so engaged conform to the requirements of this order.

5. Discontinue dealing with the persons revealed by the aforesaid program of surveillance or by any other means who continue on their own the unfair or deceptive acts or practices prohibited by this order.

It is further ordered, That in the event that respondent transfers all or a substantial part of its business or assets to any other corporation, individual, partnership or other entity, respondent shall require said transferee to file promptly with the Commission a written agreement to be bound by the terms of this order; *provided,* that if respondent wishes to present to the Commission any reasons why said order should not apply in its present form to said transferee, it shall submit to the Commission a written statement setting forth said reasons prior to the consummation of said business transfer. Failure to require that such transferee be bound under this order as set out in this paragraph shall be considered a continuing violation of this order.

It is further ordered, That respondent notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent, such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of

subsidiaries or any other change in the corporations which may affect compliance obligations arising out of this order.

It is further ordered, That the respondent herein shall within sixty (60) days after service upon it of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

IX

It is further ordered, That

1. For the purposes of this section, the following terms shall be defined as stated:

a. *Liquid Assets* means cash, cash equivalents, government securities, other marketable securities, dividends and interest earned, and the land owned by respondent at Lake Forest, Placer County, California, including improvements thereon.

b. *Contingent Utility Liability* means the present value of the cost of installing utilities for property in respondent's subdivisions in Arizona, taking into account both the increased costs of future installations caused by inflation, and the discount rate that should be applied to future costs because of the time value of money.

c. *Qualified Corporate Securities* means corporate bonds which at the time of acquisition are rated not less than AA by Standard & Poor's Corporation, or not less than AA by Moody's Investors Service, Inc., and which provide a yield not less than that obtainable through obligations of the United States of America with comparable maturities.

2. Respondent shall invest the sum of \$3,500,000 in government securities, qualified corporate securities, certificates of deposit, and savings and other bank accounts in such a reasonable and prudent manner so as to satisfy the contingent utility liability.

3. For a period of five (5) years from the date on which this modified Order is issued:

a. Respondent shall pay no cash dividends to its shareholders.

b. Respondent shall not cause or permit the dissipation of any of its assets in any manner that impairs respondent's ability to comply with the terms of this Order; *provided, however,* that deterioration in the ordinary course of operation and normal wear is not a violation of this subsection.

c. Respondent shall not acquire the assets or stock of any company.

d. Respondent shall not purchase any of its outstanding stock.

e. Respondent shall not sell any additional lots at Valle Vista or

1239

Modifying Order

Verde Village and shall not sell any additional lots at retail at Cordes Lake.

4. Respondent shall, for five (5) years from the date on which this modified Order is issued, maintain in liquid assets as a contingent utility liability account an amount equal to \$2,800,000 reduced by the appropriate present value of the cost of utility installations made during the five year period. At any time after five (5) years from the date on which this modified Order is issued, respondent may recompute the contingent utility liability, if such recomputation is done by qualified personnel in accordance with all applicable professional standards.

Any such recomputation may take into account changes or new information regarding any factor used to calculate the present value of the future liabilities, including but not limited to the rate of installation of utilities, estimates of costs, inflation rates, or the appropriate discount rate. Any change in the rate of installation of utilities used in such recomputation shall be based upon actual historical experience over a period of not less than four (4) years immediately preceding the year of recomputation, or upon other stated factors that indicate that the previous assumptions regarding installation rates should be adjusted.

5. Before reducing the liquid assets in the contingent utility liability account, respondent shall submit such recomputation to the Commission for approval. The Commission shall treat such recomputation as if it were a request for modification pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b) and Rule 2.51 of the Commission's Rules of Practice.

6. Notwithstanding the foregoing, respondent is under no obligation to make or utilize any recomputation of its contingent utility liability, *provided*, that in the absence of any recomputation the last approved recomputation or, if none, the computations contained in respondent's submission to the Commission in conjunction with these modification proceedings, shall remain applicable.

7. Respondent shall report annually to the Commission on the anniversary of this modification, for a period of seven (7) years, on its compliance with Paragraph IX of this modified Order.

Complaint

102 F.T.C.

IN THE MATTER OF

AMANA REFRIGERATION, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF
THE FEDERAL TRADE COMMISSION ACT*Docket 9162. Complaint, Oct. 7, 1982—Decision, Sept. 30, 1983*

This consent order requires an Amana, Iowa manufacturer and seller of household appliances, among other things, to cease representing that only Amana microwave ovens passed independent laboratory testing conducted in 1980, and that Amana microwave ovens were rated "best quality" in a 1980 consumer survey. The order prohibits misrepresentations concerning the purpose, content, or conclusion of any test or survey, and requires the company to maintain accurate records which substantiate and/or contradict any claim made for products covered by this order. Further, respondent must have a reasonable basis for all future quality, safety, or comparative performance representations made for microwave ovens.

Appearances

For the Commission: *Andrew Sacks* and *Joel Winston*.

For the respondent: *Steven R. Gustafson*, in-house counsel, Amana, Iowa and *Arthur L. Herold*, *Webster, Chamberlain & Bean*, Washington, D.C.

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 Amana Refrigeration, Inc., a corporation, hereinafter 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 in that respect as follows:

PARAGRAPH 1. Respondent Amana Refrigeration, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Iowa with its office and principal place of business located in Amana, Iowa.

PAR. 2. Respondent is now and at all times relevant to this complaint has been engaged in the manufacture and sale of microwave ovens, combination microwave and convection ovens, (hereafter "microwave ovens") and other products for personal or household use by members of the general public (hereafter "consumer products").

PAR. 3. Respondent has caused to be prepared and placed for publication and has caused the dissemination of advertising and promotional material, including, but not limited to, the advertising referred to herein, to promote the sale of Amana microwave ovens.

PAR. 4. Amana Refrigeration, Inc. operates in various States and in the District of Columbia. Respondent's manufacture, sale, and distribution of microwave ovens mentioned herein constitutes maintenance of a substantial course of trade in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 5. Respondent at all times mentioned herein has been and now is in competition with individuals, firms and corporations engaged in the sale of microwave ovens and consumer products.

PAR. 6. In the course and conduct of its business, and for the purpose of promoting the sale and distribution of Amana microwave ovens, and other consumer products, respondent has disseminated and caused the dissemination of advertising in national magazines and newspapers distributed by mail and across state lines, and in radio broadcasts transmitted by radio stations located in various States of the United States and in the District of Columbia, having sufficient power to carry such broadcasts across state lines.

PAR. 7. Typical statements and representations in said advertisements, and promotional materials, disseminated as previously described, but not necessarily inclusive thereof, are found in advertisements attached hereto as Exhibits A, B, C, and D.*

PAR. 8. Through the use of the statements and representations referred to in Paragraph Seven, and other representations contained in advertisements not specifically set forth herein, respondent has represented, and now represents directly or by implication, the following claims:

1. An independent laboratory tested Amana microwave ovens and ovens of five other manufacturers, in four of the tests required for exemption from displaying a warning label. Only the Amana ovens passed all four tests.

2. A survey of microwave oven owners found that owners of nine other brands of microwave ovens rated Amana ovens "best quality."

PAR. 9. In truth and in fact the direct or implied representations found in Paragraph Eight are false, for the following reasons:

1. The independent laboratory tested ovens of six manufacturers in addition to Amana. Ovens of one other manufacturer—Panasonic—passed all of the tests.

2. The survey relied upon did not find that owners of nine other brands of microwave ovens rates Amana "best quality" more often

* See pages 1277-1280. Identical exhibits were used in *Footo, Cone & Belding Advertising, Inc.*, Dkt. C-3116.

than they rated their own brand "best quality". As many or more owners of all other brands for which the data were tabulated rated their own brand "best quality" as rated Amana microwave ovens "best quality". The vast majority of owners of other brands did not rate Amana "best quality" in the survey. In addition, the data Amana relied upon reported results for owners of only four other brands of microwave ovens.

PAR. 10. At the time respondent made the representations alleged in Paragraph Eight, respondent did not possess and rely upon a reasonable basis for making such representations. Therefore, respondent's making and dissemination of said representations, as alleged, constituted and now constitute unfair and deceptive acts or practices.

PAR. 11. Through the use of the advertisements referred to in Paragraph Seven, and other advertisements not specifically set forth herein, respondent has represented, directly or by implication, that it possessed and relied upon a reasonable basis for the representations set forth in Paragraph Eight at the time of the initial dissemination of the representations and each subsequent dissemination. In truth and in fact, respondent did not possess and rely upon a reasonable basis for making such representations. Therefore, respondent's making and dissemination of said representations, as alleged, constituted and now constitute unfair and deceptive acts or practices.

PAR. 12. As the representations referred to above are false, such representations are deceptive, misleading, and unfair.

PAR. 13. The use by respondent of the aforesaid false, unfair, or deceptive statements, representations, acts, and practices, and the placement in the hands of others of the means and instrumentalities by and through which others may have used the aforesaid statements, representations, acts, and practices, have had the capacity and tendency both to mislead consumers into the erroneous and mistaken belief that said statements and representations are true and complete and to induce such persons to purchase Amana microwave ovens by reason of said erroneous and mistaken belief.

PAR. 14. The aforesaid acts or practices of respondent, herein alleged as aforesaid, were and are all to the prejudice and injury of the public and of respondent's competitors, and constituted and now constitute unfair or deceptive acts and practices affecting commerce and unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act, as amended.

DECISION AND ORDER

The Commission having heretofore issued its complaint charging the respondent named in the caption hereof with violation of Section 5 of the Federal Trade Commission Act, as amended, and the respond-

ent having been served with a copy of that complaint, together with a notice of contemplated relief; and

The respondent, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Secretary of the Commission having thereafter withdrawn this matter from adjudication in accordance with Section 3.25(c) of its Rules; and

The Commission having considered the matter and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 3.25(f) of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondent Amana Refrigeration, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located in the City of Amana, State of Iowa.
2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

I

It is ordered, That respondent Amana Refrigeration, Inc. ("Amana"), a corporation, its successors and assigns, and its officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale, or distribution of any Amana microwave oven for consumer use in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Representing, directly or by implication, contrary to fact, that only Amana ovens passed independent testing conducted by an independent laboratory in 1980.

B. Representing, directly or by implication, contrary to fact, that in

a consumer survey owners of nine other microwave ovens rated Amana "best quality" more often than they rated any other brand best quality, including the owners' own brand.

II

It is further ordered, That respondent, its successors and assigns, and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale, or distribution of any product normally sold to members of the general public for their personal or household use in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Misrepresenting in any manner, directly or by implication, the purpose, content, sample, reliability, results or conclusions of any survey or test.

B. Failing to maintain accurate records:

1. Of all materials that were relied upon by respondent in disseminating any representation covered by this order.

2. Of all test reports, studies, surveys, or demonstrations in its possession or control that contradict any representation made by respondent that is covered by this order.

Such records shall be retained by respondent for three years from the date that the representations to which they pertain are last disseminated, and may be inspected by the staff of the Commission upon reasonable notice.

III

A. *It is further ordered,* That respondent, its successors and assigns, and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, offering for sale, sale, or distribution of any microwave oven, or combination microwave and convection oven, for consumer use in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication, the quality and/or safety of any such product or from comparing any such product as to quality and/or safety to any product or products of one or more competitors, unless, at the time of such representation, respondent possesses and relies upon a reasonable basis for such representation,

consisting of reliable and competent evidence that substantiates such representation.

Provided, however, That nothing in this Part shall prohibit respondent from making any non-deceptive representation concerning the microwave oven warning label exemption program operated pursuant to 21 C.F.R. 1030.10(C)(6)(i) and administered by the Office of Radiological Health.

B. To the extent the evidence of a reasonable basis consists of scientific or professional tests, analyses, research, studies or any other evidence based on expertise of professionals in the relevant area, such evidence shall be "reliable and competent" for purposes of Part III (A) only if those tests, analyses, research, studies, or other evidence are conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession or science to yield accurate and reliable results.

IV

It is further ordered, That respondent notify the Commission at least thirty (30) days prior to any proposed change in respondent such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

V

It is further ordered, That respondent shall forthwith distribute a copy of this order to each of its operating divisions and to all authorized Amana distributors.

VI

It is further ordered, That respondent shall, within sixty (60) days after this order becomes final, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

IN THE MATTER OF
THE READER'S DIGEST ASSOCIATION, INC.

MODIFYING ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5
OF THE FEDERAL TRADE COMMISSION ACT

Docket C-2075. Consent Order, Nov. 2, 1971—Modifying Order, Sept. 30, 1983

This order reopens the proceeding and modifies the Commission's order issued against The Reader's Digest Association, Inc. on Nov. 2, 1971 (79 F.T.C. 696), *modified* March 12, 1974 (82 F.T.C. 1356). The modified order deletes the prohibition on use of the word "lucky" in contest promotions; allows truthful special selection claims; reinstates a conditional odds disclosure requirement to apprise consumers of their likelihood of winning; limits the recordkeeping requirement of Paragraph I.A. (7)-(9) to 3 years; and permits respondent to disclose the terms and conditions of a sales offer in its catalog instead of on order forms or return reply coupons. Further, respondent is no longer required to disclose the value of all free promotional items, but rather is prohibited from misrepresenting these items' value.

ORDER REOPENING THE PROCEEDING AND MODIFYING
CEASE AND DESIST ORDER

On March 3, 1983, the Reader's Digest Association, Inc., (Reader's Digest) requested that the Commission reopen and modify its November 2, 1971, order to cease and desist (79 F.T.C. 696), as modified on March 12, 1974 (82 F.T.C. 1356). In a letter dated June 21, 1983, Reader's Digest amended its request to ask for specific modifications it negotiated with the staff. For the reasons discussed below, the Commission reopens the proceeding and modifies the order.

The Commission's 1971 order arose from an investigation of practices Reader's Digest used in connection with its sweepstakes promotions. Respondent has used such contests to promote its magazine and book sales. The Commission's complaint alleged that Reader's Digest engaged in unfair and deceptive acts or practices, by, *inter alia*, failing to award all advertised prizes, misrepresenting contestants' chances of winning, and mailing simulated items of value. The consent order prohibited these practices, and required Reader's Digest to disclose the odds of winning all advertised prizes. In 1974, however, following the Commission's dismissal of a complaint against D.L. Blair Corp. (82 F.T.C. 252) for allegedly deceptive sweepstakes practices, the Commission deleted the odds disclosure requirement from the Reader's Digest order.

In 1975, the Commission brought a civil penalty action alleging that Reader's Digest mailed simulated checks and bonds in violation of the order. The district court, after granting summary judgment on liabili-

ty, awarded \$1.75 million in civil penalties. 494 F.Supp. 770 (D. Del. 1980), *aff'd*, 662 F.2d 955 (3d Cir. 1981), *cert. denied* 455 U.S. 908 (1982).

Reader's Digest asks the Commission to modify the order provisions governing simulated items of value, use of the word "lucky", "especially selected" representations, affirmative disclosure of the value of premium items, disclosure of the terms and conditions of its catalogue sales offers, and the duration of record-keeping requirements.

Respondent seeks the deletion of order paragraph II.C(3), which prohibits:

Using or distributing simulated checks, currency, "new car certificates," or using or distributing any confusingly simulated item of value.

Reader's Digest argues that this provision is unnecessary because such items do not in fact mislead consumers. The respondent has submitted in support of its request (1) an economic analysis discussing the value of sweepstakes advertising; (2) sample simulated items of value its competitors have used during the past year; and (3) surveys to show that consumers do not mistake the simulated items of value cited in the Commission's original complaint and in the civil penalty action as having value. From this data respondent argues that no cognizable percentage of recipients would be misled by simulated items. Reader's Digest contends that, given its competitors' frequent use of simulated items of value and the lack of any evidence that such items deceive consumers, the order provision unjustifiably hinders its ability to compete. Respondent also alleges that the prohibition violates its first amendment rights.

The Commission concludes from the surveys and other data submitted by respondent, taken together with the lack of any complaints from consumers that they have been misled, that the use of simulated items of value in advertising respondent's products is unlikely to mislead consumers. Moreover, any deception that might exist would cause only *de minimis* injury—the cost of the time necessary to open and read the materials. Because the costs that the absolute ban on simulated items of value imposes on respondent appear to outweigh any consumer benefits the ban may confer, the Commission concludes on the facts submitted that the public interest requires eliminating paragraph II.C(3).

Respondent seeks to modify paragraph I.A (4) to eliminate the absolute prohibition on using the term "lucky" in contest promotions. The provision now prohibits:

Using the word "lucky" to describe any number, ticket, coupon, symbol, or other

entry; or representing in any other manner directly or by implication that any number, ticket, coupon, symbol, or other entry confers or will confer an advantage upon the recipient that other recipients will not have or is more likely to win a prize than are others, or has some value that other entries do not have.

The company argues that banning "lucky" is unnecessary because "lucky" is "harmless puffing," and because the restriction infringes its free speech rights.

The Commission believes that the term "lucky" is not inherently deceptive and should not, therefore, be barred. The remainder of this provision as modified will be sufficient to protect consumers against false claims that they have an advantage in respondent's contests.

Respondent next requests that the Commission remove its absolute ban on claims that participants have been "especially selected" to win a prize. Paragraph I.A (3) of the order prohibits:

Representing directly or by implication that the number of participants has been significantly limited; or that any person has been especially selected to win a prize.

This provision was intended to protect consumers from being misled regarding their chances of winning a prize. Reader's Digest contends that it does in fact specially select persons to whom they send some contest mailings, so that the order improperly restricts truthful representations. Respondent seeks permission to make such truthful claims provided it discloses the odds of winning each offered prize.

The Commission believes that truthful specially-selected representations, coupled with an odds disclosure, would not mislead consumers. When the Commission previously modified this order to delete the odds disclosure requirement, the order prohibited all special selection claims. Because the Commission now modifies the order to allow truthful special selection claims, reinstating a conditional odds disclosure requirement to apprise consumers of their likelihood of winning is in the public interest.

Reader's Digest also seeks alterations to paragraph I.A (2), governing premium value disclosures, paragraph I.A (4), regarding disclosing the terms and conditions of catalogue sales, and paragraphs I.A (7)-(9), concerning record keeping. Paragraph I.A (2) now requires Reader's Digest to disclose the value of all free promotional items. Respondent argues that because such items are often bought in bulk, they may not have a readily ascertainable retail value. The Commission agrees with respondent's request to change the current order's affirmative disclosure requirement to a provision prohibiting misrepresenting these items' value. Paragraph I.A. (4) requires all of respondent's order coupons to disclose all terms and conditions of the sales offer. Reader's Digest asserts that this provision requires un-

necessarily duplicative disclosures in its catalogues. The Commission agrees that respondent can effectively disclose the required information by having a single catalogue disclosure, provided that each coupon directs consumers to the place in the catalogue at which the disclosure is located. Finally, Reader's Digest seeks to limit its record-keeping obligations in paragraphs I.A. (7)-(9) to three years; its current obligations are indefinite. The Commission agrees that three years is sufficient for its monitoring purposes, and Reader's Digest has agreed to further modify the order to allow the Commission ready access to all required contest records.

The Commission, having considered the request, has determined that Reader's Digest has submitted adequate evidence and made a satisfactory showing that changes in fact and the public interest require the Commission to reopen the proceeding and modify the order as requested, and therefore:

It is ordered, That the proceeding be, and hereby is, re-opened.

It is further ordered, That the Decision and Order issued on November 2, 1971, and modified on March 12, 1974, be, and hereby is, further modified by:

1) Substituting for paragraph 3 of subpart A of Part I of that Decision and Order the following:

(3) representing, directly or by implication, that in any sweepstakes the number of participants has been significantly limited or that any person has been especially selected to win a prize; *provided, however*, that respondent may make a truthful representation that a person has been especially selected to receive the opportunity to participate in a sweepstakes as long as with that representation (but not necessarily in immediate conjunction therewith) respondent clearly and conspicuously discloses the approximate odds of that person's winning each prize to be awarded in that sweepstakes.

2) Substituting for paragraph 4 of subpart A of Part I of that Decision and Order the following:

(4) falsely representing, directly or by implication, that any number, ticket, coupon, symbol or other entry confers or will confer an advantage upon the recipient that other recipients do or will not have, or is more likely to win a prize than are others, or has some value that other entries do not have.

3) Substituting for paragraph 7 of subpart A of Part I of that Decision and Order the following:

(7) failing, for two years after the conclusion of the promotional

device, to furnish to any requesting individual a complete list of names of winners of all prizes having a retail value of \$15 or more, together with the city and state of, and prize won by, each.

4) Substituting for paragraph 8 of subpart A of Part I of that Decision and Order the following:

(8) failing to maintain for three years after the conclusion of the promotional device, and to furnish upon request to the Federal Trade Commission, adequate records (a) which disclose the facts upon which any of the representations of the type described in Paragraphs 1-7 of this order are based, and (b) from which the validity of the representations of the type described in Paragraphs 1-7 of this order can be determined.

5) Substituting for paragraph 9 of subpart A of Part I of that Decision and Order the following:

(9) failing to maintain for three years after the conclusion of the promotional device, and to furnish upon request to the Federal Trade Commission, the following:

(a) a complete list of the names and addresses of the winners of each prize, and an exact description of the prize, including its approximate value;

(b) a list of the winning numbers or symbols, if utilized, for each prize;

(c) the total number of coupons or other entries distributed;

(d) the total number of participants in the promotional device;

(e) the total number of prizes in each category or denomination which were made available; and

(f) the total number of prizes in each category or denomination which were awarded.

6) Deleting "C." from the beginning of paragraph 1 of the *It is ordered* paragraph of Part II of that Decision and Order.

7) Substituting for paragraph 2 of the *It is ordered* paragraph of Part II of that Decision and Order the following:

(2) falsely representing, directly or by implication, to any purchaser or prospective purchaser of respondent's products the value of any gift or other item furnished without charge, or at a nominal charge, or at a cost substantially below its retail value.

8) Deleting paragraph 3 of the *It is ordered* paragraph of Part II of that Decision and Order.

9) Substituting for paragraph 4 of the *It is ordered* paragraph of Part II of that Decision and Order the following:

(3) failing to disclose clearly and conspicuously on the order form, return reply coupon, or similar material the way in which persons may participate in respondent's promotional devices without making or committing themselves to a purchase, or incurring any other obligation, or agreeing to any other act or condition; or offering any product for sale when all of the terms and conditions of the offer are not explained fully and clearly and set forth conspicuously on any order form furnished with the offer to be used to order the product or, in the case of offers in a catalogue, either on such order form or elsewhere in the catalogue with a clear and conspicuous disclosure on such order form of a notice such as "See page [] for important terms and conditions to this offer."

SEPARATE STATEMENT OF COMMISSIONER PERTSCHUK

In 1971, the Commission was concerned that simulated checks included in Reader's Digest sweepstakes promotions misled consumers into believing that the checks had actual cash value. Research presented by Reader's Digest indicates that such is not the case today.

Today's action by the Commission, together with its prior civil penalty action against Reader's Digest for flagrantly violating the provisions modified today, clearly demonstrates the appropriateness of refusing to permit respondents to flout Commission orders, as well as the need to grant relief from those orders when the proper showing has been made.