February 1980

The State of South Carolina

Office of the Attorney General

T. TRAVIS MEDLOCK
ATTORNEY GENERAL

REMBERT C. DENNIS BUILDING
POST OFFICE BOX 11549
COLUMBIA, S.C. 29211
TELEPHONE 803-758-3970

February 28, 1985

George L. Schroeder, Director
Legislative Audit Council
620 Bankers Trust Tower
Columbia, South Carolina 29201

Dear Mr. Schroeder:

You have asked our advice as to whether the Charleston Commissioners of Pilotage enjoy Parker v. Brown immunity from antitrust prosecution. More particularly, you wish to know the implications of this question for the Commission relative to (1) South Carolina antitrust laws, (2) the South Carolina Uniform Trade Practices Act, and (3) whether the Commission members are immune from antitrust prosecution. We would advise that the Commissioners of Pilotage for the Port of Charleston are entitled to immunity under both the federal and state antitrust laws, as well as the South Carolina Unfair Trade Practices Act.

We will first review the laws relating to the Charleston Commissioners of Pilotage. Then, we will summarize the development of the doctrine of state action immunity under the antitrust laws. Finally, we will discuss how that doctrine of immunity relates to the Charleston Commissioners of Pilotage.

LAWS RELATING TO THE CHARLESTON COMMISSIONERS OF PILOTAGE

In an opinion of this Office, dated July 24, 1984, we reviewed extensively the various laws relating to the Commissioners of Pilotage for the port of Charleston. We will now expand upon that review briefly.

By Act No. 48 of 1868, the State of South Carolina licensed various individual pilots, including several for the port of Charleston. In that same Act, the State established a board of

REQUEST LETTER

commissioners of pilotage which henceforward was to license all harbor pilots in the State of South Carolina. Then, in 1872 by Act No. 48, the state created separate pilotage boards to regulate the ports of Charleston, Beaufort and Georgetown respectively.

In 1881, by Act No. 479 the General Assembly established the Board of Harbor Commissioners, which had been created by separate Act in 1880 to serve ex officio as the Board of Commissioners of Pilotage for the Port of Charleston. The 1881 Act also stated that, with respect to regulations of pilotage in the port of Charleston, the Harbor Commission's subcommittee on pilotage could be fully delegated with all the powers of the Harbor Commission itself. The Harbor Commission generally consisted of the mayor of Charleston, the president of the Charleston Chamber of Commerce and residents of the City of Charleston; the function of the Harbor Commission was the overall governance of the harbor itself, whereas the Commissioners of Pilotage were, of course, concerned principally with the licensing and regulation of the pilotage industry in the Charleston port area. At this same time, separate boards governed the other harbors of the State with respect to pilotage.

With respect to the Commissioners of Pilotage for the port of Charleston, the Charleston Harbor Commission (and more particularly its subcommittee on pilotage) continued to function ex officio as the commissioners of pilotage for Charleston until 1957. See, 1912 Code of laws of South Carolina, §§ 2471, 2472, 2505, 2514; 1932 Code of Laws §§ 6682 et seq.; 1942 Code of Laws, §§ 6682 et seq.; 1952 Code of Laws, §§ 56-1400 et seq. Throughout this period, pursuant to the foregoing statutory provisions, the General Assembly defined the prerequisites to licensure as a pilot in Charleston; set forth the oath that all pilots were required to take; defined the precise number of pilots who could be licensed by the Commissioners; defined the standards which licensed pilots were required to maintain; and set the rates of pilotage for the port of Charleston. The General Assembly delegated to the Charleston Commissioners the responsibility of carrying out these functions, including licensure, revocation and suspension of pilot's licenses. The Commissioners (through the Harbor Commission) were required to report annually to the General Assembly.

In 1957, by Act No. 31, the General Assembly abolished the Board of Harbor Commissioners of the Port of Charleston and devolved those functions relative to pilotage upon the Commissioners of Pilotage for the Port of Charleston. The

remainder of the functions of the Harbor Commission were by that same act turned over to the State Ports Authority, which was also created at that same time. See, Act No. 30 of 1957. Generally speaking, the 1957 Act is the means by which the pilotage trade in Charleston is today regulated. See, § 54-15-10 et seq. of the Code of Laws of South Carolina (1976 as amended). We will now review the present Code provisions.

Section 54-15-40 establishes the Commissioners of Pilotage for the Port of Charleston and the method of appointment thereof. The board is composed of five members, one of which is the chairman of the South Carolina State Ports Authority, who serves ex officio; one member is the President of the Charleston Pilots Association; and the other three members were formerly appointed upon the recommendation of a majority of the Charleston legislative delegation from lists provided by various interested associations but now, pursuant to ordinance, such appointments are made by Charleston County Council from lists provided by the same groups.

Section 54-15-60 provides for the Commissioners to appoint a board of examiners to oversee the pilot's examination. The oath which the board of pilot commissioners is to administer to all pilots is prescribed by Section 54-15-110, which also empowers the board to license all pilots for the port of Charleston. Requirements for licensure of pilots is set forth in great detail in Section 54-15-120. Section 54-15-130 limits the number of pilots for the bar and harbor of Charleston (presently 15). Section 54-15-140 empowers the board to "prescribe to the licensed pilots such orders and regulations" not inconsistent with general law as they may deem necessary. And in Section 54-15-150 through 54-15-280, the General Assembly has set forth explicit requirements which pilots must follow (approval of all pilot boats by the Commissioners, no moonlighting by pilots, requiring all pilot boats to use pilots, etc.). Of particular interest is Section 54-15-180 which states that "[n]o pilot boat shall be commissioned and used at Charleston for the purpose of pilotage unless such boat is owned and manned by the group of associated pilots then currently licensed by the Commissioners of Pilotage for the Port of Charleston.

Rates and fees for pilotage services for each port (including Charleston) are set by the respective board of commissioners. Section 54-15-290. And the commissioners are authorized to revoke or suspend a pilot's license for misconduct. Finally, Section 54-15-340 provides that all fines, forfeitures and penalties for each and every offense relating to the pilotage

law may be prosecuted, sued for and recovered in any court of competent jurisdiction for the use of the State.

On occasion our Supreme Court has reviewed the pilotage laws and commented thereupon. A brief review of the Court's comments would be helpful. For example, in State ex rel. Stephens v. Comms. of Pilotage, 23 S.C. 175, 178 (1885), the Court extensively described the pilotage laws and characterized the duties of pilots and the commissioners who regulated them as follows:

> The position of pilot is a very important one - important to commerce, to the safety of vessels, and to the lives of their crew and passengers, and vastly important to the cities and towns built upon the harbors where pilots are needed; and the pilot commissioners are expected not only to be careful in their appointment, so as to secure safe and reliable officers, but to be watchful afterwards over their conduct, and the manner in which they discharge their duties, and to this end something must be left to their discretion in the application of general principles.

And in State v. Penny, 19 S.C. 218 (1883), the Court observed:

> Upon an examination of the whole act regulating the pilotage ... its provisions will be found quite stringent and somewhat onerous on the pilots, the intent of the act being that an experienced and perfectly reliable body of pilots shall always be on hand ready and prepared to discharge the important duty of aiding vessels to cross the bar and be conducted with safety into port. The evil to be remedied was the danger resulting from inexperienced and unreliable parties engaged in this work. The remedy was to secure this work to persons who, upon examination ... furnished the necessary evidence that they were qualified... .

19 S.C. at 221. In O'Brien v. De Larrinaga, 49 S.C. 497, 503 (1896), the Court said:

> From this brief view of the statutory provisions in reference to pilotage and the rules and regulations prescribed in conformity therewith, it is manifest that the scheme of the law is, that, with a view to the protection of both life and property on board of vessels proposing to enter the ports and harbors of this State, and in view of the arduous and hazardous nature of the duties required of pilots, there shall always be a sufficient number of competent and experienced pilots in the prescribed cruising grounds of the several bars and harbors, ready to offer their services to all incoming vessels....

Finally, in Wilson v. Charleston Pilots' Assn., 57 F. 227 (D.Ct., E.D.S.C. 1893), the federal district court of South Carolina commented:

> No person can engage in the business as pilot on the bar and harbor of Charleston unless he possesses a commission or license for that purpose from the State, called a "branch." This license is granted to a number limited by law, after tests of the fitness of the applicant, the execution by him of a bond, and his qualification on oath... . The rate of compensation is fixed by law. Pilotage is compulsory on all vessels coming from other than home ports. The duties of pilots are carefully laid down. The reason for the existence of this privileged class is to secure safety to vessels entering or departing a port.

57 F. at 228.

DEVELOPMENT OF STATE ACTION IMMUNITY UNDER THE FEDERAL ANTITRUST LAWS

Parker v. Brown, 317 U.S. 341, 87 L.Ed. 315 (1943) is generally thought of as the case where the United States Supreme Court first fully articulated the state action exemption to the federal antitrust laws. However, it is now well established that "the state action doctrine had its genesis in several cases preceding Parker v. Brown." Star Lines Ltd. v. Puerto Rico

Maritime Ship Authority, 451 F.Supp. 157, 161 n. 21 (S.D.N.Y. 1978). In the case of Olsen v. Smith, 195 U.S. 332, 344-45, 49 L.Ed. 224 (1904), the United States Supreme Court held that a state statutory scheme for the licensure of pilots, although clearly a monopoly, was in reality an example of the State's power to regulate the pilotage profession. And in Lowenstein v. Evans, 69 F. 908 (D.S.C. 1895), the federal Circuit Court for the District of South Carolina held that the State Board of Liquor Control could not violate the federal antitrust laws because it was neither a "person" or "corporation" within the meaning of those laws.

Then, in Parker v. Brown, supra, the Supreme Court more fully articulated the doctrine of state action immunity. There, the Court considered whether a state program restricting agricultural production was subject to attack under the Sherman Act. The Court concluded that there was "nothing in the language of the Sherman Act or in its history [which] ... suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature." 317 U.S. at 350-351. Thus, in the interest of federalism, absent a clear indication from Congress, the states are entitled to immunity. In the particular case before it, the Court noted that "[i]t is the State which has created the machinery for establishing the prorate program."

> The State itself exercises its legislative authority in making the regulation and in prescribing the conditions of its application.

Supra at 352.

Subsequently, in Bates v. State Bar of Arizona, 433 U.S. 350, 53 L.Ed.2d 810 (1977), the Court felt that a rule adopted by a sovereign authority of the state is entitled to immunity in an antitrust action. The Court granted immunity in Bates to a state supreme court rule which prohibited the advertising of legal services. In Bates the Court found that the State's policy, with respect to anticompetitive conduct, was "clearly and affirmatively expressed"; moreover, it was also significant that "the state's supervision is so active." 433 U.S. at 362. Unlike other previous cases, in Bates, noted the Court, there was an official state policy to displace competition.

The United States Supreme Court has decided a number of other important cases concerning the state action exemption.

The Sixth Circuit Court of Appeals in Hybud Equipment Co. v. City of Akron, 742 F.2d 949, 955 (6th Cir. 1984) recently summarized the reasoning of these Supreme Court decisions as follows:

> In Parker, the anticompetitive conduct under attack was directed by the state legislature and supervised by state officers. In Bates, the rules in question were adopted by the state supreme court acting in its capacity as a legislative body with ultimate authority over the legal profession. In such cases, the challenged restraints are easily ascribed to the state as sovereign. Where the activity, however, "is not directly that of the legislature or supreme court, but is carried out by others pursuant to state authorization," the application of the exemption requires a more searching analysis. Hoover v. Ronwin, ___ U.S. ___, 104 S.Ct. 1989, 1995, 80 L.Ed.2d 590 (1984). In these cases, the Court has required a showing that the challenged restraint is "one clearly articulated and affirmatively expressed as state policy." California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc., 445 U.S. 97, 100 S.Ct. 937, 943, 63 L.Ed.2d 233 (1980). See also, City of Lafayette v. Louisana Power & Light Co., 435 U.S. 389, 410, 98 S.Ct. 1123, 1135, 55 L.Ed.2d 364 (1978); Community Communications Co., Inc. v. City of Boulder, 455 U.S. 40, 54, 102 S.Ct. 835, 842, 70 L.Ed.2d 810 (1982). The Court has also considered the degree to which the state "actively supervises" the policy. Midcal Aluminum, 445 U.S. at 105, 100 S.Ct. at 943; New Motor Vehicle Bd. v. Orrin W. Fox Co., 439 U.S. 96, 110, 99 S.Ct. 403, 412, 58 L.Ed.2d 361 (1978).

In the controversial Boulder case, the Court addressed the applicability of the state action exemption to a state's political subdivisions. There, the Court observed that state sovereignty was reserved to the state itself, not its political subdivisions. A political subdivision, held the Court, "could partake of the Parker exemption only to the extent that [it] ... acted pursuant to a clearly articulated and affirmatively expressed state

policy." 450 U.S. at 54. Rather than the State having a policy of "mere neutrality" with respect to its political subdivisions acting in an anticompetitive manner, the State must instead have "contemplated" the specific anticompetitive actions for which liability against the municipality is sought. Supra at 55.

The Court in Boulder specifically reserved judgment as to the question of whether a political subdivision must also meet the "active state supervision" test which other cases involving private activity had theretofore focused upon. 455 U.S. at 51 n. 14. See, Midcal, supra. Several circuit courts of appeals have, however, held that the requirement of active state supervision is not necessary where the challenged activity is within a traditional function of a political subdivision. Golden State Transit Corp. v. City of Los Angeles, 726 F.2d 1430 (9th Cir. 1984); Gold Cross Ambulance and Transfer v. City of Kansas City, 705 F.2d 1005 (8th Cir. 1983); Town of Hallie v. City of Eau Claire, 700 F.2d 376 (7th Cir. 1983), cert. granted, ___ U.S. ___, 104 S.Ct. 3508, 82 L.Ed.2d 818 (1984). These courts have reasoned that the "active state supervision" portion of the test is limited primarily to the activities of private parties; they reason that the Midcal case, where the active state supervision portion of the test was most rigorously applied, was most concerned with the private abuse of state regulatory measures. However, "[t]his danger is diminished where the challenged activities are undertaken by state agencies that are not tempted by private gain." Hybud Equipment, supra, 742 F.2d at 949. And one court reasoned that the imposition of this additional requirement on local government "would erode the concept of local autonomy and home rule authority." Town of Hallie v. City of Eau Claire, 700 F.2d at 384.

However, the most recent United States Supreme Court decision, Hoover v. Ronwin, supra, seems to indicate that the active state supervision test remains intact as to all anti-competitive conduct where it is not the sovereign itself, either the Legislature or Supreme Court, carrying out the challenged activity. In the Hybud case, the Sixth Circuit recently characterized the Supreme Court's reasoning as follows:

> While there are reasons in logic and in policy for the distinction between state and private actions, there is slight support for such a position in the opinion of the Supreme Court. In the most recent discussion of the requirement, Hoover v. Ronwin, the Court made no distinction

> between state and private actions, referring only to the activities of a "nonsovereign state representative." The Court stated that the degree to which the state legislature or supreme court supervises its representative is relevant" to a determination of whether the conduct is protected by the Parker exemption.

742 F.2d at 963. Thus, while some doubt still remains as to whether a state or local agency must also meet the "active state supervision" test, and indeed the issue is presently before the United States Supreme Court, see, Town of Hallie v. City of Eau Claire, supra, it would appear that this requirement must also still be met.

Even if the "active state supervision" portion of the test still remains intact, the Sixth Circuit Court of Appeals recently held that, where the entity involved is governmental, the test will not be strenuously applied. Concluded the Court in Hybud,

> The Court in Hoover v. Ronwin mentions supervision by the state legislature or supreme court. Yet, where the inquiry is relevant, it would be extremely impractical to limit "active state supervision" to the oversight by those bodies. By necessity, actual supervision must be delegated to subordinate officials....
>
> We believe that it is unnecessary and inappropriate in this case to establish strict rules setting forth the circumstances requiring rigorous application of the test of state supervision. Where a suit challenges the particular exercise of state power, the court should consider the nature and extent of supervision by the state as part of the general inquiry into whether the challenged actions are those of the state as sovereign. See Hoover v. Ronwin. The court should give close scrutiny to the existence of supervision where the circumstances indicate the possibility of an improper exercise of that power. See New Motor Vehicle Bd.; Midcal Aluminum.

742 F.2d at 963-964. (emphasis added). Based on the foregoing, we will now review the applicability of the state action exemption as it relates to the Commissioners of Pilotage for the Port of Charleston.

APPLICABILITY OF THE DOCTRINE OF STATE ACTION IMMUNITY TO THE CHARLESTON COMMISSIONERS OF PILOTAGE

In our view, it is evident that, with respect to the profession of pilotage, there exists a clearly articulated and affirmatively expressed state policy of anticompetitive conduct in that profession. The State has here, unquestionably sought to displace competition with regulation of the profession. Such a policy is not only contemplated by our State laws regulating pilotage, but is mandated thereby.

By way of background, it is evident that a State's regulation of the pilotage profession is longstanding and has traditionally been viewed as a monopoly. As long ago as 1895, in Olsen v. Smith, supra, the Texas laws regulating pilotage were attacked on the basis that they impermissibly restrained trade. To that, the Court agreed, but ruled that it was a monopoly created by the State itself, and thus permissible.

> The contention that because the commissioned pilots have a monopoly of the business, and by combination among themselves exclude all others from rendering pilotage services, is also but a denial of the authority of the State to regulate, since if the State has the power to regulate, and in so doing to appoint and commission, those who are to perform pilotage services, it must follow that no monopoly or combination in a legal sense can arise from the fact that the duly authorized agents of the State are alone allowed to perform the duties devolving upon them by law.

195 U.S. at 344-345. Later, in Kotch v. River Port Pilots, 330 U.S. 552, 91 L.Ed. 1093 (1947), the Supreme Court reviewed in great detail the history of pilotage in this country as part of its analysis of whether the method of selection of pilots in Louisiana survived scrutiny under the Equal Protection Clause. The Court recognized, with respect to the pilotage profession, that

> [t]he number of people, as a practical matter, who can be pilots is very limited. No matter what system of selection is adopted, all but the few occasionally selected must of necessity be excluded.

330 U.S. at 563. Likewise, the Supreme Court of North Carolina in St. George v. Hardie, 147 N.C. 881, 60 S.E. 920 (1908) extensively reviewed the North Carolina statutory scheme regulating pilots, which is quite similar to our own, and again recognized that the State's regulation of pilotage constituted a permissible monopoly. And, as we have seen, pilots in this State have been characterized by the courts as a "privileged" class, Wilson v. Charleston Pilots Assn., supra and our courts have consistently recognized that, by definition and as a result of state policy, the number in the profession remains extremely limited. State v. Penny, supra; O'Brien v. De Larrinaga, supra.

Examination of the present statutory provisions regulating pilotage also demonstrates quite clearly that the State's policy is one of anticompetitive activity in the form of regulation of the pilotage profession. Of course, unless a pilot is licensed by the State, he cannot act as a pilot in South Carolina. §§ 54-15-60; 54-15-110; 54-15-280. He cannot be licensed without meeting a number of prerequisites; he must first be an apprentice, meeting the qualifications therefor and must also be approved as such by the majority of pilots as well as the commissioners of pilotage. Before he can become eligible to be a pilot, he must be apprenticed for three years, then must meet the statutory requirements for a pilot (including examination), and still cannot become a pilot until the number has fallen below the prescribed statutory limits for the Port of Charleston (15). See, § 54-15-120. Applicants for licensure must pay an examination fee prescribed by the commissioners of pilotage. § 54-15-80.

Pilots must also operate their boats in a specific area designated by the commissioners. § 54-15-160. A pilot boat is subject to absolute direction and approval by the commissioners. § 54-15-170. Moreover, pursuant to § 54-15-180, in order for a pilot boat to be used at Charleston, it must be "owned and manned by the group of associated pilots then currently licensed by the commissioners of pilotage for the Port of Charleston." Only in an emergency, can other boats be used. Licensed pilots are not permitted "to engage in any other business or calling while holding his license or branch without first obtaining the written consent of the commissioners of pilotage." § 54-15-200.

Section 54-15-280 prohibits any unlicensed person from acting as a pilot and if he does so, he is required to "pay the regular pilotage to the group of associated licensed pilots in the port" in addition to being "subject to a fine of five hundred dollars or imprisonment for not more than thirty days." Finally, the rates and fees which a pilot may charge for his services is set absolutely by the commissioners themselves. § 54-15-290.

From these statutes, it is apparent that the General Assembly has clearly articulated and affirmatively expressed a State policy which mandates that the pilotage profession remain anticompetitive in nature. Unequivocally, the Legislature has displaced competition with regulation. Even membership on the Pilotage Commission reflects this policy. One of the members of the Commission must always be the President of the Charleston Pilots Association. § 54-15-40. And three of the other four members are appointed from lists of nominations submitted by related groups. The fees and rates which pilots charge are fixed by law and the number of pilots remains stable.

Cases where the policy to displace competition with regulation was not nearly as clearly defined as here have determined that state action immunity must be granted. In Golden State Transit Corp. v. City of L.A., 726 F.2d 1430 (9th Cir. 1984), for example, the Court determined that state statutory provisions requiring carriers to be licensed; that they pay certain fees for licensure; that they meet statutory criteria for licensure; that they were subjected to fines and penalties for violations of the Act; and that the State specified the method for computation of the carriers' charges, was sufficient to meet the "clearly acticulated and affirmatively expressed" test. Of course, all of these factors and many others as well are present here. See also, Gold Cross Amb. and Transit v. City of Kansas City, 705 F.2d 1005, 1012-13 (8th Cir. 1983); Euster v. Eagle Downs Racing Assn., 677 F.2d 992 (3d Cir. 1982). Clearly, in this instance, we think the State's regulation of pilotage meets this first prong of the Supreme Court's test for Parker v. Brown immunity.

Since this policy of anticompetitive conduct is so clearly and definitively set forth by legislative act which is mandated and carried out by the State itself, it can be argued that there is no need to inquire further, i.e. that no "active State supervision" need be shown. See, Deak-Perera Hawaii, Inc. v. Dept. of Transportation, 553 F.Supp. 976 (D.Hawaii 1983). However, as noted in Hybud Equipment Corp., supra, it is "extremely impractical" for a legislative body to supervise the carrying out of its regulatory policy and consequently "actual

supervision must be delegated to subordinate officials." 742 F.2d at 963. In this instance, the State has, of course, delegated such responsibility to the Commissioners of Pilotage for the Port of Charleston. Assuming then, that the "active supervision" test must be met, it is clearly met here.

As we have pointed out throughout, the State has delegated to the Commissioners of Pilotage for the Port of Charleston considerable oversight authority in insuring that the State policy of regulation and anticompetitive conduct is carried out. The State has instructed the Commissioners to license the required number of pilots and to revoke or suspend their licenses where warranted. The State has further mandated that the commissioners keep a register of all licensed pilots (§ 54-15-150); that the commissioners approve all apprentices (§ 54-15-100); that the commissioners administer to each pilot a prescribed oath (§ 54-15-110); that the commissioners prescribe regulations and orders concerning pilots, so long as these are not in conflict with § 54-15-10 et seq. (§ 54-15-140); and of course, that the commissioners determine all fees and rates for pilots (§ 54-15-290).

In an opinion, dated July 24, 1984, we stated that § 1-20-50 of the Code designates the Commissioners of Pilotage a "state agency" and sets June 30, 1985 as the date for termination or "sunset" of each state agency unless, of course, continued pursuant to the established procedures. See, § 1-20-10 et seq. In that same opinion, after reviewing the status of the Commission, we concluded:

> ... the Harbor Pilot agency or program [Commissioners of Pilotage] is a state agency and should be reviewed by the Legislative Audit Council just as any other state agency would be reviewed under Section 1-20-10 et seq. of the Code.

We believe this conclusion is correct and it is consistent with and supported by the observation of the Court in Wilson v. Chas. Pilots Assn., supra, that pilots must possess a license from the "state". We believe that, for virtually every purpose, the Commission of Pilotage for the Port of Charleston, the agency to which the General Assembly has delegated the responsibility of continuing regulation of the pilotage profession in this area, is an agency of the State.

Where, as in this instance, a state agency retains regulatory oversight over the implementation of the State's own policy, there is usually no dispute that the active State supervision test has been met because there is little doubt that the State as sovereign possesses numerous means to retain control over its own agencies. See, Deak-Perera Hawaii, Inc. v. Dept. of Transp., supra. And where the State, through its own agencies sets the fees and prices members of a profession or trade may charge, as is the case here, the test is considered by the courts as clearly met. As the Court stated in Euster v. Eagle Downs Racing Assn.,

> In Midcal, private parties were authorized to set prices by themselves, without the further involvement of the State. Here, the regulation promulgated by the commission itself contains the fees. There is no such abdication of price fixing activity to private parties by The Horse Racing Commission. It is the State Commission itself which sets the fees.

677 F.2d at 996. See also, Parker v. Brown, supra.

The fact that certain authority in the general regulatory process is granted to citizens other than the commissioners of pilotage, who constitute a board of examiners and administer the pilots' examination pursuant to § 54-15-60, is, in our judgment, not significant. Even if these persons are not themselves State officers, in all instances, it is the commissioners of pilotage who oversee the examiners board and control their activity. The examiners board is appointed by the commissioners and it is they who determine the content of the examinations, pursuant to § 54-15-60. Of course, the commissioners also have the final determination as to who is licensed as a pilot and it is again they who promulgate the governing regulations for all pilots.

This relationship is not unlike that addressed by the Supreme Court in Hoover v. Ronwin, supra. There, the Court rejected an argument that members of Arizona's examining committee who administered the bar examination in that state, acted as private individuals and independently of the Arizona Supreme Court, thus subjecting them to antitrust liability. Responded the Court:

> The petitioners here were each members of an official body selected and appointed by the Arizona Supreme Court. Indeed, it is

> conceded that they were state officers. The court gave the members of the committee discretion in compiling and grading the bar examination, but retained strict supervisory powers and ultimate full authority over its actions.... [W]e conclude that, although the Arizona Supreme Court necessarily delegated the administration of the admissions process to the Committee, the Court itself approved the particular grading formula and retained the sole authority to determine who should be admitted to the practice of law in Arizona. Thus, the conduct that Ronwin challenges was in reality that of the Arizona Supreme Court.

80 L.Ed.2d at 602. Here, the Commissioners of Pilotage, a state agency, continuously monitor the activity of the board of examiners, as well as the pilots in Charleston. Thus, active state supervision is maintained.

The State maintains continuous and active supervision over the activities of pilots in other ways as well. For example, § 54-15-340 provides in pertinent part that "[e]ach and every fine, forfeiture and penalty, for each and every offense under this chapter, shall be prosecuted, sued for and recovered in any court of competent jurisdiction for the use of the State." (emphasis added). Moreover, § 54-15-40 requires that the Chairman of the South Carolina State Ports Authority, clearly an independent state agency, see, South Carolina State Ports Authority v. Seaboard Air Line R. Co., 124 F.Supp. 553 (D.S.C. 1954), serves ex officio as a permanent member of the pilotage board; thus, there always remains on the board a representative from another State agency, who is appointed by the Governor with the advice and consent of the Senate. See, Parker v. Brown, supra.

Finally, the General Assembly itself actively supervises the pilotage board which it has created, by utilizing its auditing arm, the Legislative Audit Council. As noted earlier, in an opinion dated July 24, 1984, this Office concluded that, by statute, the Legislature has mandated that the pilotage board is subject to extensive audit and review under § 1-20-10 et seq. of the Code. In this manner, the General Assembly maintains continuous oversight over most state agencies and boards. Not only does this constitute extensive oversight by the State over the activities of pilots, but also over the state agency which

itself regulates those activities. Deak-Perera v. Hawaii Dept. of Transportation, supra. 1/

There has been some concern that the pilotage commission is not a state agency, but instead a county entity; this is apparently the result of an opinion of this Office dated January 28, 1980. In that opinion, it was stated that, pursuant to § 4-9-170 of the Code [Home Rule provision], County Council now possesses the appointment power of commissioners of pilotage. As a result of this opinion, Charleston County Council enacted an ordinance which is virtually identical to § 54-15-40 (composition of pilotage board) except that instead of the county legislative delegation recommending three members of the board, county council now performs that appointment function.

It appears that the opinion assumed that the pilotage board was a county agency, at least for purposes of appointment; the only question really considered in the opinion was whether the commissioners were formerly appointed pursuant to a general or special law. See, § 4-9-170. Since the former method of appointment was not pursuant to a general law, the opinion concluded that county council could make the appointments in the future, which they have done since the opinion.

As we noted in a letter to you, dated January 24, 1985 "a state board or program may have both state and local attributes," and this is apparently the case with the commissioners of pilotage. While it is clear that the General Assembly by statute considers the pilotage board a state agency for most purposes, see § 1-20-50(F) and this view is supported in our opinion of July 24, 1984, the board may also have certain local attributes. For example, it should be noted that, pursuant to § 54-15-40, a majority of the board was formerly appointed upon the recommendation of the county legislative delegation; our Supreme Court has held that in such cases it is in reality the

---

1/ It may be also that the Administrative Procedures Act, § 1-23-10 et seq. governs the activities of the pilotage board. If so, this would provide another means for the State to maintain "active supervision" through legislative review of the Commission's regulations and judicial review of its contested cases. See, Bates, supra at 362.

delegation itself which makes the appointment. Blalock v. Johnston, 180 S.C. 40, 185 S.E. 51 (1936). The legislative delegation, of course, formerly ran the county government prior to Home Rule, Duncan v. County of York, 267 S.C. 327, 334-335, 228 S.E.2d 92 (1976), and it is commonly understood that where a legislative delegation makes an appointment, the office involved is usually local in nature or at least possesses local attributes. Moreover the board governs a particular local area, § 54-15-60, and formerly bonds given by pilots were submitted to the county commissioners. Act No. 48 of 1872, Sec. 7. Accordingly, it is not unreasonable to ascribe certain local characteristics to the pilotage board.

We continue however to be convinced and reiterate that, for most purposes, the pilotage board is a state agency. That is why the Legislative Audit Council is authorized and required to audit this board for "sunset" review. Yet, there also is probably some basis for the opinion of January 28, 1980 and the subsequent Charleston County ordinance authorizing county council to appoint three members of that board; we cannot now say the opinion was clearly erroneous. Until a court rules otherwise, the ordinance is presumed valid and should continue to be followed. 2/

Whether or not the board of commissioners is deemed local for certain limited purposes is, however, probably of little significance with respect to state action immunity. In Hybud Equipment Corp. v. City of Akron, supra, it was stated that there are situations when even a local government's powers "standing alone, are sufficient to satisfy the state action exemption." 742 F.2d at 964 (Merritt, J., concurring). Thus, where the State grants to a local government entity the power to "regulate" an industry and to oversee the regulation of that industry, the test for the state action exemption is met.

2/ Further indication of the validity of the ordinance is the fact that the General Assembly has taken no action toward changing the method of appointment since the ordinance was enacted. Clearly, since the members of the local legislative delegation formerly appointed a majority of the board members, the Legislature is presumed to know of the ordinance and we assume that the General Assembly is content with the present method of appointment.

> This state delegation to the local legislative body of the power to implement and oversee the operation of the monopoly is sufficient to satisfy the "active state supervision" aspect of the state action test as well as the state delegation aspect.

Supra. The clear State mandate to carry out a monopoly, coupled with the continuing oversight given the pilots as well as the pilot commissioners by the State, renders insignificant for antitrust purposes any debate as to whether the pilot commissioners are primarily a state agency or possess local attributes as well. Such is in marked contrast to the Boulder case.

Moreover, the recently enacted Local Government Antitrust Act of 1984, P.L. 98-544, enacted only last October 24, also removes any need for such a distinction. With respect to local governmental entities, the Act makes both the local government and its officials immune from antitrust liability. The Act reads in pertinent part as follows:

> Sec. 3(a) No damages, interest on damages, costs, or attorneys fees may be recovered under Section 4, 4A, or 4C of the Clayton Act (15 U.S.C. 15, 15a, or 15c) from any local government, or official or employee thereof acting in an official capacity.

Thus, for all intents and purposes, even if the commissioners are characterized as "county" officials for certain purposes, this provision makes them monetarily immune from antitrust liability. 3/

3/ Since we believe the commission is a state agency, it is unnecessary to consider any other form of relief. And because we believe that the State's regulation of pilots is entitled to the State action exemption, there is no need to address whether the State statute "on its face irreconcilably conflicts with federal antitrust policy." Rice v. Norman Williams, 458 U.S. 654, 73 L.Ed.2d 1042 (1982).

In summary then, with respect to the pilotage profession, there is a " 'clear articulated and affirmatively expressed state policy' to replace competition with regulation." Hoover v. Ronwin, 104 S.Ct. at 1995. Unlike cases such as Boulder, the State's policy is hardly "neutral". Instead, it is clear that the State not only "contemplated" the specific anticompetitive actions, it has mandated such actions. Moreover, through a number of means, the State maintains active supervision over the implementation of its policy. Finally, Courts, including the United States Supreme Court, have always held that States were immune from antitrust liability in the regulation of the pilotage profession. Olsen v. Smith, 195 U.S. 332, 49 L.Ed.224 (1904); St. George v. Hardie, 147 N.C. 881, 60 S.E. 920 (1908); Brechtel v. Bd. of Examiners of Bar Pilots, 230 F.Supp. 18 (E.D.La. 1964). Our own courts, in earlier cases, suggest they would follow this same reasoning. State v. Penny, supra; compare also, Wilson v. Charleston Pilots Assn., supra with Lowenstein v. Evans, supra. Accordingly, we believe a court would hold the State's regulation of pilotage subject to immunity from federal antitrust actions.

THE STATE ANTITRUST LAWS

For many of the same reasons, we believe a court would hold that the State's regulation of pilotage is not subject to state antitrust laws. Section 39-3-10 et seq. prohibits certain restraints of trade, trusts and monopolies between two or more "persons as individuals, firms or corporations." To our knowledge, our Supreme Court has not addressed the question of whether a governmental agency falls within this description. See however, Omni Outdoor Advertising, Inc. v. Cola. Outdoor Advertising, Inc., 566 F.Supp. 1444 (D.S.C. 1983).

While it is clear that a state or local agency is a "person" or "corporation" for certain purposes, see 9A Words and Phrases, p. 413 et seq.; 32 Words and Phrases, p. 284 et seq., courts have usually held that for purposes of a state's antitrust laws, state or local agencies are exempt. Cf., Lowenstein v. Evans, supra; McAdoo Contractors, Inc. v. Harris, 222 Tenn. 623, 439 S.W.2d 594 (1969); Denman v. City of Idaho Falls, 51 Idaho 118, 4 P.2d 361 (1931); Wilcox v. City of Idaho Falls, 23 F.Supp. 626 (N.D. Idaho 1938); State v. Superior Court, 183 P.2d 802 (Wash. 1947); State v. Fairbanks-Morse & Co., 246 S.W.2d 647 (Tex.Civ.App. 1952); Whalen, Inc. v. Greenough, 181 Wash. 412, 43 P.2d 983, 98 A.L.R. 1181 (1935); Widdows v. Koch, 263 Cal.App.2d 288, 69 Cal. Repts. 464 (1968); Town of Hallie v. City of Chippewa Falls, 105 Wis.2d 533, 314 N.W.2d 321 (1981).

Accordingly, we believe a court would hold the State's regulation of pilotage exempt from the State's antitrust laws. 4/

UNFAIR TRADE PRACTICES ACT

The Unfair Trade Practices Act, commonly known as "The Little FTC Act" is codified at § 39-5-10 et seq. It makes "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce" unlawful. State ex rel. McLeod v. Rhoades, 275 S.C. 104, 267 S.E.2d 539 (1980). However, as stated above, the Act exempts, by Section 39-5-40(a), actions or transactions permitted under laws administered by any regulatory body. (See footnote 4 for complete text.)

Clearly, as shown throughout, the State's regulation of pilotage would fall within this exemption. Accordingly, a court would likely hold that such regulation is exempt from the application

---

4/ We would also point out that § 39-5-40 of the Code provides in pertinent part:

> Section 39-5-40 Article inapplicable to certain practices and transactions. Nothing in this article shall apply to: (a) Actions or transactions permitted under laws administered by any regulatory body or officer acting under statutory authority of this State or the United States or actions or transactions permitted by any other South Carolina State law. (emphasis added)

While the provision was obviously aimed primarily at the Unfair Trade Practices Act, the Legislature codified the provision in such a way as to relate to the entire article. Of course, the state antitrust provisions are contained in the same article and it is certainly arguable that the foregoing exemption is applicable to the state antitrust laws as well. See, Omni Outdoor Advertising, supra. The 1976 Code is official and was adopted by the Legislature. See, Act No. 95 of 1977.

of the Uniform Trade Practices Act. State ex rel. McLeod v. Rhoades, supra.

If we can be of further assistance, please advise this Office.

Sincerely,

Robert D. Cook
Executive Assistant for Opinions

RDC:djg