

Commission Opinion

IN THE MATTER OF

KENTUCKY HOUSEHOLD GOODS CARRIERS
ASSOCIATION, INC.

OPINION OF THE COMMISSION AND FINAL ORDER IN REGARD TO
ALLEGED VIOLATIONS OF SEC. 5 OF THE
FEDERAL TRADE COMMISSION ACT

Docket 9309; File No. 0210115
Complaint, July 8, 2003—Opinion and Final Order, June 30, 2005

In a unanimous Opinion, the Commission concluded that respondent's collective ratemaking activities, in preparing and filing collective tariffs for its members violated Section 5 of the Federal Trade Commission Act. The Commission also determined that the state action doctrine did not apply because the state agency responsible for overseeing the respondent's ratemaking did not actively supervise that activity. The Final Order, among other things, prohibits the respondent from entering into adhering to, or maintaining -- any contract, agreement, understanding, plan, program, combination, or conspiracy to fix, stabilize, raise, maintain, or otherwise interfere or tamper with the rates charged by two or more carriers for the intrastate transportation of property or related services, goods, or equipment ("intrastate transportation"). These prohibited practices include but are not limited to knowingly preparing, developing, disseminating, or filing a proposed or existing tariff that contains collective rates for intrastate transportation, and preparing, developing, disseminating, or filing a proposed or existing tariff containing automatic changes to rates charged by two or more carriers. The Final Order also requires the respondent to cancel and withdraw all tariffs and any supplements thereto on file with the Kentucky Transportation Cabinet's Division of Motor Carriers that establish intrastate transportation rates by common carriers in the Commonwealth of Kentucky, and to amend its by-laws to require its members to observe the provisions of this Order as a condition of membership in KHGCA.

Participants

For the Commission: *Dana C. Abrahamsen, Peggy Bayer Femenella, Harry Schwirck, Ashley Masters, Patrick J. Roach, Geoffrey D. Oliver, Richard B. Dagen, and John Howell.*

For the Respondents: *James C. McMahon and Kevin P. Kelly, McMahon & Kelly.*

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OPINION OF THE COMMISSION

By MAJORAS, Chairman, For A Unanimous Commission:

INTRODUCTION

This case presents the question whether the activities of Respondent Kentucky Household Goods Carriers Association, Inc. in preparing and filing collective rates for its members under color of compliance with state law, are shielded from federal antitrust scrutiny by virtue of the “state action” doctrine. The Administrative Law Judge (ALJ) concluded that Respondent’s ratemaking activities constitute unlawful horizontal price fixing, and that Respondent is not entitled to the state action defense. We agree, and affirm the decision of the ALJ.

The state action doctrine and its jurisprudence are important because the doctrine enables the displacement of the federal antitrust laws. The doctrine, which is based on principles of state sovereignty, allows the states to implement legitimate policies. By enabling the displacement of the antitrust laws, however, the doctrine also can allow the implementation of programs that produce powerful anticompetitive effects, including higher prices and fewer choices for consumers.

The Supreme Court has made clear that the state action doctrine only applies when (1) “the challenged restraint [is] clearly articulated and affirmatively expressed as state policy,” and (2) the “policy [is] actively supervised by the State itself.” *California Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980) (internal quotation marks omitted). The principal issue here is whether the state agency responsible for supervising Respondent’s ratemaking engaged in the necessary “active supervision.” Active supervision is essential for the state action doctrine to apply because it ensures that the extent to which the antitrust laws are displaced and responsibility for this displacement is properly laid on the state itself, not merely the

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private actors. For the reasons set forth below, we find that the state has fallen far short of the conduct needed to satisfy the active supervision requirement, and therefore that the state action doctrine does not apply.¹

I. Background

A. Respondent's Activities

The central facts are not in dispute. The Kentucky Household Goods Carriers Association, Inc. ("Respondent" or "Kentucky Association") is an organization with a membership of approximately ninety-three household goods carriers that provide intrastate and local moving services within Kentucky. IDF 7.² One of the Kentucky Association's primary functions is that of a "tariff publishing agent" or so-called "rate bureau" that prepares

¹ This opinion uses the following abbreviations for citations:
ID - Initial Decision of the Administrative Law Judge
IDF - Initial Decision Finding of Fact
CX - Complaint Counsel's Exhibit
RX - Respondent's Exhibit
JX - Joint Exhibit
Dep. - Deposition (+ volume number, if multi-volume deposition)
Tr. - Trial Transcript
RAB - Respondent's Appeal Brief
RRB - Respondent's Reply Brief
CCAB - Complaint Counsel's Answering Brief

We adopt the ALJ's findings of fact to the extent those findings are not inconsistent with this opinion.

² The FTC has jurisdiction to regulate the intrastate moving services at issue here, because such activities affect interstate commerce. JX 1 at ¶ 51; *see Mass. Furniture & Piano Movers Ass'n v. FTC*, 773 F.2d 391, 394 (1st Cir. 1985).

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the initiation, preparation, development, dissemination, and filing of joint tariffs and tariff supplements with the Kentucky Transportation Cabinet (“KTC” or “Intervenor”) on behalf of the Kentucky Association’s members. This function is conducted through the Kentucky Association’s tariff committee. IDF 10. The participating carriers have authorized the Kentucky Association to file rates on their behalf by granting it power of attorney. IDF 24.

The Kentucky Association regularly files supplements to its tariff that contain proposed rate increases for its members. The decision to propose a rate increase can either be agreed to by a voice vote at a general membership meeting or by a vote of the Kentucky Association’s Board of Directors. IDF 25. Before the Kentucky Association files a tariff supplement with the KTC, it notifies its members of the proposed rates. Participating carriers that want to file different rates can submit a request for a tariff change with the Kentucky Association’s tariff committee. IDF 21. If participating carriers do not affirmatively exempt themselves from the terms of the proposed tariff rates, they are covered by the collective rates contained in the Kentucky Association’s tariff. Once tariff rates are filed and approved, every carrier covered by them is obliged to charge the tariff rates. IDF 23. The majority of carriers agree to charge the same rate for many items in the tariff, and there is considerable uniformity among the participating carriers with respect to intrastate rates. IDF 30, 31.

B. State Regulation

Every household goods carrier operating in Kentucky must file a tariff containing its rates with the state. KY. REV. STAT. ANN. § 281.680(1) (Michie 2004). Under Kentucky law, these rates must be “just and reasonable.” KY. REV. STAT. ANN. § 281.675(1) (Michie 2004). It is the policy of the state “to promote safe, adequate, economical and efficient service and foster sound economic conditions in transportation and among the several carriers,” and “to encourage the establishment and

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maintenance of reasonable charges for such transportation service.” KY. REV. STAT. ANN. § 281.590 (Michie 2004). Kentucky law authorizes household goods carriers to become participating parties to a joint tariff published by a tariff-issuing agency. KY. REV. STAT. ANN. § 281.680(1). Carriers must charge the rate set by their tariff – no discounting is permitted. KY. REV. STAT. ANN. § 281.685 (Michie 2004).

The KTC is the state agency authorized to fix or approve the rates charged by household goods carriers. KY. REV. STAT. ANN. § 281.695(1); 601 KY. ADMIN. REGS. 1:050. The KTC is responsible for ensuring that every rate charged by carriers is just and reasonable. 601 KY. ADMIN. REGS. 1:050; IDF 11. The oversight function, however, is assigned to only one person. IDF 54, 55, 61, 62. The KTC is also charged with the responsibility of developing procedures for collective ratemaking, which procedures must “assure that respective revenues and costs of carriers . . . are ascertained.” KY. REV. STAT. ANN. § 281.680(4).

Common carriers must submit a proposed rate change to the KTC thirty days before the rate’s proposed effective date. KY. REV. STAT. ANN. § 281.690(1) (Michie 2004). If the KTC takes no action within thirty days, the proposed rate change becomes effective. IDF 94. Kentucky law provides that the KTC “may, upon its own initiative, and shall, upon protest” filed with the KTC, conduct hearings concerning a proposed rate change. KY. REV. STAT. ANN. § 281.690(2). The law also states that if, after a hearing, the KTC finds a proposed rate change to be “unjust, unreasonable, or unjustly discriminatory,” it must determine the “just and reasonable” rate. *Id.* Another statute provides that if, after a hearing, the KTC finds a proposed rate is “excessive,” it may “determine the just and reasonable rate.” KY. REV. STAT. ANN. § 281.695(1). In addition, the law states that carriers must give notice of a proposed rate change to “interested persons” in the manner directed by the KTC’s administrative regulations. KY. REV. STAT. ANN. § 281.690(1). The KTC’s administrative regulations provide that if a household goods carrier proposes an

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increase to its rates, it must publish a notice of the proposed increase in a newspaper of general circulation, which notice must state that any interested party may file a protest with the KTC. 601 KY. ADMIN. REGS. 1:070(2)(c). Notwithstanding this regulation, the record contains no evidence that the Kentucky Association has ever posted, or the KTC has required, notices of proposed rate increases. IDF 74. The KTC has not held any hearings to examine or analyze the collective rates contained in the Kentucky Association's joint tariff since the late 1950s or early 1960s, when the tariff was first developed. IDF 96.

As noted above, the KTC employs only one person to review and process household goods carrier rates. IDF 54, 61-62. That individual (William Debord) obtains general information about the bases for the Kentucky Association's planned rate increases from discussions with the head of the Kentucky Association's tariff committee or by attending meetings of the Kentucky Association. IDF 70, 76-80. However, the Kentucky Association does not submit, and the KTC does not require submission of, any business records, economic studies or cost justification data. IDF 75. Moreover, the movers do not disclose details about their costs, revenues, or profit margins at Kentucky Association meetings. IDF 70, 71. The KTC used to require household goods carriers to file annual financial reports in the 1970s and '80s, but it no longer requires the submission of this data. IDF 42, 63. The KTC also used to perform uniform cost studies and calculate operating ratios for all household goods carriers in the 1970s, but it no longer does so. IDF 44, 45. The KTC does not have any standard or formula for determining whether a rate increase is appropriate or complies with statutory standards. IDF 88, 89. The KTC does not issue a written decision when it permits a rate increase to go into effect. IDF 95. For years, the KTC has approved these rate increases in their entirety without modification. *See* CX 116 (Debord, Dep. II at 94).

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C. Proceedings Before the Administrative Law Judge

The Commission's complaint in this matter, issued on July 8, 2003, alleged that the Kentucky Association and its members have engaged in a combination to fix prices in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, by taking actions to establish and maintain collective rates for the transportation of household goods within Kentucky. The complaint alleges that Respondent's conduct has had the effect of raising prices in the household goods moving industry and depriving consumers of the benefit of competition.

Respondent denied that its members' collective ratemaking activities constitute a horizontal agreement to fix prices, and asserted as an affirmative defense that the challenged conduct is exempt from the federal antitrust laws under the state action doctrine. Respondent relied on provisions of state law which permit carriers to adhere to joint tariffs. *See* Memorandum of Respondents in Support of Motion for Summary Decision at 24-42. Respondent filed a motion for summary decision on December 19, 2003, which ALJ D. Michael Chappell denied on February 26, 2004. On February 23, 2004, the KTC filed a motion seeking leave to intervene supporting Respondent. On March 10, 2004, the ALJ granted the motion in part and denied it in part, permitting the KTC to offer evidence and testimony at the hearing in this proceeding, subject to certain limitations, and to present an opening statement and closing argument. Trial commenced on March 16, 2004. No witnesses were called to testify. By agreement of Complaint Counsel and Respondent, the deposition transcripts and videotapes of depositions of four witnesses were offered into evidence in lieu of live testimony. Intervenor KTC did not attend the March 16 proceedings, and did not offer any evidence or testimony at the trial.

Following the submission of post-trial briefs, the ALJ found that Respondent and its members engaged in horizontal price

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fixing that is *per se* unlawful. The ALJ also found that Respondent is not exempt from antitrust liability under the state action doctrine, because it failed to establish that the Commonwealth of Kentucky actively supervises its ratemaking activities. Accordingly, the ALJ found violations of Section 5, and recommended entry of an order requiring Respondent to cease and desist from collective ratemaking.

This matter now is before the Commission on Respondent's appeal from the Initial Decision. Respondent's principal contention in this appeal is that its ratemaking activities are exempt from antitrust liability under the state action doctrine. In this regard, Respondent also contends that the ALJ erroneously failed to take into account the KTC's views that it actively supervises Respondent's collectively-set rates and that holding this conduct in violation of the federal antitrust laws would reduce the KTC's ability to enforce the applicable state laws and regulations.

The Commonwealth of Kentucky, represented by its Attorney General, has submitted an *amicus curiae* brief in this appeal asserting that the ALJ's decision does not conflict with Kentucky law or public policy and, thus, does not implicate federalism concerns.

On the day of oral argument, Respondent filed a motion asking the Commission to stay this proceeding pursuant to Section 3.54(c) of the Commission's Rules of Practice, 16 C.F.R. § 3.54(c), pending the Commission's review of recent actions taken by the KTC, which Respondent asserts show that the KTC has instituted procedures consistent with the standards for active supervision set forth in the Initial Decision. As discussed below, we have deferred ruling on Respondent's Rule 3.54(c) motion until issuing our final decision on the merits, and address the issues raised in that motion herein.

II. State Action Doctrine

A. Overview

The principal issue on appeal is whether the Kentucky Association's ratemaking activities are beyond the purview of the federal antitrust laws by virtue of the state action doctrine. The Supreme Court first articulated this doctrine in *Parker v. Brown*, 317 U.S. 341 (1943), where the Court upheld California's Agricultural Prorate Act against a Sherman Act challenge. The Court determined that federal statutes do not limit the sovereign states' autonomous authority over their own officers, agents, and policies in the absence of clear congressional intent to do so, and it found no such intent in the language or legislative history of the Sherman Act. *Id.* at 350-51. Accordingly, the Court held that when a "state in adopting and enforcing [a] program . . . , as sovereign, imposed the restraint as an act of government," the Sherman Act does not prohibit the restraint. *Id.* at 352.³ The state action doctrine is thus grounded in principles of federalism and state sovereignty.

Although *Parker* involved acts of the state itself, the Supreme Court subsequently confirmed that the state action doctrine also protects certain private conduct from the federal antitrust laws. The Court has articulated a two-part test for determining whether anticompetitive conduct of private entities qualifies as "state action": (1) the challenged conduct must be undertaken pursuant to a "clearly articulated and affirmatively expressed" state policy to displace competition with regulation; and (2) the conduct must be "actively supervised" by the state itself. *Midcal*, 445 U.S. at

³ The state action defense is available in Section 5 cases applying Sherman Act standards. *Ticor Title Ins. Co.*, 112 F.T.C. 344, 424 n.5 (1989).

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105 (internal quotation marks omitted).⁴ Compliance with both parts of the *Midcal* test ensures not only that the federal antitrust laws are displaced only where there is a “deliberate and intended state policy,” but that the state remains politically accountable for the anticompetitive conduct it has sanctioned and overseen. *Ticor Title*, 504 U.S. at 636.

The first part of the *Midcal* test seeks to determine whether the state has intended to depart from the Sherman Act’s competitive model as an act of government to which federalism principles demand deference.⁵ In *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48 (1985), the Supreme Court applied the “clear articulation” requirement to collective ratemaking by intrastate common carrier rate bureaus operating under a regulatory scheme that was in some ways comparable to the state regulations at issue here. The Court held that collective ratemaking undertaken pursuant to state statutes that explicitly permitted collective rate-making or otherwise “made clear [the state’s] intent that intrastate rates would be determined by a regulatory agency, rather than by the market” established

⁴ Because the state action exception is an affirmative defense, the burden of proof is on Respondent to show that this standard has been met. See *Federal Trade Comm’n v. Ticor Title Ins. Co.*, 504 U.S. 621, 638 (1992) (“[T]he party claiming the immunity must show that state officials have undertaken the necessary steps to determine the specifics of the price-fixing or rate-setting scheme.”). Respondent does not dispute this point. See Memorandum of Respondent in Support of Motion for Summary Decision at 7-8.

⁵ “Even strong regard for state policy would require antitrust immunity *only* if that were the state’s wish – that is, if the state intended in some sense to displace the antitrust laws from a certain area of activity.” I Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* § 221d, at 363 (2d ed. 2000) (emphasis in original).

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sufficiently clear articulation of the state's intent to displace competition to satisfy the first part of the *Midcal* test. *Id.* at 63-64.⁶ In this case, nobody disputes that Respondent's challenged conduct – undertaken pursuant to Kentucky law that explicitly permits collective ratemaking – meets the first part of the *Midcal* test.

The issue in contention here is the application of the second part of the *Midcal* test. While a state may substitute its own regulatory program in place of the competitive market, principles of federalism and state sovereignty do not empower a state simply to displace the federal antitrust laws and then abandon the market at issue to the discretion of non-governmental actors.⁷ Accordingly, to qualify for the state action exemption from the antitrust laws, a challenged restraint effectuated by such actors not only must accord with a clearly articulated state policy to displace competition, but also must be actively supervised by the state. *Midcal*, 445 U.S. at 105. This requirement “stems from the recognition that ‘[w]here a private party is engaging in the anticompetitive activity, there is a real danger that he is acting to further his own interests, rather than the governmental interests of the State.’” *Patrick v. Burget*, 486 U.S. 94, 100 (1988) (quoting *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 47 (1985)). As the Supreme Court explained in *Federal Trade Comm’n v. Ticor Title Ins. Co.*:

[W]hile a State may not confer antitrust immunity on private persons by fiat, it may displace competition with active state supervision if the displacement is

⁶ The Court did not examine whether the state's involvement satisfied the second part of the *Midcal* test, because the government had conceded that the relevant state agencies actively supervised the rate bureaus' collective ratemaking activities. *Southern Motor Carriers Rate Conference*, 471 U.S. at 62.

⁷ See I Areeda & Hovenkamp, § 226a, at 464.

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both intended by the State and *implemented in its specific details*. Actual state involvement, not deference to private price-fixing arrangements under the general auspices of state law, is the precondition for immunity from federal law.

504 U.S. 621, 633 (1992) (emphasis added). The purpose of the active supervision requirement is not to impose normative standards on state regulatory practices, but rather to ensure that a state, in displacing federal law, takes appropriate steps to ensure that its own stated standards are met. *Id.* at 634-35.

The Supreme Court has made clear that the standard for active state supervision is a rigorous one. It is not enough that the state approves private pricing agreements with little review. As the Court held in *Midcal*, “[t]he national policy in favor of competition cannot be thwarted by casting such a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement.” *Midcal*, 445 U.S. at 106. Active supervision “requires that state officials have *and exercise* power to review particular anticompetitive acts of private parties and *disapprove those that fail to accord with state policy*.” *Patrick*, 486 U.S. at 101 (emphasis added). State officials must engage in a “pointed reexamination” of the private conduct. *Midcal*, 445 U.S. at 106 (internal quotation marks omitted). They must exercise “sufficient independent judgment and control so that the details of the rates or prices have been established as a product of deliberate state intervention.” *Ticor*, 504 U.S. at 634.

In *Ticor*, the Supreme Court confirmed the Commission’s application of the active state supervision requirement to collective ratemaking activities. The Court disagreed with lower court decisions holding that the active supervision requirement is met merely where the state regulatory program is “staffed and funded,” grants state officials “power and the duty to regulate pursuant to declared standards of state policy, is enforceable in the state’s courts, and demonstrates some basic level of activity

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directed towards seeing that the private actors carry out the state's policy." *Id.* at 637 (quotation omitted). The Court stated that these criteria might be a "beginning point," but were "insufficient to establish the requisite level of active supervision." *Id.* at 637-38. The Court held:

Where prices or rates are set as an initial matter by private parties, subject only to a veto if the State chooses to exercise it, the party claiming the immunity must show that state officials have undertaken the necessary steps to determine the specifics of the price-fixing or ratesetting scheme. The mere potential for

state supervision is not an adequate substitute for a decision by the State.

Id., at 638. Applying this standard, the Court found supervision inadequate in states where private rate filings routinely went into effect without further activity by the state regulatory agency – sometimes checked only for mathematical accuracy, and sometimes not even checked to that extent.⁸

The Supreme Court's decisions in *Ticor*, *Patrick*, and *Midcal* thus make clear that a state official or agency must have ascertained the relevant facts, examined the substantive merits of the private action, and assessed whether the private action comports with the underlying statutory criteria established by the state legislature in a way sufficient to establish the challenged conduct as a product of deliberate state intervention rather than

⁸ Although *Ticor* involved a "negative option" regulatory scheme (*i.e.*, where proposed rates go into effect automatically within a specified time period, unless the regulatory agency raises an objection), the Court's holding that active supervision requires the state actually to exercise "independent judgment and control" over the "details" of the ratesetting scheme is not limited to a negative option system. *Ticor*, 504 U.S. at 634-35.

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private choice. Although the Supreme Court has not prescribed specific state supervisory activities that must exist to meet the active supervision standard, *Ticor* does suggest some steps that may be indicative of active supervision. The Court noted that the government's concession of active supervision in *Southern Motor Carriers* was against a background that "the State had ordered and held ratemaking hearings on a consistent basis." *Ticor*, 504 U.S. at 639. The *Ticor* Court also indicated that a state regulatory agency might properly use "sampling techniques" to investigate filed supporting data, or use a "specified rate of return" formula to determine whether a rate increase was justified. *Id.* at 640.

The courts that have addressed the active supervision requirement, and the Commission's previous decisions involving collective ratemaking, have identified a number of state supervisory activities that support a determination of active state supervision. These factors include where the state: collects business data (including revenues and expenses); conducts economic studies; reviews profit levels and develops standards or measures such as operating ratios; disapproves rates that fail to meet the state's standards; conducts hearings; and issues a written decision. For example, in *Yeager's Fuel, Inc. v. Pennsylvania Power & Light Co.*, 22 F.3d 1260, 1270-72 (3rd Cir. 1994), the court found active state supervision of a utility's special electric rates and other incentives for use of high-efficiency electric heating systems, where state officials: approved the rate after a hearing in a contested tariff proceeding; required the utility to submit an annual report regarding its rebate and rate program; promulgated regulations detailing the methodology to be used in assessing whether such programs and their associated costs were just and reasonable; conducted an investigation of the programs in response to inquiries from the legislature and complaints by non-participants; and issued a written report concluding that the

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programs were cost effective and did not adversely affect non-participants.⁹

Other circuit court decisions have pointed to similar indicia of state supervision. In *Lease Lights, Inc. v. Public Service Co. of Oklahoma*, 849 F.2d 1330, 1334 (10th Cir. 1988), the court found active state supervision of a utility's rates where, in response to the utility's request for a rate adjustment, the regulatory agency conducted public hearings involving extensive testimony and documentary evidence, and subsequently authorized a different rate adjustment than the utility had proposed. In *DFW Metro Line Services v. Southwestern Bell Tel. Corp.*, 988 F.2d 601, 606-07 (5th Cir. 1993), the court found active supervision of telephone rates where the state agency's numerous published decisions ruling on petitions for a rate change showed that the agency examined the reasonableness of the rates and provided a forum for complaints regarding application of the tariffs. And, in *TEC Cogeneration, Inc. v. Florida Power & Light Co.*, 76 F.3d 1560 (11th Cir.), *modified on reh'g*, 86 F.3d 1028, 1029 (11th Cir. 1998), the court held that the state "exercised sufficient independent judgment and control" to satisfy the active supervision requirement where state regulators approved a utility's rates and its other challenged conduct after conducting extensive, contested administrative proceedings.¹⁰

⁹ The state's supervisory activities are described in further detail in the district court's opinion. *Yeager's Fuel, Inc. v. Pennsylvania Power & Light Co.*, 804 F. Supp. 700, 712-13 (E.D. Pa. 1992), *aff'd in relevant part and rev'd in part*, 22 F.3d 1260 (3rd Cir. 1994).

¹⁰ See also *Green v. Peoples Energy Corp.*, No. 02 C 4117, 2003 WL 1712566, at *6-7 (N.D. Ill. Mar. 28, 2003) (finding active supervision where the state agency conducted "elaborate hearings" and issued "lengthy orders" approving the tariffs at issue); *Destec Energy, Inc. v. Southern California Gas Co.*, 5 F. Supp. 2d 433, 455-58 (S.D. Tex. 1997) (finding active supervision

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The Commission's previous decisions finding active supervision of collective ratemaking are also instructive. In *Motor Transport Ass'n of Connecticut, Inc.*, 112 F.T.C. 309, 341-42 (1989), the Commission held that the active supervision requirement was satisfied where the regulatory agency required that a proposed rate increase of more than 5% be accompanied by financial information – including operating revenues and expenses – to justify the reasonableness of the increase; applied a specified operating ratio to evaluate the proposed rate's reasonableness; and held several public hearings and issued written decisions regarding proposed rates. In *New England Motor Rate Bureau, Inc.*, 112 F.T.C. 200, 282-83 (1989), *rev'd on other grounds sub nom New England Motor Rate Bureau, Inc. v. Federal Trade Comm'n*, 908 F.2d 1064 (1st Cir. 1990), the Commission concluded that the active supervision requirement was met where

where the state agency held contested public hearings regarding contracts at issue, circulated its proposed resolutions for public notice and comment, and issued a written decision that addressed the reasonableness of the challenged provisions); *County of Stanislaus v. Pacific Gas & Elec. Co.*, No. CV-F-93-5866-OWW, 1994 WL 706711, at *26-27 (E.D. Cal. Aug. 25, 1994) (finding active supervision where the state agency conducted a “searching and thorough” annual review of the reasonableness of utility's rates that included the agency's “application of criteria to consider competitive concerns”); *City of Vernon v. Southern California Gas Co.*, No. CV 92-3435-SVW(CTx), 1994 WL 896057, at *2 (C.D. Cal. Aug. 4, 1994) (finding active supervision where the state agency conducted extensive proceedings regarding utility's rates and issued written orders which contained detailed explanations of the agency's reasons for its decision and indicated that the agency considered the competitive effects of its decision); *Gulf Marine Repair Corp. v. Liberty Mutual Ins. Co.*, No. 92-1576-CIV-T-21A, 1994 WL 805208, at *10-11 (M.D. Fla. Jan. 13, 1994) (finding active supervision where state agency routinely held public hearings on rates and only once approved rates as initially filed).

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state regulators analyzed proposed collective rates to determine whether they fell within a “zone of reasonableness” based on the minimum and maximum industry averages of previously approved rates, had suspended tariffs determined to be unreasonable pending a formal public hearing, and issued written orders.

Finally, in 2003, the Commission issued a complaint against the Indiana Household Goods and Warehousemen, Inc., and an accompanying Agreement Containing Consent Order. The complaint alleged that the respondent, an association consisting of 70 household goods movers, took collective actions to establish and maintain moving rates, in violation of Section 5 of the FTC Act. Complaint, ¶¶ 7-9, *Indiana Household Movers and Warehousemen, Inc.*, Dkt. No. C-4077 (April 25, 2003). The Consent Order, among other things, required the respondent to cease and desist from the unlawful conduct, barred the respondent from filing collective rates, and required cancellation of all existing tariffs. Consent Order, *Indiana Household Movers and Warehousemen, Inc.*, Dkt. No. C-4077 (April 25, 2003). An accompanying Analysis of Proposed Order to Aid Public Comment, *Indiana Household Movers and Warehousemen, Inc.*, Dkt. No. C-4077 (April 25, 2003) (“Analysis”), discussed the Commission’s views about the parameters and requirements of the state action doctrine. The Analysis stated that the Commission would consider the following elements in its analysis of the active supervision prong:

- (1) the development of an adequate factual record supporting the proposed rate increase, including notice and opportunity to be heard; (2) a written decision on the merits; and (3) a specific assessment – both quantitative and qualitative – of how the private action comports with the standards established by the state legislature.

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Analysis at 5, *Indiana Household Movers and Warehousemen, Inc.*, Dkt. No. C-4077 (April 25, 2003).¹¹

The ALJ concluded, and we agree, that no single measure identified above by the courts or the Commission is necessarily a prerequisite for active supervision in this case. We recognize, for example, that the financial information required for a small number of utilities may differ markedly from the information required of a large number of small movers. However, the ALJ's finding that the state of Kentucky has taken none of the measures identified by the courts and the Commission plainly supports a conclusion that the level of state supervision of the challenged private activity does not meet the active supervision standard. ID 36.

We now turn to an examination of the KTC's supervision of the conduct at issue.

B. State Supervision in Kentucky

We find that the Commonwealth of Kentucky does not actively supervise the Kentucky Association's collective ratemaking. Although the KTC has the authority – indeed the responsibility – to ensure that household goods carrier rates are “just and reasonable” and not “excessive,” *see* KY. REV. STAT. ANN. §§ 281.675, 281.590, and 281.695(1), the record shows that, in practice, the KTC's review of the appropriateness of the rates in the Kentucky Association's tariff has been exceedingly limited.

As discussed in the preceding section, the active supervision standard requires Respondent to demonstrate that the state, having chosen to substitute regulation for the economic constraints of the

¹¹ *See also* Office of Policy Planning, *Report of the State Action Task Force 55* (September 2003), available at <http://www.ftc.gov/os/2003/09/stateactionreport.pdf> (identifying same factors as indicia of active supervision).

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competitive market, actually undertakes a substantive review of Respondent's collective rates to ensure that the rates comport with the state's articulated policy objectives. While there are a range of ways a state may undertake this review, the normal starting point for such a program of regulatory oversight is for the state to establish some methodology for evaluating the appropriateness of proposed rates. Usually, such an evaluation involves some analysis of the relevant firms' costs and revenues, profit margins, operating ratios, or other such measures. *See, e.g., Motor Transport Ass'n of Connecticut*, 112 F.T.C. at 320-22, 341 (state regulators reviewed carriers' operating revenues and expenses); *Yeager's Fuel*, 804 F. Supp. at 713 (agency's regulations set forth in detail the methodology to be used in assessing the cost effectiveness of utility's programs); *United States v. Southern Motor Carriers Rate Conference, Inc.*, 467 F. Supp. 471, 477 (N.D. Ga. 1979) (regulators used carriers' cost data to arrive at an operating ratio).¹²

In this case, the statute that authorizes the KTC to establish procedures for collective ratemaking expressly provides that these procedures must "assure that respective revenues and costs of carriers . . . are ascertained." KY. REV. STAT. ANN. § 281.680(4). It is thus evident that the state legislature has contemplated that the agency should undertake some cost-based analysis of collective rates. The KTC, however, has no formula or methodology for determining whether the Kentucky Association's collective rates comply with the statutory standards. IDF 88, 89. Although, at one time, the KTC performed "uniform cost studies" and calculated operating ratios for household goods carriers, it has not done so for over two decades. IDF 44, 45. As the KTC employee responsible for reviewing household goods carrier tariffs explained, "I didn't see it necessary to make – spend the time and expense of going into that in depth study when I felt

¹² As we noted above, the government in *Southern Motor Carriers* conceded active state supervision.

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common sense provided me that judgment.” CX 116 (Debord, Dep. II at 90).

Not only has the KTC failed to establish any methodology for analyzing rates, it does not even obtain data – including the cost and revenue data specified in the statute – that would enable it to assess the reasonableness of the Kentucky Association’s rates. Over the years, the Kentucky Association has proposed numerous rate increases to its tariff. In the ten-year period from 1992 to 2002 alone, the Kentucky Association proposed nine general rate increases. IDF 27 (increase of 4.5% in 1992, 8% in 1994, 5% in 1996, 8% in 1998, 5% in 1999, 10% in 2000, 8% in 2001, 5% in 2002). The Kentucky Association also has filed tariff supplements adding new categories of rates – including, for example, higher peak season rates (to which all but two of its members adhere). IDF 29, 35. Year after year, the KTC has nearly always approved these rate increases in their entirety without any modification. *See* CX 116 (Debord, Dep. II at 94-95) (KTC employee identified only one instance in which KTC rejected a proposed increase to the collective tariff rates). Yet the record shows that the KTC has obtained little, if any, business data from the Kentucky Association or its members to verify the reasonableness of these numerous rate increases. IDF 75.

The KTC employee generally learns about the bases for proposed rate increases by attending meetings of the Kentucky Association membership or through informal discussions with Kentucky Association representatives. IDF 70, 76. The type of information the KTC obtains in this way is only of a very general nature – for example, “the general membership felt they needed an increase in their charges in order to offset the increase, whether it be in operation cost or whether it be in insurance, whichever the case may be.” IDF 79. The KTC does not request or obtain information about the carriers’ actual costs, revenues, or profit margins to verify the Kentucky Association’s asserted

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justifications for its proposed rate increases. IDF 70, 79.¹³ Although the KTC formerly required household goods carriers to file annual financial reports in the 1970s and '80s, it no longer requires carriers to submit that information and does not examine such materials in its review of proposed rates. IDF 42.¹⁴ Instead, the KTC employee testified that he relies on his experience in the industry, conversations with truckers regarding their costs, and his review of publications such as the *Wall Street Journal*. IDF 67.

One justification that the Kentucky Association has given, and the KTC has accepted, for proposed increases to its *intrastate* tariff is that *interstate* tariff rates have increased. For example, in December 1999, the Kentucky Association informed the KTC that it was seeking a 10% increase to its tariff rates because interstate tariff rates had increased by 5%. The following December, the Kentucky Association proposed an 8% rate increase because the interstate tariff rates had increased by 5%. The KTC allowed these rate increases to go into effect. IDF 83, 84. The KTC employee explained that “[i]t was very common for [the Kentucky Association] to state to me that their costs for doing intrastate work was equal to that of interstate work. And, if interstate went up eight percent, then it should be logical to assume that intrastate should be increased by an equal amount.” CX 116 (Debord, Dep. II at 102). The KTC employee indicated, however, that he did not

¹³ The KTC employee reviews records that movers keep on individual moves while conducting household goods compliance audits to ensure that movers are adhering to the filed rates, but he does not routinely look at balance sheets, income statements, payroll documents, or business records that would allow him to analyze the movers' profitability. IDF 72.

¹⁴ A limited number of carriers still submit financial statements to the KTC on a voluntary basis, but they are not audited, and the KTC does not consider them reliable sources of information regarding the industry's economic conditions. IDF 63.

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really know how the interstate rates – which are developed by a private rate publishing agency and published pursuant to federal law – are established. IDF 98. He also acknowledged that, because movers are permitted to discount from the interstate tariff rates, and routinely do discount from those rates, it would be difficult to compare the rates in the Kentucky Association’s tariff rates with the rates in the interstate tariff. IDF 99-101. Indeed, the KTC employee stated that, in his view, the federal standards for the interstate tariff differ significantly from Kentucky’s standards for intrastate rates, because in “my understanding, their goal [for interstate rates] is to let the industry charge as they wish, charge whoever they wish, whatever they wish and discriminate as they see fit.” IDF 102 (quotation omitted). Under these circumstances, we find that the KTC could not reasonably make an assessment of the appropriateness of the intrastate tariff rates based on an increase in the interstate tariff rates. In particular, it is difficult to see any reasonable basis for using an interstate increase as a justification for a *larger* percentage increase in intrastate rates, as has occurred at least twice.

In *Ticor*, the Commission found active supervision lacking where the state agency “suffered from a dearth of information that would have enabled it to assess the appropriateness of the filed rates.” *Ticor*, 112 F.T.C. at 432. On remand from the Supreme Court, the circuit court affirmed the Commission’s decision, finding that the state “could not meaningfully examine the rates proposed because it never obtained the information necessary for a proper evaluation.” *Ticor Title Ins. Co. v. Federal Trade Comm’n*, 998 F.2d 1129, 1140 (3rd Cir. 1993). The same is true here. We do not mean to suggest that there is a specific factual inquiry that a state necessarily must undertake as part of its regulatory program. The factual record that will suffice for a meaningful review of the private conduct at issue depends at least in part on the substantive norms that the state has provided. In this case, it is of significant consequence that the state legislature itself has provided that the KTC must “assure that respective revenues and costs of carriers . . . are ascertained,” KY. REV.

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STAT. ANN. § 281.680(4), and that the KTC does not obtain this data.

Furthermore, the state's regulatory program lacks the procedural elements – such as public input, hearings, and written decisions – that courts have found to be important indicators of active state supervision. *See, e.g., Yeager's Fuel*, 22 F.3d at 1270-72; *Lease Lights*, 849 F.2d at 1334; *Destec Energy, Inc. v. Southern California Gas Co.*, 5 F. Supp. 2d 433, 455-58 (S.D. Tex. 1997); *City of Vernon v. Southern California Gas Co.*, No. CV 92-3435-SVW(CTx), 1994 WL 896057, at *2 (C.D. Cal. Aug. 4, 1994) These procedural elements are powerful tools for ensuring that relevant facts – especially those that might contradict the proponent's contentions – are brought to the state decision-maker's attention. Although the state legislature has identified public hearings as procedures state regulators may – and, upon receipt of a protest, must – use in reviewing rates, the state has not conducted hearings regarding the Kentucky Association's collective tariff since the late 1950s or early 1960s, when the tariff was first developed. IDF 96.¹⁵ Moreover, although a state statute and the KTC's own administrative regulations require that household goods carriers give public notice of proposed rate increases, the KTC does not appear to enforce this requirement. IDF 74. The KTC receives no input from groups advocating on behalf of consumers. IDF 73. The KTC does not issue written decisions when it permits rate increases to go into effect, nor does it set forth in writing any

¹⁵ Respondent argues that it has not been necessary for the KTC to hold hearings or suspend the Kentucky Association's proposed rates because the Kentucky Association's formal tariff filings already reflect input from KTC employee Debord regarding which proposals he would accept or reject. As we have already discussed, however, Debord did not obtain or review the type of information that would support a substantive assessment of the merits of the Kentucky Association's proposed rates.

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analysis of the collective rates contained in the Kentucky Association's tariff. IDF 95.

We agree with the ALJ that this minimal level of state activity falls far short of the active supervision required by *Ticor*, *Patrick*, *Midcal*, and other relevant cases. ID 46.¹⁶ This is not a difficult case in which we are called upon to decide whether a state's implementation of certain supervisory steps but not of others satisfies the active state supervision requirement. Where, as here, the relevant state agency has not taken any of the steps that courts have identified as indicia of active supervision, it is clear that the state has not exercised "sufficient independent judgment and control so that the details of the rates or prices have been established as a product of deliberate state intervention." *Ticor*, 504 U.S. at 634-35. This conclusion is all the more compelling when the state agency has not taken the steps that the state legislature itself has identified as important for a determination of whether rates are reasonable.

Respondent argues that this case is different than *Ticor*, because *Ticor* involved a negative option system, whereas the record here demonstrates KTC "activity" with regard to the Kentucky Association's tariff filings. RAB at 29. The Supreme Court in *Ticor*, however, never said that the need for a state to exercise "independent judgment and control" over the "details" of proposed rates is satisfied simply because a state avoids use of a negative option system. *Ticor*, 504 U.S. at 634-35. Moreover, the record evidence in the present case demonstrates the spurious nature of the distinction Respondent would have us draw. The record shows that when the Kentucky Association wants to increase rates, it informs the KTC employee of the proposed

¹⁶ The ALJ also found that the minimal level of staffing for the KTC's regulatory program weighs against a finding of active supervision. ID at 37-38. We believe that the evidence in this regard is inconclusive; thus, this finding does not factor into our analysis.

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change to the tariff, and the employee often says merely “file the tariff and we’ll take it from there.” IDF 79 (citing CX 117 (Mirus, Dep. At 153)). Then, when the document requesting the change is filed, the KTC stamps the document, and, in the absence of further action by the KTC, this is deemed the KTC’s approval of the proposed change. IDF 94. When Respondent submitted a price increase in 1994, for example, the Association’s notes of the filing stated bluntly: “Take to Bill Debord [the KTC employee] for acceptance stamp.” *Id.* (quoting RX 102). Regardless of whether this is properly deemed a negative option system, based on these facts we cannot say that the regulatory scheme here is significantly different than the one at issue in *Ticor*.

Respondent also argues that a requirement for notice and a hearing would add nothing to the regulatory process here because, given the sporadic and occasional nature of household moving, individual consumers shipping goods would have no interest in any rate proceeding and would therefore be unlikely to participate. RAB at 34. Respondent further argues that such procedural requirements are inappropriate, because the state’s system of tariff “publication” (*i.e.*, making tariffs available for inspection by shippers) is consistent with the manner of tariff publication prescribed by the federal government for interstate tariffs, and identical to rules that have traditionally governed tariff rate filings. *Id.* at 35. These arguments are ill-founded. Even assuming, for the sake of argument, that individuals who only occasionally use moving services would not be inclined to complain about rates, there are other groups that may well have an interest in providing input to the ratemaking process. *See* CX 116 (Debord, Dep. II at 94) (KTC employee testified that businesses that paid for their employees’ moving expenses had complained about proposed rate increases). Furthermore, Respondent fails to explain how publication of tariffs by itself can meet the basic requirement for active supervision – *i.e.*, ensuring that “the details of the rates or prices have been established as a product of deliberate state intervention.” *Ticor*, 504 U.S. at 634.

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More fundamentally, these arguments misapprehend the significance of the ALJ's observations about the lack of hearing procedures. As we already have made clear, neither we nor the ALJ have held that notice and a hearing are absolute requirements for a state's program of active supervision.¹⁷ Nonetheless, while there are many ways a state may structure its supervision of private anticompetitive conduct, it is essential that the state's chosen procedures allow for meaningful review of the merits of the conduct at issue to ensure that it comports with the state's own normative standards.

Respondent also argues that it is improper to compare the KTC's current level of supervision with the KTC's supervisory activities in the past, because the state's regulatory needs have diminished as a result of federal deregulation of other non-household goods carrier rates in 1995. RAB at 40. We do not hold that the KTC must adhere to its supervisory activities of the past; rather, we merely look to these prior activities as an indicator of what supervisory activities are possible in this context.¹⁸ Changing circumstances may indeed cause the state to alter its regulatory activities, but that does not relieve the state of its obligation to exercise "independent judgment and control" over the regulated rates. *Ticor*, 504 U.S. at 634. At any time, the state has a choice: it can choose to return to a freely competitive

¹⁷ See *Motor Transport Ass'n of Connecticut*, 112 F.T.C. at 342 (rejecting argument that notice and a hearing are essential for active supervision).

¹⁸ Complaint Counsel also invites the Commission to consider documents (excluded by the ALJ) showing the extensive supervision of collective rates undertaken by the state of Oregon to assess how Kentucky's supervision fares by comparison. CCAB at 39-43. In a closer case, we might find the material helpful as an example of the level of supervision that is possible in this industry. However, because we find that this is not a close case, consideration of these materials is not necessary here.

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system, or it can allocate the resources necessary to ensure that the regulated activity accords with state policy.

Last, Respondent argues that the Initial Decision does not give proper deference to the KTC's determination that its procedures for overseeing collective rates are appropriate and effective, or the fact that the KTC intervened in this matter, and that the ALJ erred in excluding a declaration by the KTC expressing its views that it actively supervises Respondent's collective rates. RAB at 15-18, 40-41. As the ALJ correctly found, the KTC declaration adds nothing to this case.¹⁹ Whether a state agency is satisfied with its level of regulatory oversight does not determine whether the state in fact actively supervises private anticompetitive conduct.²⁰ As the Supreme Court has made clear, states do not have unfettered discretion to determine the level of regulatory oversight that is adequate when competition has been displaced. *Midcal*, 445 U.S. at 106. Protection from the federal antitrust laws will be granted only when the state has substituted a program of active supervision for the economic constraints of the competitive market.

¹⁹ For this reason, we hold that the ALJ did not err in excluding the KTC's declaration. Even if we take this declaration into account, however, it does not change our analysis, for the reasons stated above.

²⁰ We note that the Commonwealth of Kentucky – represented by the Kentucky Attorney General – has submitted an *amicus* brief in this appeal expressing its view that the ALJ's decision does not conflict with state law or public policy. Although the objective facts – rather than the state's opinion – determine whether the active supervision standard is met, the submission further undercuts Respondent's argument.

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III. Price Fixing

We next address whether the Kentucky Association's rate-making conduct, if not shielded by the state action doctrine, violates the antitrust laws. The household goods carriers that participate in the Kentucky Association are competitors. IDF 8. On behalf of its members, the Kentucky Association prepares and files with the KTC joint tariffs and tariff supplements containing proposed rates, which, after nearly automatic approval by the KTC, establish the prices its members agree to charge, unless they file an exemption. IDF 10, 23.²¹ This activity is collective ratemaking – concerted activity to fix or stabilize prices that historically has been condemned as *per se* illegal price-fixing.²² See *Ticor*, 504 U.S. at 639 (“This case involves horizontal price fixing No antitrust offense is more pernicious than price fixing.”); *Motor Transport Ass’n of Connecticut*, 112 F.T.C. 336 (collective ratemaking “easily fits the classic description of a ‘naked price restraint’”) (internal quotation marks omitted); *Massachusetts Furniture & Piano Movers Ass’n, Inc.*, 102 F.T.C.

²¹ The ALJ found that the Kentucky Association sometimes pressured its members to drop requests to charge rates lower than those in the tariff. IDF 36-40. Although there is some evidence in the record to support this finding, we do not believe that it is dispositive to the issues of whether the Kentucky Association's collective ratemaking violates the federal antitrust laws and whether its activities are exempt from these laws under the state action doctrine. Whether or not such pressure was imposed, the fact remains that the majority of Respondent's members voluntarily engaged in collective tariff filings, which amply demonstrates price-fixing.

²² “So called ‘rate bureaus’ are really cartels of common carriers, utilities, insurers, or other price-regulated firms that submit rates jointly. While joint submissions greatly simplify the rate approval process . . . , they pose obvious dangers of price fixing.” I Areeda & Hovenkamp, § 221a, at 356.

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1176, 1224 (1983) (“it is clear beyond cavil that agreements among competitors to set price levels or price ranges are *per se* illegal under the antitrust laws”) (citation omitted), *rev’d on other grounds sub nom Massachusetts Furniture & Piano Movers Ass’n, Inc. v. Federal Trade Comm’n*, 773 F.2d 391 (1st Cir. 1985).²³

Respondent does not seriously dispute that, unless the state action exemption applies, collective ratemaking violates the federal antitrust laws. *See* Tr. at 23-24. Although Respondent asserts that its members do not agree to prices but merely agree to submit tariff proposals for the KTC’s consideration (RAB 5), it does not contend that a “mere” agreement on *proposed* rates alters the illegal character of the challenged conduct.²⁴ Lest there be any doubt on the subject, we find that the need for formal KTC approval of proposed tariff filings (which can be effected simply by agency inaction, IDF 94) does not change the fact that the

²³ In *PolyGram Holding Inc.*, Dkt. No. 9298, op. 49 n. 66 (FTC July 24, 2003), *review pending*, No. 03-1293 (D.C. Cir.), the Commission recognized that, although the Supreme Court has abandoned the view of a sharp *per se* rule of reason dichotomy for most types of collective activity, a traditional *per se* approach remains appropriate in cases with no possible arguments that restraints are needed to achieve procompetitive results. The collective ratemaking at issue clearly falls into the latter category.

²⁴ Respondent maintained during the oral argument before the Commission that its members sometimes charged old rates. Although the degree of uniformity could be potentially relevant in a damages action, we can find that Respondent’s conduct constitutes *per se* unlawful price fixing, even if Respondent’s rates were not adhered to uniformly. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 222 (1990) (“Nor is it important that the prices paid by the combination were not fixed in the sense that they were uniform and inflexible. Price fixing . . . has no such limited meaning.”).

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participating carriers agree on rates that they will charge. Furthermore, as the Commission has previously recognized, the Kentucky Association and its members “need not agree to a single price level in order to fix prices.” *Motor Transport Assoc. of Connecticut*, 112 F.T.C. at 336. Respondent effectively conceded this point as well. Tr. at 33. As noted earlier, the vast majority of carriers agree to charge the same rate for many items in the tariff.

Although we agree with the Initial Decision that Respondent’s challenged conduct constitutes horizontal price-fixing that is *per se* unlawful, we disagree that relevant markets must be defined in a *per se* case. ID 28-29. It is obviously necessary to identify the goods or services that are subject to the price-fixing or other anticompetitive restraint, and that has been done here. It is not necessary, however, to show that these goods or services constitute a relevant antitrust product market, as described, for example, in the *Horizontal Merger Guidelines*. See U.S. DEPARTMENT OF JUSTICE & FEDERAL TRADE COMMISSION, HORIZONTAL MERGER GUIDELINES § 1.1 (rev’d 1997). As the Supreme Court has long recognized, an analysis of market power – of which market definition is the typical starting point – is unnecessary in a *per se* price-fixing case:

Even [if] the members of the price fixing group were in no position to control the market, to the extent that they raised, lowered, or stabilized prices they would be directly interfering with the free play of market forces. The [Sherman] Act places all such schemes beyond the pale and protects that vital part of our economy against any degree of interference.

United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 221 (1940). See *PolyGram Holding Inc.*, Dkt. No. 9298, op. 29 (FTC July 24, 2003) (in a small “but significant category of cases, scrutiny of the restraint itself is sufficient to find liability without consideration of market power”). Accordingly, we conclude that, the collective ratemaking at issue here is *per se* unlawful, without need for any inquiry into relevant market or market power.

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We acknowledge that the Kentucky Association's liability in this matter is due in part to the KTC's sustained failure to provide proper supervision to Respondent's rate-making activities. This fact, however, does not warrant a different result. Private interests can assess whether a state is in compliance with the requirements of the state action doctrine, and can urge the state to adopt the necessary practices. If a state, for whatever reason, declines to follow the requirements of the state action doctrine, then private interests can alter their behavior to comply with the antitrust laws.

IV. Remedy

The ALJ proposed an order that would require Respondent to cease and desist from collective ratemaking. The order would require Respondent to cancel and withdraw all existing tariffs and tariff supplements on file with the KTC and to cease and desist from developing future tariffs that contain collective rates. *Id.* at 51-52. Pursuant to paragraph VII, the order would remain in effect until active supervision is demonstrated to the Commission. *Id.* at 54. We believe that these provisions are warranted with two exceptions discussed below.

The Commission has issued orders with similar provisions in prior cases involving motor carriers' collective tariffs. *New England Motor Rate Bureau*, 112 F.T.C. at 300; *Massachusetts Furniture & Piano Movers*, 102 F.T.C. at 1228. The provisions in the order are also similar to terms contained in a recent series of consent orders accepted by the Commission. *Indiana Household Movers and Warehousemen, Inc.*, Dkt. No. C-4077 (April 25, 2003); *Iowa Movers and Warehousemen's Ass'n*, Dkt. No. C-4096 (Sept. 10, 2003); *Minnesota Transportation Services Ass'n*, Dkt. No. C-4097 (Sept. 15, 2003); *Alabama Trucking Ass'n, Inc.*, Dkt. No. D-9307 (Dec. 4, 2003); *Movers Conference of Mississippi, Inc.*, Dkt. No. D-9308 (Dec. 4, 2003). As Complaint Counsel points out, paragraph VII of the proposed order differs from the recent consent orders in two significant respects: it does not contain the 20-year "sunset" provision common to most of the Commission's orders, and it explicitly provides that respondent

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may seek to modify the order if, in the future, the KTC engages in active supervision as determined by the Commission. Complaint Counsel argues that Section 5(b) of the FTC Act, as implemented by Section 2.51 of the Commission's Rules of Practice, 16 C.F.R. § 2.51, sets forth the standards for modifying a Commission order, and that including this provision in the order might create an impression that some showing other than that established under Section 5(b) and Rule 2.51 will be either sufficient or necessary. Complaint Counsel also asserts that a 20-year sunset provision is appropriate in this case. We agree with Complaint Counsel on both counts and have modified our order accordingly.

Respondent argues that the better course of action would be for the Commission to stay entry of a remedial order altogether to allow the state to develop a program that will satisfy the active supervision requirement. Respondent argues, among other things, that a stay would allow the KTC to continue to protect the public interest by regulating household goods carriers, and would avoid exposing the KTC, Respondent and its members to unjustified private litigation. RAB at 45; RRB at 11-13. Respondent has separately moved the Commission to stay this proceeding pursuant to Commission Rule 3.54(c), 16 C.F.R. § 3.54(c), pending the Commission's review of actions taken by the KTC after the Initial Decision, which Respondent asserts show that the KTC has recently instituted procedures that satisfy the active supervision requirement.

Having found a violation of Section 5 of the FTC Act, the Commission has wide discretion in its choice of a remedy. *Federal Trade Comm'n v. Colgate-Palmolive Co.*, 380 U.S. 374, 392 (1965); *Jacob Siegel Co. v. Federal Trade Comm'n*, 327 U.S. 608, 611-13 (1946). The record in this case shows that, year after year, the KTC has allowed the Kentucky Association and its members to raise rates with virtually no examination of the merits of these rates. The brunt of these anticompetitive practices is being borne by consumers in Kentucky, and until the Kentucky Association can demonstrate that the state has in place a tested program of active supervision to ensure the reasonableness of

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collective rates, a cease and desist order is necessary to protect the interests of consumers, notwithstanding any hardship to Respondent and its members.

Contrary to Respondent's contention, entry of a cease and desist order would not expose the KTC to litigation or dismantle the state's entire system for regulating household goods carrier rates. By its terms, the order applies only to the Kentucky Association; it does not run against the KTC. Only joint tariff filings are prohibited. The KTC retains its power to review individual tariff filings to ensure that household goods carrier rates in Kentucky are reasonable and not discriminatory. If the state prefers a system of joint tariffs and is willing to devote the appropriate resources to it, the state is free to modify this regulatory program to ensure a substantive review of joint tariff filings. In the intervening time, however, there is no reason to believe that either the state's entire system for regulating movers' rates or the interests of the moving public will be in jeopardy.

Moreover, we do not believe that a stay is warranted under Rule 3.54(c). That rule provides that the Commission may withhold final action in an appeal pending the receipt of additional information or views "as to the form and content of the rule or order to be issued." This rule is not a mechanism for avoiding a Commission decision on liability or entry of a cease and desist order prohibiting conduct found to be unlawful. Instead, the Commission has applied this rule to consider additional information that could affect the specific remedy provided in a final order.²⁵ Although the materials submitted by Respondent in

²⁵ For example, in *Holiday Magic, Inc.*, 83 F.T.C. 1590 (Apr. 29, 1974), the Commission granted a 30-day extension of time for respondents to submit additional information regarding orders entered in a federal district court proceeding, which apparently provided some of the same relief – the refund of money – contemplated in the Commission's prospective order. In granting the motion, the Commission noted that this time extension would

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support of its motion indicate that the KTC has taken some initial steps to augment the level of supervision it exercises over the Kentucky Association's collective rate-making (such as requiring some sort of financial reports and written findings), these materials fall significantly short of demonstrating that the KTC's new procedures satisfy the "active supervision" requirement articulated by the Supreme Court in *Ticor*, and other relevant decisions. Most important, Respondent has not shown with precision what information the KTC will require to support proposed rate adjustments and what criteria the KTC will apply to assess the reasonableness of proposed rate adjustments. These are not questions that are likely to be answered satisfactorily merely by awaiting the KTC's action with regard to the Kentucky Association's most recent tariff filing. Rather, as Respondent itself has acknowledged, development of a new program of supervision will take some time. RRB at 11.

Under these circumstances, there is no good reason to delay entry of a cease and desist order in this case. If and when the KTC implements a program to exercise greater supervision over household goods carrier rates, Respondent can apprise the Commission of these changed circumstances in a petition to reopen the proceeding and modify or set aside the Commission order, pursuant to Commission Rule 2.51, and the Commission will then consider whether the new evidence sufficiently demonstrates active state supervision.

not delay final disposition of the case and directed respondents to assume that the ALJ's finding of liability would be affirmed. The Commission subsequently issued an opinion and final order upholding the ALJ's findings of liability, enjoining the respondents' unlawful practices, and ordering the refund of money, but staying the latter provision so long as respondents remained in compliance with the federal district court order. *Holiday Magic, Inc.*, 84 F.T.C. 748 (Oct. 15, 1974).

FINAL ORDER

This matter having been heard by the Commission upon the appeal of Respondent, and upon briefs and oral argument in support thereof and opposition thereto, and the Commission for the reasons stated in the accompanying Opinion having determined to sustain the Initial Decision with certain modifications:

IT IS ORDERED THAT the Initial Decision of the administrative law judge be, and it hereby is, adopted as the Findings of Fact and Conclusions of Law of the Commission, to the extent not inconsistent with the findings of fact and conclusions of law contained in 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 be, and it hereby is, entered:

ORDER**I.**

IT IS ORDERED THAT, for the purposes of this Order, the following definitions shall apply:

- A. “Respondent” or “KHGCA” means the Kentucky Household Goods Carriers Association, Inc., its officers, executive board, committees, parents, representatives, agents, employees, successors, and assigns;
- B. “Carrier” means a common carrier of property by motor vehicle;
- C. “Intrastate transportation” means the pickup or receipt, transportation, and delivery of property hauled between

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points within the Commonwealth of Kentucky for compensation by a carrier authorized by the Kentucky Transportation Cabinet's Division of Motor Carriers to engage therein;

- D. "Member" means any carrier or other person that pays dues or belongs to KHGCA or to any successor corporation;
- E. "Tariff" means the publication stating the rates of a carrier for the transportation of property between points within the Commonwealth of Kentucky, including updates, revisions, and/or amendments, including general rules and regulations;
- F. "Rate" means a charge, payment, or price fixed according to a ratio, scale, or standard for direct or indirect transportation service;
- G. "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 two or more carriers and Respondent; and
- H. "Person" means both natural persons and artificial persons, including, but not limited to, corporations, unincorporated entities, and governments.

II.

IT IS FURTHER ORDERED THAT Respondent, its successors and assigns, and its officers, agents, representatives, directors, and employees, directly or through any corporation, subsidiary, division, or other device, shall immediately cease and desist from entering into, and shall, within 120 days after this Order becomes final, cease and desist from 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 two or more carriers for the intrastate transportation of property or related services, goods, or equipment, including, but not limited to:

- A. Knowingly preparing, developing, disseminating, or filing a proposed or existing tariff that contains collective rates for the intrastate transportation of property or other related services, goods, or equipment;
- B. Providing information to any carrier about rate changes considered or made by any other carrier employing the publishing services of Respondent prior to the time at which such rate change becomes a matter of public record;
- C. Inviting, coordinating, or providing a forum (including publication of an informational bulletin) for any discussion or agreement between or among competing carriers concerning rates charged or proposed to be charged by carriers for the intrastate transportation of property or related services, goods, or equipment;
- D. Suggesting, urging, encouraging, persuading, or in any way influencing 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;
- E. Maintaining any rate or tariff committee or other entity to consider, pass upon, or discuss intrastate rates or rate proposals; and
- F. Preparing, developing, disseminating, or filing a proposed or existing tariff containing automatic changes to rates charged by two or more carriers.

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III.

IT IS FURTHER ORDERED THAT Respondent shall, within 120 days after this Order becomes final:

- A. Take such action pursuant to the laws of the Commonwealth of Kentucky as may be necessary to effectuate the cancellation and withdrawal of all tariffs and any supplements thereto on file with the Kentucky Transportation Cabinet's Division of Motor Carriers that establish rates for transportation of property or related services, goods, or equipment by common carriers in the Commonwealth of Kentucky;
- B. 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 Kentucky;
- C. Take action pursuant to the laws of the Commonwealth of Kentucky to 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 Order; and
- D. Take action pursuant to the laws of the Commonwealth of Kentucky to amend its by-laws to require members of KHGCA to observe the provisions of this Order as a condition of membership in KHGCA.

IV.

IT IS FURTHER ORDERED THAT Respondent shall mail or deliver a copy of this Order (A) to each current member of Respondent engaged in the transportation of household goods

within 75 days after this Order becomes final, and (B) to each new member engaged in the transportation of household goods within ten (10) days after each such member's acceptance by Respondent.

V.

IT IS FURTHER ORDERED THAT Respondent shall 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, or any other proposed change in the corporation which may affect compliance obligations arising out of this Order.

VI.

IT IS FURTHER ORDERED THAT Respondent shall file a written report within 180 days after this Order becomes final, and annually on the anniversary date of the original report, 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 Respondent has complied with this Order.

VII.

IT IS FURTHER ORDERED THAT this Order shall terminate twenty (20) years after the date on which this Order becomes final.

Complaint

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 Kentucky Household Goods Carriers Association, Inc. (hereinafter sometimes referred to as “respondent” or “KHGCA”), 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:

NATURE OF THE CASE

This matter concerns horizontal agreements among competing household goods movers that, through respondent, file tariffs for intrastate moving services in Kentucky. The tariffs contain collective rates that participating movers charge consumers for moving services. Through these tariffs, the participating movers engage in a horizontal agreement to fix prices for their services.

RESPONDENT AND ITS MEMBERS

PARAGRAPH 1. Respondent Kentucky Household Goods Carriers Association, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of Kentucky, with its office and principal place of business located at P.O. Box 22204, Louisville, Kentucky 40252.

PARAGRAPH 2. Respondent is an association organized for and serving its members' interests, including their economic interests, by promoting, fostering, and advancing the household goods moving industry in Kentucky. One of the primary functions of respondent is the initiation, preparation, development, dissemination, and filing with the Kentucky Transportation Cabinet's Division of Motor Carriers of tariffs and supplements thereto on behalf of and as agent for its members. Said tariffs and supplements contain rates and charges for the intrastate and local

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transportation of household goods and for related services, including, among other things, transporting bulky articles; packing cartons and crates; and extra charges for elevator, stair, and long distance carrying of items. (For purposes of this complaint, the term "tariff" means the publication stating the rates of a carrier for the transportation of property between points within Kentucky, including updates, revisions, and/or amendments, including general rules and regulations.)

PARAGRAPH 3. Pursuant to Kentucky state law, each household goods mover is required to file a tariff with the Division of Motor Carriers containing the carrier's rates, fares, or charges for the intrastate transportation of household goods. By Kentucky law, a household goods mover is not permitted to charge a rate, fare, or charge different from those contained in its tariff or supplements thereto once the Division of Motor Carriers has accepted it.

PARAGRAPH 4. Members of respondent are engaged, among other things, in the business of providing transportation and other services for compensation as household goods movers between points within Kentucky. 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 household goods movers.

PARAGRAPH 5. The membership of KHGCA consists of approximately 93 household goods movers that conduct business within Kentucky. KHGCA members receive compensation for intrastate and local moves. KHGCA's Tariff Committee conducts KHGCA's tariff-related activities. The control, direction and management of KHGCA are vested in the directors and the President, the Vice President, the Secretary, and the Treasurer.

JURISDICTION

PARAGRAPH 6. The acts and practices of respondent set forth in Paragraph 7 have been and are now in or affecting

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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 use of equipment and other goods and services by respondent's members that 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 and fees for publications and services from out-of-state members and others.

THE CHALLENGED CONDUCT

PARAGRAPH 7. For many years and continuing up to and including the date of the filing of this complaint, respondent, its members, its 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 household goods movers in the intrastate Kentucky household goods 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:

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- (A) Initiating, preparing, developing, disseminating, and taking other actions to establish and maintain collective rates, with the purpose or effect of fixing, establishing, stabilizing or otherwise tampering with rates and charges for the transportation of household goods between points within Kentucky;
- (B) Participating in and continuing to participate in the collectively set rates;
- (C) Filing collectively set rates with the Division of Motor Carriers; and
- (D) Initiating, organizing, coordinating, and conducting meetings or providing a forum for any discussion or agreement among competing carriers concerning or affecting rates charged or proposed to be charged for the intrastate transportation of household goods; or otherwise influencing its members to raise their rates, charge the same or uniform rates, or participate or continue to participate in the collectively set rates.

PARAGRAPH 8. The acts and practices of respondent, its members and others, as alleged in Paragraph 7, have had 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 moves;
- (B) Restricting, restraining, hindering, preventing, or frustrating price competition in the household goods moving industry; and
- (C) Depriving consumers of the benefits of competition.

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THE VIOLATION CHARGED

PARAGRAPH 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 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.

NOTICE

Notice is hereby given to the Respondent that the eighth day of October, 2003, at 10:00 a.m., or such later date as determined by an Administrative Law Judge of the Federal Trade Commission, is hereby fixed as the time and Federal Trade Commission offices, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580, as the place when and where a hearing will be had before an Administrative Law Judge of the Federal Trade Commission, on the charges set forth in this complaint, at which time and place you will have the right under the FTC Act to appear and show cause why an order should not be entered requiring you to cease and desist from the violations of law charged in the complaint.

You are notified that the opportunity is afforded to you to file with the Commission an answer to this complaint on or before the twentieth (20th) day after service of it upon you. An answer in which the allegations of the complaint are contested shall contain a concise statement of the facts constituting each ground of defense; and specific admission, denial, or explanation of each fact alleged in the complaint or, if you are without knowledge thereof, a statement to that effect. Allegations of the complaint not thus answered shall be deemed to have been admitted.

If you elect not to contest the allegations of fact set forth in the complaint, the answer shall consist of a statement that you admit all of the material facts to be true. Such an answer shall constitute a waiver of hearings as to the facts alleged in the complaint and,

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together with the complaint, will provide a record basis on which the Administrative Law Judge shall file an initial decision containing appropriate findings and conclusions and an appropriate order disposing of the proceeding. In such answer, you may, however, reserve the right to submit proposed findings and conclusions under § 3.46 of the Commission's Rules of Practice for Adjudicative Proceedings and the right to appeal the initial decision to the Commission under § 3.52 of said Rules.

Failure to answer within the time above provided shall be deemed to constitute a waiver of your right to appear and contest the allegations of the complaint and shall authorize the Administrative Law Judge, without further notice to you, to find the facts to be as alleged in the complaint and to enter an initial decision containing such findings, appropriate conclusions, and order.

The ALJ will schedule an initial prehearing scheduling conference to be held not later than 14 days after the last answer is filed by any party named as a Respondent in the complaint. Unless otherwise directed by the ALJ, the scheduling conference and further proceedings will take place at the Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Room 532, Washington, D.C. 20580. Rule 3.21(a) requires a meeting of the parties' counsel as early as practicable before the prehearing scheduling conference, and Rule 3.31(b) obligates counsel for each party, within 5 days of receiving a Respondent's answer, to make certain initial disclosures without awaiting a formal discovery request.

NOTICE OF CONTEMPLATED RELIEF

Should the Commission conclude from the record developed in any adjudicative proceedings in this matter that respondent's conduct violated Section 5 of the Federal Trade Commission Act as alleged in the complaint, the Commission may order such relief as is supported by the record and is necessary and appropriate, including but not limited to:

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1. Requiring respondent to cease and desist from preparing, developing, disseminating or filing a proposed or existing tariff that contains collective rates for the intrastate transportation of property or other related services, goods or equipment.
2. Requiring respondent to cease and desist from providing information to any carrier about rate changes considered or made by any other carrier employing the publishing services of respondent prior to the time at which such rate changes become a matter of public record.
3. Requiring respondent to cease and desist from inviting, coordinating or providing a forum (including maintaining any rate or tariff committee) for any discussion or agreement between or among competing carriers concerning rates charged or proposed to be charged by carriers for the intrastate transportation of property or related services, goods or equipment.
4. Requiring respondent to cease and desist from suggesting, urging, persuading or in any way influencing 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.
5. Requiring respondent to cease and desist from preparing, developing, disseminating or filing a proposed or existing tariff containing automatic changes to rates charged by two or more carriers.
6. Requiring respondent to cancel all tariffs and any supplements thereto on file with the state that establish rates for transportation of property or related services, goods or equipment.

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7. Requiring respondent to cancel those provisions of its articles of incorporation, by-laws and procedures, tariff service agreements and every other rule that has the purpose or effect of permitting, announcing, explaining or agreeing to any business practice enjoined by the terms of any order, and to amend its by-laws to require members to observe the provisions of any order.
8. Requiring respondent to make public, in a manner likely to reach as many members as possible, the nature of the relief ordered by the Commission.
9. Such additional relief as is necessary to correct or remedy the violations alleged in the complaint.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this eighth day of July, 2003, issues its complaint against KHGCA.

Initial Decision

INITIAL DECISION

By D. Michael Chappell, Administrative Law Judge

I. INTRODUCTION**A. Overview and Summary of Decision**

The primary question presented in this case is whether the state action doctrine, developed in the line of cases beginning with *Parker v. Brown*, 317 U.S. 341 (1943), protects Respondent from federal antitrust liability for its activities in preparing and filing tariff rates for the transportation of household goods in the Commonwealth of Kentucky.

Respondent Kentucky Household Goods Carriers Association, Inc. ("Respondent") is an Association consisting of approximately ninety-three household goods moving companies, competitors that provide intrastate and local moving services. Respondent's functions include the initiation, preparation, development, dissemination, and filing of tariffs and supplements thereto with the Kentucky Transportation Cabinet ("KTC"). The Complaint in this proceeding alleges that the conduct of Respondent in submitting proposed tariff rates for the transportation of household goods to the KTC constitutes unlawful price fixing. Respondent's defense is that its conduct is immune from liability under the federal antitrust laws pursuant to the state action doctrine established by the United States Supreme Court in *Parker* and its progeny. Specifically, Respondent asserts that the challenged conduct was undertaken as part of a state initiated and sponsored activity, adopted by the state pursuant to a clearly articulated and affirmatively expressed state policy, and that its conduct was actively supervised by the state.

As set forth in this Initial Decision, Complaint Counsel has established that Respondent engaged in horizontal price fixing. Respondent has established that the collective ratemaking it engaged in was undertaken pursuant to a policy that has been clearly articulated and affirmatively expressed by the State. Although the Commonwealth of Kentucky has a statutory and regulatory program in place to regulate rates for local and

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intrastate moving services, it has not taken adequate measures to supervise the collective ratemaking process. Failure to verify statutory compliance is tantamount to unregulated collective ratemaking. Thus, Respondent has not established that the State has actively supervised Respondent's activities or the ratemaking process. Accordingly, Respondent is not entitled to the state action defense. The appropriate remedy is a cease and desist order barring price fixing by Respondent.

B. Summary of Complaint and Answer

The Federal Trade Commission ("FTC") issued its Complaint in this matter on July 9, 2003. The Complaint charges that Respondent and its members have taken actions to establish and maintain collective rates and charges for the transportation of household goods between points within Kentucky. Complaint P7. The Complaint further alleges that the acts of Respondent have had the effects of raising prices, restricting price competition, and depriving consumers of the benefits of competition. Complaint P8. The Complaint charges one violation: that the acts of Respondent constitute unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, as amended. Complaint P9.

In its Answer, filed on August 20, 2003, Respondent admitted that it causes documents containing proposed rates to be filed with the KTC and that these documents become tariffs. Answer introduction, P2. Respondent further admitted that the tariffs contain rates which are charged by household goods movers to consumers for household goods transportation services. Answer P2. Respondent denied that household goods movers engage in a horizontal agreement to fix prices for their services. Answer P7.

C. Procedural Background

Respondent filed a motion for summary decision on December 19, 2003. By Order dated February 26, 2004, Respondent's motion was denied on the basis that the issue of whether the challenged policy is actively supervised by the Commonwealth of Kentucky raised a genuine issue of material fact.

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By Joint Motion, filed on February 27, 2004, both parties requested to use deposition transcripts and videotapes of depositions in lieu of live testimony. By Order dated March 4, 2004, the parties were instructed that properly admitted deposition testimony is part of the record and that the parties could offer it into evidence at the final pre-hearing conference.

On February 23, 2004, the KTC filed a motion seeking an Order granting it leave to intervene in this proceeding. By Order dated March 10, 2004, the motion was granted in part and denied in part. Intervenor KTC was permitted to offer evidence and testimony at the hearing in this proceeding, subject to limitations, and to present an opening statement and a closing argument. March 10, 2004 Order at 3-4 (www.ftc.gov/os/adjpro/d9309). Intervenor KTC was aware of the final prehearing conference and the trial date and chose not to attend either. Transcript of Final Pretrial Hearing, March 16, 2004 at 4-5. In failing to appear, the KTC waived any right to object at the hearing. *Id.*

The final prehearing conference was held on March 16, 2004. Trial commenced immediately following the prehearing conference. Complaint Counsel and Respondent's Counsel presented opening statements. No witnesses were called to testify during the trial. Complaint Counsel and Respondent stipulated that the deposition transcripts of Dennis Tolson, Denise King, William Debord, and A.F. Mirus were offered into evidence to be used in lieu of live testimony at the hearing. JX 1, Stipulations of Law, Fact and Authenticity ("Stipulation") P3.

On April 2, 2004, Complaint Counsel and Respondent filed and served Proposed Findings of Fact, Post Trial Briefs, and Conclusions of Law. On April 6, 2004, Intervenor KTC served a Post Trial Brief. The KTC's Post Trial Brief was filed with the Office of the Secretary on June 17, 2004. Complaint Counsel and Respondent filed and served replies to each other's Post Trial Briefs and Proposed Facts on April 17, 2004. Closing arguments were heard on May 19, 2004.

The hearing record was closed pursuant to Commission Rule 3.44(c) by Order dated March 23, 2004. This Initial Decision is

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filed within one year of the issuance of the Complaint and within ninety days of the close of the record, pursuant to Commission Rule 3.51(a).

D. Evidence

This Initial Decision is based on the exhibits properly admitted in evidence and the proposed findings of fact and conclusions of law and replies thereto submitted by the parties. Citations to specific numbered Findings of Fact in this Initial Decision are designated by "F."

This Initial Decision addresses only material issues of fact and law. Proposed findings of fact not included in this Initial Decision were rejected, either because they were not supported by the evidence or because they were not dispositive or material to the determination of the allegations of the Complaint or the defenses thereto. The Commission has held that Administrative Law Judges are not required to discuss the testimony of each witness or all exhibits that are presented during the administrative adjudication. *In re Amrep Corp.*, 102 F.T.C. 1362, 1670 (1983). Further, administrative adjudicators are "not required to make subordinate findings on every collateral contention advanced, but only upon those issues of fact, law, or discretion which are 'material.'" *Minneapolis & St. Louis Ry. Co. v. United States*, 361 U.S. 173, 193-94 (1959).

II. FINDINGS OF FACT**A. Definitions**

1. A "household goods carrier" or a "mover" is a company that receives compensation for moving property from one location to another. (Answer P5; JX 1 P10).

2. A "participating carrier" or a "member" is a member of the Kentucky Household Goods Carriers Association, Inc. (See CX 1; CX 2; Respondent's Admission P18; JX 1 P10).

3. A "tariff" contains a schedule of rates, fares, and prices that carriers charge. (CX 2; JX 1 P4). A tariff also sets forth rules that carriers impose on their transportation processes, such as how to

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handle claims and compute time. (CX 116 (Debord, Dep. I at 42-43)).

4. A "tariff publishing agent" is an agent that may file a tariff on behalf of one or more household goods carriers. (JX 1 P8; see also CX 116 (Debord, Dep. I at 35); RX 95 (601 KY. ADMIN. REG. ("KAR") 1:060)).

5. "Collective ratemaking" means that rates are collectively filed through a joint tariff publishing agency representing rates of more than one carrier or group of carriers. (CX 116 (Debord, Dep. I at 37-38); JX 1 P6).

B. Respondents**1. The Kentucky Household Goods Carriers Association, Inc.**

6. Respondent is the Kentucky Household Goods Carriers Association, Inc. (Respondent or "Kentucky Association"). (CX 3; JX 1 P9).

7. The membership of the Kentucky Association consists of approximately ninety-three household goods moving companies that conduct business within Kentucky, receiving compensation for intrastate and local moves. (Answer P5; JX 1 P10).

8. Participating Carriers of Respondent are competitors with one another. (CX 129 (Tolson, Dep. at 133)).

9. Every household goods carrier operating in the Commonwealth of Kentucky is required to file a tariff, or have a tariff publishing agent file a tariff containing its rates, charges, and rules with the Kentucky Transportation Cabinet ("KTC"). (CX 2; JX 1 PP5, 8; see also RX 80 (KY. REV. STAT. ANN. ("KRS") § 281.680); RX 95 (601 KY. ADMIN. REG. 1:060)).

10. Respondent is a tariff publishing agent. One of its primary functions is the initiation, preparation, development, and dissemination of, and filing with the KTC's Division of Motor Carriers tariffs and supplements thereto on behalf of and as agent for its members. (Answer P2; Respondent's November 28, 2003 Response to P13 of Complaint Counsel's Request for Admission issued October 31, 2003 ("Respondent's Admission"); JX 1 P11).

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This function is conducted through the Kentucky Association's tariff committee. (Answer P5).

2. Intervenor Kentucky Transportation Cabinet

11. The Kentucky Transportation Cabinet ("KTC") is the state agency with the responsibility to insure that every rate charged by household goods carriers for regulated transportation is just and reasonable. (CX 116 (Debord, Dep. I at 33)).

12. The KTC has promulgated administrative regulations relating to rate filings by household goods carriers pursuant to KRS 281.680. (CX 116 (Debord, Dep. I at 34)).

13. The KTC filed a motion seeking to intervene as respondent in this proceeding on February 23, 2004. By Order dated March 10, 2004, the KTC's motion was granted in part and denied in part. The KTC was permitted to offer evidence and testimony at the hearing in this proceeding to the extent that the exhibits or witnesses from whom it might seek to elicit testimony had previously been disclosed by the deadlines established in the Scheduling Orders. The KTC was permitted to call as a witness the declarant in support of the KTC's motion for intervention. In addition, the KTC was permitted to submit post trial briefing. (March 10, 2004 Order) (www.ftc.gov/os/adjpro/d9309).

C. The Kentucky Association Engaged in Collective Ratemaking**1. The Tariff Establishes the Rates for Household Goods Moving Services**

14. Respondent files collective rates with the KTC. (CX 116 (Debord, Dep. I at 38)).

15. KYDVR TARIFF NO. 5 is the Kentucky Association's tariff which is applicable to Kentucky intrastate traffic. (Respondent's Admission P9; CX 1; CX 2).

16. Participating Carriers are required to charge the rates contained in KYDVR TARIFF NO. 5. (CX 1; CX 2; Respondent's Admission P18; see also JX 1 P10). A carrier cannot charge any more or less than the rates contained in the tariff. (CX 116 (Debord, Dep. I at 41-42)).

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17. Respondent causes KYDVR TARIFF NO. 5 to be prepared and published. The tariff was issued 3-1-88 with an effective date of 4-1-88, and includes all subsequent supplements. (CX 2; Respondent's Admission PP10, 11, and 14; JX 1 P12).

18. The tariff contains the rates movers must charge for local moves, which are those moves within twenty-five miles of the city limits of the carriers' situs. Local rates are either charged at a flat rate per room or determined by hourly fees for labor and equipment. The tariff also specifies the rates movers must charge for intrastate moves of more than twenty-five miles ("intrastate rates"). Intrastate rates are established as a function of the distance traveled and the total weight of the shipment. (CX 1; CX 2; Respondent's Admission P16; JX 1 P14).

19. Another part of the tariff lists the rates for additional services, such as packing, moving particular bulky or heavy items, and moves involving flights of stairs. (JX 1 P15). The tariff also establishes higher charges for work performed on "overtime": any packing or unpacking performed on the weekends or after 5:00 p.m. during weekdays. (CX 2 at KHGCA 7007). For example, packing a "Drum, Dish-Pack" costs \$ 14.60 on regular time and \$ 20.40 on overtime. Unpacking a "Drum, Dish-Pack" costs \$ 5.35 on regular time and \$ 7.50 on overtime. (CX 2 at KHGCA 6977; JX 1 P16).

20. Packing a wardrobe carton costs \$ 3.60 on regular time and \$ 4.95 on overtime. Unpacking a wardrobe carton costs \$ 1.35 on regular time and \$ 1.95 on overtime. (CX 1 at KTC 2001; CX 2 at KHGCA 6977; Respondent's Admission P16; JX 1 P16).

21. Respondent provides a copy of proposed supplements to KYDVR TARIFF NO. 5 to all of the Participating Carriers. This provides the Participating Carriers the opportunity to request rates different than those contained in the supplement. This is done prior to the time the Kentucky Association submits that supplement to the KTC. (CX 11; CX 29; CX 117 (Mirus, Dep. at 54-58)).

22. Participating Carriers that want to file different rates do so by filing a Form 4286 with the Kentucky Association's tariff

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committee. (CX 12; JX 1 P27). Information about any such different rates is then sent to all Participating Carriers. When the Kentucky Association circulates proposed rates and proposed rate changes to Participating Carriers, members are permitted to protest any rates or rate changes that they find objectionable. (CX 11; CX 29; CX 117 (Mirus, Dep. at 54-58)).

23. Movers know that if they do not affirmatively exempt themselves from the terms of the proposed tariff rates, their firms will be obligated to charge the collective rates contained in the tariff. (See, e.g., CX 12; CX 13; CX 22; CX 57; Respondent's Admission PP12, 20; CX 117 (Mirus, Dep. at 53-54); CX 116 (Debord, Dep. II at 60-61); JX 1 P27).

24. The Participating Carriers enable Respondent to file with the KTC the rates contained in the Kentucky Association's KYDVR TARIFF NO. 5 by granting Respondent power of attorney to file their tariff with the KTC. (CX 1; CX 2; Respondent's Admission PP17, 20; e.g., CX 4).

2. The Kentucky Association Files for Increases in the Collective Rates

25. Respondent regularly files supplements to the tariff that contain proposed rate increases for its members. The decision to propose an increase to rates can either be agreed to by a voice vote at a general membership meeting or by a vote of the Board of Directors. (CX 117 (Mirus, Dep. at 62-63); CX 15; JX 1 P13). For example, on October 13, 1999, Respondent, on behalf of its members (through its Board of Directors), agreed to seek a 10% increase in the transportation rates and charges then in effect in Sections II and VI of KYDVR TARIFF NO. 5. (CX 19; Respondent's Admission P23).

26. On October 11, 2000, Respondent, on behalf of its members (through its Board of Directors), agreed to seek an 8% increase in the intrastate transportation rates and charges then in effect in Sections II and VI of KYDVR TARIFF NO. 5. (CX 15; Respondent's Admission P24).

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27. Other examples of rate increases that have been proposed by the Kentucky Association and which have taken effect include the following (JX 1 P18):

Supplement No.	Effective Date	Increase	CX
71	4-1-02	5% Intrastate rates & certain items	CX 10 - CX 12; CX 14
66	1-1-01	8% Intrastate rates	CX 15
63	4-1-00	10% Certain items & local moves	CX 16
61	1-1-00	10% Intrastate rates	CX 17 - CX 19
56	1-1-99	5% Intrastate rates & certain items	CX 20; CX 21
51	1-1-98	8% Across the board	CX 22 - CX 26
46	10-1-96	5% Across the board	CX 27 - CX 30
30	7-1-94	8% Across the board	CX 32 - CX 36
21	5-1-92	4.5% Intrastate rates	CX 37 - CX 40

28. The April 26, 1985 annual meeting minutes of the Kentucky Association state: "rates have increased 42% since 1980." (CX 44; JX 1 P19).

29. Respondent filed a collective amendment to the tariff to propose a new set of intrastate rates in 1990. Those rates were placed in Schedule G of Section II of the tariff and were 15% higher than the rates then in effect in Schedule F of Section II of the tariff. (CX 41).

30. The movers have agreed to specific charges in the tariff. For instance, effective 04/01/02, the rate is \$ 134.70 to move an automobile, which all but two Participating Carriers charge. (CX 1 at KTC 2026; CX 2 at KHGCA 6989; Respondent's Admission PP30-31; JX 1 PP20-21). Similarly, all but two Participating Carriers charge the rate effective 04/01/02 of \$ 84.15 to move jet skis. (CX 1 at KTC 2026; CX 2 at KHGCA 6989; Respondent's Admission P35; JX 1 PP22-23).

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31. There is considerable uniformity among movers with respect to intrastate rates. All of the following firms agree to have Respondent submit rates to the KTC and are required to charge the same intrastate transportation rates contained in Section II-B of KYDVR TARIFF NO. 5: A-1 Equipped Veteran's Mov/Stg., Inc.; Howard Ball Mov/Stg.; Carl Boyd, dba Harrison Movers; Brentwood Properties, LLC, dba Brentwood Mov/Stg.; Clark's Moving Co. dba Clarks Moving; Dahlenburg Trucking Co., Inc.; Ecton Movers, Inc.; Fallon Mov/Whsg.; Hall's Mov. Serv., Inc.; Hardin Mov/Del. Svc.; Shelby Hedger; H & O Transport, Inc.; Miller Mov/Stg., Inc.; Moyers Transfer, dba Leeman M. Moyer; Odle Movers (Robert Sadler, dba); Paducah Mov/Stg.; T. Peavler Mov. Sys., LLC; Sexton & Sons Mov/Stg., Inc.; Stevens Van Lines, Inc., dba Stevens Worldwide Van Lines; Whitis & Whitis, Inc., dba William H. Johnson Mov/Stg.; June Webb; Kimberley June Webb & Sharon Kay Webb (Webb Mov/Stg., dba). (CX 1 at KTC 1901-66; CX 2 at KHGCA 6936-6947; Respondent's Admission PP40, 41; JX 1 PP24-26).

3. Members of the Kentucky Association Agree on Increases in Collective Rates

32. Respondent has exerted pressure on participating carriers to conform to the collective rates. In one example, in early 1996, Boyd Movers sought an exception to the tariff whereby the firm would compensate the consumer more for damage done in a move. The head of the tariff committee called Mr. Buddy Boyd of Boyd Movers and urged him not to file his exemption. The head of the tariff committee wrote that he spoke to Boyd and pressured him not to go against the will of the majority of Participating Carriers. The notes of the conversation state:

- Spoke to Buddy Boyd in regard to weakness of his justification for exception, and advised him that the \$ 5,000.00 release liability was in conflict with provisions in the tariff.
- Also requested that put-off (delay) filing this exception until a later date, this will allow time to see

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how the majority of parties to the tariff adjust to these new rules and items applicable to valuation charges.

- Buddy stated that he did not want to "upset the program" or work against the majority of tariff participants. Therefore, he withdrew the requested exception as shown on this form.

- He did say that, in his opinion, and in the interests of the customer, he would like to see a set of valuation charges (lower) that would apply to local moves. Also, would it be possible to increase the 60 cent release up to 80 cents.

- This is a matter for further review and discussion.

(CX 48; CX 129 (Tolson, Dep. at 212-17)).

33. Participating Carriers use the knowledge of the tariff rates to keep rates elevated. For instance, one mover increased his local rate (by submitting a Form 4286 to the Kentucky Association), stating as his justification "somewhat lower than our competition in this area." (CX 49). Similarly, a mover filed a Form 4286 with the Kentucky Association for a higher local rate stating as his justification, "even with this rate increase we will still be the lowest priced hourly mover in the Owensboro area. We can raise our rates and still be in direct competition with the other moving companies." (CX 50).

34. Respondent's decisions to submit proposals for rate increases are implemented by majority vote. (CX 117 (Mirus, Dep. at 62-63; CX 15)). There are instances where an increase is proposed, but some movers "don't want an increase" because they "are getting along fine." (CX 117 (Mirus, Dep. at 163)). If the movers opposing an increase in rates are in the minority, the majority decision will nevertheless result in an increase in the collective rates. (CX 16 - CX 19).

35. The movers have agreed to tariff language that sets higher rates during the peak (summer) moving season. All of the

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Participating Carriers, except one or two, charge 10% higher rates from May 15th through September 30th. (CX 1 at KTC 2098; CX 2 at KHGCA 7018; CX 45 - CX 47; Respondent's Admission PP25, 26; JX 1 P17; CX 129 (Tolson, Dep. at 179-80)).

4. The Kentucky Association Has Prevented Carriers From Offering Discounts

36. Movers often seek to offer discounts from the collective rates. (E.g., CX 9). There have been instances where other Participating Carriers complain to the Kentucky Association Board to prevent these discounts from occurring. (F. 37-39; see generally, CX 129 (Tolson, Dep. at 34-40)).

37. An example of a complaint to Respondent is the complaint made by one Participating Carrier, A. Arnold, that its competitor, Shelter Moving, was offering a 52% discount: "we at A. Arnold appreciate and respect fair and honest competition. However, in our regulated state we do not condone dishonest business practices." Mr. William Debord, the KTC employee responsible for intrastate movers matters, sent Shelter Moving a warning letter telling it not to offer discounts. (CX 5; CX 6; CX 116 (Debord, Dep. II at 40-41); JX 1 P34).

38. Another mover, Rudy Miller, complained that his competitor, Berger, had offered a 30% discount from the tariff. (CX 7). Debord investigated this matter. (CX 116 (Debord, Dep. II at 44-45)).

39. Another mover alleged that Peters Movers was discounting 30% from the established tariff. (CX 8). Debord subsequently did "a routine investigation on Peters, but not a complaint audit." (CX 116 (Debord, Dep. II at 46-47)).

40. At times, consumers show estimates from one mover to another mover to try to get a lower price. There have been instances where, if one of the movers presents the consumer with an estimate that includes a discount, Respondent's officials have called the mover offering the discount to instruct that mover not to discount. (CX 129 (Tolson, Dep. at 37-39)).

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D. Collective Ratemaking Under the Articulated and Affirmatively Expressed State Policy of the Commonwealth of Kentucky

41. The relevant statutory and regulatory provisions relating to the Commonwealth of Kentucky's state policy are set forth in Section III, *infra*.

E. The Commonwealth of Kentucky Does Not Actively Supervise Collective Ratemaking

1. The KTC Provided More Supervision of Rates in the Past

42. In the past, the KTC did take steps to supervise movers' rates. While the KTC initially required household goods movers to file annual financial reports, it subsequently stopped requiring such financial reports. The KTC would get financial reports on firms' costs and expenses which were routinely audited "through the '70s [and] through the '80s." The KTC would check their accuracy by comparing the data sent to the State with each firm's federal Interstate Commerce Commission filings, which could be 200 pages long. (CX 104; RX 129; CX 116 (Debord, Dep. II at 82-83, 86-89)).

43. In 1966, Respondent considered hiring a consultant to prepare information for the KTC. "It was decided that due to the amount of information which maybe [sic] required by D.M.T., it would be feasible and probably more economical to call in an outside rates firm" (CX 107). The expert under consideration had many years experience at the Interstate Commerce Commission, where he supervised "between 30 and 40 employees whose duties were to develop cost formulae for the determination of rail, motor carrier . . . , to prepare cost studies . . . [and] to furnish cost data to the Suspension Board and other members of the Commission staff for use in determining the reasonableness of rates for rail carriers, motor carriers, and barge carriers and to introduce cost and other evidence in proceedings before the I.C.C." (CX 106).

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44. In 1972, the KTC had a staff of three auditors and others who did "uniform cost stud[ies]" of for-hire carriers which involved a "mathematical formula" or a "statistical formula" that was used, which was "very, very in depth or involved." Now, no official cost studies for household goods movers are done. (CX 116 (Debord, Dep. II at 72-73)).

45. "In the '70s," the KTC routinely filled out a spreadsheet which contained the calculated operating ratio for all household goods movers. Those operating ratios varied from 92% for bigger carriers to over 100% for marginal carriers. (CX 116 (Debord, Dep. II at 88-89); JX 1 P48).

46. Until "in the '80s," Debord provided monthly written reports to the Commissioner of the Department of Vehicle Regulations which would analyze rate applications. (CX 116 (Debord, Dep. II at 74-76)).

47. Debord no longer provides monthly written reports to the Commissioner. "In the 1980's," the Commissioner told Debord "not to bother them with those things." (CX 116 (Debord, Dep. II at 76-77); JX 1 P47).

48. Debord testified that besides the initial minimum rate that was issued "in the 1950's or early 1960's," Debord did not "know of any household goods rate that was established by and set by order of the Cabinet or Department." (CX 116 (Debord, Dep. I at 49)).

2. The KTC Commits Very Limited Resources to Tariff Issues

49. Ms. Denise King was Director of the Division of Motor Carriers of the KTC and reported to Mr. William M. Bushart, Commissioner of the Department of Vehicle Regulations at the time the Complaint was issued. She had been Director since May 2003 and Assistant Director since January 2000. (CX 115 (King, Dep. at 10, 40, 43); JX 1 P29). Commissioner Bushart reported to Deputy Secretary of Transportation Clifford Linkes, who in turn reported directly to Secretary of Transportation James Codell, III. (CX 115 (King, Dep. at 10, 40, 43); JX 1 P29).

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50. King spends one to two percent of her time on household goods matters. (CX 115 (King, Dep. at 14-15)). King testified that the individual who is responsible for the program of activity on the part of the KTC with respect to household goods tariffs is Mr. William Debord. (CX 115 (King, Dep. at 9)).

51. King has never given any written or oral instructions to Debord on how he should determine whether the rates contained in the Kentucky Association's tariff meet the State's statutory standards. (CX 115 (King, Dep. at 20-23)). King has not given Debord any instruction on how to evaluate rate increase proposals and she has no role in determining whether to permit a rate increase to take effect; she has delegated such decisions to Debord. (CX 115 (King, Dep. at 29-31)).

52. King has never discussed with her supervisor the rates contained in the tariff or the standard to be used when reviewing rates and she has never been given any written instructions by her supervisor as to how she should analyze the rates contained in the tariff. (CX 115 (King, Dep. at 39-40)).

53. King has no standards for determining whether rates meet the statutory goal of being not unjust or unreasonable. King has never discussed any such standard with Debord. King also is not aware of any standards that her predecessors used to review household goods carriers' rates. (CX 115 (King, Dep. at 43-45)).

54. Debord testified that he is the person at the KTC responsible for intrastate movers matters. He has had responsibility for household goods matters since 1979. Debord is currently an "Administrative Specialist 3," employed by the Division of Motor Carriers. Debord works part-time, 100 hours per month. (CX 116 (Debord, Dep. I at 11-12); JX 1 P30).

55. From 1972 to 1979, Debord was employed with the "Division of Rates & Services" of the "Department of Motor Transportation," which was the name by which the Division of Motor Carriers was known at that time. From December 1979 to October 1999, he served as either Director, Acting Director, or Assistant Director of the Division of Motor Carriers, KTC. From 1972 until the present, Debord has been responsible for

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administering the Commonwealth of Kentucky's program for the regulation of household goods carriers. (CX 116 (Debord, Dep. I at 11-15)).

56. Debord has been a member of the National Association of State Transportation Specialists since 1972 and served as its President in 2000-2001. He has been involved with other trucking industry groups including the Specialized Riggers Conference and tax associations and groups. (CX 116 (Debord, Dep. I at 85)).

57. It has been a part of Debord's employment responsibilities since 1972 to be familiar with the Kentucky laws regulating household goods carriers. (CX 116 (Debord, Dep. I at 15)).

58. Debord spends "a very high percent," over half, of his time performing household goods compliance audits. (JX 1 P33; CX 116 (Debord, Dep. II at 21)). In a compliance audit, Debord investigates complaints about carriers that discount their rates. (CX 116 (Debord, Dep. I at 103-04)).

59. In addition, Debord spends time investigating illegal movers, handling complaints about damage caused by movers, conducting seminars, updating power of attorney forms, and handling inquiries from the public. (CX 116 (Debord, Dep. II at 19-24); JX 1 P31).

60. Debord is responsible for other matters besides household goods movers. He has responsibility for tariff filings and other matters involving passenger carriers such as taxis, regular route busses, airport limousines, airport shuttles, and charter bus operations, as well as trucking matters in general. (CX 116 (Debord, Dep. II at 15); JX 1 P31).

61. Debord does not get guidance from his supervisor about tariff issues. He has authority over such matters and has not reported to anyone in that regard since 1979. (CX 116 (Debord, Dep. II at 26-27); CX 115 (King, Dep. at 20-21; 23; 30-31)).

62. No KTC employees report to Debord. (CX 116 (Debord, Dep. II at 26); JX 1 P30).

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3. The KTC Does Not Receive Adequate Data

63. Household goods movers do not routinely submit balance sheets and income statements to the KTC. (CX 116 (Debord, Dep. II at 53-54); CX 115 (King, Dep. at 32); CX 129 Tolson, Dep. at 48)). The KTC does still receive "a limited number" of movers' financial statements on a voluntary basis. However, Debord testified that such filings were not audited and could "misrepresent the industry's economic conditions." (CX 116 (Debord, Dep. II at 82-83)).

64. The KTC does not get any formal data on the percentage of movers' interstate moves versus their intrastate moves. (CX 116 (Debord, Dep. II at 84-85); JX 1 P46).

65. Respondent does not compile business data on movers' costs. (CX 129 (Tolson, Dep. at 85); CX 117 (Mirus, Dep. at 78-79)).

66. If a Participating Carrier wants to file for an exception or make a change in its rate, the Kentucky Association requires the carrier to fill out a Form 4268 and send it to the Chairman of Respondent's tariff committee. (CX 12 - CX 13; CX 116 (Debord, Dep. II at 62-63)). The Form 4268's that are sent by Participating Carriers to Respondent's tariff committee are not routinely filed with the KTC. (CX 116 (Debord, Dep. II at 63-65)).

67. Debord testified that the KTC's efforts to determine the costs of household goods carriers are: Debord's knowledge of the industry, Debord's conversations with trucking companies to determine various costs, and Debord's review of various publications such as the Wall Street Journal. (CX 116 (Debord, Dep. I at 39-40)).

68. Debord is on the mailing list of the Kentucky Association. He receives tariff bulletins when they are sent to the Kentucky Association's membership. (CX 116 (Debord, Dep. I at 93-94)).

69. Debord has attended meetings of the Kentucky Association to "obtain information relative to the industry" and to "be made aware of tariff change proposals." (CX 116 (Debord, Dep. I at 86-87)).

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70. Debord testified that he learns the bases for planned rate increases at the Kentucky Association meetings. (CX 116 (Debord, Dep. I at 49-50)). However, movers do not disclose details about their costs, revenues, or profit margins at the Kentucky Association meetings. Mr. Dennis Tolson, President of the Kentucky Association, testified about the lack of specific information disclosed in the verbal discussions that take place at the Kentucky Association's board meetings: "you have to understand that these . . . men and women are competitors with one another, too, so that a lot of . . . exact detailed financial information is not made available to--for public consideration at that point." (CX 129 (Tolson, Dep. at 133)).

71. Movers would not disclose at a meeting that KTC officials attend the exact wages that they pay their workers. (CX 129 (Tolson, Dep. at 123)). Movers would not disclose their actual costs of obtaining supplies such as boxes. (CX 129 (Tolson, Dep. at 127)). They would also not disclose their margins on selling a box to a customer. (CX 129 (Tolson, Dep. at 127)). During the Kentucky Association meetings, associate members, who sell goods or services to movers, also do not divulge actual invoices showing what movers paid for their goods or services. (CX 129 (Tolson, Dep. at 238-39)).

72. When Debord does a tariff compliance investigation, he looks at certain documents that movers keep on individual moves. He does not routinely look at balance sheets, income statements, payroll documents, documents that show information about cost of capital, or documents that would allow him to analyze movers' profitability. (CX 116 (Debord, Dep. II at 78-81)).

73. The KTC does not receive any input from groups advocating on behalf of consumers. (CX 116 (Debord, Dep. II at 109-10)). In one instance of a limited hearing held on issues involving individual moving firms, the State did not allow people in the hearing room unless they represented a mover. (CX 117 (Mirus, Dep. at 98-99)).

74. The record does not indicate that notice of rate increases was ever provided to the public. (See CX 116 (Debord, Dep. II at

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59-60)). When asked about the notice requirements, Debord testified that information is available for inspection by the public at the Division of Motor Carriers. (CX 116 (Debord, Dep. I at 43-45)). Debord further testified that household goods carriers are not required to provide notice of rate increases to the public. (CX 116 (Debord, Dep. I at 43-45)).

4. The KTC Receives Minimal Justifications for Rate Increases

75. Minimal justification is provided to the KTC in support of movers' requests for rate increases. The Kentucky Association does not submit, nor does the KTC require, any business records, economic studies, or cost justification data. (CX 116 (Debord, Dep. II at 72-74, 109, 111-12, 115-16, 119-20, 124-26)).

76. Generally, it is customary for the Kentucky Association's representatives to have discussions with Debord to provide informal justifications regarding collectively set rates before they are filed by the Kentucky Association. (CX 116 (Debord, Dep. I at 132-33)).

77. The chairman of the tariff committee of the Kentucky Association, Mr. A.F. Mirus, described the information that the tariff committee provides to the KTC to justify general rate increases as follows: "I could have a conversation with [Debord] advising him as to what the board wishes to do, what the board of directors wishes to do, and more or less just to get his feeling on it." (CX 117 (Mirus, Dep. at 88)).

78. In response to a request to describe discussions with Debord about possible rate increases, Mirus said: "well, I would contact Mr. Debord and tell him as a result of a board meeting the board proposed a possible rate increase and that we would ask him what his feelings were on it before we got too deeply into it, because there was money involved, et cetera, and see what his feelings were on it. And if he felt it was, and nicely he would ask us what is your justification, and we would have something to back it up." (CX 117 (Mirus, Dep. at 151-52)).

79. Mirus did not provide Debord with detailed justifications or business documents to justify rate increases. (CX 117 (Mirus,

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Dep. at 153-54)). Instead, Mirus would "tell [Debord] what went on at the board meeting and that the membership, the general membership felt they needed an increase in their charges in order to offset the increase, whether it be in operation cost or whether it be in insurance, whichever the case may be." (CX 117 (Mirus, Dep. at 153)). Mirus testified that, in response to Mirus's statement to Debord that costs had gone up, "many times [Debord] would say file the tariff and we will take it from there." (CX 117 (Mirus, Dep. at 153)).

80. Debord testified that he learns the justifications for planned rate increases at the Kentucky Association meetings. (CX 116 (Debord, Dep. I at 49-50)). No specific information is discussed at the meetings. F. 70.

81. Debord could not recall specific justifications provided in support of proposals for general rate increases. (F. 82-84; CX 116 (Debord, Dep. II at 115-16)).

82. In Tariff Supplement 71, effective April 1, 2002, Respondent filed for a 5% increase on specific items contained in the tariff, such as the added cost of moving a car, which increased from \$ 128.30 to \$ 134.70. Debord does not recall the justification for that increase. (CX 116 (Debord, Dep. II at 119-20)). This rate increase was allowed to go into effect. (CX 10).

83. In December 2000, Respondent filed Tariff Supplement 66, seeking an 8% increase in intrastate rates. The written justification provided to the State for that increase was a cover letter. (RX 169). Debord characterized that letter as an "extra courtesy" and said that normally tariff filings were not accompanied by such a justification letter. (CX 116 (Debord, Dep. II at 97-101)). The justification provided by Respondent was an increase of interstate rates by 5% and a statement that the adjusted rates were deemed necessary to offset increases in operational expenses. (RX 169). Debord testified that he did not recall any oral statements justifying this rate increase during the time the Kentucky Association was preparing the rate increase. (CX 116 (Debord, Dep. II at 102-03)). This rate increase was allowed to go into effect. (CX 116 (Debord, Dep. II at 105)).

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84. In 1999, Respondent filed Tariff Supplement 61, seeking a 10% increase in intrastate rates. The written justification provided to the State for that increase was a cover letter which discussed a 5% increase in interstate rates. (RX 164; CX 116 (Debord, Dep. II at 112)). Debord testified that he did not "recall this particular event." (CX 116 (Debord, Dep. II at 113)). This rate increase was allowed to go into effect. (CX 17).

85. If a Participating Carrier wants to make a change in its rate, it is required by the Kentucky Association to fill out a Form 4268. (CX 12 - CX 13; CX 116 (Debord, Dep. II at 62-63)). Debord has not given Respondent any formal instructions about what information should be on the Form 4268. (CX 116 (Debord, Dep. II at 66-67)); see also CX 129 (Tolson, Dep. at 66)).

86. The information contained on the Form 4268's in Respondent's files lack adequate data regarding a justification for a rate increase. Many Participating Carriers have changed their rates without even filling out the Form 4268 or with providing minimal information on the form. Many simply assert that costs have risen or that the Participating Carrier wishes to raise its rates. (CX 57 - CX 103; JX 1 P28; CX 129 (Tolson, Dep. at 65)).

5. The KTC Does Not Analyze Requests for Rate Increases or Rates

87. Even during the time that the KTC calculated operating ratios, there was no written policy which set forth an acceptable level. The KTC did not have a numerical goal for an acceptable operating ratio. "As far as official policy stating that to allow ninety-five or ninety-three percent ratio--operating ratio, we never had that." The KTC did not mandate rates, as was done in many states. (CX 116 (Debord, Dep. II at 95-96); JX 1 P49).

88. The KTC does not have any standard or formula that it uses to determine whether to permit a rate increase or whether a rate increase is appropriate. (CX 116 (Debord, Dep. II at 105-09)). Similarly, the KTC does not have any way of knowing whether a rate increase will increase movers' profits. (CX 116 (Debord, Dep. II at 105-06)). Respondent's president testified he

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was not aware of any procedure used by the KTC to determine or justify rate increases. (CX 129 (Tolson, Dep. at 98-99)).

89. The KTC does not have any mathematical or numerical formula for determining whether movers' rates comply with the statutory standards. (CX 116 (Debord, Dep. II at 36-37, 108-09)). Debord was asked whether there were any written standards for determining whether rates were "reasonable" under Kentucky statutes. He testified that "there's not a written rule within the Cabinet that requires specific standards to be followed." (CX 116 (Debord, Dep. II at 36-37)). Similarly, Debord testified that the KTC did not have any way of analyzing whether rate increases would result in rates being "excessive." (CX 116 (Debord, Dep. II at 108-09)). Respondent's president testified he was not aware of any standard used by the KTC to determine if rates are appropriate. (CX 129 (Tolson, Dep. at 98-99)).

90. In one instance, a moving company that is not a member of the Kentucky Association, Apartment Movers, filed for individual rates. Debord was asked whether he had any standard for deciding whether to allow separate rates that had been submitted by a firm to go into effect if they were "X percent higher" than other firms' rates and Debord testified that "we don't have any specific standards documented." (CX 116 (Debord, Dep. II at 123-24)).

91. The Planes Moving Company filed an exception whereby it charges 20% more than the highest intrastate rates in the tariff. Another firm, Weil-Thoman, filed an exception whereby it charges 38% more than the highest intrastate rates in the tariff. In neither instance could Debord identify a standard that the KTC used to determine whether these rates complied with the statutory requirement that the rates be not "excessive." (CX 116 (Debord, Dep. II at 141-45)). The KTC permitted both of these firms to charge these increased rates. (CX 2 at KHGCA 7038).

92. Respondent does not have any formula it uses in determining what level of rate increase to seek. (CX 129 (Tolson, Dep. at 133, 142)). Nor does Respondent have any assumptions concerning what level of rate increase the KTC is likely to approve to go into effect. (CX 129 (Tolson, Dep. at 133)).

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93. When the intrastate rates are increased, the tariff has many rates which are adjusted upward. For instance, each rate table has 240 prices on it and there are seven rate tables. For a 5% rate increase, such as was contained in Supplement 71, the Kentucky Association prepares the new tables with the upwardly adjusted rates. Debord checks "three or four" numbers per page to see if the rate increase has been calculated accurately. (CX 116 (Debord, Dep. II at 137-40)). Debord conceded in his testimony that, "I'm sure there might be some math errors that arrive based upon not checking and auditing." (CX 116 (Debord, Dep. II at 140)).

6. The KTC Does Not Issue Written Decisions

94. When Respondent wants to change the tariff, it informs Debord of its proposal. Debord reviews and stamps the document requesting the change. (E.g., CX 108; see also RX 16 - RX 48; RX 102 ("Take to Bill Debord for acceptance stamp")). If the State does not act within thirty days, the change becomes effective. As Debord testified, "no action is approval." (CX 116 (Debord, Dep. II at 58-60)). As he further testified, "so, after the thirty days notice, then it becomes an approved tariff." (CX 116 (Debord, Dep. II at 60)).

95. The KTC does not issue a written decision when it permits rate increases to go into effect. (CX 116 (Debord, Dep. II at 77-78); CX 115 (King, Dep. at 34); CX 129 (Tolson, Dep. at 56, 130)). Further, the KTC does not set forth in writing any analysis of the collective rates contained in the tariff. (CX 129 (Tolson, Dep. at 130)).

7. The KTC Does Not Hold Hearings

96. Aside from hearings that were held "in the 1950's or early 1960's" when the tariff was first developed, the State has not held hearings to examine or analyze the collective rates contained in the Kentucky Association tariff. (CX 116 (Debord, Dep. I at 47-49); CX 116 (Debord, Dep. II at 67-69); CX 115 (King, Dep. at 33); JX 1 P45)).

97. The Kentucky Association's Board meetings are not publicly announced, and no group or individual representing

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consumers has ever attended a Board meeting. (CX 129 (Tolson, Dep. at 145)).

8. Interstate Rates

98. Respondent at times references increases in interstate rates when submitting a justification for increases in intrastate rates. F. 83, 84. The record does not indicate how the interstate rate levels are established. (See CX 129 (Tolson, Dep. at 193-94)). As Debord testified, the interstate rates are established by a private rate publishing agency and Debord did not know how that organization established the interstate rates. (CX 116 (Debord, Dep. II at 131-33)).

99. Movers are permitted to discount from the interstate tariff and do routinely discount off those rates. (CX 116 (Debord, Dep. II at 127-28)). Debord testified that he had seen a wide variety of discounts from the interstate rate including discounts as high as 70% and 75% from the interstate rate. (CX 116 (Debord, Dep. II at 128)).

100. Debord testified that he is "not aware of any" industry or government publication that tracks the actual cost of interstate moves as compared to the rates published in the interstate tariff. He also has not discussed that issue with movers. (CX 116 (Debord, Dep. II at 127-28)).

101. Debord testified that he has not compared and that it would be difficult to compare the rates in the Kentucky Association intrastate tariff with either the rates in the interstate tariff or with the actual rates charged for interstate moves. (CX 116 (Debord, Dep. II at 129-31); JX 1 P50).

102. The interstate tariff is not established using the standards set out in the Kentucky statutes. (CX 116 (Debord, Dep. II at 133-34)). As Debord testified, "my understanding, their goal is to let the industry charge as they wish, charge whoever they wish, whatever they wish and discriminate as they see fit." (CX 116 (Debord, Dep. II at 133-34)).

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III. RELEVANT PROVISIONS OF LAW

A. Constitution of the Commonwealth of Kentucky

1. Section 196 of the Kentucky Constitution provides, among other things, that the transportation of freight by common carrier ". . . shall be so regulated, by general law, as to prevent unjust discrimination." Ky. Const. § 196.

B. Statutes of the Commonwealth of Kentucky

2. Chapter 281 of the Kentucky Revised Statutes ("KRS") contains the principal provisions governing the regulation of motor common carriers of household goods in the Commonwealth of Kentucky. KRS Ch. 281.

3. The KTC has administrative powers and functions which include all administrative functions of the State in relation to motor transportation. (RX 75 (KRS 281.600)). The KTC is required to establish collective ratemaking procedures. (RX 80 (KRS 281.680(4))).

4. The term "common carrier" means any person who holds himself out to the general public to engage in the transportation by motor vehicle of persons or property in intrastate or interstate commerce over regular or irregular routes. (RX 69 (KRS 281.011)).

5. KRS 281.590 contains a "Declaration of Policy" ("Kentucky State Transportation Policy") regarding transportation in the Commonwealth of Kentucky. The Kentucky State Transportation Policy includes the following elements:

- to provide for fair and impartial regulation of all transportation subject to the provisions of Chapter 281;
- to promote safe, adequate, economical, and efficient service;
- to foster sound economic conditions among the several carriers;

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- to encourage the establishment and maintenance of reasonable charges for transportation service;
- to avoid unjust discrimination, undue preference, undue advantage, unfair competitive practices, and destructive competitive practices in the establishment and maintenance of transportation charges.

(RX 74).

6. KRS 281.590 provides that all of the provisions of Chapter 281 must be administered and enforced with a view to carry out the "Declaration of Policy" contained in KRS 281.590. (RX 74).

7. KRS 281.624 includes a definition of "household goods," as "personal effects and property used or to be used in a dwelling, when part of the equipment or supply of the dwelling, and similar property if the transportation of the effects or property is: (a) arranged and paid for by the householder, including transportation of property from a factory or store when the property is purchased by the householder with intent to use in his or her dwelling; or (b) arranged and paid for by another party." (RX 76).

8. KRS 281.640 describes the method of conduct of hearings before the Department, and specifically provides that nothing in the section shall prevent the commissioner of the Department from holding or conducting any hearing referred to in this section, in regard to rates, fares, and charges. (RX 78).

9. KRS 281.675(1) requires that "every rate, fare, and charge demanded or received by any certificate holder shall be just and reasonable, and every holder of a certificate shall furnish adequate, efficient, safe and reasonable service." (RX 79).

10. KRS 281.680(1) governs collective ratemaking by carriers of passengers and household goods. The subsection contains the following provisions:

- common carriers and irregular route common carriers of passengers and household goods must

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maintain a schedule of rates, charges, and classifications;

- a carrier must keep open for public inspection such parts of its schedule of rates, charges, and classifications as the Department deems necessary for public information;

- a carrier may become a participating party to a tariff published or issued by a tariff publishing agency;

- the "tariff-issuing agent" must file the carrier's tariff with the Department;

- each of the foregoing provisions is required to occur under administrative regulations promulgated by the department under KRS Chapter 13A.

(RX 80).

11. KRS 281.680(2) requires that a contract carrier's transportation contracts must be maintained on file with the department and requires that the contract carrier must "keep open for public inspection at designated offices such contracts as the department deems necessary for public information." The subsection further provides that the foregoing shall take place "under administrative regulations promulgated by the department under KRS Chapter 13A." (RX 80).

12. KRS 281.680(3) provides that "the department shall have full power concerning the control of rates and contracts under its administrative regulations." (RX 80).

13. KRS 281.680(4) provides the following:

- the department must establish collective ratemaking procedures.

- the department's collective ratemaking procedures must apply to all (a) commodities, and (b) services;

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for which the department prescribes (i) rates; (ii) charges; and (iii) classifications.

- the department's collective ratemaking procedures must assure that the revenues and costs of carriers are ascertained.

- the department's collective ratemaking procedures must be established for the purpose of "ensuring non-discriminatory rates, charges, and classifications for all shippers and users of transportation services for which the department prescribes rates."

(RX 80).

14. KRS 281.685(1) prohibits a common carrier or irregular route common carrier of household goods from charging an amount different than its tariff rate or charge for any regulated transportation service. The section also prohibits any refund, unreasonable preference, or rate discrimination. (RX 81).

15. KRS 281.690(1) contains the procedure for changes in the rates of household goods carriers. The section requires:

- changes in rates must be on 30 days notice to the KTC;

- the notice must state the proposed changes and effective date of the change;

- the carrier must give notice of the proposed rate change to interested persons as directed by the department in administrative regulations;

- proposed rate changes must be shown in new tariffs;

- the department may, by administrative regulations, allow for rate changes on less than 30 days' notice.

(RX 82).

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16. KRS 281.690(2) allows the department to schedule a hearing concerning the lawfulness of a proposed tariff rate change on its own motion or on the filing of a protest to the rate change. In the event of such a hearing, the following provisions apply:

- The department is obligated to mail written notice of the hearing to the applicant, protestant, and any other person who may be interested in or affected by the rate in the department's opinion;
- The department may suspend the proposed rate for up to 6 months from the proposed effective date by order stating the reasons for the suspension;
- The department must determine the just and reasonable rate if it finds the rate to be objectionable after hearing.

(RX 82).

17. KRS 281.695(1) provides that the department has the authority to fix and approve common carrier rates and insure adequate and convenient transportation service. In the event that the department finds a rate to be excessive, inadequate, unreasonable, or unjustly discriminatory after a hearing, the department may determine the just and reasonable rate. (RX 83).

18. KRS 281.705 authorizes the department to prescribe uniform systems of accounts and the filing of reports by motor carriers. (RX 85).

C. Regulations of the Kentucky Transportation Cabinet

19. Pursuant to KRS 281.600, the Department of Vehicle Regulation has the power to promulgate administrative regulations as it deems necessary to carry out the provisions of that chapter. (RX 75). Kentucky Administrative Regulations ("KAR") 601 KAR 1:050, 1:060, 1:070, and 1:080 were promulgated pursuant to KRS 281.600. 601 KAR 1:050, 1:060, 1:070, and 1:080. (RX 94, 95, 96, 98).

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20. 601 KAR 1:050 authorizes the KTC to fix or approve the rates, charges, and rules of carriers and prescribes the form of tariffs for carriers. This administrative regulation requires the filing and administration of just and reasonable rates. (RX 94).

21. 601 KAR 1:060 contains general rules governing tariffs and supplements. The regulation includes the following provisions:

- tariffs and supplements must be received at the KTC at least 30 days prior to the proposed effective date;
- the foregoing 30 day requirement does not apply to a tariff being filed (a) pursuant to an Order fixing rates; or (b) as the result of a hearing.
- specific provision governing the form and size of tariffs and information included in tariffs;
- a requirement that each common carrier and irregular route common carrier must maintain a copy of its intrastate tariffs at each of its terminals at which an agent is employed and its principal place of business;
- carriers' employees are ". . . required to give any desired information contained in such tariffs, to lend assistance to seekers of information therefrom, and to afford inquirers opportunity to examine any of such tariffs without requiring the inquirer to assign any reason for such desire."
- tariffs must contain the following: (a) table of contents; (b) list of participating carriers; (c) index of commodities; (d) explanation of abbreviations, symbols, and reference marks; (e) rules and regulations; (f) rates and charges expressed in dollars and cents per 100 pounds per mile or otherwise, as

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indicated; and (g) mileage or method of determining mileage where rates are based on distance from point of origin to point of destination.

(RX 95).

22. 601 KAR 1:070(2)(c) contains the requirements for changes in tariff rates and charges by household goods carriers. The requirements include the following:

- at or immediately prior to the time of filing the tariff or supplement containing the proposed changed rate or charge, the carrier must "notify all competing and connecting carriers having a situs within fifty (50) miles of his situs of such change";
- "similar notice must be given to any shipper or interested party requesting same";
- "if the change in the rates and charges involves an increase, then he shall also, and at the same time, cause a notice to be printed in a newspaper of general circulation in the area of his situs, which shall give notice of the proposed increase, the old rates and charges, the proposed rates and charges, and which shall state that any interested party may protest said increase by filing a protest with the Transportation Cabinet in accordance with its rules and administrative regulations."

(RX 96).

23. 601 KAR 1:070(2)(d) contains further requirements respecting the process of notice to shippers and other interested persons regarding tariff rate changes. The subsection contains the following requirements:

- Regular and irregular route common carrier truck operators (which includes household goods carriers);

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and tariff publishing agencies (such as Respondent) must maintain a list of shippers and interested parties.

- Any shipper desiring notice of rate changes of any carrier may request such carrier or its tariff publishing agent to be placed on the list for notices of rate changes.
- Once on the list, any such shipper or interested party must be provided with notice of any change in rates.

(RX 94).

24. 601 KAR 1:080(2) describes the requirements which must be met for charges for "accessorial" or "terminal" services provided for household goods carriers. These requirements include the following:

- charges for Accessorial and Terminal services must comply with the tariff filing requirements of 601 KAR 1:060;
- tariffs establishing such charges must separately state each service to be rendered and the charge therefore;
- tariffs may state an hourly labor charge applicable to miscellaneous labor service performed at the request of the shipper in connection with transportation when a tariff rate is not specifically provided;
- charges established for packing and unpacking shall be in amounts per container;
- charges for other services shall be stated on a unit or hourly basis, as appropriate;

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- no charge so established shall be lower than the cost of providing the service;
- the rate for transportation of goods shall not include the charge for any accessorial service; and
- no such services other than those for which separate charges have been so established shall be rendered by any such carrier.

(RX 98).

25. 601 KAR 1:080(3) prohibits discounting by household goods carriers. (RX 98).

26. 601 KAR 1:080(9) contains provisions governing the providing of estimates for household goods transportation services to shippers. (RX 98).

IV. ANALYSIS AND CONCLUSIONS OF LAW

A. Jurisdiction

The Complaint charges Respondent with violating Section 5 of the Federal Trade Commission Act, as amended ("FTC Act"). 15 U.S.C. § 45. Section 5(a)(2) of the FTC Act gives the Commission jurisdiction "to prevent persons, partnerships, or corporations . . . from using unfair methods of competition in or affecting commerce" 15 U.S.C. § 45(a)(2); *Kaiser Aluminum & Chem. Corp. v. FTC*, 652 F.2d 1324, 1327 n.2 (7th Cir. 1981). See also *McLain v. Real Estate Bd. of New Orleans, Inc.*, 444 U.S. 232, 241-42 (1980); *Hosp. Bldg. Co. v. Trs. of Rex Hosp.*, 425 U.S. 738, 745-46 (1976). The FTC has jurisdiction to regulate intrastate activities of movers associations that affect interstate commerce. *Massachusetts Furniture & Piano Movers Ass'n, Inc. v. FTC*, 773 F.2d 391, 394 (1st Cir. 1985). Respondent does not dispute that the acts and practices of Respondent challenged in the Complaint have been and are now in or affecting commerce, as "commerce" is defined in the FTC Act, or that the Federal Trade Commission has jurisdiction in this proceeding. Stipulation P51; see also F. 7. Accordingly, the

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Commission has jurisdiction over Respondent and the subject matter of this proceeding.

B. Burden of Proof

Under Commission Rule of Practice 3.51(c)(1), "an initial decision shall be based on a consideration of the whole record relevant to the issues decided, and shall be supported by reliable and probative evidence." 16 C.F.R. § 3.51(c)(1). The Commission made amendments to its Rules of Practice, effective May 18, 2001. FTC Rules of Practice, Interim rules with request for comments, 66 Fed. Reg. 17,622 (April 3, 2001). Through these amendments, the Commission removed the requirement of Rule 3.51(c)(3) that the initial decision of an Administrative Law Judge ("ALJ") be supported by "substantial" evidence. 66 Fed. Reg. at 17,626. The Administrative Procedure Act, however, requires that an ALJ may not issue an order "except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence." Administrative Procedure Act ("APA") 5 U.S.C. § 556(d). According to Black's Law Dictionary, "probative evidence" means having the effect of proof; tending to prove, or actually proving an issue. "Substantial evidence" is defined in Black's Law Dictionary as such evidence that a reasonable mind might accept as adequate to support a conclusion. At the adjudicative level of these proceedings, any difference between "probative" evidence and "substantial" evidence is not dispositive under these standards. Therefore, all findings of fact in this Initial Decision are supported by reliable, probative, and substantial evidence.

The parties' burdens of proof are governed by Commission Rule 3.43(a), Section 556(d) of the APA, and case law. FTC Rules of Practice, Interim rules with request for comments, 66 Fed. Reg. 17,622, 17626 (April 3, 2001). Pursuant to Commission Rule 3.43(a), "counsel representing the Commission . . . shall have the burden of proof, but the proponent of any factual proposition shall be required to sustain the burden of proof with respect thereto." 16 C.F.R. § 3.43(a). Under the APA, "except as otherwise provided by statute, the proponent of a rule or order has

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the burden of proof." 5 U.S.C. § 556(d). See also *Steadman v. SEC*, 450 U.S. 91, 102 (1981) (APA establishes preponderance of the evidence standard of proof for formal administrative adjudicatory proceedings).

The government bears the burden of establishing a violation of antitrust law. *United States v. E.I. duPont de Nemours & Co.*, 366 U.S. 316, 334 (1961). "The antitrust plaintiff must present evidence sufficient to carry its burden of proving that there was [an anticompetitive] agreement." *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 763 (1984). Accordingly, Complaint Counsel bears the burden of demonstrating that Respondent's actions are anticompetitive.

"State action immunity is an affirmative defense as to which [defendant] bears the burden of proof." *Yeager's Fuel, Inc. v. Pennsylvania Power & Light Co.*, 22 F.3d 1260, 1266 (3d Cir. 1994); *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 638 (1992) ("The party claiming the immunity must show that state officials have undertaken the necessary steps to determine the specifics of the price-fixing or ratesetting scheme."). See also *Patrick v. Burget*, 486 U.S. 94, 103 (1988) (respondents have not shown the active supervision required to result in state action immunity). Accordingly, Respondent bears the burden of demonstrating that its actions are shielded by the state action doctrine.

C. Relevant Market

The relevant market has two components, a geographic market and a product market. *H.J., Inc. v. Int'l Tel. & Tel.*, 867 F.2d 1531, 1537 (8th Cir. 1989). Even in a horizontal price fixing case analyzed under the per se rule, the relevant market must be defined. *Bogan v. Hodgkins*, 166 F.3d 509, 515 (2d Cir. 1999); *Double D Spotting Service, Inc. v. Supervalu, Inc.*, 136 F.3d 554, 559 (8th Cir. 1998). The relevant geographic market is the region "in which the seller operates, and to which the purchaser can practicably turn for supplies." *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 327 (1961). The relevant product or service market is "composed of products that have reasonable interchangeability for the purposes for which they are produced - price, use and qualities considered." *United States v. E.I. du Pont*

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de Nemours & Co., 351 U.S. 377, 404 (1956). The relevant market in this case is not a contested issue. Consumers seeking local or intrastate household goods moving services turn to household goods movers that provide local or intrastate moving services within the Commonwealth of Kentucky. F. 1, 2, 7. Therefore, for assessing the allegations of the Complaint, the relevant geographic market is the Commonwealth of Kentucky and the relevant product market is intrastate and local moving services in the Commonwealth of Kentucky.

D. Horizontal Agreement

The FTC Act's prohibition of "unfair methods of competition" encompasses violations of other antitrust laws, including Section 1 of the Sherman Act, which prohibits agreements in restraint of trade. *California Dental Ass'n v. FTC*, 526 U.S. 756, 762 n.3 (1999). The Commission relies on Sherman Act law in adjudicating cases alleging unfair competition. E.g., *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 451-52 (1986); *In re California Dental Ass'n*, 121 F.T.C. 190, 292 n.5 (1996).

Agreements among competitors to fix or set prices have been historically condemned as per se illegal. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 218 (1940); see also *Arizona v. Maricopa County Med. Soc'y*, 457 U.S. 332 (1982). Further, ratemaking associations, in which members are otherwise competitors, that establish rates that apply to and across the membership constitute illegal price fixing arrangements, and absent the existence of an antitrust law defense, have been proscribed by the courts for nearly sixty years. *Georgia v. Pennsylvania R.R.*, 324 U.S. 439, 456, 460-61 (1945) (holding that collective rate publication by railroads constituted illegal price fixing under the antitrust laws).

Conduct similar to the conduct challenged in this action - collective intrastate ratemaking by an association of motor carriers - has been held to violate antitrust laws, if not immune under the state action doctrine. E.g., *United States v. Southern Motor Carriers Rate Conference*, 467 F. Supp. 471, 486 (N.D. Ga. 1979), *aff'd*, 702 F.2d 543 (5th Cir. 1983), *rev'd on other grounds*, 471 U.S. 48 (1985); *In re Massachusetts Furniture and Piano*

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Movers Ass'n, 102 F.T.C. 1176, 1201 (1983), aff'd, 102 F.T.C. 1176, 1224-26, rev'd on other grounds, 773 F.2d 391 (1st Cir. 1985); and *In re New England Motor Rate Bureau, Inc.*, 112 F.T.C. 200, 261 (1986), aff'd, 112 F.T.C. 263 (1989), rev'd on other grounds, 908 F.2d 1064 (1st Cir. 1990).

In *United States v. Southern Motor Carriers Rate Conference*, the district court held that defendants, rate bureaus who, on behalf of their members, published tariffs containing proposed rates for intrastate for-hire transportation of general commodities, were in violation of the Sherman Act. 467 F. Supp. at 486. The Supreme Court reversed, finding defendants' activities immunized by the state action doctrine, but characterizing the challenged collective ratemaking as "anticompetitive conduct." *Southern Motor Carriers Rate Conf., Inc. v. United States*, 471 U.S. 48, 65 (1985). The collective ratemaking process in this case is similarly anticompetitive conduct.

Respondent's conduct in this case is also similar to the conduct engaged in by a household goods carrier that was found to violate Section 5 of the FTC Act. *In re Massachusetts Furniture and Piano Movers Ass'n*, 102 F.T.C. 1176. There, the Administrative Law Judge held that concerted activity to influence or tamper with the level of prices, which putative competitors may either accept or reject, was violative of antitrust laws. 102 F.T.C. at 1200-01. The Commission agreed, stating, "plainly, the rate-making activities of the Association are per se unlawful under the antitrust laws." 102 F.T.C. at 1225. The Court of Appeals for the First Circuit agreed that collective ratemaking was price fixing, but remanded for further consideration the association's state action defense. 773 F.2d at 397.

Similarly, in *New England Motor Rate Bureau, Inc.*, the Administrative Law Judge held, and the Commission affirmed, that the Respondent's acts and practices of collectively formulating intrastate rates and issuing tariffs prevented customers from making price comparisons and constituted a per se violation of the Federal Trade Commission Act. 112 F.T.C. at 261, 285. The Court of Appeals for the First Circuit did not address whether collective ratemaking was price fixing, but

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reversed the Commission's decision on whether the active supervision requirement for state action immunity was present. 908 F.2d at 1077.

In *FTC v. Ticor Title Ins. Co.*, 112 F.T.C. 344 (1989), the Commission was confronted with an assertion that, under *Broadcast Music, Inc. v. CBS*, 441 U.S. 1 (1979), tariffs containing collective rates should not automatically be treated as a per se violation of the antitrust laws. The Commission rejected that argument: "Respondents have not advanced, and we cannot conceive of, any plausible efficiency justification for their price fixing activities." 112 F.T.C. at 465. The Commission's decision was affirmed by the Supreme Court, which stated, "this case involves horizontal price fixing No antitrust offense is more pernicious than price fixing." *Ticor*, 504 U.S. at 639. Thus, the Commission has held that a rate bureau that prepares a collective tariff cannot assert a legitimate justification for its horizontal agreement. In this case, Respondent has not raised one.

Respondent's sole argument is that its conduct is immune under the state action doctrine. Nowhere does Respondent argue that its conduct is not price fixing. The evidence establishes that Respondent has coordinated a price fixing agreement. F. 14-40. The household goods carriers that participate in the Kentucky Association are competitors with each other. F. 8. Respondent's actions facilitate the members' agreement on the schedule of local and intrastate rates that each will charge, as well as agreements on specific rates for additional tasks such as hauling a car or moving jet skis. F. 30. The members, through Respondent's efforts, collectively agree to file rate increases. F. 25-29. At least once every year for many years, Respondent has filed a tariff supplement raising the rates that members must charge approximately five to ten percent per year. F. 27. Members also have agreed to establish uniform hours for overtime charges and have agreed to specific "peak" summer dates when members increase their rates. F. 35. These are the types of horizontal agreements courts have found to be per se illegal in the past. Thus, unless the conduct here is shielded by the state action defense, it violates Section 5 of the Federal Trade Commission Act.

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E. State Action Defense

The state action doctrine was forged by the United States Supreme Court in *Parker v. Brown*, 317 U.S. 341 (1943). In *Parker*, the Supreme Court considered whether the Sherman Act prohibits anticompetitive actions taken by a state. Petitioner in that case was a raisin producer who brought suit against the California Director of Agriculture to enjoin the enforcement of a marketing plan adopted under the State's Agricultural Prorate Act. That statute restricted competition among food producers in the State in order to stabilize prices and prevent economic waste. Relying on principles of federalism and state sovereignty, the Supreme Court refused to find in the Sherman Act "an unexpressed purpose to nullify a state's control over its officers and agents." *Id.* at 351. The Sherman Act, the Supreme Court held, was not intended "to restrain state action or official action directed by a state." *Id.* Where the "state itself exercises its legislative authority in making the regulation and in prescribing the conditions of its application, . . . [the state] impose[s] the restraint as an act of government." *Id.* at 352.

Although *Parker* involved a suit against a state official, the Supreme Court subsequently recognized that *Parker*'s federalism rationale demanded that the state action exemption also apply in certain suits against private parties. E.g., *Southern Motor Carriers Rate Conference*, 471 U.S. 48. In *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), the Supreme Court established a rigorous two-pronged test to determine whether anticompetitive conduct engaged in by private parties should be deemed state action and thus shielded from the antitrust laws:

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.

Midcal, 445 U.S. at 105 (quoting *Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 410 (1978)).

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In *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 638 (1992), the Supreme Court confirmed the two prong test established in *Midcal*. "Our insistence on real compliance with both parts of the *Midcal* test will serve to make clear that the State is responsible for the price fixing it has sanctioned and undertaken to control." *Id.* at 636. The Supreme Court provided further rationale for the state action doctrine:

Midcal confirms that while a State may not confer antitrust immunity on private persons by fiat, it may displace competition with active state supervision if the displacement is both intended by the State and implemented in its specific details. Actual state involvement, not deference to private price-fixing arrangements under the general auspices of state law, is the precondition for immunity from federal law. Immunity is conferred out of respect for ongoing regulation by the State, not out of respect for the economics of price restraint.

Id. at 633.

Respondent in this case asserts that the challenged conduct meets both prongs of the *Midcal* test and the standards established in *Ticor*. Complaint Counsel does not argue that the challenged restraint is not clearly articulated and affirmatively expressed as state policy. Rather, Complaint Counsel argues that the key issue is whether the policy is actively supervised by the Commonwealth of Kentucky.

1. Whether the Challenged Restraint is One Clearly Articulated and Affirmatively Expressed as State Policy

The challenged restraint in this case is the Respondent's filing with the State a collective tariff for intrastate household goods movers in Kentucky. The tariff sets forth the rates that household goods movers must charge for their moving services. F. 13-21, 27. Through its statutes and regulations, the Commonwealth of Kentucky has clearly articulated and affirmatively expressed a state policy in favor of collective ratemaking. For example, KRS

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281.680(4) provides that the KTC must establish collective ratemaking procedures; that the department's collective ratemaking procedures must assure that the revenues and costs of carriers are ascertained; and that the department's collective ratemaking procedures must be established for the purpose of "ensuring non-discriminatory rates, charges, and classifications for all shippers and users of transportation services for which the department prescribes rates." KRS 281.680(4). KRS 281.685(1) prohibits a common carrier or irregular route common carrier of household goods from charging an amount different from the rates, fares, or charges specified in its tariffs. The section also prohibits any refund, unreasonable preference, or rate discrimination. KRS 281.685(1). KRS 281.690(1) contains the procedure for changes in the rates of household goods carriers. KRS 281.690(1). Other examples of Kentucky's articulation of its State policy are set forth in Section III, *supra*.

In *Southern Motor Carriers Rate Conf. v. United States*, 471 U.S. 48 (1985), petitioners were rate bureaus composed of motor common carriers who submitted joint rate proposals on behalf of their members to the Public Service Commission for approval or rejection. The Supreme Court held that where the State statutes explicitly permitted collective ratemaking by common carriers, the rate bureaus' challenged actions were "taken pursuant to an express and clearly articulated state policy." *Id.* at 63. In this case, where Kentucky statutes and regulations explicitly permit collective ratemaking, Respondent's challenged actions are within a clearly articulated and affirmatively expressed state policy. Accordingly, Respondent has established the first prong of the state action doctrine.

2. Whether the Policy is Actively Supervised by the Commonwealth of Kentucky

The second prong, "the active supervision requirement[,]" mandates that the State exercise ultimate control over the challenged conduct." *Patrick*, 486 U.S. at 101 (citing *Southern Motor Carriers Rate Conference, Inc.*, 471 U.S. at 51 (noting that state public service commissions "have and exercise ultimate authority and control over all intrastate rates")); *Parker v. Brown*,

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317 U.S. at 352 (stressing that a marketing plan proposed by raisin growers could not take effect unless approved by a state board)). "The mere presence of some state involvement or monitoring does not suffice." Patrick, 486 U.S. at 101 (citation omitted).

The Supreme Court explained:

The active supervision prong of the Midcal test requires that state officials have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy. Absent such a program of supervision, there is no realistic assurance that a private party's anticompetitive conduct promotes state policy, rather than merely the party's individual interests.

Patrick, 486 U.S. at 101.

In *Ticor*, the Supreme Court further explained: "the purpose of the active supervision inquiry . . . is to determine whether the State has exercised sufficient independent judgment and control so that the details of the rates or prices have been established as a product of deliberate state intervention, not simply by agreement among private parties." 504 U.S. at 634-35. "The analysis asks whether the State has played a substantial role in determining the specifics of the economic policy." *Id.* at 635.

The Supreme Court, in *Ticor*, noted that a "beginning point" of the active state supervision inquiry is to determine whether the State's program is in place, whether the program is staffed and funded, whether the program grants to the state officials ample power and the duty to regulate pursuant to the declared standards of state policy, whether the policy is enforceable in the state's courts, and whether the policy demonstrates some basic level of activity directed towards seeing that the private actors carry out the state's policy and not simply their own policy. *Ticor*, 504 U.S. at 637-38 (citing *New England Motor Rate Bureau*, 908 F.2d at 1071). However, the Supreme Court found that this level of supervision alone is not sufficient to constitute active supervision.

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Id. Instead, the Supreme Court held that "where prices or rates are set as an initial matter by private parties, subject only to a veto if the State chooses to exercise it, the party claiming the immunity must show that state officials have undertaken the necessary steps to determine the specifics of the price-fixing or ratesetting scheme." Id. at 638.

Although the Supreme Court did not enumerate what steps are necessary to determine whether the active supervision prong has been met, other courts addressing the active supervision requirement have identified specific state supervisory activities that they considered in determining whether the antitrust defendant could sustain its burden. *Union Carbide Corp. v. Florida Power & Light Co.*, 1993 U.S. Dist. LEXIS 21203, *27 (M.D. Fla. 1993) ("[a] court will examine several factors to assess a state's participation in operative decisions relating to the anticompetitive conduct at issue."). Some of these factors are: the state collects accurate business data, conducts economic studies, reviews profit levels and develops standards or measures such as operating ratios, conducts hearings, and issues a written decision. See, e.g., *Ticor*, 112 F.T.C. at 428, 432, 438; *Yeager's Fuel*, 22 F.3d at 1271-72; *DFW Metro Line Services v. Southwestern Bell Tel. Corp.*, 988 F.2d 601, 606 (5th Cir. 1993); *Stanislaus v. Pacific Gas & Elec. Co.*, 1994 U.S. Dist. LEXIS 21032, *78-79 (E.D. Cal. 1994); *Vernon v. Southern Calif. Gas Co.*, 1994 U.S. Dist. LEXIS 20900, *6-7 (C.D. Cal. 1994); *TEC Cogeneration Inc. v. Florida Power & Light Co.*, 86 F.3d 1028, 1029 (11th Cir. 1996). While no one of these measures is a "necessary step" to find active supervision, a finding, as in this case, that none of these measures have been taken clearly leads to the conclusion that the State has not taken adequate steps to actively supervise the challenged program. As set forth below, the evidence presented in this case demonstrates that the KTC has not sufficiently exercised its statutory power to review the challenged anticompetitive acts of Respondent and disapprove those actions that fail to accord with state policy.

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a. Respondent has not demonstrated that the KTC actively supervises the collective ratemaking process

The Kentucky regulatory structure provides for an active role for the KTC. The KTC's statutory policy is to avoid unfair competitive practices. KRS 281.590. The KTC is authorized to establish collective ratemaking procedures for the purpose of ensuring reasonable and non-discriminatory rates. KRS 281.680. In addition, Kentucky statutes allow the KTC to schedule hearings concerning the lawfulness of proposed tariff rate changes and to determine just and reasonable rates if, after a hearing, the department finds that rate to be objectionable. KRS 281.690. "Alone, however, [the] potential for supervision does not satisfy the second prong of the Midcal test." DFW Metro Line Services, 988 F.2d at 606. The KTC must actually fulfill the active role granted to it under the statute. See *id.*

As discussed below, the level of funding and staffing that the KTC has dedicated to approve collective rates indicates that the KTC is not actually fulfilling the active role granted to it. In addition, the KTC has not received or reviewed reliable data in connection with proposed rate increases, has not inquired into the justifications provided for rate increases, does not adequately analyze requests for rate increases, does not issue written decisions, and does not conduct hearings with respect to rate increases. Although all those measures are not requirements for finding active supervision, a determination that none of them have been met can only lead to the conclusion that the KTC does not actively supervise the collective ratemaking process.

(i) Program in place, but minimal staffing and funding

Among the factors described by the Supreme Court as a starting point for analyzing active supervision are whether the program is staffed and funded and whether the program grants to the state officials ample power and the duty to regulate pursuant to the declared standards of state policy. *Ticor*, 504 U.S. at 637-68. The KTC's review of household goods matters currently resides with its Division of Motor Carriers. F. 11. Ms. Denise King was the director of the Division of Motor Carriers at the time the Complaint was issued. F. 49. King, who spent only one

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to two percent of her time on household goods matters, testified that Mr. William Debord was responsible for the KTC's program with respect to household goods tariffs. F. 50. No one at the KTC other than Debord works on household goods tariffs and no employees report to Debord. F. 50, 54, 62.

Debord has had responsibility for household goods matters since 1979. F. 54. He is now a part-time employee. F. 54. He works a total of 100 hours per month. F. 54. In addition to household goods matters, Debord has responsibility for tariff filings and other matters involving passenger carriers such as taxis, regular route busses, airport limousines, airport shuttles, and charter bus operations, as well as trucking matters in general. F. 60. Debord's responsibilities involving household goods matters include investigating unlicensed movers, conducting seminars, updating power of attorney forms, and handling inquiries from the public. F. 59. The majority of his time is devoted to "compliance audits," which are on-site visits Debord makes to determine whether movers are offering discounts to consumers. F. 58.

The evidence in this case demonstrates a minimal level of staffing for the KTC's regulatory program. This level of staffing weighs against a finding that state officials exercise ample power pursuant to the declared standards of state policy.

(ii) Failure to verify statutory compliance

In *Midcal*, the Supreme Court found that active supervision was not adequate where "the State simply authorizes price setting and enforces the prices established by private parties. The State neither establishes prices nor reviews the reasonableness of the price schedules." 445 U.S. at 105-06. Under *Midcal*, active supervision is not established where "the State does not monitor market conditions or engage in any 'pointed reexamination' of the program." *Id.* As detailed in the Findings of Fact F. 63-102 and summarized below, the evidence presented in this case establishes that the KTC neither establishes prices nor performs a pointed reexamination of the reasonableness of the rates submitted.

The KTC does not establish the rates. See F. 15-17. Instead, the legislature has established collective ratemaking procedures.

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F. 94; KRS 281.680. The Kentucky legislature has determined that the rates that movers can charge must be, among other things, reasonable and not excessive. KRS 281.590; 281.690; 281.695. The Kentucky legislature has also determined that its policy includes to avoid unfair competitive practices. KRS 281.590. As summarized below, the KTC's review of rates to determine whether rates are reasonable does not satisfy Midcal and Ticor because the KTC does not collect or examine data to determine the reasonableness of the rates, receives only minimal justifications for increases to rates, does not have established standards to review the reasonableness of the rates, does not issue written decisions, and does not hold hearings. Thus, the KTC does not determine the specifics of the ratesetting scheme, as required by Ticor.

A Kentucky administrative regulation contains requirements that must be followed if movers change the tariff rates. The requirements include the following: "if the change in the rates and charges involves an increase, then he shall also, and at the same time, cause a notice to be printed in a newspaper of general circulation in the area of his situs which shall give notice of the proposed increase, the old rates, and charges, the proposed rates and charges, and which shall state that any interested party may protest said increase by filing a protest with the Transportation Cabinet in accordance with its rules and administrative regulations." 601 KAR 1:070(2)(c). Despite numerous rate increases over the years, a review of all exhibits and testimony in the record does not indicate that any such notices have ever been published. E.g., F. 74.

. Lack of collection or examination of data

Courts have evaluated whether a state receives reliable data or collects and verifies data from industry participants to determine whether an agency's review is sufficient. "Courts will further examine whether the state monitors conditions in the relevant market and engages in 'pointed reexamination of the program.'" *Union Carbide*, 1993 U.S. Dist. LEXIS 21203 at *28 (quoting *Midcal*, 445 U.S. at 106). The Commission, in *Ticor*, found no active supervision based in part on testimony by a state official

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that he "didn't have any idea what an efficient company's expenses would be for search and examination services." Ticor, 112 F.T.C. at 434. Further, the Commission found active review lacking where the agency "suffered from a dearth of information that would have enabled it to assess the appropriateness of the filed rates." Ticor, 112 F.T.C. at 432. The ALJ findings that were accepted by the Commission were favorably cited by the Supreme Court. Ticor, 504 U.S. at 638.

The Kentucky legislature has indicated that the State should review carriers' revenue and cost data. KRS 281.680(4). Despite this requirement, the KTC does not require household goods movers to submit cost and expense data to the State and does not collect or verify data from industry participants. F. 63-64, 67, 70, 71. For instance, movers do not routinely submit balance sheets and income statements to the KTC. F. 63. The KTC does receive "a limited number" of movers' financial statements on a voluntary basis. F. 63. However, Debord testified that such filings could "misrepresent the industry's economic conditions." F. 63.

Debord visits movers' offices to look at documents that movers keep on individual moves. F. 72. However, he does not review balance sheets, income statements, payroll documents, documents that show information about cost of capital, or documents that would allow him to analyze movers' profitability. F. 72.

Respondent also does not compile accurate data on movers' costs. F. 65. Respondent requests financial information from its members only when members file for an exception to an item in the tariff. F. 66. In those instances, the Kentucky Association requires the carrier to fill out a Form 4268. F. 66. These forms are received by the Kentucky Association's tariff committee, but are not routinely filed with the KTC. F. 66.

One analytical tool that states have used to review the reasonableness of rates is the use of a private consultant performing a return on capital analysis to evaluate a proposed rate increase. Ticor, 112 F.T.C. at 382. At one point, Kentucky did use one of these methods; it maintained a spreadsheet containing calculations of all movers' operating ratios. F. 45, 46. However,

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"sometime in the 1980's," Debord was told not to bother his supervisors with that analysis. F. 47.

. Minimal scrutiny of rate increase proposals

Courts also evaluate the scrutiny of rate increases performed by the state. In *Yeager's Fuel*, where defendant annually described its program to the state bureau, the Third Circuit held that such "reporting alone does not indicate active supervision because the Bureau does no more than review the reports." 22 F.3d at 1271. The Third Circuit did, however, find active supervision where it was "clear that the Bureau has considered these programs more extensively than simply reviewing [the] reports upon submission." *Id.*

In this case, there is nothing in the record to establish that the KTC does more than simply review and approve the submissions. See F. 75-94. The chairman of the tariff committee of Respondent testified that if Respondent wanted a rate increase, Respondent would inform Debord that the general membership felt that they needed an increase in order to offset costs. F. 79. See also F. 94; RX 102 ("Take to Bill Debord for acceptance stamp"). Debord testified that the KTC's efforts to determine costs were based on Debord's knowledge of the industry, Debord's conversations with trucking companies, and Debord's review of newspapers. F. 67. The record does not indicate that the KTC considered these rate increases more extensively than simply reviewing tariffs upon submission. See F. 75-94.

This minimal level of review is not sufficient to constitute a pointed examination. "Rubber stamp approval of private action does not constitute state action." *A.D. Bedell Wholesale Co. v. Philip Morris, Inc.*, 263 F.3d 239, 260 (3d Cir. 2001). "If review is not meaningful because a state regulator fails or is unable to evaluate whether rates are 'reasonable' as required by statute, then the rates are the product of private and not state action." *Ticor*, 112 F.T.C. at 434.

A general rate increase involves adjusting upward hundreds of prices contained in the tariff's rate charts. F. 93. Debord checks only a few of the numbers on each page for mathematical

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accuracy. F. 93. A ministerial checking of the information submitted, such as the mere checking of filed rates for mathematical accuracy, does not equate to active supervision. Tigor, 504 U.S. at 638.

In Tigor, state agencies were supplied with profit data and actual rates of return on capital. Even there, the Commission found active supervision absent because the State did not obtain information on what lay behind the profit figures. 112 F.T.C. at 416, 432; Tigor Title Ins. Co. v. FTC, 998 F.2d 1129, 1140 (3d Cir. 1993) (on remand from Sup. Ct.), cert. denied, 510 U.S. 1190 (1994). See also Yeager's Fuel, 22 F.3d at 1271 (active supervision requirement met where agency's approval of rate "amounted to more than mere examination for mathematical accuracy, for it has actually considered complaints about the [challenged rate] and decided that it served [state policy objectives].")

. Lack of review of justification for increases

Some courts have found active supervision where the record reflects references into the agency's inquiry into the reasonableness of the submitted rates. E.g., DFW Metro Line Services, 988 F.2d at 606. See also Midcal, 445 U.S. at 104 (citing Cantor v. Detroit Edison Co., 428 U.S. 579 (1976) ("no antitrust immunity was conferred when a state agency passively accepted a public utility's tariff"). In this case, the record does not reflect the KTC's request for or review of justifications for rate increases. F. 75-86.

When Respondent seeks a rate increase, it submits a list of the changes it is requesting and a cover letter requesting that the increase be permitted to take effect. E.g., F. 82-84. Respondent does not submit, nor does the KTC require, any business records, economic study, cost studies, or cost justification data. F. 75. Debord testified that, generally, he learns of the justifications for planned rate increases at the Kentucky Association meetings. F. 80. However, because these are meetings of competitors, movers provide only general information and do not disclose details about their costs, revenues, or profit margins at Kentucky Association meetings. F. 70.

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The record contains numerous examples of collective rate increases where only minimal justification was provided. For instance, in December 2000, Respondent sought an 8% intrastate rate increase. F. 83. The written justification for that increase was a cover letter which discussed a 5% interstate rate increase. F. 83. Debord could not recall any oral statements made to justify this rate increase. F. 83. In 1999, Respondent sought a 10% increase in intrastate rates. F. 84. However, the written justification provided to the State was a cover letter which discussed a 5% interstate rate increase. F. 84. Debord could not recall any oral statements made to justify this rate increase. F. 84. Further, increases to interstate rates provide little justification to increases in intrastate rates because movers are permitted to and do discount from the interstate rates and because the KTC has not compared or evaluated interstate rates. F. 98-102.

. Lack of criteria to evaluate increases

Some courts have found active supervision where the agency review includes an application of criteria to consider competitive concerns. E.g., Stanislaus, 1994 U.S. Dist. LEXIS 21032 at *78-79. In Ticor, the Commission found no active supervision where there was no "program of supervision," but merely a "hit-and-miss review." 112 F.T.C. at 432.

Here, the KTC has no standards or measures in place for determining whether the rates they allow to go into effect are reasonable. F. 88-89. As Debord stated, there is no "written rule within the Cabinet that requires specific standards to be followed." F. 89. Debord testified that he does not receive any guidance from his superiors about tariff issues and he has not reported to anyone in that regard since 1979. F. 61. See also F. 52-53 (testimony of King that she had no standards for determining whether the rates were unjust or unreasonable; nor had she had a discussion with Debord about standards for determining whether the rates were unjust or unreasonable.)

In addition to not having standards in place to review the collective rate increases challenged in this case, the State also does not have standards in place to review rates filed by particular

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members that exceed the collective rates. See F. 90, 91. In one instance, a Participating Carrier filed an exception whereby it would charge 20% more than the highest intrastate rates in the tariff. F. 91. Another firm filed an exception whereby it would charge 38% more than the highest intrastate rates in the tariff. F. 91. Both of these firms operate in the same geographic region. F. 91. In neither instance could Debord identify a standard that the State would use to determine whether these rates complied with the statutory requirement that rates not be "excessive." F. 91. The KTC permitted both moving companies to charge these increased rates. F. 91.

. No written opinions

Whether a state issues written opinions evaluating rates has also been considered by courts in determining active supervision. E.g., DFW Metro Line Services, 988 F.2d at 606 (court found active supervision where there were published decisions that indicated that the agency had conducted other broad-based ratemaking proceedings); Yeager's Fuel, 22 F.3d at 1271 (active supervision found where agency issued a final staff report reviewing the challenged programs in response to inquiries from the legislature and protests by others); Vernon, 1994 U.S. Dist. LEXIS 20900 at *6-7 (active supervision found where agency issued two orders on the issue which contained lengthy consideration of the parties' positions, findings of fact, and conclusions of law and a detailed explanation for the agency's reasons for denying the requested rate.)

The KTC does not issue a written decision with respect to Respondent's tariff filings. F. 95. When the Kentucky Association institutes a change to the tariff--typically the change involves an increase in rates--it informs Debord of the change, and he stamps the document requesting the change "received." F. 94. After thirty days, the change takes effect. As Debord testified, "no action is approval." F. 94. When Respondent submitted papers to implement a rate increase in 1994, the Kentucky Association's notes of the filing bluntly stated, "take to Bill Debord for acceptance stamp." F. 94. Aside from stamping the document received, there is no statement issued by the KTC explaining why

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it permits the movers to increase prices that consumers must pay. F. 95.

. No hearings

Whether a state holds hearings to evaluate rates has also been considered by courts in determining active supervision. E.g., *TEC Cogeneration*, 86 F.3d at 1029 ("eleven-month contested administrative proceeding" and "extensive and contested agency proceedings"); *Destec Energy, Inc. v. Southern Cal. Gas Co.*, 5 F. Supp. 2d 433, 457-58 (S.D. Tex. 1997) (contested hearings, circulation of proposed resolutions for public notice and comment before being adopted, and a "fact-finding process" that "required public proceedings in which ratepayers and the public were represented"); *Lease Lights, Inc. v. Public Serv. Co. of Okla.*, 849 F.2d 1330, 1334 (10th Cir. 1988) (the Commission conducted three days of public hearings involving extensive testimony and over 100 exhibits). In *Southern Motor Carriers*, the government conceded that prong two of *Midcal* was met where the District Court found that "although [the] submitted rates could go into effect without further state activity, the State had ordered and held ratemaking hearings on a consistent basis, using the industry submissions as the beginning point." *Ticor*, 504 U.S. at 639; see also *Southern Motor Carriers*, 471 U.S. at 66.

In this case, the KTC has not held ratemaking hearings on a consistent basis. F. 96. Kentucky held hearings in the "1950's or early 1960's," when the State first approved the Kentucky Association's tariff. F. 96. The Kentucky legislature itself has specifically identified public hearings as one of the ways the KTC is expected to consider rates. See, e.g., KRS 281.640, 281.690(2), 281.695(1). However, Kentucky has not held any hearings "since the 1950's or early 1960's" to examine or analyze the collective rates contained in the Kentucky Association tariff. F. 96.

The KTC also does not receive any informal input from groups advocating on behalf of consumers and has not received or considered complaints about the rates in the tariffs. F. 73. The record is clear that the Kentucky Association meetings that Debord attends are not open to the public and have never been attended by members of the public. F. 73.

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b. Respondent's arguments not persuasive**(i) Respondent has not met the requirements of Midcal and Ticor**

Respondent argues that it has met its burden of showing active supervision. Respondent states that Kentucky has in place statutes and regulations pertaining to movers and asserts that Debord, because of his experience, can judge whether rates are reasonable based on his discussions with movers and his review of general industry information. Post Trial Brief of Respondent at 11-14. Respondent asserts that Debord's review constitutes active supervision because: (a) Debord has knowledge of the industry and reviews general information such as the Wall Street Journal; (b) Debord attends meetings where movers discuss rates; and (c) witnesses have testified that rate increases have been discussed beforehand. Respondent's Post Trial Proposed Findings of Fact PP74-77, 92-93. Further, Respondent argues that active supervision exists, even though the record makes clear that the only input the State receives on the appropriate level of rates is provided in the discussions between the movers and the person who is responsible for regulating them. The evidence shows that year after year the KTC has permitted the private actor's collective rates and rate increases to go into effect as proposed.

Respondent cites no case where such a minimal level of state activity has been held to constitute active supervision. The evidence presented by Respondent falls far short of the "active supervision" required by Midcal, Ticor and other relevant cases.

(ii) Intervention by the KTC does not indicate active supervision

Respondent states that the KTC has asked the Administrative Law Judge to permit the KTC to intervene in this proceeding and argues that there could be no more dramatic indication of the existence of "active supervision" than this fact. Post Trial Brief of Respondent at 7-8. Respondent asserts that the KTC's decision to intervene shows "enthusiastic interest" in the regulatory program. Id. at 20. While through its motion to intervene, the KTC did seek permission to "offer evidence and testimony at the hearing," the

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KTC did not appear at the hearing. Trial Volume 1, March 16, 2004 ("Trial Tr.") at 4.

The Post Trial brief of the KTC adds no new arguments or analysis to this proceeding. It contains two conclusory sentences asserting that the KTC actively supervised tariffs and that collectively set rates provide great benefit. However, KTC's brief contains no recitation or analysis of facts. The KTC's brief lists a number of statutes and regulations in support of its assertion that prong one of the Mical test is met, but provides no proposed findings of fact to indicate steps it has taken to actively supervise the program.

In *Midcal*, where the state agency responsible for administering the program did not appeal the decision of the California Court of Appeal, the Supreme Court noted that the State had "shown less than an enthusiastic interest in its wine pricing system." 445 U.S. at 112 n.12. In *Ticor*, the states filed briefs as *amici curiae* arguing that Respondent's broad immunity rule would not serve the state's best interests. 504 U.S. at 635. Unlike in *Midcal* and *Ticor*, in this case, the state agency responsible for administering the program has expressed its support of the program and its opposition to this action. However, Respondent has cited no cases that have held that the mere act of intervening in a proceeding rises to the level of a necessary step to actively supervise the regulatory scheme. The evidence presented indicates that, despite the intervention, the KTC has not taken the necessary steps required by *Midcal*, *Ticor*, and other relevant cases.

(iii) Reliance on excluded evidence is inappropriate

In the Post Trial Order issued in this case on March 17, 2004, the parties were instructed not to "cite to documents that are not in evidence." Post Trial Order at 2. Nevertheless, in its Post Trial Brief, Intervenor KTC cites to the Declaration of Maxwell C. Bailey Submitted in Support of KTC Motion to Intervene ("Bailey Declaration"). Post Trial Brief of KTC at 1. That declaration had been offered into evidence by the Kentucky Association as exhibit RX 227 and was excluded from evidence as unreliable hearsay. Pretrial Hearing, March 16, 2004 ("Pretrial Tr.") at 11-12. No

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party took the deposition of Secretary Bailey. The KTC was given the opportunity to have Secretary Bailey's views considered by the Court. In granting the KTC's motion to intervene, the KTC was provided the opportunity to call Secretary Bailey as a witness at trial, as long as he was first deposed. Intervention Order at 3-4. The KTC did not call Secretary Bailey as a witness at trial. Trial Tr. at 45; Pretrial Tr. at 16.

Respondent, rather than citing directly to the excluded declaration, cites to and quotes from the KTC's Post Trial Brief to summarize the position of the KTC in this proceeding. Respondent's Post Trial Brief at 8-9. The portions of the KTC Brief that are cited by Respondent are a recitation of the Bailey declaration. Respondent's arguments that rely upon the Bailey Declaration are disregarded.

F. Summary

The evidence in this case demonstrates that, while the KTC has a program in place for regulating prices, it has not taken adequate measures to supervise the collective ratemaking process. "The mere potential for state supervision is not an adequate substitute for a decision by the State." *Ticor*, 504 U.S. at 638. See also *Am. Tel. & Tel. Co. v. IMR Capital Corp.*, 888 F. Supp. 221, 240 (D. Mass. 1995) ("theoretical power to regulate such behavior" is not enough to make such behavior the State's own and immunize it from federal law). The methods and procedures utilized by the KTC have failed to verify compliance with the existing regulatory framework. Accordingly, the second prong of the Midcal test has not been met. Because Complaint Counsel has established antitrust liability and Respondent's conduct is not immunized by the state action doctrine, the appropriate remedy is ordered.

G. Remedy

Pursuant to Section 5 of the Federal Trade Commission Act, upon determination that the challenged practice is an unfair method of competition, the Commission "shall issue . . . an order requiring such . . . corporation to cease and desist from using such method of competition or such act or practice." 15 U.S.C. §

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45(b); *FTC v. Nat'l Lead Co.*, 352 U.S. 419, 428 (1957) (Commission is authorized "to enter an order requiring the offender to 'cease and desist' from using such unfair method."). The Supreme Court has held that the Commission has wide discretion in determining the type of order that is necessary to bring an end to the unfair practices found to exist, so long as the remedy selected has a reasonable relation to the proven violations. *Jacob Siegel Co. v. FTC*, 327 U.S. 608, 611 (1946); *National Lead*, 352 U.S. at 429.

Complaint Counsel attached a proposed order to its Post Trial Brief. However, Complaint Counsel failed to include any argument, case law, or discussion of authority in support of its proposed order. Moreover, neither Respondent nor KTC addressed, objected to, or otherwise discussed the specific provisions of the proposed order submitted by Complaint Counsel.

In this case, Complaint Counsel has proven that Respondent engaged in horizontal price fixing through its collective ratemaking practices. The remedy necessary to bring an end to this unfair practice is an order requiring Respondent to cease and desist from collective ratemaking. The Order requires Respondent, *inter alia*, to cease and desist from developing tariffs that contain collective rates for the intrastate transportation of property or other related services, goods or equipment and to provide notice of this Order to its members. Because existing tariffs are based upon a finding of unlawful collective ratemaking, Respondent must take actions to cancel or withdraw existing tariffs. Further, since the violation of law has now been found, this Order remains in effect until active supervision is demonstrated to the Commission. This Order is narrowly tailored and reasonably related to the violation of law found to exist.

V. SUMMARY OF CONCLUSIONS OF LAW

1. The Federal Trade Commission has jurisdiction over the subject matter of this proceeding and over Respondent Kentucky Household Goods Carriers Association.

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2. The acts and practices charged in the Complaint in this matter took place in or affecting commerce within the meaning of the Federal Trade Commission Act, as amended.

3. The relevant market is intrastate and local moving services in the Commonwealth of Kentucky.

4. Respondent Kentucky Association, its members, officers, and directors, are engaged in a continuing combination and conspiracy to fix rates charged by motor common carriers for the intrastate transportation of property within the Commonwealth of Kentucky.

5. The acts and practices of the Kentucky Association in the Commonwealth of Kentucky, as set forth in paragraph 4 above, constitute unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act, as amended.

6. The state action defense is an affirmative defense to an antitrust action. The Respondent bears the burden of establishing the defense.

7. Respondent has not established that the Kentucky Transportation Cabinet ("KTC") took the regulatory steps necessary to make the collective rates in Respondent Kentucky Association's tariff the State's own.

8. Respondent's activities were not subject to active supervision by the Commonwealth of Kentucky through the KTC.

9. Respondent's activities in the Commonwealth of Kentucky, as set forth in paragraphs 4 and 5 above, are not immune from liability under Section 5 of the Federal Trade Commission Act by reason of the state action defense.

10. Complaint Counsel met its burden of proof in support of the Violation of Section 5 of the Federal Trade Commission Act charged in the Complaint.

11. Relief designed to remedy Respondent Kentucky Association's unlawful activities and to require Respondent to cease and desist from collective ratemaking is appropriate.

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12. The Order entered herewith is necessary and appropriate to remedy the violation of law found to exist.

ORDER**I.**

IT IS ORDERED that, for the purposes of this Order, the following definitions shall apply:

1. "Respondent" or "KHGCA" means the Kentucky Household Goods Carriers Association, Inc., its officers, executive board, committees, parents, representatives, agents, employees, successors, and assigns;
2. "Carrier" means a common carrier of property by motor vehicle;
3. "Intrastate transportation" means the pickup or receipt, transportation, and delivery of property hauled between points within the Commonwealth of Kentucky for compensation by a carrier authorized by the Kentucky Transportation Cabinet's Division of Motor Carriers to engage therein;
4. "Member" means any carrier or other person that pays dues or belongs to KHGCA or to any successor corporation;
5. "Tariff" means the publication stating the rates of a carrier for the transportation of property between points within the Commonwealth of Kentucky, including updates, revisions, and/or amendments, including general rules and regulations;

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

7. "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 two or more carriers and Respondent; and

8. "Person" means both natural persons and artificial persons, including, but not limited to, corporations, unincorporated entities, and governments.

II.

IT IS FURTHER ORDERED that Respondent, its successors and assigns, and its officers, agents, representatives, directors, and employees, directly or through any corporation, subsidiary, division, or other device, shall immediately cease and desist from entering into, and shall, within 120 days after service upon it of this Order, cease and desist from 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 two or more carriers for the intrastate transportation of property or related services, goods, or equipment, including, but not limited to:

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

2. Providing information to any carrier about rate changes considered or made by any other carrier employing the publishing services of Respondent prior to the time at which such rate change becomes a matter of public record;

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3. Inviting, coordinating, or providing a forum (including publication of an informational bulletin) for any discussion or agreement between or among competing carriers concerning 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 in any way influencing 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;
5. Maintaining any rate or tariff committee or other entity to consider, pass upon, or discuss intrastate rates or rate proposals; and
6. Preparing, developing, disseminating, or filing a proposed or existing tariff containing automatic changes to rates charged by two or more carriers.

III.

IT IS FURTHER ORDERED that Respondent shall, within 120 days after service upon it of this Order:

1. Take such action pursuant to the laws of the Commonwealth of Kentucky as may be necessary to effectuate the cancellation and withdrawal of all tariffs and any supplements thereto on file with the Kentucky Transportation Cabinet's Division of Motor Carriers that establish rates for transportation of property or related services, goods, or equipment by common carriers in the Commonwealth of Kentucky;

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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 Kentucky;
3. Take action pursuant to the laws of the Commonwealth of Kentucky to 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 Order; and
4. Take action pursuant to the laws of the Commonwealth of Kentucky to amend its by-laws to require members of KHGCA to observe the provisions of this Order as a condition of membership in KHGCA.

IV.

IT IS FURTHER ORDERED that, within fifteen (15) days from service upon it of this Order, Respondent shall mail or deliver a copy of this Order to each current member of Respondent engaged in the transportation of household goods, and until the requirements of Paragraph VII have been met, to each new member engaged in the transportation of household goods within ten (10) days of each such member's acceptance by Respondent.

V.

IT IS FURTHER ORDERED that Respondent shall 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, or any other proposed change in the corporation which may affect compliance obligations arising out of this Order.

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VI.

IT IS FURTHER ORDERED that Respondent shall file a written report within six (6) months from the date of service upon it of this Order, and annually on the anniversary date of the original report, until the requirements of paragraph VII have been met, 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 Respondent has complied with this Order.

VII.

IT IS FURTHER ORDERED that this Order shall remain in effect until such time as Respondent demonstrates to the Commission that the Commonwealth of Kentucky has taken adequate measures to actively supervise the clearly articulated and affirmatively expressed state policy to regulate collective rates of carriers for the transportation of property between points within the Commonwealth of Kentucky or until modified or vacated by the Commission.

Complaint

IN THE MATTER OF

SAN JUAN IPA, INC.

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

Docket C-4142; File No. 0310181
Complaint, June 30, 2005--Decision, June 30, 2005

This consent order, among other things, prohibits the respondent from entering into, participating in, implementing, or otherwise facilitating any combination, conspiracy, agreement, or understanding between or among any physicians (1) to negotiate on behalf of any physician with any payor; (2) to deal, refuse to deal, or threaten to refuse to deal with any payor; (3) regarding any term, condition, or requirement upon which any physician deals, or is willing to deal, with any payor, including, but not limited to, price terms; or (4) not to deal individually with any payor, or not to deal with any payor through any arrangement other than the respondent. The order also requires the respondent, for three years, to notify the Commission at least sixty days before entering into any arrangement with any physicians under which the respondent would act as their messenger or agent with payors regarding contracts or terms of dealing. In addition, the order requires the respondent, for three years, to notify the Commission before participating in a qualified risk-sharing arrangement or qualified clinically integrated arrangement.

Participants

For the Commission: *Steve Vieux, Aaron Hewitt, David R. Pender, Daniel P. Ducore, and Louis Silvia.*

For the Respondent: *Daniel L. Wellington, Fulbright & Jaworski.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, 15 U.S.C. § 41 *et seq.*, and by virtue of the authority vested in it by said Act, the Federal Trade Commission (“Commission”), having reason to believe that San Juan IPA, Inc. (“Respondent”), has violated 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