

Order

IN THE MATTER OF

**KENTUCKY HOUSEHOLD GOODS CARRIERS
ASSOCIATION, INC.****ORDER DENYING RESPONDENT'S MOTION FOR
RECONSIDERATION OR, IN THE ALTERNATIVE, FOR
A STAY OF FINAL ORDER PENDING REVIEW BY U.S.
COURT OF APPEALS**

On July 20, 2005, Respondent Kentucky Household Goods Carriers Association, Inc. ("Kentucky Association") moved the Commission for reconsideration of its June 21, 2005 final order in this case, in light of proceedings that have taken place before the Kentucky Transportation Cabinet ("KTC") with regard to a tariff filing by the Kentucky Association proposing a rate increase.¹ Respondent argues that these proceedings demonstrate that the KTC's current procedures for reviewing the Kentucky Association's collective rate-making satisfy the "active supervision" requirement of the state action defense. In the alternative, Respondent seeks a stay of the Final Order pending review by an appropriate court of appeals. Complaint Counsel opposes Respondent's motion. For the reasons stated below, we deny Respondent's motion in its entirety.

I. Motion for Reconsideration

Pursuant to Commission Rule 3.55, 16 C.F.R. § 3.55, a petition for reconsideration "must be confined to new questions raised by the decision or final order and upon which the petitioner had no opportunity to argue before the Commission." As the Commission has previously stated:

¹ Respondent's motion is cited herein as "Resp. Mot."

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This standard recognizes that litigation must end at some point, and that decision makers must render their judgment based on a finite body of evidence. We thus view reconsideration of a fully-litigated opinion and order as an “extraordinary remedy which should be used sparingly.”

Chicago Bridge & Iron Co. N.V., Dkt. No. 9300, 2005 FTC LEXIS 70, at *6 (May 10, 2005) (citation omitted).

Respondent’s argument – that proceedings at the KTC with respect to the Kentucky Association’s most recent proposed rate increase (Special Supplement No. 86) demonstrate active supervision by the KTC – is not a new question raised by our decision and final order in this case. On the day of oral argument before the Commission, Respondent filed a motion for a stay, in which it argued that the KTC’s adoption of new procedures and the KTC’s actions with regard to Special Supplement No. 86 demonstrated active state supervision.² The Commission’s opinion specifically considered and rejected this argument. The Commission concluded that, although the KTC had taken some “initial steps” to augment its level of supervision over the Kentucky Association’s collective rate-making, Respondent had failed to show that the KTC’s new procedures satisfied the active supervision requirement articulated by the Supreme Court in *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621 (1992), and other relevant decisions. Opinion (“Op.”) at 27. The Commission stated:

Most importantly, 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

² See Respondent’s Motion for a Stay of Proceedings Pending Action by Kentucky Transportation Cabinet, filed on Jan. 24, 2005 (hereinafter cited as “1/24/05 Mot. for Stay”).

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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 indicated, development of a new program of supervision will take some time.

Id. at 27-28.

In its present motion, Respondent asserts that proceedings at the KTC that have taken place since Respondent filed its prior motion for a stay warrant reconsideration of the Commission's decision. However, a motion that "merely seeks to provide additional factual support for a position that Respondent[] ha[s] already argued . . . does not meet the mandatory requirement of Rule 3.55 that the petition present only new questions raised by Commission decisions or orders." *Chicago Bridge & Iron Co.*, 2005 FTC LEXIS 70, at *9. *See also Novartis Corp.*, Docket No. 9279, 1999 FTC LEXIS 212, at *1 (July 2, 1999) (denying a petition for reconsideration where the respondent "could have introduced the recent factual developments upon which it now relies before this late stage").

Moreover, the materials submitted here by Respondent suffer from the same shortcomings as the materials upon which Respondent based its prior motion for a stay. Although the KTC has conducted a hearing on the Kentucky Association's proposed rate increase, it apparently has yet to issue a decision on the matter. Thus, we still do not know what analysis the KTC will undertake or what criteria it will apply to assess the reasonableness of the proposed rate increase. Also, the materials submitted by Respondent do not clearly indicate what information the KTC will require to support the proposed rate increase. It is not clear, for example, whether the KTC will consider the information provided at the hearing regarding the costs of a single "test case" – the moving company operated by the Kentucky Association's president – to be adequate to justify the general rate increase proposed by the Kentucky Association. And although the

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hearing transcript indicates that the KTC has received some sort of financial statement from movers, no information is given regarding what information is contained in these financial statements. We thus conclude that Respondent has not met its burden under our rules for reconsideration of the decision and final order issued in this case. We therefore deny this portion of Respondent's motion under Commission Rule 3.55.

II. Motion for a Stay

Section 5(g) of the Federal Trade Commission Act, 15 U.S.C. § 45(g)(2), provides that Commission adjudicative orders (except divestiture orders) take effect "upon the sixtieth day after" their date of service, unless "stayed, in whole or in part and subject to such conditions as may be appropriate, by . . . the Commission" or "an appropriate court of appeals." A party seeking a stay must first apply for such relief to the Commission, as Respondent has done here. *California Dental Ass'n* ("CDA"), Docket No. 9259, 1996 FTC LEXIS 277, at *2 (May 22, 1996).

Pursuant to Commission Rule 3.56(c), 16 C.F.R. § 3.56(c), a motion for a stay must address the following four factors: (1) "the likelihood of the applicant's success on appeal;" (2) "whether the applicant will suffer irreparable harm if a stay is not granted," (3) "the degree of injury to other parties if a stay is granted," and (4) "why the stay is in the public interest." Rule 3.56(c) further provides that a motion for a stay must be supported by "supporting affidavits or other sworn statements, and a copy of the relevant portions of the record." *Id.* See *Toys "R" Us, Inc.*, Docket No. 9278, 1998 FTC LEXIS 224, at *2 (Dec. 1, 1998). Here, none of the four factors supports Respondent's motion.

A. Likelihood of Success on Appeal

Respondent's assertions of a likelihood of success on appeal merely revisit arguments that the Commission already considered and rejected in its June 21, 2005 opinion. Respondent's principal assertion is that the Commission failed to accord proper

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significance to the KTC's intervention in this case and views regarding the adequacy of its level of supervision over collective rates. Resp. Mot. at 5.³ As the Commission stated in its opinion, however, "the objective facts – rather than the state's opinion – determine whether the active supervision standard is met." Op. at 22 n.20. The Commission explained that:

the Supreme Court has made clear [that] states do not have unfettered discretion to determine the level of regulatory oversight that is adequate when competition has been displaced. Rather, 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.

Id. at 22 (citing *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 106 (1980)). The Commission also noted that Respondent's argument regarding the significance of the KTC's intervention was further undercut by the Commonwealth of Kentucky's submission of an *amicus* brief expressing its view that the initial decision finding no active state supervision did not conflict with state law or public policy. *Id.* at 22 n.20. Respondent offers no reason for us to question our decision on any of these points, and Respondent's renewal of its prior arguments, without more, is insufficient to justify the grant of a stay. See *Novartis Corp.*, 128 F.T.C. 233, 234 (1999); *Toys "R" Us*, 1998 FTC LEXIS 224, at *4.

Although previous Commission decisions have held that a stay may be appropriate where the case involves difficult legal

³ Respondent also asserts, without elaboration or explanation, that it believes the Commission wrongly interpreted the legal standards for "active supervision" contained in the Supreme Court's decisions in *Ticor* and *Midcal*. Resp. Mot. at 6.

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questions or a complex factual record,⁴ this is not such a case. As the Commission stated in its opinion:

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.

Op. at 19. Under these circumstances, we find that Respondent's arguments on the merits do not support the grant of a stay.

B. Irreparable Harm to Respondent

Respondent bears the burden of demonstrating that denial of a stay would cause it irreparable harm. "Simple assertions of harm or conclusory statements based on unsupported assumptions will not suffice. A party seeking a stay must show, with particularity, that the alleged irreparable injury is substantial and likely to occur absent a stay." *CDA*, 1996 FTC LEXIS 277, at *6-7. *Accord Novartis*, 128 F.T.C. at 235; *Toys "R" Us*, 1998 FTC LEXIS 224, at *7.

⁴ *Novartis*, 128 F.T.C. at 234-35; *Toys "R" Us*, 1998 FTC LEXIS 224, at *5; *CDA*, 1996 FTC LEXIS 277, at *10.

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Respondent asserts that if a stay is not granted and the Kentucky Association is prohibited from filing a collective tariff, it will go out of business because it is not in a position to file individual tariffs on behalf of its members, and its non-tariff activities are insignificant in nature. Resp. Mot. at 7. Respondent also asserts that its members will be irreparably injured because they will have to file individual tariffs – an undertaking “which few understand and fewer can perform in a professional and competent manner.” *Id.* However, Respondent provides no specific factual support for these assertions. Also, Respondent’s claim that the preparation of individual tariffs is necessarily a burdensome and complex undertaking would seem to be undercut by evidence in the record that movers in Kentucky who do not participate in the Kentucky Association’s tariff have been allowed to file, and do file, very simple individual tariffs. CX 116 (Debord, Dep. II at 18). Accordingly, we find that Respondent has not met its burden of showing irreparable harm.

C. Harm to Others and the Public Interest

Because Complaint Counsel represents the public interest in effective law enforcement, we consider the third and the fourth factors together. *See Novartis*, 128 F.T.C. at 236.

Respondent contends that if a stay is not granted and the Kentucky Association’s tariff is cancelled, the KTC and the moving public will be harmed because the KTC likely will be unable to handle the increased number of individual tariff filings on such short notice; many movers will either fail to file tariffs or will file tariffs that do not comply with state law; and confusion regarding applicable rates will provide greater opportunity for unscrupulous movers to engage in fraudulent conduct. Resp. Mot. at 7-8. Respondent made similar claims of harm in its prior motion for a stay. At that time, the Commission concluded that “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” as a result of the final order. Op. at 27. Now, as then, Respondent has provided no support for its predictions of

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harm if a stay is not granted. Moreover, because the prohibitions against the Kentucky Association's collective rate-making contained in the Commission's final order do not take effect until 120 days after entry of the order, *see* Final Order ¶¶ II and III, the order gives considerable time for the KTC and movers in Kentucky to prepare for the transition to individual tariff filings.⁵

Further, as we stated in our opinion, 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. Op. at 28. The Commission will then consider whether the new evidence sufficiently demonstrates active state supervision.

Respondent also argues that a stay of the final order is appropriate here because there is no evidence that the rates in the Kentucky Association's tariff are unreasonable or that Kentucky's regulatory program has actually caused economic harm. *Id.* at 8-9. These arguments, however, are contrary to well settled principles of antitrust law that agreements among competitors to set prices are *per se* unlawful precisely because "their nature and necessary effect are so plainly anticompetitive," *National Soc'y of Prof'l Eng'rs v. FTC*, 435 U.S. 679, 692 (1978); and that "[i]t is no excuse that the prices fixed are themselves reasonable," *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 647 (1980). *See Tigor*, 504 U.S. at 639 ("No antitrust offense is more

⁵ Although there is testimony in the record that, at the KTC's existing level of staffing (*i.e.*, one employee), it would be difficult for the KTC to process a large number of individual tariffs, CX 116 (Debord, Dep. II at 9), materials submitted by Respondent in support of its prior motion for a stay indicate that the KTC is already taking steps to increase the number of personnel responsible for reviewing tariffs. *See* 1/24/05 Mot. for Stay, Ex. K.

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pernicious than price fixing.”). In this case, the Commission found 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 program of active supervision to ensure the reasonableness of collective rates, a cease and desist order is necessary to protect the interests of consumers, notwithstanding any hardship to Respondent and its members.

Op. at 26. Under these circumstances, we find that consideration of the harm to consumers and the public interest weighs against the grant of a stay.⁶

Conclusion

We find that Respondent has not met its burden under our rules for reconsideration of the Commission’s decision in this case. We also find that the relevant factors do not support a stay of the Commission’s final order. Accordingly,

⁶ Unlike cases in which respondents have merely sought a stay of collateral provisions of a final order, Respondent here seeks a stay of the final order’s core provisions enjoining unlawful activity. *See, e.g., CDA*, 1996 FTC LEXIS 277, at *10 (“Respondent has not sought to stay those provisions of the order that prohibit continuation of the restraints found to be unlawful. Respondent has thus attempted to minimize the harm to the public interest while focusing on the provisions that create the greatest harm to itself.”).

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IT IS ORDERED THAT Respondents' Motion for Reconsideration or, in the Alternative, for a Stay of Final Order Pending Review by U.S. Court of Appeals is **DENIED**.

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IN THE MATTER OF

CHICAGO BRIDGE & IRON COMPANY N.V.**ORDER GRANTING IN PART AND DENYING IN PART
RESPONDENTS' MOTION FOR *IN CAMERA*
TREATMENT OF MATERIAL PREVIOUSLY
DESIGNATED AS CONFIDENTIAL**

Pursuant to Commission Rule 3.45(b), Respondents Chicago Bridge & Iron Company N.V. and Chicago Bridge & Iron Company ("CB&I" or "the Respondents") have filed a Motion for *In Camera* Treatment of Material Previously Designated as Confidential ("the Motion"). The materials for which CB&I seeks *in camera* treatment consist of Attachment B to Complaint Counsel's Response to CB&I Respondents' Further Briefing on Specific Remedy Issues ("Response"), discussions on pages 7, 13, and 14 of the Response that were redacted from the public version of the Response, and portions of the Motion and Exhibit A of the Motion (Affidavit of David Bordages). CB&I seeks *in camera* treatment of these materials for a period of five years.

CB&I asserts that the public disclosure of this material would damage CB&I's business and the information meets the Commission's criteria for granting *in camera* treatment. Motion at 4. Complaint Counsel does not oppose Respondents' Motion to the extent it seeks *in camera* treatment for the material on pages 13 and 14 of Complaint Counsel's Response and portions of CB&I's Motion and Exhibit A of the Motion. However, Complaint Counsel point out that CB&I has not provided a justification for *in camera* treatment of the material on page 7 and Attachment B of Complaint Counsel's Response and thus argue that those materials should be placed on the public record.

The Commission finds that CB&I has satisfied the standard set forth in Commission Rule 3.45(b) for those materials on pages 13 and 14 of Complaint Counsel's Response and portions of CB&I's Motion and Exhibit A of the Motion and shown that the disclosure