

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

DOCKET NO. 9309

IN THE MATTER OF
KENTUCKY HOUSEHOLD GOODS
CARRIERS ASSOCIATION, INC.

APPEAL BRIEF OF RESPONDENT
KENTUCKY TRANSPORTATION CABINET

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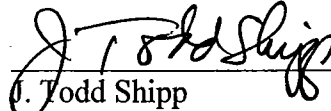
July 30, 2004

Respondent Kentucky Transportation Cabinet hereby joins in the Appeal Brief submitted herein on behalf of the Respondent Kentucky Household Goods Carriers Association, Inc., filed herein on July 30, 2004, in all respects.

The text of the foregoing Appeal Brief is incorporated herein by reference and made a part hereof.

Dated: Frankfort, KY
July 30, 2004

Respectfully submitted,

A handwritten signature in black ink, appearing to read "J. Todd Shipp", written over a horizontal line.

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CERTIFICATE OF SERVICE

This is to certify that on July 30, 2004, I caused a copy of the attached Appeal Brief of Intervenor Respondent Kentucky Transportation Cabinet to be delivered by hand to the persons listed below:

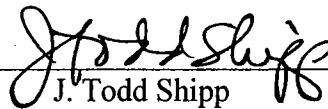
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TABLE OF ABBREVIATIONS

The following abbreviations and citation forms are used in this Appeal
Brief:

APA	Administrative Procedure Act
CX	Complaint Counsel's Exhibit
ID	Initial Decision
KTC	Kentucky Transportation Cabinet
RFF	Respondent's Post-Trial Proposed Findings of Fact
RX	Respondent's Exhibit
5/19/04 Hearing Tr.	Transcript of Hearing before ALJ; May 19, 2004; vol. 2.

STATEMENT OF THE CASE

In this proceeding, Complaint Counsel alleges that the Kentucky Association has engaged in unlawful conduct by reason of its compliance with Kentucky law and regulations governing intrastate collective ratemaking by Movers. The relief sought is the destruction of a highly effective State program for the regulation of household goods movers and intrastate household goods transportation rates which has successfully protected the consumers of Kentucky for more than half a century.

The antitrust laws would not permit a challenge to the real party in interest in this proceeding, namely, the Commonwealth of Kentucky. Accordingly, Respondent has been compelled to provide a defense to both Kentucky and itself, while the small businesses which constitute Respondent's Membership and the Kentucky moving public are both placed at risk by this proceeding.

The Kentucky Transportation Cabinet sought, and was granted, leave to intervene in this proceeding *as a Respondent*. (ID; p.46) There could be no more dramatic indication of the existence of "active supervision" than this fact.

In an action which demonstrates Complaint Counsel's utter lack of interest in the merits of this proceeding, except for the furtherance of a political agenda which bears no relationship to the applicable law, Complaint Counsel refused to consent to KTC's intervention.

The evidence compels the conclusion that dismissal of the Complaint is warranted since the active supervision of the Kentucky Association's household goods tariff collective ratemaking activities by the Kentucky Transportation Cabinet satisfies the legal standard necessary to preserve this valuable public benefit.

THE POSITION OF THE COMMONWEALTH OF KENTUCKY

Notwithstanding the ALJ's refusal to properly consider a statement made by the Kentucky Secretary of Transportation (ID; p.47), the Commonwealth of Kentucky has made its position clear in this proceeding. It has done this through the testimony and documentary evidence submitted on its behalf, and most dramatically by its efforts to participate in this proceeding in furtherance of the interests of the Kentucky moving public.

In its Motion seeking leave to intervene and the accompanying Declaration, the Kentucky Secretary of Transportation has stated the following:

1. KTC expressed a desire to offer evidence and testimony in this Proceeding. RFF 10
2. KTC joined in Respondent's Motion for Summary Decision - - which was decided without the benefit of considering the evidence and arguments raised in KTC's Motion for Leave to Intervene. RFF 10
3. The interests of *KTC* are ". . .unjustly threatened by the prosecution of this proceeding and the relief sought in the Complaint herein." RFF 10 [Emphasis added.]
4. The interests of *consumers* of Kentucky intrastate household goods transportation services are ". . .unjustly threatened by the prosecution of this proceeding and the relief sought in the Complaint herein." RFF 10 [Emphasis added.]
5. The record in this proceeding fails to support Complaint Counsel's allegations that KTC has failed to "actively supervise" Respondent's tariff filings - - particularly as to collectively set rates. RFF 12

6. “[C]ollectively set rates provide great benefit, as a matter of policy, to KTC, in its ability to promote and enforce compliance with rate requirements as well as the myriad of other requirements imposed by Kentucky law and [regulations] on household goods movers which [are] contained in the record in this case.” RFF 12
7. “[N]o competitive harm results from the process as a result of which KTC sets collectively set rates.” RFF 13
8. “[B]ecause of the manner in which KTC involves itself in the household goods transportation rate process, there is assurance that the public is paying a fair rate for a regulated service and an enhanced ability of KTC to ensure that the appropriate rate is charged by the State’s Movers.” RFF 13
9. “KTC now has the ability to regulate virtually the entire population of household goods carriers through one (1) Kentucky Association tariff - - with Movers entirely free to file for rates independently.” RFF 14
10. “If Complaint Counsel’s erroneous legal theories somehow prevail in this proceeding, the public will greatly suffer due to the multiplicity of both tariffs and rates, with no corresponding benefit to the public and a seriously reduced ability to enforce the applicable laws and regulations.” RFF 14
11. “There is no justification whatsoever for the destruction of a highly successful regulatory program that has protected the public for over half a century.” RFF 14

These statements were excluded from evidence by the ALJ, who stated that “KTC adds no new arguments or analysis to this proceeding.” (ID; p. 46) Nothing could be farther from the truth.

The referenced statements clearly constitute a statement by the Commonwealth of Kentucky which demonstrates its “political responsibility” for the regulatory program challenged in the Complaint. It was clearly erroneous for the ALJ to refuse to consider a

statement made by the Commonwealth of Kentucky, which was contained in a document which constituted a part of the record in this proceeding.

STATEMENT OF FACTS

The factual circumstances surrounding the so-called “collective-ratemaking” activities of the Respondent acting pursuant to Kentucky law and regulations were described in detail in Respondent’s Proposed Findings of Fact & Conclusions of Law.

All of these findings of fact were supported by substantial evidence in the form of documents and testimony, as indicated in the record. Almost none were adopted by the ALJ, notwithstanding the fact that Complaint Counsel offered no witness to support its position in this proceeding. The ALJ engaged in a selective exercise to extract disjointed items of information from the record which would support the determination reached by the Initial Decision without properly considering the evidence as a whole.

The household goods transportation rates which are at issue in this proceeding are established by KTC based on tariff *proposals* (ID ¶¶ 21, 23, 25, 29, 34) submitted by the Kentucky Association. RFF 24, 30, 35, 94, 118, 122, 146, 173.

The household goods carriers which are Members of Respondent (sometimes referred to herein as “Movers”) make no agreement on the rates which will be ultimately charged to consumers. The only “agreement” that exists is an agreement to submit tariff proposals which will be filed with KTC in the form of a Supplement, for KTC’s consideration.

Only KTC has the authority to establish rates. RFF 122

The process by which Kentucky Association rates are approved by KTC has changed over the years. KTC’s regulatory responsibilities have also changed, as prior to the effective date of the ICC Termination Act of 1995, the States were able to exercise responsibility for the rates of carriers of property other than household goods. This is no

longer the case, so that the need for a substantial infrastructure attendant upon the rate regulatory process has been seriously diminished. RFF 186

The State's involvement in the rate approval process is not under any circumstances a "rubber stamp" type of approval. The State is actively involved in the process from start to finish. RFF 146

Rates do not become effective by the filing of a Tariff - - they become effective by reason of the approval of KTC. RFF 122

The Tariff which is the subject of this proceeding consists of the original tariff filing, and some 82 Supplements (collectively, the "Tariff") - - each of which has been approved by KTC. RFF 18

There is a standard established by State Law and KTC Regulations which provides that rates must be fair and reasonable. (ID; ¶ 11) RFF 41-93, 53, 58, 59, 62, 81, 82, 94-99, 116, 117, 191.

KTC takes substantial efforts to insure that rates in the Tariff meet this standard. RFF 146.

The State collects business data from Members of the Kentucky Association, and a State Official with 30 years of transportation regulatory experience involving household goods rates is responsible for administering the Kentucky regulatory program. RFF 109, 110, 126, 127, 135, 138, 139, 146, 149, 150, 154, 169, 171.

Mr. William Debord is principally responsible for administering the State's program. RFF 104-106.

Debord acts as a "consumer advocate." RFF 177.

Debord conducts a substantive review of the rates in the Tariff. RFF 146.

The Kentucky Association files the Tariff on behalf of its Members. RFF 17.

The Tariff contains many rate levels, and Movers are free to select the rates which they wish to be published for their account, so long as the rate is contained in the KTC-approved Tariff. RFF 21

Respondent does *not* institute increases in the Tariff; Respondent institutes *rate proposals* for submission to KTC for KTC approval. RFF 58, 75.

The Kentucky Association does not “orchestrate” Tariff changes.

There is no evidence that the Kentucky Association has ever put “pressure” on any Member or interfered with any Mover’s right of independent action to charge whatever Tariff rate it deemed appropriate.

There are a number of statutes and regulations which govern the filing of tariffs and the standard which must be met for household goods transportation rates. (ID; pp. 18-25) Tariff charges must be reasonable and charges must be made without unjust discrimination, unjust preference or advantage, or unfair or destructive competitive practices. RFF 120.

There is a State Transportation Policy which forms part of the standard for household goods transportation rates. RFF 46.

If KTC finds a rate unreasonable, it has the authority to establish a reasonable rate. RFF 62, 98.

Offering discounts from regulated rates is unlawful, as this would constitute rate discrimination. RFF 82, 99, 115, 119, 128, 144.

KTC reviews the Tariff rates to insure that they comply with the legal standard. RFF 146.

KTC has not recently held hearings regarding rates, as Debord discusses the rates with Kentucky Association representatives prior to the time that proposed Supplements containing the rates are formally filed with KTC. RFF 135, 151, 154, 156, 157.

KTC issues no written decision with regard to rates, as this is not required by law, and the approval process is deemed by the State to be sufficient for the purposes of its regulatory program.

Debord is constantly receiving information regarding “business data” of Movers. He attends the Kentucky Association’s Board of Directors and Membership Meetings and has done so for decades. RFF 108, 109, 110, 111, 112, 113, 114, 126, 127, 135, 136, 154, 156.

KTC conducts audits of household goods carriers. These audits are sufficient for KTC’s regulatory purposes and provide KTC with information which it uses in the ratemaking process, including information regarding Movers’ costs and revenues. RFF 127, 138, 139, 149, 150, 163, 169.

No law or case requires KTC to hold hearings to satisfy the Supreme Court’s “active supervision” requirement.

No law or case requires KTC to issue written decisions to satisfy the Supreme Court’s active supervision requirement.

No law or case requires KTC or the Kentucky Association to satisfy the arbitrary whims - - or even the “good faith” wishes - - of employees of the federal government, by maintaining or conducting useless exercises, not required by law, in order to avail themselves of the State Action Defense.

The Commonwealth of Kentucky held extensive hearings when the Tariff was first approved in the 1950s. All Supplements filed since that time have their origin in that original hearing process; it has been an amendment and “supplementing” process since that time. RFF 175.

KTC has elected to comply with its statutory responsibility to collect cost and revenue information (KRS § 281.680[4]) by the current methods it employs to determine such information.

It has not been necessary for KTC to “formally reject” Kentucky Association or other Tariff filings because through its involvement in the rate-setting process from start to finish, KTC is able to advise the Kentucky Association regarding what proposals would be accepted or rejected by KTC. RFF 133,136.

KTC has suspended proposed rates. RFF 132.

This method of operation has been determined by KTC to be more appropriate than conducting hearings.

No evidence has been made a part of the record in this proceeding which would tend to show that KTC’s method of operation - - in this or any other regard - - in any way fails to comply with the law governing the availability of the State Action Defense.

The record contains numerous examples of “justification” being submitted to KTC or discussed with KTC in connection with Kentucky Association Tariff proposals. In many cases, appropriate justification is described in a cover letter.

The Initial Decision identifies no law or case which states that this form of justification is in any way insufficient.

There is no case or law which states that rate justification of this type in any way deprives Respondent of the availability of the State Action Defense.

In many cases, justification for rate changes is based on the most commonly used tariff which governs the *interstate* transportation of household goods. RFF 192, 195, 196.

While the basis of the ALJ's refusal to recognize the significance of this fact is not entirely clear, the Initial Decision seems to be saying that this approach is not legally sufficient because KTC Tariffs do not exactly "mirror" the provisions of the interstate tariff. Provisions in the interstate tariff are among the items of information employed by KTC to establish Kentucky intrastate transportation rates. There is no law or case which suggests that this approach in any way deprives the Kentucky Association of the State Action Defense.

The ALJ's position would be more plausible if the Federal Trade Commission were either (a) a State Legislature; or (b) a State motor carrier regulatory agency. The FTC is neither of these.

The Commonwealth of Kentucky has "standards" in place for determining the reasonableness of rates. (ID; ¶ 11) These standards are governed by, among other things, KTC Regulations and the methods chosen by KTC to comply with them. RFF 107

The Initial Decision's apparent preoccupation with the way things were in the 1950s, 1960s, 1970s, and 1980s may be of historical interest, but the law which governs the availability of the State Action Defense - - in the form of Ticor and Midcal - - is of more contemporary origin, and should govern the disposition of this proceeding..

QUESTIONS PRESENTED

1. Was it error for the Administrative Law Judge to refuse to allow into the record a Statement of Policy of the Commonwealth of Kentucky describing its position on the issues in this proceeding including, without limitation, a statement describing the State's position on the benefits of intrastate collective ratemaking by household goods movers ?
2. Is the position of the Kentucky Transportation Cabinet on the issue of "Active Supervision" entitled to consideration in a "State Action" inquiry by the Commission ?
3. Was it error for the Administrative law Judge to refuse to follow the law as articulated by the U.S. Supreme Court on the issue of "Active Supervision" ?
4. Is a finding of "Active Supervision" appropriate with respect to an intrastate motor carrier rate bureau comprised of household goods movers where proposed tariff rates are submitted to the State regulatory agency for approval and the State agency has provided undisputed evidence of "Active Supervision" which has not been rebutted by Complaint Counsel ?
5. Should an Order be entered (a) staying any further proceedings in this matter; and (b) directing "good faith" discussions between representatives of the Bureau of Competition and the Kentucky Transportation Cabinet in an effort to resolve the concerns regarding the KTC regulatory program raised in the Complaint; in view of (i) the stated willingness of KTC to resolve any Commission concerns; and (ii) the potential harm which would be suffered by Respondent and its Membership by an adverse determination in this proceeding ?

6. Did the Administrative Law Judge commit error in failing to find that the Kentucky Transportation Cabinet “Actively Supervises” the collective ratemaking activities of Respondent for purposes of the State Action Defense described in Parker v. Brown ?

COMMISSION STANDARD OF REVIEW

On appeal from the Initial decision in this proceeding, the applicable standard of review is *de novo*, with the Commission exercising “all the powers which it could have exercised if it made the initial decision.” Rule 3.54(a); *In the Matter of Trans Union Corp.*; No. 9255; 2000 WL 257776 (F.T.C., 2/10/00).

SUMMARY OF ARGUMENT

The Complaint in this proceeding alleges that conduct of the Respondent in submitting proposed tariff rates for the transportation of household goods to the Kentucky Transportation Cabinet constitutes unlawful price fixing in violation of Section 5 of the Federal Trade Commission Act.

In this proceeding, the evidence clearly confirms that Respondent and the Kentucky Transportation Cabinet have successfully established the availability of the “State Action Defense,” namely, that the challenged conduct is immune from liability under the federal antitrust laws because that conduct was undertaken as part of a State initiated and sponsored activity, and adopted by the State pursuant to a clearly articulated and affirmatively expressed State policy, which was and is actively supervised by the State.

The Initial Decision describes no evidence, nor does the trial record contain any evidence to contradict the position of KTC which has been advanced in this proceeding - (a) in testimony and documents; (b) in the Kentucky Secretary of Transportation’s Statement of KTC’s position described in KTC’s Motion seeking leave to intervene in this proceeding as a Respondent; (c) in KTC’s Post-Trial Brief filed herein; and (d) in statements made by KTC Counsel at the trial of this proceeding, which statements constitute a significant part of the record in this proceeding.

ARGUMENT

I. IT WAS ERROR FOR THE ALJ TO REFUSE TO CONSIDER KTC'S POSITION AS EXPRESSED IN KTC'S MOTION FOR LEAVE TO INTERVENE AND ITS POST-TRIAL BRIEF

Despite the fact that the ALJ chose to ignore the positions expressed by the Commonwealth of Kentucky, the State vigorously asserted its interests at the trial before the ALJ. Moreover, the Initial Decision fails to note the critical fact that KTC “[joined] into the Kentucky Association’s pretrial, post-trial briefs.” The ALJ refused to acknowledge the fact that KTC joined in the position of the Kentucky Association, or to even allow a motion addressed to this issue to be heard. (5/19/04 Hearing Tr.; pp.105-106)

At the trial, KTC Counsel made the following statements on behalf of the Commonwealth of Kentucky: (1) “[I] believe that the work that I do, and that the work that the people around me do, which has been criticized here and throughout this proceeding, provides great service to the people of the Commonwealth [of Kentucky]” (5/19/04 Hearing Tr.; p.101); (2) “the Commonwealth of Kentucky believes that collective ratemaking by Kentucky Household Goods Carriers in the form that it is conducted and supervised under our statutes and regulations provide an important public purpose” (5/19/04 Hearing Tr.; p. 101); (3) “I was somewhat disappointed to learn, your Honor, that the declaration which was signed by the Kentucky Secretary of Transportation, General Maxwell Bailey, was excluded from evidence in this case. That document very clearly states the Commonwealth’s” [Counsel was interrupted at this point by the ALJ, who refused to allow Counsel to finish his sentence](5/19/04 Hearing Tr.; pp.101-102); (4) “[there] is really no justification whatsoever for the destruction of a

highly successful regulatory program that has benefited the public and our agency and our Commonwealth for the last 45 years”(5/19/04 Hearing Tr.; p.102); (5) “[KTC has] no record of at any time receiving a complaint from the general public about any rate or service provided by the [Kentucky Association]” (5/19/04 Hearing Tr.; p. 102); (6) “The Kentucky Transportation Cabinet is not an enforcement agency in some price fixing conspiracy, as has been suggested here.” (5/19/04 Hearing Tr.; p. 102); (7) “[KTC is] both puzzled and disappointed at this Commission, why it has taken aim at our agency fo0r no apparent purpose at all in an effort to destroy a program which has helped the public for over half a century.” (5/19/04 Hearing Tr.; p. 102); (8) “If there were concerns, FTC should have come to us [KTC] [; we] never knew or had any knowledge about this until the Complaint had been filed.” (Hearing Tr.; p. 103); (9) KTC would have been more than willing to work with the FTC to resolve any differences in the program, but that never happened.” (Hearing Tr.; p. 103); and (10) “The Cabinet is equally concerned that the government attorneys in this case have taken it upon themselves to question the good faith, integrity and competence of Director William Debord, a knowledgeable transportation regulatory professional who has served on national boards involving motor carriers for the last 34 years [;] [his] competence in matters affecting motor carrier regulation is matched by none of which we are aware in both the public and private sector.” (5/19/04 Hearing Tr.; p. 103).

All of the foregoing statements were uniformly ignored by the ALJ in their entirety, in the course of his examination of the regulation of the State program for the regulation of Movers’ rates under consideration in this proceeding. This was clear error.

Moreover, the general disrespect shown by the ALJ is hardly characteristic of the “principles of federalism and state sovereignty” referred to by the Initial Decision in its discussion of the State Action Defense. (ID; p. 32)

During the trial, at closing argument, KTC Counsel made an effort to further explain the parts of the record which demonstrate the State’s commitment to the regulatory program under review. Much has been made manner in which Director William Debord handled his responsibilities at KTC, and to whom he did and did not report. Counsel for KTC stated the following at the trial:

MR. SHIPP: “She [Denise King; Director of the KTC Division of Motor Carriers at the time of discovery in this proceeding] had held that capacity for three or four months. Mr. Debord had held his position and an equal position [to that of Director King] for approximately 34 years. There was no need for Ms. King to direct Mr. Debord in his activities. It would have been pointless, Your Honor, and that’s what I’m trying to point out.

Second, the monthly report that Mr. Abrahamsen refers to, that is no different than a status report that you get from your boss or asking from you or my boss gets from me. It’s simply a status report about that monthly activity. It covers oversize permits, it covers fuel tax collection, complaints filed by the general public. It is not a specific report designated for this type of activity Only.

Lastly, Your Honor, as Mr. McMahon has explained in the filings which he has made on behalf of the Kentucky Association, Kentucky Transportation [KTC] goes to great lengths to supervise this program and the rate-setting process. We believe that it is an important factor in protecting the public from problems that can arise.

In closing, Kentucky Transportation would respectfully Request that the Commission cease and desist in interfering With KTC’s ability to protect the interests of its citizens in The manner which we have for the last 45 years and that the Complaint in this proceeding be dismissed.”
(5/19/04 Hearing Tr.; pp.104-105).

It was error for the ALJ to refuse to consider these positions of the Kentucky Transportation Cabinet. This statement, consistent with all other statements made by and on behalf of the Commonwealth of Kentucky and its representatives in this proceeding, and disregarded by the ALJ, confirm the presence of "active supervision" and are entitled to be recognized as determinative on that issue.

II. THE ALJ's COMPLETE DISREGARD OF THE POSITION OF KTC IN THIS PROCEEDING WARRANTS REVERSAL AND CALLS INTO SERIOUS QUESTION WHETHER THE ALJ PROPERLY ANALYZED THE ISSUE OF "ACTIVE SUPERVISION" IN ANY RESPECT

The Initial Decision completely mischaracterizes the participation of KTC in this proceeding in a manner which suggests that the outcome of this case was somehow "pre-ordained" - - no matter what the evidence in the record disclosed.

The unwillingness of the ALJ to allow the formal position of the KTC into the record is curious - - in addition to constituting obvious error. The ALJ's refusal to consider the written statements of the Kentucky Secretary of Transportation, either as evidence or argument, represented not only an affront to the Commonwealth of Kentucky, but demonstrated a complete lack of understanding of the critical elements of a "State Action" inquiry.

III. THE EVIDENCE DEMONSTRATES THAT RESPONDENT HAS ESTABLISHED THE ELEMENTS OF THE STATE ACTION DEFENSE UNDER *PARKER V. BROWN*.

Respondent and the Kentucky Transportation Cabinet have established that Respondent's actions in preparing and submitting collective rate proposals to KTC satisfy the criteria first announced by the Supreme Court in *Parker v. Brown*, 317 U.S. 341 (1943).

In *Parker v. Brown*, the Supreme Court held that the Sherman Act did not apply to the actions of local agricultural cooperatives in developing marketing policies for the California raisin crop. 317 U.S. at 351. The Supreme Court found that the actions of an "Advisory Commission" comprised of private actors was exempt from application of the federal antitrust laws because of the involvement of the State in the statutory program.

"In *Parker v. Brown*, this Court found in the Sherman Act no purpose to nullify state powers. Because the Act is directed against 'individual and not state action,' the Court concluded that the State's regulatory programs could not violate it. *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 104 (1980).

The cases relied upon by the ALJ in the Initial Decision - - other than *Ticor* and *Midcal* - - are almost uniformly unsuited to an analysis of the issues in this proceeding.

The District Court Decision in *U.S. v. Southern Motor Carriers Rate Conference*, 467 F.Supp. 471 (N.D. Ga. 1979) was, as the Initial Decision acknowledges, ultimately reversed by the Supreme Court. More significantly, in

the Supreme Court, the issue of “active supervision” was *conceded* by the Government.

Active supervision was not even *considered* by the Administrative Law Judge or the U.S. Court of Appeals which subsequently reversed his and the Commission’s position in Matter of Massachusetts Furniture & Piano Movers Ass’n, 773 F.2d 391 (1st Cir. 1985).

None of the other cases cited by the Initial Decision in support of its State Action analysis involve household goods transportation rates. Moreover, they are easily further distinguished by a complete lack of identity of issue with this case.

Yeager’s Fuel, Inc. v. Pennsylvania Power & Light Co., 22 F.3d 1260 (3d Cir. 1994) (ID; p. 41), was a case which involved, among other things, the federal RICO statute, and the use of rebates and incentives by a Pennsylvania electric utility to increase its share of the home heating market.

DFW Metro Line Services v. Southwestern Bell Telephone Co., 901 F.2d 1267 (5th Cir. 1990) (ID; p. 36), was a case where a lessee of telephone lines sought a preliminary injunction against a regional telephone company for excessive rate charges.

TEC Cogeneration, Inc. v. Florida Power & Light Company, 86 F.3d 1028 (11th Cir. 1998) (ID; p. 36), involved allegations of refusal to wheel electricity, predatory use of electric rates, and interference with interconnection by a regulated electric utility.

Lease Lights, Inc. v. Public Service Company of Oklahoma, 849 F.2d 1330 (10th Cir. 1988) (ID; p. 44), was a monopoly claim involving rates charged to the public for outdoor lighting service.

Dystec Energy, Inc. v. Southern California Gas Company, 5 F.Supp. 2d 433 (S.D. Tex. 1997) (ID; p. 44) was a private antitrust claim prosecuted by the owner and operator of electric cogeneration facilities based on provisions contained in long-term natural gas contracts. Congressional policy regarding the de-regulation of the natural gas market figured prominently in the decision.

A. D. Bedell Wholesale Company, Inc. v. Philip Morris Incorporated, 263 F.3d 239 (3d Cir. 2001) (ID; p. 41), was a Sherman Act challenge involving the “multi-billion dollar national tobacco settlement.”

Neither Ticor nor Midcal require hearings, written decisions, or newspaper notices to household goods transportation consumers who would have no reason to comment on them. Inquiry into the specifics of the Kentucky regulatory program at issue in this case discloses the availability of the State Action Defense as shown by Respondent.

Conspicuous in its absence from the Initial Decision is any discussion of the position taken in this case by the Kentucky Secretary of Transportation. The record would have surely benefitted from an analysis of the significance of the Kentucky Transportation Cabinet’s views as expressed in its Motion for leave to Intervene and its joinder in the arguments and evidence raised in Respondent’s Motion for Summary Decision.

A. The ALJ Erred in Concluding that the Commonwealth of Kentucky's household goods Transportation regulatory Program failed to satisfy the "Active Supervision" requirement described in California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.

The Commonwealth of Kentucky's Household Goods Transportation Regulatory Program is consistent with the "Active Supervision" Requirement described in California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc., 445 U.S. 97 (1980). In Midcal, the State of California Supreme Court had previously ruled that the subject wine pricing scheme violated the Sherman Act and "... held that because the State played only a passive part in liquor pricing, there was no Parker v. Brown immunity for the program." 445 U.S. at 101.

A review of each item of the program before the Court in Midcal, compared to the corresponding factor of the Kentucky regulatory program at issue in this proceeding, confirms the availability of the State Action Defense to Respondent so far as the activity challenged in the Complaint is concerned.

The pricing scheme before the U.S. Supreme Court in Midcal involved, among other things, division of the State of California into "three trading areas for administration of the wine pricing program." 445 U.S. at 99. This factor is not of particular significance as far as the KTC program of collective ratemaking in *this* case is concerned.

"The State [had] no direct control over wine prices. . ." 445 U.S. at 100. In *this* case, KTC has control over the rates charged by household goods carriers.

The State “[did] not review the reasonableness of the prices set by wine dealers.” 445 U.S. at 100. Undisputed deposition testimony and documentary evidence in *this* case confirms that the reasonableness of household goods transportation rates is reviewed by KTC.

“[S]tate regulations [provided] that the wine prices posted by a single wholesaler within a trading area [bound] all wholesalers in that area.” 445 U.S. at 100. No such regulation exists under the KTC regulatory program at issue in *this* case.

“The [California] Court of Appeal ordered the Department of Alcohol Beverage Control not to enforce the resale price maintenance and price posting statutes for the wine trade. The Department . . . did not appeal the ruling in this case. An appeal was brought by the California Retail Liquor Dealers Association, an intervenor. The California Supreme Court declined to hear the case, and the Dealers Association sought certiorari from this Court.” 445 U.S. at 102. This point of procedure is irrelevant in *this* proceeding, where there has been no complaint or grievance by any person respecting the conduct challenged in the Complaint except for the FTC.

The issue for determination in Midcal was “. . . whether California’s plan for wine pricing violates the Sherman act.” 445 U.S. at 102. A parallel issue exists in *this* proceeding by reason of the provisions of Section 5 of the FTC Act.

The Supreme Court commented on the State’s “less than enthusiastic interest” in the regulatory program which was subject to challenge, 445 U.S. at 112, in language which is critical to an understanding of the application of Midcal to the facts of the case at bar. The Court stated at note “12,” 445 U.S. at 113 as follows:

“As the unusual posture of this case reflects, the State of California has shown less than an enthusiastic

interest in its wine pricing system. As we noted, the state agency responsible for administering the program did not appeal the decision of the California Court of Appeal. See *supra* at 101-102; Tr. Of Oral Arg. 20. Instead, this action has been maintained by the California Retail Liquor Dealers Association, a private intervenor. But neither the intervenor nor the State Attorney General, who filed an *amicus curiae* in support of the legislative scheme, has specified any state interests protected by the resale price maintenance system other than those noted in the state-court Opinions cited in text.”

It is noteworthy that in *this* proceeding, the Commonwealth of Kentucky *has* “enthusiastically” come forward in an effort to preserve the regulatory program under scrutiny, as is demonstrated by (1) KTC’s Motion for Leave to Intervene and the accompanying statements by the Kentucky Secretary of Transportation; (2) KTC’s Post-Trial Brief; and (3) Statements made by KTC at the trial of this case- - each of which also describes the State’s interests in establishing and maintaining collective ratemaking for Kentucky intrastate household goods transportation rates.

In Midcal, the Supreme Court was asked to rule on the correctness of a determination made by a *State’s* highest Court that a *State* regulatory program violated the Sherman Act. The fact that the highest Court of the State whose regulatory program was before the Supreme Court for review had found an absence of antitrust immunity in favor of the private actors weighed heavily in the Court’s decision. The Court stated as follows at 445 U.S. 113:

“We have no basis for disagreeing with the view of the California courts that the asserted state interests are less substantial than the national policy in favor of competition. That evaluation of the resale price maintenance system for Wine is reasonable, and is supported by the evidence cited by the State Supreme Court in *Rice*. . . . The unsubstantiated state concerns put forward in this case simply are not of the same stature as the goals of the Sherman Act.”

There has been no previous judicial or administrative determination in *this* case. Confronted with a price-fixing arrangement which was clearly without public purpose and which was characterized by a complete lack of state involvement, participation, or oversight, the Supreme Court took the opportunity to comment on the elements of a successful State Action Defense.

It is significant that under the wine pricing scheme in Midcal, “[a] single fair trade contract or schedule for each brand [set] the terms for all wholesale transactions in that brand within a given trading area.” 445 U.S. at 99. There was not even the pretense or appearance of State involvement. In the instant case, it cannot be seriously disputed that irrespective of the nature and extent of the involvement of private actors (i.e., members of the rate bureau), the proposed rates cannot, as a matter of law, become effective solely by reason of the action of those private actors.

“[The] State’s role [was] restricted to enforcing the prices specified by the producers.” 445 U.S. at 100. As a matter of law, the circumstances of Midcal bear virtually no relationship to the process under examination in the case, where the State possesses a broad range of powers, other than enforcement, with respect to intrastate household goods transportation rates.

The regulatory program before the Court in Midcal is so dramatically dissimilar to the Kentucky regulatory program at issue in this case that it provides no support for the conclusions regarding “active supervision” contained in the Initial Decision.

The specific, positive guidance with regard to the State Action Defense offered by the Supreme Court in Midcal consisted of the following statement at 445 U.S. 105:

“These decisions establish two standards for antitrust immunity under Parker v. Brown. First, the challenged

restraint must be 'one clearly articulated and affirmatively expressed as state policy', second, the policy must be 'actively supervised' by the State itself.

Any other instruction from the Court came in the form of specific comments directed to the California wine pricing program's failure to satisfy the requirements for antitrust immunity.

B. The ALJ erred in failing to recognize that the conduct challenged in the Complaint is immune under the most recent explanation of the "State Action Doctrine" found in *F.T.C. v. Ticor Title Guarantee*.

The conduct challenged in the Complaint is immune under the most recent explanation of the "State Action Doctrine" found in *F.T.C. v. Ticor Title Guarantee*.

Ticor represents the Supreme Court's most recent statement on the "State Action" defense. However, the case must be read bearing in mind some important elements *not* present in the proceeding at bar.

First, in Ticor, the F.T.C. brought its administrative proceeding against the individual title insurance companies which were members of the rate bureaus - - and not the rate bureaus themselves.

Second, the price fixing activity challenged by the F.T.C. was not the core, regulated insurance business of the respondents and their rate bureaus, but a collateral and, apparently, not *specifically* exempted component of the service offered by Respondents. The particular rates at issue were not "title insurance" rates but "title search and examination fees. The Commission made no allegations respecting those aspects of the title insurance business which involved insurance.

Third, the Respondents accounted for 57% of the gross revenues of the title insurance business on a national basis shortly before the Complaint was filed. Complaint Counsel offered no statistics in evidence regarding the portion of household goods moving services performed by Movers pursuant to the Tariff in this case. If such statistics had been sought by Complaint Counsel during discovery in this case, they

would unquestionably show a negligible amount of household moving services as compared with any regional or national standard..

The actual, specific holding of Ticor was “. . . that there was no active supervision in either Wisconsin or Montana.” In support of its holding, the Supreme Court took the following positions:

1. Inaction by a state regulatory agency in a so-called “negative-option” rate filing system does not signify substantive approval. *The record in this proceeding demonstrates activity by KTC with respect to every Kentucky Association rate filing.*
2. The potential for state supervision was not realized in these states. *Examination of the record in this proceeding confirms realization of the “potential” contemplated and mandated by Kentucky statutes and regulations.*
3. At most, rate filings were checked for mathematical accuracy. *KTC activity with regard to Kentucky Association filings at issue in this proceeding included substantive analysis of the proposed rates submitted.*
4. Some rate filings were unchecked altogether. *No Kentucky Association filing was “unchecked” by KTC in this case.*
5. A Montana rate filing became effective in spite of the fact that the rate bureau failed to comply with an information request about the filing. *The record in this proceeding confirms that the Kentucky Association complied with all KTC information requests.*
6. A Wisconsin rate filing remained effective for a period of seven (7) years during which the rate bureau failed to provide requested information relating to the filing. *The record in this proceeding confirms that the Kentucky Association complied with all KTC information requests.*

The foregoing constitutes the sole basis articulated by the Supreme Court for its determination that state regulatory agency action on the non-insurance rate bureau filings in Ticor failed to satisfy the “Active Supervision” Standard described in Midcal.

The Supreme Court’s guidance of the availability if the State Action Defense was both sparing and direct. The Court offered the following statements:

1. “Our decisions make clear that the purpose of the active supervision inquiry is not to determine whether the State has met some normative standard, such as efficiency, in its regulatory practices.” 504 U.S. at 634.
2. The action of the State in displacing competition must be “both intended by the State and implemented in its specific details.” 504 U.S. at 633.
3. The State must [exercise] sufficient independent judgment and control so that the detail 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. 634-635.
4. The State must “[play] a substantial role in determining the specifics of the economic policy.” 504 U.S. at 635.
5. The “anticompetitive scheme” must be “the State’s own.” 504 U.S. at 635.
6. “States must accept political responsibility for actions they intend to undertake.” 504 U.S. 636.
7. “[Particular] anticompetitive mechanisms [must] operate because of a deliberate and intended state policy.” 504 U.S. at 636.
8. “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 immunity must show that state officials have undertaken the necessary steps to determine the specifics of the price fixing or ratesetting scheme. 504 U.S. at 638.

9. “Our decision should be read in light of the gravity of the antitrust offense, the involvement of private actors throughout, and the clear absence of state supervision.” 504 U.S. at 639.
10. “We do not imply that some particular form of state or local regulation is required to achieve ends other than the establishment of uniform prices.” 504 U.S. at 639.

The Supreme Court in Ticor made it very clear that it was not prepared to specify a particular formula for what constitutes “active supervision” and what would satisfy the second prong of the Midcal test. This matter was left to the States with the benefit of the direction provided by the Court.

Although the Supreme Court has decided that “active supervision” cannot be analyzed in a test tube, the ALJ has wrongfully decided that the Commission’s jurisdiction and authority are sufficient to override not only the Supreme Court, but the Kentucky Legislature as well.

In order for the ALJ’s interpretation of Ticor to be correct, a tremendous amount of surgery on the opinion is required. In order to be able to extract from Ticor the requirements for notice, hearings, economic studies, and the like, it is necessary to go far beyond the four corners of the decision, and resurrect cases and decisions which the Supreme Court may have had in mind or could have intended to rely on in Ticor.

The most reasonable explanation for the Supreme Court’s failure to lay down the specific requirements for a finding of “Active Supervision” in Ticor is that the Court did not want to “freeze” those requirements for all States, all methods of regulation

of all industries, and all time. The Commission should assume that the Court knew what it was doing when it wrote the Ticor decision and came down in favor of standards and rules to be applied on a case-by-case basis. And *this* case, *this* proceeding, involving 93 small firms in the Commonwealth of Kentucky, which are in the business of moving households for everyday people, provides the perfect rationale for understanding why the Supreme Court acted as it did. The answer is that there is not a “one-size-fits-all” analysis that can serve as the calculus to determine whether State Action exists. Ticor does not contain a specific checklist that a Court must consider in determining if State Action exists.

Ticor was written the way it was because the Supreme Court recognized that there is an element of proportionality that must be considered in the State Action analysis - - including its “Active Supervision” component. A Court or agency which is applying the reasoning of Ticor needs to look at the particular circumstances involved. What is right for a railroad, electric utility, telephone company, or tobacco settlement administrator may be different from the way a Ticor analysis should be applied to the manner in which a State decides to regulate the rates of a Mover.

Respondent suggests that this is the correct approach, and that it correctly explains the reason why the Supreme Court didn’t just publish a “laundry list” in the Ticor case - - since it surely had the opportunity to do so - - but chose not to.

C. The ALJ committed error in recognizing the Completely erroneous Standard for “Active Supervision” Described in the Commission’s Analysis of Proposed Consent Order to Aid Public Comment in Iowa Household Goods and Warehousemen, Inc.

The position of the Commission described in the analysis of the proposed Consent Order in Indiana Household Goods and Warehousemen, Inc. sets forth a Completely Erroneous Standard for the State Action Defense. In its “Analysis of Proposed Consent Order to Aid Public Comment,” In re Iowa Movers and Warehousemen’s Association (File No. 021-0115) (“Iowa Analysis”), the Commission advanced a detailed interpretation of the State Action Defense which bears little relationship to the state of the law on this issue. The Iowa Analysis is more of a “wish-list” than an analysis. While it might be appropriate to accompany State Legislation which actually said the things the Iowa Analysis invents, it surely is completely inappropriate as a guide to understanding the law as it has been articulated by the Supreme Court in Mical and Ticor.

The mythical regulatory program enthusiastically crafted by the Commission in the Iowa Analysis would be appropriate if the Commission were either Congress or the Kentucky Legislature. As it stands, it is a fanciful vision of intrastate motor common carrier rate regulation by a Federal agency that appears to have no notion of the history and significance of transportation regulatory standards. More significantly, the Iowa Analysis is neither justified nor supported by the Supreme Court’s decisions in Midcal and Ticor.

The FTC’s position regarding the “publication” of proposed rate changes demonstrates a lack of understanding of the purpose and elements of a transportation regulatory program such as exists in Kentucky.

The Commission's "due process" type analysis does not comport with the realities of regulation and compliance with it would serve no rational purpose. The concept of tariff "publication" as it exists in Kentucky mirrors the tariff "publication requirements contained in the Interstate Commerce Act and successor federal legislation governing tariffs covering the interstate transportation of household goods.

A conventional APA program of notice, hearing, and newspaper publication would add nothing to the regulatory process for several reasons.

First, the individual household goods shipper would have no interest in any rate proceeding due to the sporadic and occasional nature household moving. People are only interested in the cost of household transportation when they are moving. The subject holds no interest otherwise.

Second, the Kentucky Legislature has determined that the *constant and permanent* availability of rate information at (1) the premises of each individual Mover; (2) KTC; and (3) the rate bureau, is the most effective means of informing and apprising the public of household goods transportation rate information.

Third, the Kentucky regulatory program has as its centerpiece the determination of the appropriateness of rates by KTC - - an administrative body with expertise in the rate regulation area.

Fourth, the very existence of the Kentucky regulatory program reflects a determination by the State that the nature of the household goods transportation service and its rates require the special expertise of an administrative agency in order to protect the public interest. The statutory and regulatory method selected by the State (1) is a

substitute for; and (2) has been determined to be superior to an APA type notice and hearing process - - for the protection of the public interest.

Consistent with this approach is a statement made by F.T.C. Complaint Counsel in another pending Commission appeal: "Under the federal Administrative Procedures Act, ratemaking is not considered an adjudication, it is considered a rulemaking." ("Appeal Br. Of Counsel Supporting Complaint"; In re Union Oil Company of California; Docket No. 9305; 1/14/04.)

In Hannah v. Larche, 363 U.S. 420 (1960), the Supreme Court ruled on a "due process" challenge to the validity of rules of procedure adopted by the U.S. Commission on Civil Rights. The Court stated that "the requirements of due process frequently vary with the type of proceeding involved." 363 U.S. at 440. The Court also noted the importance of the fact that the procedures under review were consistent with the methods employed by agencies with similar functions. The Court said at 363 U.S. 444:

"[W]e think it is highly significant that the Commission's procedures are not historically foreign to other forms of investigation under our system. Far from being unique, the Rules of Procedure adopted by the Commission are similar to those which, as shown by the Appendix to this Opinion, have traditionally governed the proceedings of the vast majority of governmental investigating agencies."

In this case, the Kentucky rate regulation program is (1) "historically" consistent with the manner of tariff publication prescribed by the Interstate Commerce Commission and its successor agency, the U.S. Surface Transportation Board, from 1887 until the present day; and (2) identical to the rules which have "traditionally governed" tariff rate filings.

In 1997, the U.S. Surface Transportation Board ("S.T.B.") adopted regulations governing household goods tariffs. The regulations were made necessary by reason of the ICC Termination Act of 1995. The regulations were codified as Part 1310, Title 49, C.F.R. entitled "Tariff Requirements for Household Goods Carriers."

The Initial decision completely ignores the S.T.B. decision which accompanied publication of the household goods tariff regulations in regards to household goods tariffs (S.T.B. Ex Parte No. 555, 2/4/97), explained the provisions of proposed 49 C.F.R. 1310.2 relating to "Availability of tariffs for inspection by the Board and Shippers." The decision noted the current position of S.T.B. with regard to tariff publication and notification requirements for interstate household goods shipments. The notice and publication requirements parallel those traditionally observed by transportation tariffs and are consistent with the approach taken by the KTC regulatory program.

The Supreme Court also commented on the distinction, relevant here, between determinations of a "quasi-judicial nature" and "fact-finding investigations." The Court stated the following at 363 U.S. 446:

"Due process is an elusive concept. Its exact boundaries are undefinable, and its content varies according to specific factual contexts. Thus, when governmental agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative that those agencies use the procedures which have traditionally been associated with the judicial process. On the other hand, when governmental action does not partake of an adjudication, as for example, when a general fact-finding investigation is being conducted, it is not necessary that the full panoply of judicial procedures be used. Therefore, as a generalization, it can be said that due process embodies the differing rules of fair play, *which through the years, have become associated with differing types of proceedings.*

Whether the Constitution requires that a particular right obtain in a specific proceeding depends on a complexity of factors. The nature of the alleged right involved, the nature of the proceeding, burden and *the possible on that proceeding*, are all considerations which must be taken into account.”
[Emphasis added.]

The procedural rules in Hannah v. Larche, which protected the identity of complainants alleging racial discrimination in the deprivation of voting rights in Louisiana in 1959, were a matter of great concern to the Supreme Court - - arguably far more than the approval of intrastate household goods transportation rates. However, the Court made it clear that fear of “collateral consequences” did not affect its decision. The Court said at 363 U.S. 443:

“It is probably sufficient merely to indicate that the rights claimed by respondents are normally associated only with adjudicatory proceedings, and that since the Commission does not adjudicate, it need not be bound by adjudicatory procedures. Yet, the respondents contend, and the court below implied, that such procedures are required since the Commission’s proceedings might irreparably harm those being investigated by subjecting them to public opprobrium and scorn, the distinct likelihood of losing their jobs, and the possibility of criminal prosecutions. That any of these consequences will result is purely conjectural. There is nothing in the record to indicate that such will be the case or that past Commission hearings have had any harmful effects upon witnesses appearing before the Commission. However, even if such collateral consequences were to flow from the Commission’s investigations, they would not be the result of any affirmative determinations made by the Commission, and they would not affect the legitimacy of the Commission’s investigative function.”

The Court also noted the increased burden that would be imposed on administrative agencies by requiring unnecessarily cumbersome processes as part of their

methods when not justified by their legislative responsibilities. The Court stated the following at 363 U.S. 443-444:

“Fact-finding agencies without any power to adjudicate would be diverted from their legitimate duties and would be plagued by the injection of collateral issues that would make the investigation interminable. Even a person not called as a witness could demand the right to appear at the hearing, cross-examine any witness whose testimony or sworn affidavit allegedly defamed or incriminated him, and call an unlimited number of witnesses of his own selection. This type of proceeding would make a shambles of the investigation and stifle the agency in its gathering of facts.”

IV. THE KENTUCKY LEGISLATURE HAS ADOPTED A CLEARLY ARTICULATED AND AFFIRMATIVELY EXPRESSED STATE POLICY IN FAVOR OF ESTABLISHING INTRASTATE HOUSEHOLD GOODS TRANSPORTATION RATES THROUGH TARIFF FILINGS AND COLLECTIVE RATEMAKING.

The ALJ properly determined that applicable Kentucky statutes (including a State Constitutional provision) and KTC regulations, which were discussed at length in the Initial Decision, conclusively demonstrate that the Commonwealth of Kentucky has a clearly articulated and affirmatively expressed state policy in favor of intrastate collective ratemaking by Movers. (ID; pp. 19-26)

V. THE ALJ FAILED TO CONSIDER EVIDENCE PROVIDED BY THE KENTUCKY TRANSPORTATION CABINET WHICH CONCLUSIVELY DEMONSTRATES THAT THE PRIVATE CONDUCT CHALLENGED IN THE COMPLAINT IS “ACTIVELY SUPERVISED” AND SATISFIES THE SECOND PRONG OF THE MIDCAL TEST.

1. The ALJ’s Emphasis on the Fact that KTC Provided “More Supervision” of Rates in the Past Adds Nothing to the “Active Supervision” Analysis.

The Initial Decision makes isolated findings of fact regarding KTC regulatory activity which took place as far in the distant past as 1966 (ID ¶¶ 42-48). However, these findings contain no point of reference against which a determination regarding the basis for past regulation can be assessed. The findings made by the ALJ have been made in a vacuum, as they fail to address the statutes, regulations, or regulatory environment that existed at the time this activity took place.

The KTC regulatory program “of the past” was dramatically different than it is today due to changes in the subject matter of regulation as well as the judgment of KTC as to what type of regulation is appropriate in the current environment.

The ALJ completely ignored the fact that since the effective date of the ICC termination Act of 1995, Kentucky, as well as all other States, have been precluded by federal law from regulating the rates of motor common carriers of property other than household goods. The KTC regulatory program of the past covered numerous motor common carriers of property other than household goods. The fact is that KTC has determined that the methods which it now employs to regulate household goods carriers are effective as implemented and practiced. The Initial Decision gives no deference to the position of the State regarding what means and methods of regulation are appropriate for

the protection of its consumers in the highly sensitive and unique area of household goods moving.

2. The ALJ's Finding that KTC Commits "Very Limited Resources" to Tariff Issues was error as it Set up no Standard for Comparison.

The Initial Decision finds that the Commonwealth of Kentucky "commits very limited resources to tariff issues" (ID; p.12), but makes no finding or determination as to exactly what "commitment of resources" would be appropriate. The ALJ's findings in this regard (ID; ¶¶ 49-62) contain a description of KTC's regulatory activity which clearly shows that the State has developed and administered a program to regulated the Kentucky Association's rates. The ALJ's decision that the State's resources are limited provides no indication as to what type of resources would be satisfactory to support a finding of "active supervision."

KTC has made a determination as to what resources are appropriate and has committed those resources to its regulatory program. Against this background, the ALJ summarily concludes - - without even identifying the resources committed - - that the resources committed are insufficient. This type of completely subjective basis for determining the presence of "active supervision" is not appropriate to the analytical task at hand.

3. The ALJ's Finding that KTC does not Receive Adequate Data was Improperly Made.

The Initial Decision makes a summary and unsupported finding which finds no support in the record. The record identifies the type of data which is considered by KTC to be appropriate for its regulatory purposes. The Initial Decision offers no basis at all for concluding that this data is insufficient.

4. The ALJ's Finding that KTC Receives Minimal Justification for Rate Increases was Improperly Made and Completely Inconsistent with the Evidence.

KTC receives rate justification which it has determined is sufficient for its regulatory purpose. It would appear that the ALJ believed that a "State Action" analysis required a re-evaluation of all rate increases and tariff changes approved by KTC. The ALJ's approach was, apparently, to sit as an appellate tribunal to judge the appropriateness of specific rate increases. This is improper.

The record is clear on the type of rate justification required by KTC. If the Commission is to credit the ALJ's findings in this regard, than it would be appropriate for Respondent to be given notice of this fact, and for this proceeding to be remanded to the ALJ with instructions to hear evidence from the Kentucky Association and KTC with regard to rate increases contained in each of the 82 Tariff Supplements contained in Tariff KYDVR No. 5 - - all of which are part of the record in this proceeding..

5. The ALJ Erred when He Concluded that KTC does not Analyze Requests for Rate Increases or Rates.

KTC's analysis of rate increases is documented in the record. This finding is improper on its face, as there is evidence of the type of analysis performed by KTC in the record, and the record contains no suggestion that the methods of analysis employed by KTC were in any respect fabricated or untrue.

6. The ALJ's Reliance on the Fact that KTC Seldom Issues Written Decisions on Rate Matters Was Improper.

According to the manner of regulation employed by KTC, the Tariff itself constitutes written evidence of a decision. The Initial Decision points to no motor carrier tariff regulatory program where a "written decision" is either warranted or provided as part of the regulatory process.

7. The ALJ's Reliance on the Fact that KTC Seldom Holds Hearings on Household Goods Transportation Rate Matters Was Improper.

The ALJ chose to completely ignore evidence in the record demonstrating that KTC believes that hearings are not necessary to its regulatory function.

8. The ALJ Failed to Recognize that KTC's reference to *Interstate* Household Goods Transportation Rates in Consideration of Rate Proposals Did Not Require Adoption of Those Rates.

The record shows that KTC considers many factors in connection with its rate approval activity. *Interstate* household goods transportation rates constitute one factor in this process. The record shows that *interstate* rates are considered by KTC. This is the significance of the fact that KTC offered evidence on this issue.

The record also shows KTC's position regarding federal regulation of interstate Movers. KTC's position is that this form of regulation is not consistent with KTC's beliefs as to what is necessary to protect the moving public in Kentucky.

V. THE REMEDY ORDERED BY THE ALJ IS COMPLETELY INAPPROPRIATE IN ITS FAILURE TO ACCOUNT FOR THE PRESENCE OF AN INTERVENING STATE GOVERNMENT IN THIS PROCEEDING.

The presence of the Commonwealth of Kentucky as a party to this proceeding, as well as its subject matter, suggest that a conventional remedy is neither necessary nor appropriate.

No “wrongdoing” by Respondent has been either proven or suggested.

A State Government has come forward and told the Commission that its citizens will be harmed if the remedy sought in this case is granted.

Moreover, the State, which, under even the most critical and severe interpretations of “federalism” should be entitled to some measure of respect from this Commission, has affirmatively stated its willingness to work with the Commission to resolve the Commission’s concerns regarding its household goods regulatory program.

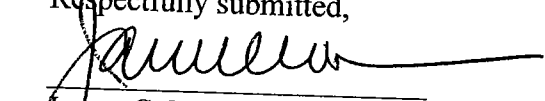
This proceeding should be stayed to permit the Respondent Kentucky Transportation Cabinet and the Commission to resolve the Commission’s concerns so that the interests of both the State and the Commission can be resolved without exposing KTC and the Movers of Kentucky to unwarranted hardship, expense, and potential litigation.

VII. CONCLUSION

For all the foregoing reasons, Respondent respectfully requests that the Initial Decision of the Administrative Law Judge be reversed, that the Commission enter an Order dismissing the Complaint herein, on the grounds that the conduct which is described in the Complaint is immune from challenge under the Federal Antitrust Laws by reason of the State Action Defense, and that the Commission grant such other and further relief as shall be appropriate.

Dated: New York, NY
July 30, 2004

Respectfully submitted,



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CERTIFICATE OF SERVICE

This is to certify that on July 30, 2004, I caused a copy of the attached Appeal Brief of **Respondent Kentucky Household Goods Carriers Association, Inc.** to be delivered by hand to the persons listed below:

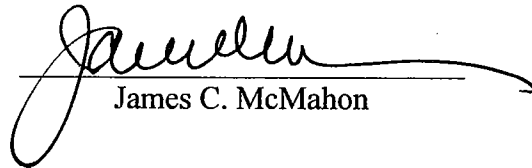
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July 30, 2004


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