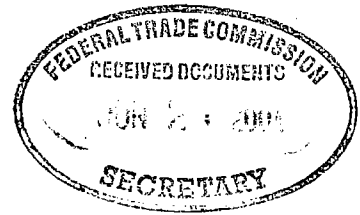


PUBLIC

**UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES**



DOCKET NO. 9309

In the Matter of
KENTUCKY HOUSEHOLD GOODS CARRIERS ASSOCIATION, INC.
Respondent.

INITIAL DECISION

**D. Michael Chappell
Administrative Law Judge**

Date: June 21, 2004

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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 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 ¶ 7. 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 ¶ 8. 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 ¶ 9.

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, ¶ 2. Respondent further admitted that the tariffs contain rates which are charged by household goods movers to consumers for household goods transportation services. Answer ¶ 2. Respondent denied that household goods movers engage in a horizontal agreement to fix prices for their services. Answer ¶ 7.

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.

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") ¶ 3.

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 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 ¶ 5; JX 1 ¶ 10).
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 ¶ 18; JX 1 ¶ 10).
3. A "tariff" contains a schedule of rates, fares, and prices that carriers charge. (CX 2; JX 1 ¶ 4). A tariff also sets forth rules that carriers impose on their transportation processes, such as how to 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 ¶ 8; 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 ¶ 6).

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 ¶ 9).

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 ¶ 5; JX 1 ¶ 10).

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 ¶¶ 5, 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 ¶ 2; Respondent's November 28, 2003 Response to ¶ 13 of Complaint Counsel's Request for Admission issued October 31, 2003 ("Respondent's Admission"); JX 1 ¶ 11). This function is conducted through the Kentucky Association's tariff committee. (Answer ¶ 5).

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 ¶ 9; 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 ¶ 18; *see also* JX 1 ¶ 10). A carrier cannot charge any more or less than the rates contained in the tariff. (CX 116 (Debord, Dep. I at 41-42)).

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 ¶¶ 10, 11, and 14; JX 1 ¶ 12).

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 ¶ 16; JX 1 ¶ 14).

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 ¶ 15). 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 ¶ 16).

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 ¶ 16; JX 1 ¶ 16).

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 committee. (CX 12; JX 1 ¶ 27). 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 ¶¶ 12, 20; CX 117 (Mirus, Dep. at 53-54); CX 116 (Debord, Dep. II at 60-61); JX 1 ¶ 27).

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 ¶¶ 17, 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 ¶ 13). 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 ¶ 23).

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 ¶ 24).

27. Other examples of rate increases that have been proposed by the Kentucky Association and which have taken effect include the following (JX 1 ¶ 18):

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: “[r]ates have increased 42% since 1980.” (CX 44; JX 1 ¶ 19).

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 ¶¶ 30-31; JX 1 ¶¶ 20-21). 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 ¶ 35; JX 1 ¶¶ 22-23).

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 ¶¶ 40, 41; JX 1 ¶¶ 24-26).

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 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 "[s]omewhat 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, “[e]ven 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 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 ¶¶ 25, 26; JX 1 ¶ 17; 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: “[w]e 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 ¶ 34).

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)).

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).

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. "[I]n 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 ¶ 48).

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 ¶ 47).

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 ¶ 29). 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 ¶ 29).

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 ¶ 30).

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 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 ¶ 33; 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 ¶ 31).

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 ¶ 31).

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 ¶ 30).

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 ¶ 46).

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)).

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 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: “[w]ell, 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, 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, “[m]any 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)).

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 ¶ 28; 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. "[A]s 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 ¶ 49).

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 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)).

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, "[s]o, 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 ¶ 45)).

97. The Kentucky Association's Board meetings are not publicly announced, and no group or individual representing 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 ¶ 50).

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)).

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;
- 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 “[e]very 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 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 [u]nder 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 “[u]nder administrative regulations promulgated by the department under KRS Chapter 13A.” (RX 80).

12. KRS 281.680(3) provides that “[t]he 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; 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).

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).

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 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";
- "[s]imilar 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); 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;
- 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 ¶ 51; *see also* F. 7. Accordingly, the 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), “[a]n 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), “[c]ounsel 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, “[e]xcept as otherwise provided by statute, the proponent of a rule or order has 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). “[T]he 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.

“[S]tate 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) (“[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 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 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 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, "[p]lainly, 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 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, “[t]his 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.

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)).

In *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 638 (1992), the Supreme Court confirmed the two prong test established in *Midcal*. "[O]ur 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 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 "ensur[ing] 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*, 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. “[T]he 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. *Id.* Instead, the Supreme Court held that “[w]here 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.

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 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 “[t]he 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 “[t]he 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. 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 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, "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 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. *Ticor*, 504 U.S. at 638.

In *Ticor*, 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; *Ticor 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.

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 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, “[n]o 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, “[t]ake to Bill Debord for acceptance stamp.” F. 94. Aside from stamping the document received, there is no statement issued by the KTC explaining why 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.

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 ¶¶ 74-77, 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 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 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. § 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.
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.

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;
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;
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;
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.


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.

ORDERED:


D. Michael Chappell
Administrative Law Judge

Date: June 21, 2004