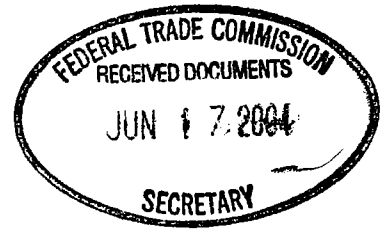


**UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION**



**In the Matter of**

**KENTUCKY HOUSEHOLD GOODS CARRIERS  
ASSOCIATION, INC.  
a corporation**

**Docket No. 9309**

**POST-TRIAL BRIEF OF INTERVENING  
RESPONDENT KENTUCKY TRANSPORTATION CABINET**

## **TABLE OF CONTENTS**

**I. INTRODUCTORY STATEMENT**

**II. THE POSITION OF THE KENTUCKY TRANSPORTATION CABINET**

**III. THE KENTUCKY LEGISLATURE HAS ESTABLISHED A CLEARLY  
ARTICULATED STATE PLAN IN FAVOR OF ESTABLISHING  
INTRASTATE HOUSEHOLD GOODS TRANSPORTATION RATES  
THROUGH TARIFF FILINGS AND COLLECTIVE RATEMAKING.**

**IV. CONCLUSION**

## **I. INTRODUCTORY STATEMENT**

The Commonwealth of Kentucky Transportation Cabinet (KTC) has intervened in this matter to protect its statutes and regulations and its active supervision of the tariff filing activity for over 45 years. In over 45 years no complaint has been made by any person regarding the Kentucky Household Goods Carrier's Association's (Association) tariff rates. There is no evidence that upon receipt of any proposed tariff rate by the Association that it was inappropriate or unreasonable. Lastly, and most importantly, there is no evidence that any person has suffered economic harm as a result of the state plan established by the Kentucky Legislature.

### **THE POSITION OF THE KENTUCKY TRANSPORTATION CABINET**

It is the position of KTC that Complaint Counsel's allegations that KTC has failed to act in a manner consistent with applicable law to actively supervise the Kentucky Associations tariff filings is simply incorrect. KTC has stated in both Secretary Bailey's Declarations and the testimony of William Debord that collectively set rates provide great benefit, as a matter of policy to KTC in its ability to promote, protect the public, and enforce compliance with rate requirements as well as all other requirements imposed by Kentucky Law and its regulations.

KTC now has the ability to efficiently and economically regulate virtually the entire population of household goods carriers through one Kentucky Association tariff while offering the opportunity to any mover wishing to do so submit for and obtain KTC's approval of its own independent tariff. There is no justification whatsoever in the efforts to destroy a highly successful regulatory program that reasonably and efficiently protects the public's interests. KTC believes the record established in the within action demonstrates active supervision of the tariff filing activities. KTC as further proof demonstrates below the Kentucky Legislature's establishment of an active supervision plan.

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

The statutes and regulations described below conclusively demonstrate that the Commonwealth of Kentucky has a clearly articulated and affirmatively expressed state policy in favor of collective rate making which renders the activities of Respondent alleged in the Complaint immune from challenge under the federal antitrust laws.

### **Kentucky State Transportation Policy and Statutory Provisions and Regulations Relating to Household Goods Transportation Rates set forth a clearly articulated and affirmatively Expressed State Policy Sufficient to Satisfy the First Prong of the *Midcal* Test.**

Each of the statutes and regulations which are described and summarized below are part of the KTC program for the regulation of intrastate household goods carriers and intrastate household goods transportation in the Commonwealth of Kentucky. While some provisions directly and specifically address the subject of rates and tariffs, all have some bearing on the transportation service and are therefore relevant to the regulatory process.

*Kentucky State Constitution  
Provision Applicable to Intrastate  
Household Goods Transportation Rates*

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." The section further states that "(n)o common carrier shall be permitted to contract for

relief from its common law liability.

*Statutes Actively Administered  
By KTC*

Chapter 281 of the Kentucky Revised Statutes (“KRS”) contains the principal provisions governing the regulation of motor carriers of household goods in the Commonwealth of Kentucky.

KRS 281.010 contains definitions including “certificate”, “interstate commerce”, “intrastate commerce”, and “property”.

KRS 281.011 contains definitions including “carrier”, “motor carrier”, “motor vehicle”, “common carrier”, “irregular route common carrier”.

KRS 281.590 contains definitions including “Declaration of Policy” (“Kentucky State Transportation Policy”) regarding transportation in the Commonwealth of Kentucky. The Kentucky State Transportation Policy includes the following elements:

1. to provide for fair and impartial regulation of all transportation subject to the provisions of Chapter 281;
2. to administer regulation so as to recognize and preserve the inherent advantage of each type of motor transportation;
3. to promote safe service;
4. to promote adequate service;
5. to promote economical service;
6. to promote efficient service;
7. to foster sound economic conditions in transportation;
8. to foster sound economic conditions among the several carriers;
9. to encourage the establishment of reasonable charges for transportation service;
10. to encourage the maintenance of reasonable charges for transportation charges;
11. to avoid unjust discrimination in the establishment and maintenance of transportation charges;
12. to avoid undue preference in the establishment and maintenance of transportation charges;
13. to avoid undue advantage in the establishment and maintenance of transportation charges;
14. to avoid unfair competitive practices in the establishment and maintenance of transportation charges;

15. to avoid destructive competitive practices in the establishment and maintenance of transportation charges;
16. to cooperate with the several states and the duly authorized officials thereof; and
17. to do all the foregoing to the end of (a) developing; (b) coordinating; and (c) preserving, a state transportation system by motor vehicles as defined in Chapter 281 adequate to meet the needs of the Commonwealth of Kentucky.

KRS 281.590 provides that all of the provisions of Chapter 281 must be administered and enforced with a view to carry out the policy described in the section (i.e., the Kentucky State Transportation Policy).

KRS 281.600 describes the administrative functions and powers of the KTC "Department of Vehicle Regulation" which include the following:

1. all administrative functions of the state in relation to motor transportation;
2. the right to regulate motor carriers;
3. to establish reasonable requirements with respect to continuous and adequate service of transportation;
4. to establish reasonable requirements with respect to systems of (a) accounts; (b) records; (c) reports; and (d) preservation of records;
5. to establish reasonable requirements with respect to safety and operation of equipment;
6. to issue subpoenas, subpoenas duces tecum, and orders of personal attendance of witnesses, and production of pertinent records, and permit the taking of depositions in any proceeding before the Department;
7. to promulgate administrative regulations as the Department may deem necessary to carry out the provisions of Chapter 281; and
8. to promulgate regulations regarding safety requirements for motor vehicles and their method of operation.

KRS 281.624 defines a "household goods certificate" as a certificate authorizing operations of an "irregular route common carrier" transporting household goods.

KRS 281.624 includes a definition of "household goods," (by reason of the structure of the section) 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.

KRS 281.625 describes the process of hearings on applications for a certificate, permit, amendment, sale, transfer, leases, change in route, or abandonment of a certificate or permit. The section

requires the following: (a) the fixing of a time and place for a hearing on the filing of an application; (b) **mailing of written notice of the hearing and the right to file a protest to (i) the applicant; (ii) every authorized carrier, including railroads, serving any part of the route proposed to be served or abandoned by applicant; (iii) any other person whom, in the opinion of the Department, may be interested in or affected by the application;** (c) the holding of a hearing if a protest is filed and the right to filing of a protest by any person having an interest in the subject matter; (d) granting of a non-profit bus certificate without hearing if no protest is filed under certain circumstances; (e) dispensing with a hearing if the application is for rights previously granted by the ICC; (f) issuance of a certificate without a hearing for transportation of commodities exempted by the ICC; (g) granting of an irregular route common carrier certificate where a certificate authorizing similar operations has been issued by the ICC; and (h) granting of a so-called "U-drive-it" permit without a hearing.

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."** [Emphasis added.]

KRS 281.675(1) requires that **"[e]very rate, fare, charge demanded by any certificate holder, shall be just and reasonable, and every holder of a certificate shall furnish adequate, efficient, safe and reasonable service."** [Emphasis added.]

KRS 281.675(2) requires that **"[e]very contract made by a contract carrier for transportation service shall be just and reasonable, and shall be comparable to the rate charged by any common carrier for the same or similar service, and such contract carrier shall furnish adequate, efficient, safe, and reasonable service."**

KRS 281.680(1) governs (a) **the filing and public inspection of rate and service schedules and contracts;** and (b) **collective ratemaking by carriers of passengers and household goods.** The subsection contains the following provisions:

1. **common carriers and irregular route common carriers of passengers and household goods must maintain a schedule of rates, charges, and classifications;**
2. 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;
3. a carrier **"may become a participating party to a tariff published or issued by a tariff publishing agency;**
4. **the "tariff – issuing agent" must file the carrier's tariff with the Department;**
5. **"the tariff – issuing agent may not represent any carrier in any matters before the department;**
6. [the] department may, by administrative regulation, require carriers to file a schedule of their rates, fares, charges, and classifications; and
7. each of the foregoing provisions is required to occur **"[u]nder administrative regulations promulgated by the department under KRS Chapter 13A. [Emphasis added.]"**

KRS 280.680(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." [Emphasis added.]

KRS 281.680(2) provides that **"[t]he department shall have full power controlling the rates and contracts under its administrative regulations."** [Emphasis added.]

KRS 280.680(4) provides the following:

1. the department must establish **collective ratemaking procedures**;
2. 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** [Emphasis added.];
3. the department's **collective ratemaking procedures** must assure that the revenues and costs of carriers are ascertained [Emphasis added.]; and
4. 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."** [Emphasis added.]

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.

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

1. changes in rates must on 30 days notice to KTC;
2. the notice must state the proposed changes and effect;
3. the carrier must give notice of the proposed rate change to interested persons as directed by the department in administrative regulations;
4. proposed rate changes must be shown in new tariffs; and
5. the department may, by administrative regulations, allow for rate changes on less than 30 days notice.

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:

1. 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;
2. the department may suspend the proposed rate for 6 months from the

proposed effective date by an order stating the reasons for the suspensions; and

3. the department must determine the just and reasonable rate if it finds the rate to be objectionable after hearing.

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 objectionable after a hearing, the department may determine the just and reasonable rate. (The section also allows the department to order that adequate service be provided after a hearing.)

KRS 281.700 governs the abandonment or change of the route or service of a common carrier.

KRS 281.705 authorizes the department to prescribe uniform systems of accounts and the filing of reports by motor carriers.

KRS 281.880 establishes a motor carrier safety management audit program applicable to intrastate motor carriers and authorizes the issuance of motor carrier safety ratings.

KRS 281.900 establishes the Kentucky Motor Carrier Advisory Committee and prescribes its functions and methods of operation.

KRS 281.905 contains further information regarding the operations of the Kentucky Motor Carrier Advisory Committee including its (a) duties; (b) meetings; (c) chairman; and (d) annual report.

KRS 281.640 pertains to the conduct of hearings before the department and describes the method of appointment and qualification of hearing examiners.

*Regulations Actively Administered  
By KTC*

601 KAR 1:029 contains definitions including "authorized carrier" and "property."

601 KAR 1:030 describes procedures in department hearings on motor carrier applications including applications for authority to transport household goods. Upon receipt of an application for household goods operating authority, the department is required to send a notice to all (a) known; (b) required; and (c) interested, parties, containing the following information: (1) statement that a hearing will be scheduled at a later date if a protest is filed; (2) complete description of the authority sought; (3) name & address of applicant; (4) docket number assigned; (5) statement that anyone having an interest may file a protest; (6) name & address of attorney, if applicable; and (7) statement that notice of protest must be filed in 30 days. Notice must also be sent to (i) the holders of certificates of the same authority; (ii) other applicants for the same or similar authority; and (iii) all household goods carriers. Additional provisions contained in the regulation address (A) Protest procedures, (B) notice of change in route, (C) general practice, (D) restrictive amendments, (E) report & recommended order, (F) exception, and (G) final order.

601 KAR 1:031 describes the procedure to be followed on a motor carrier application when no protest is filed.

610 KAR 1:040 describes the application procedure for Kentucky intrastate household goods operating authority. The following must be submitted to KTC: (1) Application; (2) filing fee; (3)



certificate of good standing, if applicant is a corporation; (4) Kentucky process agent, if applicant is a foreign corporation; and (5) financial statement. The section also addresses, among other things, (a) temporary authority applications; (b) approval of transfer of certificates; and (c) registration of *interstate* operation authority with KTC. [Emphasis added.]

601 KAR 1:045 describes the requirements for motor carrier operating authority (a) renewal applications; and (b) merger and re-issuance of certificates.

601 KAR 1:050 authorizes KTC to approve the rates, charges, and rules of carriers and prescribes the form of tariffs for carriers.

601 KAR 1:060 contains general rules governing tariffs and supplements. Provisions are included respecting (1) tariffs for carriers; (2) tariff rules; and (3) tariff publishing agencies. The regulation includes, among other things, the following provisions:

1. tariffs and supplements must be received at KTC at least 30 days prior to the proposed effective date;
2. 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.
3. specific provisions governing the form and size of tariffs and information included in tariffs;
4. 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;**
5. carrier's 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.**
6. a tariff "title page" must contain a substantial number of items of specific information including (a) tariff consecutive number, preceded by "KYTD"; (b) tariff numbers of previously filed tariffs that have been canceled by this tariff; (c) tariff supplement numbers of supplement numbers of previous supplements being canceled or changed; (d) name of carrier or agent issuing tariff; (e) description of territory or points between which tariff applies; (f) classification information where tariff names rates by classes; (g) date issued and date effective; (h) the (i) name, (ii) title, (iii) street address, and (iv) town, of the (a) carrier, or (B) agency, by whom the tariff is issued, and (i) rates may be shown on the title page of a single page tariff.
7. tariffs must contain the following: (a) table of contents; (b) list of participating carriers, where applicable; (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.

8. powers of attorney and concurrences must be provided to a tariff publishing agent and filed with KTC;
9. an Adoption Notice must be filed with KTC upon sale or other disposition of a motor carrier certificate;
10. tariff rules affecting common carriers of property and irregular route common carriers of specific commodities may include items regarding the following: (a) reasonable joint through rates; (b) commodity rates & exception ratings; (c) interchange of freight; (d) bill of lading; (e) collection of freight charges; and (f) handling of c.o.d. shipments.

601 KAR 1:060(5) requires that “[all] tariff publishing agencies doing business in Kentucky and publishing Kentucky intrastate rates, fares, or charges shall file a statement giving the name of the manager or secretary of such agency.

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

1. at or immediately prior to the time of filing the tariff or supplement containing the proposed changes 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;**
2. **“[s]imilar notice must be given to any shipper or interested party requesting same”;** and
3. **“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 increases, 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.”** [Emphasis added.]

601 KAR 1:070(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:

- (A) regular and irregular route common carrier truck operators (which includes household goods carriers), and (B) tariff publishing agencies (such as Respondent) must maintain a list of (i) shippers, and (ii) interested parties;
2. 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;
3. once on the list, any such shipper or interested party must be provided with notice of any change in rates; and
4. the department may provide carriers or tariff publishing agencies with

lists of interested persons who must be provided with notice of tariff changes.

601 KAR 1L075 contains rules governing the presentation and handling of claims for loss and damage to transported property by regular and irregular route common carriers (i.e., household goods carriers.)

610 KAR 1:080(1) contains provisions relating to the determination of weights by household goods carriers. The subsection includes specific requirements relating to (1) tare weight; (2) gross weight; (3) net weight; (4) constructive weight; (5) part loads; and (6) driver's weight certificate.

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

1. charges for accessorial and terminal services must comply with the tariff filing requirements of 601 KAR 1:060;
2. tariffs establishing such charges must separately state each service to be rendered and the charge therefore;
3. 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;
4. charges established for packing and unpacking shall be in amounts per container;
5. charges for other services shall be stated on a unit or hourly basis, as appropriate;
6. **"[n]o charge so established shall be lower than the cost of providing the service";**
7. the rate for transportation of goods shall not include the charge for any accessorial service; and
8. **"no such services other than those for which separate charges have been so established shall be rendered by any such carrier."**  
[Emphasis added.]

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

601 KAR 1:080(4) one household goods carrier as acting as agent for another household goods carrier where the agent has rates for the same service that would be different than those of the principal carrier.

601 KAR 1:080(5) contains detailed requirements (a) outlining the circumstances under which a household goods carrier may procure "all-risk insurance" for shipper, (b) the effect of insurance of the liability of the carrier for loss or damage with respect to the shipment; and (c) the purchase of liability insurance by a household goods carrier with respect to the goods which its transports.

601 KAR 1:080(6) contains provisions relating to the issuance of a Bill of Lading, at the time of receipt of goods for transportation by household goods carriers, and the information which must be

included thereon.

601 KAR 1:0808(7) contains provisions relating to the issuance of a Freight Bill, at the time of delivery of goods by household goods carriers, and the information which must be included thereon.

601 KAR 1:080(8) provides that a common carrier may not contract to avoid its common law liability as a carrier.

601 KAR 1:080(9) contains provisions governing the providing of estimates for households goods transportation services to shippers. The requirements for a household goods carrier's estimate include the following:

1. the estimate can be made only after a visual inspection of the goods by the estimator;
2. the estimate must be on a form approved by KTC;
3. the estimate form must be fully executed in accordance with the instructions thereon;
4. the original or a legible copy of the estimate form must be delivered to the shipper;
4. a copy of the estimate must be maintained by the carrier as part of the records of the shipment;
6. the shipper is not required or permitted to sign an "Estimated Cost of Services" Form;
7. carriers may furnish documents to assist the shipper in the estimating process including a form containing average weights of pieces of furniture provided that if an average weight is used, the weight must be seven (7) pounds per cubic foot;
8. the carrier must comply with requirements regarding notification regarding actual weight and changes on a shipment;
9. notice must be given to the shipper where charges exceed estimate by more than ten per cent (10%);
10. quarterly reports of underestimates must be filed with KTC;
11. re-weigh requests must be complied with by the carrier; and
12. estimates for moving charges may not be shown on certain types of enumerated forms customarily used by household goods carriers for other purposes.

601 KAR 1:080(10) prohibits a household goods carrier from advancing charges to a warehouseman or other person, except on consent of the shipper.

601 KAR 1:080(11) requires household goods carriers to provide prospective shippers with a KTC approved document entitled "Important Notice to Shippers of Household Goods" prior to the time of the move.

601 KAR 1:0808(12) prohibits a household goods carrier from accepting a household goods shipment for transportation which appears to be subject to the minimum weight provision in the carrier's tariff without first notifying the shipper of this fact.

601KAR 1:095 describes procedures pursuant to which any interested person may file a complaint concerning any matter as to which KTC has jurisdiction.

601 KAR 1:101 contains insurance documentation filing requirements for motor carriers holding certificates issued by KTC.

**Evidence Provided by the Kentucky Transportation Cabinet conclusively Demonstrates that the private conduct Challenged in the Complaint is "Actively Supervised" and Satisfies the second Prong of the Midcal Test.**

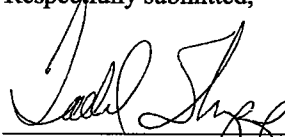
Reference is made to Respondent Association's Findings of Fact & Conclusions of Law filed earlier herein for a complete description of the evidence which confirms the satisfaction of "Active Supervision".

#### **CONCLUSION**

For all the foregoing reason, Respondent respectfully requests that the Administrative Law Judge enter an Order dismissing the Complaint herein, and that the Administrative Law Judge grant such other and further relief as shall be appropriate.

Dated: Frankfort, KY  
June 15, 2004

Respectfully submitted,



J. Todd Shipp, Assistant General Counsel  
Susan P. Chaplin, Staff Attorney  
Kentucky Transportation Cabinet  
200 Mero Street  
Frankfort, KY 40601  
(502) 564-7650  
(502) 564-5238

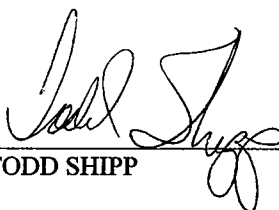
**CERTIFICATE OF SERVICE**

This is to certify that on June 15, 2004, I caused the original and two copies of the Post Trial Brief to be served upon the following person by US Mail:

Office of the Secretary  
Federal Trade Commission  
Room 159  
600 Pennsylvania Ave., NW  
Washington, DC 20580  
FAX (202) 326-2496

For filing; and a true copy was sent by first-class mail, postage pre-paid to:

Hon. Richard B. Dagen  
Associate Director  
Federal Trade Director  
601 New Jersey Ave  
Rm 6264  
Washington, DC 20580

  
\_\_\_\_\_  
J. TODD SHIPP