UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

COMMISSIONERS: **Deborah Platt Majoras, Chairman**
Mozelle W. Thompson
Orson Swindle
Thomas B. Leary
Pamela Jones Harbour

In the Matter of	)	
KENTUCKY HOUSEHOLD GOODS CARRIERS ASSOCIATION, INC.,	)	**Docket No. 9309**
a corporation.	)	

ANSWERING BRIEF OF COUNSEL SUPPORTING THE COMPLAINT

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Bureau of Competition
Federal Trade Commission
Washington, D.C. 20580

Dated: August 31, 2004

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

FEDERAL STATUTES & REGULATIONS

STATE STATUTES & REGULATIONS

MISCELLANEOUS

GLOSSARY OF ABBREVIATIONS AND RECORD REFERENCES

References in this memorandum are made using the following abbreviations:

Kentucky Association	Kentucky Household Goods Carriers Association, Inc.
KTC	Kentucky Transportation Cabinet
Complaint	Complaint of the Federal Trade Commission, Dkt. No. 9309, July 9, 2003
Answer	Respondent's Answer, August 20, 2003
PHC Tr.	Pre-hearing Conference Transcript, March 16, 2004
Trial Tr.	Trial Transcript, March 16, 2004
Closing Tr.	Transcript of Closing Argument, May 19, 2004
ID	Initial Decision, June 21, 2004
IDF ¶	Initial Decision Finding of Fact
RPL ¶	Initial Decision Relevant Provision of Law
Resp. App.	Respondent's Appeal Brief, July 30, 2004 (joined by KTC)
CX	Complaint Counsel's Exhibit
RX	Respondent's Exhibit
JX	Joint Exhibit
Debord, Dep.	Deposition Testimony of William Debord, November 13-14, 2003
King, Dep.	Deposition Testimony of Denise King, November 12, 2003
Mirus, Dep.	Deposition Testimony of A.F Mirus, November 18-19, 2003
Tolson, Dep.	Deposition Testimony of Dennis Tolson, December 15-16, 2003
CC Reply	Complaint Counsel's Post Trial Reply Memorandum of Law in Response

	to Respondent's and Intervenor's Post Trial Briefs, April 16, 2004
RFF ¶	Respondent's Proposed Findings of Fact, April 2, 2004
Respondent's Admission	Respondent's Response to Complaint Counsel's Requests for Admissions, November 19, 2003
States' *Amici* Brief	Brief of *Amicus Curiae* of Wisconsin, Kentucky *et al*., *FTC v. Ticor Title Ins. Co.,* 504 U.S. 621 (1992) (No. 91-72)
Oregon	Complaint Counsel's Opposition to Respondent Kentucky Association's Motion in Limine to Exclude Oregon Documents, February 10, 2004

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I. INTRODUCTION

On June 12, 1992, the United States Supreme Court handed down its landmark decision in *FTC v. Ticor Title Insurance Co.*, 504 U.S. 621 (1992) ("*Ticor*"). Rejecting a lower court ruling that minimal state regulatory review shielded private price-fixing under the state action defense, the *Ticor* Court ruled that the defense applies only where a state takes the necessary steps to supervise the specific prices proposed by the private parties. The Initial Decision ("ID") heeded the Supreme Court's command that the state action defense applies only when states actively supervise private price-fixing, and rejected Respondent's assertion that the defense applies where the state does little more than passively rubber stamp privately-set prices. The

Commission should affirm the ID.

Respondent Kentucky Household Goods Carriers Association, Inc. ("Respondent" or "Kentucky Association") is a rate bureau made up of 93 firms that move household goods in Kentucky. The Kentucky Association prepares a tariff setting prices these would-be competitors must charge consumers. The tariff is a horizontal agreement on price and a *per se* violation of the antitrust laws. ID at 29-31.

The Kentucky Association tariff is filed with the Commonwealth of Kentucky – specifically with the Kentucky Transportation Cabinet ("KTC"). KTC stamps the tariff received, but does little else. It does not gather economic data on movers, it does no cost studies, it does not have standards in place to measure the level of the rates, it does not require movers to justify requests for rate increases, it does not hold hearings on rates, and it issues no written opinion explaining why it allows movers' rates to take effect. It has allowed 82 rate increases to go into effect as proposed by the movers. Respondent's Appeal Brief ("Resp. App.") at 6; ID at 46.

The ID carefully reviews the leading Supreme Court active supervision cases, including *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980) ("*Midcal*") and *Ticor* and properly concludes that, "The evidence presented by Respondent falls *far short* of the 'active supervision' required by *Midcal*, *Ticor* and other relevant cases." ID at 46 (emphasis added). The Administrative Law Judge ("ALJ") also finds that "Respondent cites no case where such a minimal level of state activity has been held to constitute active supervision." *Id*. That failure persists in Respondent's Appeal Brief, which is not only devoid of relevant case law, but also fails to articulate how the facts in the record can constitute active supervision under the rigorous standard set forth in *Ticor*. Instead, Respondent appears to attempt to revive the

standard for active supervision established in *New England Motor Rate Bureau, Inc. v. FTC*, 908 F.2d 1064 (1st Cir. 1990) (state program is in place and funded) which was explicitly rejected as inadequate by the Supreme Court in *Ticor*. The Commission should deny Respondent's appeal and uphold the teaching of *Ticor* by affirming the ALJ's decision. The Commission should also issue the order proposed by the ALJ (with minor modification as explained below) barring future price-fixing.

II. STATEMENT OF THE CASE

A. STATEMENT OF THE FACTS.

1. THE KENTUCKY ASSOCIATION ESTABLISHED COLLECTIVE RATES FOR MOVERS.

The Kentucky Household Goods Carriers Association, on behalf of its 93 members, prepares a collective tariff for intrastate household goods moving in Kentucky. IDF ¶¶ 7, 10, 14. The tariff, which binds all association members, has several sections. IDF ¶¶ 16, 18, 19. One contains the rates movers must charge for "local" moves – moves within 25 miles of a carrier's situs. IDF ¶ 18. Local rates are either charged at a flat rate per room or determined by hourly fees for labor and equipment. *Id.* Another section of the tariff specifies the rates movers must charge for intrastate moves of more than 25 miles ("intrastate rate"). These rates are established under Section II of the tariff as a function of the distance traveled and the total weight of the shipment. *Id.* There is considerable uniformity among Respondent's members with respect to the schedule of prices within Section II to which they agree to adhere. IDF ¶ 31 (*citing* CX 1 at KTC 1901-66; CX 2 at KHGCA 6936-6947; Respondent's Admission ¶¶ 40, 41; JX 1 ¶¶ 24-26).

Respondent's members also have agreed to establish a "peak" season that runs from May 15th through September 30th, during which the rates in the tariff are increased ten percent. IDF ¶

35 (*citing* 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)). Another section of the tariff sets rates that are added to the customer's bill for additional services, such as packing, moving particular bulky or heavy items, and moves involving flights of stairs. IDF ¶ 19 (*citing* JX 1 ¶ 15). The members agree that "overtime" constitutes any packing or unpacking performed on weekends or after 5 p.m. weekdays. *Id*. (*citing* CX 2 at KHGCA 7007). The tariff's terms are precise. For example, packing a "Drum, Dish-Pack" costs $14.60 regular time and $20.40 on overtime. *Id*. (*citing* CX 2 at KHGCA 6977; JX 1 ¶ 16). Packing a wardrobe carton costs $3.60 regular time and $4.95 overtime. IDF ¶ 20 (*citing* CX 1 at KTC 2001; CX 2 at KHGCA 6977; JX 1 ¶ 16). Moving an automobile is $134.70 and moving jet skis costs $84.15. IDF ¶ 30 (*citing* (CX 1 at KTC 2026; CX 2 at KHGCA 6989; Respondent's Admission ¶¶ 30-31, 35; JX 1 ¶¶ 20-23).

Respondent regularly institutes collective increases in the tariff rates. Such increases can be instituted either by Kentucky Association's Board of Directors or through a vote of the general membership. IDF ¶ 25 (*citing* CX 117 (Mirus, Dep. at 62-63); CX 15; JX 1 ¶ 13). For example, on October 13, 1999, Respondent sought a 10% increase in the intrastate transportation rates then in effect. *Id*. (*citing* CX 19; Respondent's Admission ¶ 23). Similarly, on October 11, 2000, Respondent's members agreed to seek an 8% increase in the intrastate transportation rates then in effect. IDF ¶ 26 (*citing* CX 15; Respondent's Admission ¶ 24).

The ID contains a table of examples of rate increases that the Kentucky Association has instituted over the past ten years. IDF ¶ 27 (*citing* CX 10-12, 14-30, 32-40). These rate increases add up to a 53.5% increase in the intrastate rate for the ten year period. Over the course of an earlier five year period, annual meeting minutes of the Kentucky Association dated

April 26, 1985, noted that, "Rates have increased 42% since 1980." IDF ¶ 28 (*citing* CX 44; JX 1 ¶ 19).

The Kentucky Association takes steps to orchestrate changes in the tariff. Information about movers' rates is circulated to the other members prior to the time the final price level selections are sent to the KTC. IDF ¶¶ 21-23. Kentucky Association movers use this information to keep rates elevated. IDF ¶ 33 (*citing* CX 49-50 ("We can raise our rates and still be in direct competition with the other moving companies.")). On at least one occasion, Respondent exerted pressure to keep a mover from making a change in the price terms of the tariff. 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, since in effect, Boyd was decreasing price. The head of the Kentucky Association's Tariff Committee (Mr. Mirus) called Mr. Buddy Boyd of Boyd Movers and urged him not to file his exemption. According to Mr. Mirus's detailed notes of his conversation, Mr. Mirus told Mr. Boyd that his proposed change "was in conflict with provisions of the tariff," and:

> [a]lso requested that [Boyd] 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.

IDF ¶ 32 (*citing* CX 48; CX 129 (Tolson, Dep. at 212-17)).[1]

2. KENTUCKY STATUTES REGARDING HOUSEHOLD GOODS CARRIERS.

[1] It is difficult to reconcile Respondent's statement that, "[t]here is no evidence that the Kentucky Association has ever put 'pressure' on any Member" (Resp. App. at 7) with this finding.

Several Kentucky statutes relate to the household goods industry. One statute, KY. REV. STAT. ANN. § 281.680, requires that all movers file a tariff with the KTC. RPL ¶ 11. In addition, there are several statutory provisions that establish guidelines for the level of the rates movers must charge. One Kentucky statute requires transportation officials to regulate all motor carriers in order "to encourage the establishment and maintenance of reasonable charges for such transportation service, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices." KY. REV. STAT. ANN. § 281.590. RPL ¶ 5 (*citing* RX 74). That statute also declares that it is state policy to have the KTC ensure that rates provide for "economical and efficient service." *Id.* KY. REV. STAT. ANN. § 281.690(2) provides that if the KTC believes that a proposed tariff is unreasonable, it may hold a hearing. RPL ¶ 16 (*citing* RX 82). If, at the hearing, the KTC were to find that the tariff is "unjust, unreasonable, or unjustly discriminatory," it must set an alternative rate that is "just and reasonable." *Id.* And KY. REV. STAT. ANN. § 281.695(1) states that if, after a hearing, the KTC were to determine that the rates are "excessive," it may "determine the just and reasonable rate." RPL ¶ 17 (*citing* RX 83); *see also* Resp. App. at 7.

Under KY. REV. STAT. ANN. § 281.685, movers must charge the exact rate set by the tariff – no discounting is permitted. RPL ¶ 14 (*citing* RX 81); *see also* Resp. App. at 7. Nevertheless, Respondent's members often try to offer discounts to consumers. IDF ¶¶ 36-40. For example, a letter from A. Arnold, a Kentucky Association member, complained that a competitor was offering a 52% discount. A. Arnold brought this matter to the state's attention in a letter stating, "[w]e at A. Arnold appreciate and respect fair and honest competition. However, in our regulated state we do not condone dishonest business practices." IDF ¶ 37 (*citing* CX 5;

CX 6; CX 116 (Debord, Dep. II at 40-41); JX 1 ¶ 34). Two other movers also attempted to discount 30% off the collective rates in the tariff. IDF ¶¶ 38-39 (*citing* CX 7- CX 8; CX 116 (Debord, Dep. II at 44-47)).

3. THE KENTUCKY TRANSPORTATION CABINET PROVIDED MINIMAL SUPERVISION OF RATES.

Although decades ago KTC did undertake some supervision of rates, KTC currently provides minimal supervision. Indeed, in a cover letter accompanying the Kentucky Association's document production, Respondent's counsel during the investigation of this matter stated that no meaningful supervision of filed tariffs is undertaken:

> The state has never formally or informally commented, discussed, criticized, or audited any of the KHGCA filings under any Kentucky statute or regulation. And, the state does not grant official or unofficial conclusions regarding the tariff besides stamping each of the filings as approved.

CX 110. Counsel had the facts about right, as detailed in the ID and summarized below.

a. Once Upon a Time the KTC Reviewed Tariff Rates.

Decades ago, the KTC had a staff of three auditors plus other employees who took substantial steps to oversee household goods movers. IDF ¶¶ 42-46. At that time, KTC required all household goods movers to file detailed annual financial reports containing cost and expense data. IDF ¶ 42 (*citing* CX 104; RX 129; CX 116 (Debord, Dep. II at 82-83, 86-89)). These reports were routinely audited in the 1970's and 1980's. *Id*. In fact, in the 1960's Respondent considered hiring a consultant to prepare information for the state because, "[i]t was decided that due to the amount of information which maybe required by D.M.T. [KTC's predecessor state transportation department], it would be feasible and probably more economical to call in an outside rates firm . . . ." CX 107. The expert under consideration by the Kentucky Association

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 . . . and . . . costs, 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." IDF ¶ 43 (*citing* CX 106).

During this earlier period, KTC took the information required to be submitted by regulated carriers and performed an analysis of the economic condition of the industry. KTC would routinely perform "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." IDF ¶ 44 (*citing* CX 116 (Debord, Dep. II at 72-73)). This information was compiled on a spreadsheet which contained the calculated operating ratios for all household goods movers. IDF ¶ 45 (*citing* CX 116 (Debord, Dep. II at 88-89); JX 1 ¶ 48). Long time KTC employee William Debord was involved in deriving movers' operating ratios, and he would then prepare monthly written reports to the Commissioner analyzing rate applications. IDF ¶ 46 (*citing* CX 116 (Debord, Dep. II at 74-76).

b. The KTC Now Commits Limited Resources to Reviewing Tariffs.

The KTC's involvement in rate supervision has fundamentally changed since those early days, however. Sometime in the 1980's, when Mr. Debord was still preparing monthly written reports analyzing rate applications, the Commissioner told Mr. Debord "not to bother them with

those things." IDF ¶ 47 (*citing* CX 116 (Debord, Dep. II at 76-77); JX 1 ¶ 47).[2] Over the years, the KTC's review of household goods matters has evaporated.

KTC's review of household goods matters currently resides with its Division of Motor Carriers. At the time the Commission issued its Complaint in this case, Ms. Denise King was the director of the Division of Motor Carriers. IDF ¶ 49. Ms. King had never discussed household goods moving rates or standards for reviewing rates with her superior and had never received any written instructions from her superior regarding how rates contained in the tariff should be analyzed. IDF ¶ 52 (*citing* CX 115 (King, Dep. at 39-40)). Ms. King, who spent only one to two percent of her time on household goods matters, testified that Mr. Debord was responsible for the KTC's program with respect to household goods tariffs. IDF ¶ 50 (*citing* CX 115 (King, Dep. at 9, 14-15)). Ms. King never discussed with Mr. Debord any standards to determine whether movers' rates met the state's statutory goals. IDF ¶ 53 (*citing* CX 115 (King, Dep. at 43-45).

Mr. Debord has had responsibility for household goods matters since 1979. He is now a part-time employee, working a total of 100 hours per month. IDF ¶ 54 (*citing* CX 116 (Debord, Dep. I at 11-12); JX 1 ¶ 30). In addition to household goods matters, the KTC has tasked Mr. Debord with responsibility for tariff filings and other matters involving passenger carriers such as taxis, regular route busses, airport limousines, airport shuttles, and charter bus operation as well as trucking matters in general. IDF ¶ 60 (*citing* CX 116 (Debord, Dep. II at 15); JX 1 ¶ 31).

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[2] Respondent states that the KTC changed the way it regulated rates after the Federal deregulation of most trucking rates (the ICC Termination Act). Resp. App. at 40. But the Kentucky Association does not explain why KTC reduced its level of regulation of matters still under state jurisdiction – intrastate household goods movers – in response to a federal law that decreased state regulation of trucking of non-household goods.

Mr. Debord has many responsibilities involving household goods matters. The bulk of his time, however, is spent working on matters other than reviewing the rates contained in movers' tariffs. Mr. Debord spends time investigating unlicensed movers, conducting seminars, updating power-of-attorney forms, and handling inquiries from the public. IDF ¶ 59. By far the bulk of his time, in fact more than 50% of his time, is devoted to "compliance audits" which are on-site visits to make sure movers are not offering discounts to consumers. IDF ¶ 58 (*citing* JX 1 ¶ 33; CX 116 (Debord, Dep. II at 21); CX 116 (Debord, Dep. I at 103-04)).

Mr. Debord confirmed Ms. King's testimony that he does not get any guidance from his superiors about tariff issues, and he has not reported to anyone in that regard since 1979. IDF ¶ 61 (*citing* CX 116 (Debord, Dep. II at 26-27); CX 115 (King, Dep. at 20-21; 23; 30-31)). No one at the KTC other than Mr. Debord deals with household goods tariffs – no employees report to Mr. Debord. IDF ¶ 62.

c. The KTC Does Not Collect Adequate Data.

Even though KY. REV. STAT. ANN. § 281.680(4) dictates that the KTC's collective rate-making procedures "shall assure that the respective revenues and costs of carriers . . . are ascertained," (RPL ¶ 13 (*citing* RX 80)), the KTC does not require household goods movers to submit cost and expense data to the state. Movers do not routinely submit balance sheets and income statements to the KTC. IDF ¶ 63 (*citing* CX 116 (Debord, Dep. II at 53-54); CX 115 (King, Dep. at 32); CX 129 (Tolson, Dep. at 48)). KTC does receive "a limited number" of movers' financial statements on a voluntary basis. However, Mr. Debord testified that such filings are so unreliable that they could "misrepresent the industry's economic conditions." *Id.*

(*citing* CX 116 (Debord, Dep. II at 82-83)).

Mr. Debord visits movers' offices to make sure that they are not offering discounts to consumers. However, during these visits he only looks at documents that movers keep on individual moves. He does not routinely 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. IDF ¶ 72 (*citing* CX 116 (Debord, Dep. II at 78-81)).[3] Mr. Debord has attended some Kentucky Association board meetings where proposed rate increases were discussed prior to filing them with the KTC. IDF ¶¶ 69-71. However, the information available to Mr. Debord at the Kentucky Association meetings was only of a most general nature. IDF ¶¶ 70-71. Movers do not disclose details about their costs, expenses or profit margins at Kentucky Association meetings. IDF ¶ 70. Mr. Tolson, President of the Kentucky Association, testified about the lack of specific information disclosed in the verbal discussions that take place at Kentucky Association's board meetings: "you have to understand that these are -- men and women are competitors with one another, too, so that a lot of, you know, exact detailed financial information is not made available to -- for public consideration at that point." *Id*. (*citing* CX 129 (Tolson, Dep. at 133)). Mr. Tolson's testimony makes clear that movers would not disclose at meetings such information as the exact wages they pay their

[3] The Kentucky Association also does not compile accurate data on movers' costs. IDF ¶¶ 65-66. The only attempt Respondent makes to obtain financial information from its members is when members file for an exception to an item in the tariff. In those instances, the Kentucky Association requires the carrier to fill out a Form 4268. These forms are received by the Kentucky Association's Tariff Committee, but are not routinely filed with the KTC. IDF ¶ 66 (*citing* CX 12 - CX 13; CX 116 (Debord, Dep. II at 62-65)). These documents are largely devoid of data. Respondent's member firms have changed their rates without even filling out the "justification" section of the form and other forms have only minimal information. IDF ¶ 86 (*citing* CX 57 - CX 103; JX 1 ¶ 28; CX 129 (Tolson, Dep. at 65)).

workers, their actual cost of obtaining supplies such as boxes, or their margins on selling a box to a customer. Similarly, vendors, who are associate members of the Kentucky Association, do not divulge actual invoices showing what movers paid for their goods or services. IDF ¶ 71 (*citing* CX 129 (Tolson, Dep. at 123, 127, 238-39)).

d. The KTC Does Not Require Justification of Rate Increases.

When Respondent seeks a rate increase, it submits a list of the changes it is making and, at most, a cover letter requesting that the increase be permitted to take effect. ID at 42. Respondent does not submit, nor does the KTC require, any business records, economic study, or cost justification data. IDF ¶ 75 (*citing* CX 116 (Debord, Dep. II at 72-74, 109, 111-12, 115-16, 119-20, 124-26)). The ID discusses examples of collective rate increases. For instance, in December 2000 Respondent filed Supplement 66 which sought an 8% *intra*state rate increase.[4] The written justification for that increase was a cover letter, which Mr. Debord characterized as an "extra courtesy" because tariff filings were not normally accompanied by such a letter. IDF ¶ 83 (*citing* RX 169; CX 116 (Debord, Dep. II at 97-101)). The letter stated that the *inter*state rates had increased by 5%.[5] Mr. Debord also could not recall any oral statements made to justify the 8% rate increase reflected in this filing. Nevertheless, the rate increase was allowed to go

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[4] A general rate increase will involve adjusting upward hundreds of prices contained in the tariff's rate charts. Mr. Debord merely checks a few of the numbers for mathematical accuracy. And he even conceded in his testimony that "I'm sure there might be some math errors that arrive based upon not checking and auditing." IDF ¶ 93 (*citing* CX 116 (Debord, Dep. II at 137- 40)).

[5] Interstate movers publish a tariff. However, the *inter*state tariff is not federally approved, nor is there any evidence showing the basis for the rates contained in that tariff. Moreover, the rates in the interstate tariff bear no relationship to the actual price to consumers because interstate movers discount from the posted rates. IDF ¶¶ 98-102.

into effect. *Id*. (*citing* RX 169; CX 116 (Debord, Dep. II at 102-03, 105)).

In 1999 Respondent filed Supplement 61, seeking a 10% increase in *intra*state rates. There was no written justification provided to the state other than the cover letter which discussed a 5% *inter*state rate increase. IDF ¶ 84 (*citing* RX 164; CX 116 (Debord, Dep. II at 112)). Similarly, in March 2002 Supplement 71, Respondent filed for a 5% increase on additional items contained in the tariff, such as the added cost of moving a car which increased from $128.30 to $134.70. Mr. Debord could not recall any justification for that increase. IDF ¶ 82 (*citing* CX 116 (Debord, Dep. II at 119-120); CX 10).

Mr. Debord, Kentucky Association President Tolson, and Tariff Committee Chairman Mirus all were questioned extensively about justifications for rates increases and none could recall which rate increases had been discussed with the KTC or what specific factors were reviewed when movers sought rate increases. Mr. Debord was asked about justifications for two specific general rate increases, as well as rate increases for additional charges in the tariff, charges by individual movers, and he was also asked generally whether he recalled justifications given for any general rate increase. He had no recollection of any of these matters. CX 116 (Debord, Dep. II at 101-102, 111-113, 115-116, 120, 142). Similarly, Mr. Tolson and Mr. Mirus were questioned about specific rate increases and general rate increases and were given an opportunity to discuss any justifications for rate increases they could recall; they could not recall any specific justifications offered to the KTC. CX 129 (Tolson, Dep. at 139, 140-141, 143, 155, 239-240); CX 117 (Mirus, Dep. at 60,151-152, 196-197, 203-204, 209-211).[6]

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[6] The citations in the text are to testimony elicited by Complaint Counsel. Respondent's Counsel also questioned these witnesses about justifications for rate increases or was given the opportunity to do so. *See, e.g.*, CX 116 (Debord, Dep. I at 49); CX 129 (Tolson,

Mr. Debord attended some Kentucky Association board meetings where informal justifications for rate increases were offered. IDF ¶¶ 76-81. However, like cost and expense information, no specific information about the need for rate increases was provided at the meetings. IDF ¶ 80 (*citing* to IDF ¶ 70 which cites to CX 129 (Tolson, Dep. at 133)). Instead, Kentucky Association Tariff Committee Chairman Mirus would "tell [Mr. 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." In response to Mr. Mirus's statement that costs had gone up, Mr. Mirus testified that "[m]any times [Mr. Debord] would say file the tariff and we will take it from there." IDF ¶ 79 (*citing* CX 117 (Mirus, Dep. at 153)).

e. The KTC Does Not Analyze Rates or Rate Increases Under any State Standard.

The Kentucky legislature requires that the rates movers charge must be, among other things, reasonable and not excessive. RPL ¶¶ 9, 17. In the past, KTC analyzed movers' operating ratios based on income and expense data it collected. IDF ¶ 45. Currently, however, the KTC has no standards or measures in place for determining whether the rates they allow to go into effect meet these legislative norms. IDF ¶¶ 87-92. As Mr. Debord stated, there is no "written rule within the Cabinet that requires specific standards to be followed." IDF ¶ 89 (*citing* CX 116 (Debord, Dep. II at 36-37)). Similarly, the state does not have any way of knowing whether a rate increase will increase movers' profits or result in rate levels that violated the statute's requirement that prices cannot be "excessive." IDF ¶¶ 88-92 (*citing, inter alia,* CX

Dep. at 222-226); CX 117 (Mirus, Dep. at 225).

116 (Debord, Dep. II at 105-106, 108-109)).

f. The KTC Does Not Issue Written Decisions.

The KTC does not issue a written decision on Respondent's tariff filings. IDF ¶ 95 (*citing* CX 116 (Debord, Dep. II at 77-78); CX 115 (King, Dep. at 34); CX 129 (Tolson, Dep. at 56, 130)) When the Kentucky Association institutes a change to the tariff – typically the change involves an increase in rates – it informs Mr. Debord of the change, and he stamps the document requesting the change "received." After 30 days, if the KTC has not acted, the change takes effect. As Mr. Debord testified, "no action is approval." IDF ¶ 94 (*citing* CX 116 (Debord, Dep. II at 58-60)).[7] When Respondent submitted a price increase in 1994, the Association's notes of the filing bluntly stated: "Take to Bill Debord for acceptance stamp." IDF ¶ 94 (*citing* RX 102). Aside from stamping the document received, there is no statement issued by the KTC explaining why it permits the movers to increase prices to consumers. IDF ¶ 95 (*citing* CX 129 (Tolson, Dep. at 130)).

g. The KTC Does Not Hold Hearings.

Since the hearings in the 1950's or 1960's, when the state first approved the Kentucky Association's tariff, the state has not held any hearings to examine or analyze the collective rates contained in the Kentucky Association tariff. IDF ¶ 96 (*citing* 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); *see also* Resp. App. at 9. The KTC also does not receive any informal input from groups advocating on behalf of consumers. Kentucky Association meetings are not open to the public and have never been

[7] As was the case in *Ticor*, Kentucky law establishes a "negative option" system where the private rates take effect unless the state affirmatively acts. KY. REV. STAT. ANN. § 281.690; *Ticor,* 504 U.S. at 629. Respondent's statement that rates "become effective by reason of the approval of KTC" is misleading to the extent it suggests that the KTC takes some affirmative step prior to the rates becoming effective. Resp. App. at 6.

attended by members of the public. IDF ¶ 97 (*citing* CX 129 (Tolson, Dep. at 145)).

The Kentucky legislature has identified hearings as one of the ways the KTC is expected to review rates. ID at 45 (*see, e.g.*, RPL ¶ 8, *citing* KY. REV. STAT. ANN. § 281.640; RPL ¶ 16, *citing* KY. REV. STAT. ANN. § 281.690(2); RPL ¶ 17, *citing* KY. REV. STAT. ANN. § 281.695(1)). However no hearings have ever been held.

Kentucky administrative regulation, 601 KY. ADMIN. REG. ("KAR") 1:070(c), contains requirements that must be followed if a mover increases its tariff rates. The regulation mandates that movers: "cause a notice to be printed in a newspaper of general circulation in the area of his situs" so "that any interested party may protest said increase by filing a protest with the Transportation Cabinet." RPL ¶ 22 (*citing* RX 96). There is no evidence that any such notices have ever been published in newspapers. ID at 39.

B. PROCEEDINGS BELOW

The Commission issued its complaint in this matter on July 9, 2003, charging Respondent and its members with establishing and maintaining collective rates for the transportation of household goods in violation of Section 5 of the Federal Trade Commission Act. In its Answer, Respondent denied that its actions constituted a horizontal agreement to fix prices. ID at 2. Respondent raised the state action doctrine as an affirmative defense, claiming that Respondent's actions were actively supervised by the Commonwealth of Kentucky. Answer at 2.[8]

On February 23, 2004, over seven months after the issuance of the Complaint, the KTC

[8] Respondent filed a motion for summary decision on December 19, 2003, which was denied on February 26, 2004, because the ALJ found that the issue of whether the challenged conduct was actively supervised by the Commonwealth of Kentucky was a genuine issue of material fact. ID at 2.

filed a motion to intervene as a Respondent. On March 10, 2004, the motion was granted and KTC was permitted to offer evidence and testimony at the hearing, subject to certain limitations. KTC was aware of the date of the final prehearing conference and trial but chose not to attend. ID at 3.[9]

The trial was held on March 16, 2004. Complaint Counsel and Respondent's Counsel presented opening statements. No witnesses were called to testify during the trial because the parties had stipulated that the video deposition transcripts of the key KTC officials, Denise King and William Debord, as well as the transcripts of the key Kentucky Association officials, Dennis Tolson and A. F. Mirus, could be used in lieu of live testimony. ID at 3.

On June 21, 2004, the ALJ issued the Initial Decision. The ALJ found that Respondent's filing of a tariff containing collective rates for competing household goods movers was a *per se* illegal horizontal agreement on price. ID at 29-31. The ALJ also found that Respondent's illegal agreement was not shielded from antitrust liability under the state action defense because KTC failed to actively supervise Respondent's conduct. ID at 34-47. Respondent has appealed.

III. ARGUMENT

The ID properly found that the Kentucky Association engaged in *per se* illegal price-fixing by preparing and filing a tariff containing collective rates for movers. The ID unnecessarily concluded that a *per se* analysis required a determination of a product market and a geographic market. (Section A. below) The ID properly concluded that the KTC review of tariffs falls far short of the law's requirement of active supervision. (Section B. below) Official

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[9] KTC did file a post trial brief. It contained "two conclusory sentences asserting that the KTC actively supervised tariffs." ID at 46. Respondent states that KTC's position was made "dramatically by its effort to participate in this proceeding." Resp. App. at 2.

records of the State of Oregon proffered but not admitted below further illustrate, by way of contrast, the inadequacy of KTC's supervision of tariffs. (Section C. below) The ID properly notes that the KTC has intervened in this matter but that intervention alone does not establish active supervision. (Section D. below)

The ID properly contains a cease and desist order barring Respondent from future price-fixing. The order, however, did not contain a "sunset" provision in keeping with Commission policy. (Section E. below) At the pretrial conference in this matter, the ALJ properly excluded unreliable hearsay offered by Respondent. (Section F. below)

A. THESE HORIZONTAL AGREEMENTS ON PRICE ARE *PER SE* ILLEGAL.

Agreements among competitors to fix or set prices historically have been 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); ID at 29.[10] In particular, rate-making associations in which members that are otherwise competitors engage in illegal price-fixing arrangements, absent a valid antitrust defense, have been proscribed by the courts for nearly 60 years. *Georgia v. Pennsylvania R.R.*, 324 U.S. 439 (1945); ID at 29.

Collective rate-making in the moving industry, absent a valid defense, generally has been

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[10] Consistent with the analytical framework established in the Commission's opinion in *In the Matter of Polygram Holding, Inc.* ("*Three Tenors*"), FTC Docket No. 9298 (July 24, 2003), it remains appropriate and helpful to describe as *per se* illegal a horizontal restraint on competition, such as the one at issue in this case, that acts as a naked restraint. Such an agreement lacks any asserted redeeming value and the parties to the agreement offer no plausible or cognizable efficiency justification. For this reason we refer to the agreement here as a *per se* illegal horizontal agreement. *See FTC v. Perrigo Co.*, Complaint for Injunctive and Other Equitable Relief (Civil Action No. 1:04CV01397 (RMC)) (D.D.C., filed August 2004) at ¶ 43.

held to constitute a *per se* violation of the antitrust laws. The Commission has found collectively formulated intrastate rates a *per se* violation of the Federal Trade Commission Act. *In the Matter of Mass. Furniture & Piano Movers Ass'n*, 102 F.T.C. 1176, 1224 (1983) (Initial Decision ("*I.D.*")), *aff'd*, 102 F.T.C 1176, 1224-26 (Commission Opinion ("*Comm. Op.*"), *rev'd on other grounds sub nom., Mass. Furniture & Piano Movers Ass'n v. FTC*, 773 F.2d 391 (1st Cir. 1985) ("*Mass Movers*") ("[I]t is beyond cavil that agreements among competitors to set price levels or price ranges are *per se* illegal under the antitrust laws."); *see also In the Matter of New England Motor Rate Bureau, Inc.*, 112 F.T.C. 200, 261 (*I.D.*), *aff'd*, 112 F.T.C. 263, 287 (1989) (*Comm. Op.*), *rev'd on other grounds sub nom., New England Motor Rate Bureau, Inc. v. FTC*, 908 F.2d 1064 (1st Cir. 1990); ID at 29. The Supreme Court has characterized the activities of a rate bureau that published, on behalf of its members, tariffs containing proposed rates for intrastate for-hire transportation of general commodities as "anticompetitive conduct." *Southern Motor Carriers Rate Conf., Inc. v. United States*, 471 U.S. 48, 65 (1985) ("*Southern Motor Carriers*"). The Supreme Court affirmed the Commission's decision to treat collective rates as a *per se* violation of the antitrust laws in *Ticor*. In its decision, the Court noted that "[t]his case involves horizontal price fixing . . . No antitrust offense is more pernicious than price fixing." *Ticor*, 504 U.S. at 639.

The ID properly found that several of the Kentucky Association's activities constituted illegal horizontal agreements: Respondent entered into agreements on specific rates for additional tasks to be performed by the members; Respondent filed a tariff supplement at least once every year for many years raising rates approximately five to ten percent; Respondent's members agreed to establish uniform hours for overtime charges; and Respondent agreed on

"peak" summer dates when members must increase their rates.[11] The ID also found that Respondent facilitated an illegal agreement by establishing a schedule of local and intrastate rates to be charged. ID at 31.[12] The ID found that "[t]hese are the types of horizontal agreements courts have found to be *per se* illegal," and held that "unless the conduct here is shielded by the state action defense, it violates Section 5 of the Federal Trade Commission Act." ID at 31.

The ID concluded that relevant markets must be defined in *per se* horizontal price-fixing cases.[13] Were that the law, the determinative point would be, as the ID states, that the "relevant

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[11] Respondent makes passing reference in its brief to the notion that movers "make no agreement on the rates which will be ultimately charge to consumers" and that the "appropriate" rates are charged to consumers. Resp. App. at 5, 3. However, Respondent makes no serious effort to argue that these agreements should not be treated as *per se* illegal. Nor does Respondent make any serious attempt to argue that there is a need to show competitive harm. Without admitting that his client violated the antitrust laws, Respondent's counsel essentially conceded at trial that Kentucky Association's tariff constituted illegal price-fixing. Trial Tr. at 23-24 ("I understand that cases have held that under circumstances where a tariff is filed, the courts will and have presumed that there is an illegal price fixing agreement, without even any of the conduct [e.g. pressure on movers] which Complaint Counsel has described.").

[12] The Commission also has affirmed that even where collective tariffs contain several price schedules and these "options may result in price variations," such agreements constitute "concerted activity to influence or tamper with the *level* of prices, which putative competitors may either accept or reject, . . . as violative of the antitrust laws as a conspiracy aimed at absolute uniformity." *Mass Movers*, 102 F.T.C. 1176, 1201 (*I.D.*); 102 F.T.C. at 1224 (*Comm. Op.*); ID at 30. Respondent notes that movers can "select" from different "rate levels" but does not argue that adherence to rates contained in schedules should not be treated as a *per se* violation under the cited authority. Resp. App. at 7. Respondent's counsel virtually acknowledged at trial that the existence of multiple rate schedules does not absolve the Kentucky Association from liability. Trial Tr. at 33 ("I've counted so far at least 11 exceptions to that rate, which I know for Sherman Act purposes does not change the legal analysis."); Trial Tr. at 33 ("I recognize for Sherman Act purposes, it wouldn't make a difference if there were 1000 different rates.").

[13] ID at 28 ("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) ("*Bogan*"); *Double D Spotting Serv., Inc. v. Supervalu, Inc.*, 136 F.3d 554, 559 (8th Cir. 1998)

market in this case is not a contested issue." ID at 28. Had it been appropriate or necessary to determine relevant markets with any precision, the record supports the ID's conclusion that a relevant geographic market is Kentucky and the relevant product market is local and intrastate household goods moving services. *Id.*

To the extent, however, that the ID suggests that it is necessary to make a precise determination of the metes and bounds of the relevant product and geographic market in a case such as this, the decision goes substantially beyond the requirements of the law. In order to determine that an agreement is a naked horizontal restraint, of course, one must conclude that the agreement is between firms that would otherwise compete with respect to the terms of the agreement (here the price of moving household goods). This requirement does not imply, however, that one must determine the precise metes and bounds of a relevant antitrust market. Relevant market analysis is necessary only in cases where the presence or absence of market power is an issue. Not so in this case, which involves a naked agreement on price between otherwise competing entities. In such cases, the nature of the business and the agreement itself define the restraint as horizontal. Thus, the ID is correct to the extent that it finds the agreement is between horizontal competitors, but is incorrect insofar as it holds that a full-blown relevant market definition must be determined before concluding that a naked restraint of trade is *per se* illegal.

The Commission has held that such determinations are unnecessary. Specifically, it has held that in a "significant category of cases, scrutiny of the restraint itself is sufficient to find

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("*Double D*").").

liability without consideration of market power." *Three Tenors*, slip op. at 29.[14] Under the Commission's analysis, when reviewing certain practices, courts can "dispense with an elaborate analysis and condemn them as illegal *per se*." *Id.* at 15. "Such conduct ordinarily encompasses behavior that past judicial experience and current economic learning have shown to warrant summary condemnation." *Id.* at 29. One such practice that can be summarily condemned is "[a] simple ('naked') agreement by rivals to set prices." *Id.* at 15.[15] Thus, under the Commission's framework, a determination of the metes-and-bounds definition of the relevant product and geographic market, and a specific assessment of market power within that defined market, are unnecessary when analyzing a naked price agreement such as a tariff that contains numerous price agreements among what are plainly horizontal competitors.

The Commission's approach is grounded in and well-supported by antitrust precedent. Under standard *per se* analysis, the Supreme Court has recognized that "the agreement itself would define the extent of the market . . . [T]he very existence of the agreement implies power over price in that defined market."[16] Antitrust jurisprudence has required an inquiry into market

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[14] The Commission noted that this section of its opinion "addresses the analytical steps when the plaintiff seeks to avoid pleading and proving market power." *Id.* at n.37.

[15] Of course under the "inherently suspect" approach discussed in the *Three Tenors* matter, the Kentucky Association agreements would be condemned. The agreements are horizontal agreements on price for which the Kentucky Association did not even assert a justification. ID at 31. In *Ticor*, the Commission considered the issue of efficiency justifications and stated, "Respondents have not advanced, and we cannot conceive of, any plausible efficiency justification for the price fixing activities." *In the Matter of Ticor Insurance Co.*, 112 F.T.C. 344, 465 (1989).

[16] *Summit Health, Ltd. v. Pinhas*, 500 U.S. 322, 339 (1991) (citing *FTC v. Superior Court Trial Lawyers Assn.*, 493 U.S. 411, 435 n.18 (1990)); *see also* Areeda & Hovenkamp, *Antitrust Law* § 1509a (for (1) history of *per se* analysis, and (2) policy against defining market and market power in *per se* cases), § 1510a ("Since *Socony*, price-fixing cartels are routinely condemned without defining a market, showing market shares, or indicating any actual or likely

definition under the rule of reason analysis – where the nature of the market is essential to proving whether the party has market power or presents a significant threat to competition. *Re/Max Int'l, Inc. v. Realty One, Inc.*, 173 F.3d 995, 1018 (6th Cir. 1999) ("the purpose of the inquiries into market definition and market power is to determine whether an arrangement has the potential for adverse effects on competition"); *see* Areeda & Hovenkamp, *Antitrust Law* § 1503b. Where an analysis of the power or effects is unnecessary, however, defining markets is simply an unnecessary step. *ReMax Int'l, Inc.*, 173 F.3d at 1018 ("an antitrust plaintiff is not required to rely on indirect evidence of a defendant's monopoly power, such as high market share within a defined market, when there is direct evidence that the defendant has actually set prices"). The propensity for harm involved in horizontal price-fixing presents the classic situation where the determination of market harm, and thus market definition, is unnecessary. *Dagher v. Saudi Ref., Inc.*, 369 F.3d 1108, 1120 (9th Cir. 2004) (analysis and proof of market power are inappropriate in price fixing cases). As the Supreme Court observed, "[price-fixing agreements] are banned because of their actual or potential threat to the central nervous system of the economy." *Socony*, 310 U.S. at 226, n.59. The ID indirectly illustrates this point because, while the ALJ defined the relevant markets, the opinion correctly contains no further discussion of either market power or anticompetitive effects.

The ID cites two cases in support of its conclusion that relevant markets must be defined in a *per se* price-fixing case.[17] However, neither case cited in the ID involved an agreement on

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impact.") (2d ed. 2000).

[17] ID at 28 (*see* footnote 13 above).

price by horizontal rivals, neither applied a *per se* analysis,[18] and in fact, both are consistent with the proposition that a metes-and-bounds delineation of relevant markets need not be shown when the conduct at issue is a horizontal agreement among rivals to set prices.[19]

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[18] *Double D* involved a plaintiff that alleged that the defendant's grant of an exclusive license to another firm to unload trucks at its warehouse violated various antitrust laws. *Double D,* 136 F.3d at 556-57. The plaintiffs in *Bogan* alleged that an agreement among agents at the defendant insurance company not to recruit and hire each others' salesmen constituted a *per se* group boycott. *Bogan,* 166 F.3d at 511-13. Each court properly held that the agreements at issue were not horizontal price restraints among competitors. *Double D*, 136 F.3d at 559; *Bogan,* 166 F.3d at 515.

[19] Both *Double D* and *Bogan* contain general language indicating that consideration of the relevant market is appropriate in horizontal cases. The *Double D* court stated that "a plaintiff alleging a horizontal restraint must at least define the market and its participants, which, for reasons discussed below, Double D has failed to do." 136 F.3d at 558-59. The court made this statement in the context of explaining that the agreement at issue was not between horizontal competitors. *Id.* at 559. The *Bogan* court stated that "it is an element of a *per se* case to describe the relevant market in which we may presume the anticompetitive effect would occur" (166 F.3d at 515) but the court used this language in the context of its conclusion that there was no horizontal boycott agreement between competing firms. *Id.*

Neither case, however, can be read as a holding that full-blown market definition is a necessary element of a case involving an agreement by rivals to fix prices. Read in their entirety, both cases are in fact consistent with the view that it is the character of the agreement, not its effect in a carefully-defined antitrust market, that gives rise to the illegality of price-fixing. *Double D* recognized that "[c]ertain types of restraint are so inherently anticompetitive that they are illegal per se, without inquiry into the reasonableness of the restraint or the harm caused . . . *Per se* treatment is appropriate once experience with a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it. . . Practices which have been held to be illegal per se include price-fixing." 136 F.3d at 558. The opinion later stated that "[b]ecause no per se violation is established, it is necessary for Double D to allege a valid relevant market in order to apply the rule of reason analysis ..." and continues on to say "that the 'rule of reason analysis' involves 'an inquiry into market power and market structure' to assess the actual effect of the restraint." 136 F.3d at 560. *Bogan* recognized the Supreme Court's holding that the "principle of *per se* unreasonableness . . . avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable." 166 F.3d at 514 (citing *N. Pac. Ry. v. United States,* 356 U.S. 1, 5, 78 (1958)). The court also pointed to the "quick look" test as a way to "avoid examining the relevant market, market power, and anticompetitive effect in *all cases in which*

B. THE KENTUCKY TRANSPORTATION CABINET DID NOT ACTIVELY SUPERVISE RATES.

In order to avoid antitrust liability, Respondent must sustain its burden of establishing that its conduct is subject to a valid state action defense.[20] The defense dates to *Parker v. Brown*, 317 U.S. 341 (1943), which held that in a dual system of government, states are sovereigns and entitled to direct their own affairs according to their own laws, subject only to constitutional limitations. As such, Congress would not have intended that the Sherman Act restrain state officials from engaging in activities directed by their state legislature. *Id.* at 350-51. For the state action defense to apply, the Respondent must satisfy both prongs of the standard articulated in *Midcal*, 445 U.S. at 105 (1980) (quoting *City of Lafayette v. La. Power & Light*, 435 U.S. 389, 410 (1978) ("the challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy'" and "the policy must be 'actively supervised' by the State itself")). *Accord Ticor*, 504 U.S. at 631. In *Midcal,* the price-setting requirement was sufficiently set forth in the legislation to meet the first requirement of the state action defense – a clear purpose to permit resale price maintenance – but active supervision was not present. As the Court put it:

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conduct does not clearly fit within a per se category" – thereby acknowledging the exception of *per se* cases to the market definition requirement. *Id.* at n.6 (emphasis added).

[20] An antitrust defendant bears the burden of proof with respect to its state action defense. *Ticor*, 504 U.S. at 625 (state action immunity was "[o]ne of the principal defenses" asserted); *New England Motor Rate Bureau*, 112 F.T.C. at 278 (*Comm. Op.*) ("NEMRB, as the proponent of the state action defense, had the burden of demonstrating that state officials engaged in a substantive review of NEMRB's rate proposals"); *Yeager's Fuel, Inc. v. Pa. Power & Light Co.*, 22 F.3d 1260, 1266 (3d Cir. 1994) ("state action immunity is an affirmative defense" as to which defendant "bears the burden of proof"); ID at 28. Defendants cannot easily sustain their burden of showing they qualify for an exemption to the antitrust laws because the Supreme Court has held that such exemptions should be narrowly construed. *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 231 (1979) ("It is well settled that exemptions from the antitrust laws are to be narrowly construed.").

> The State simply authorizes price setting and enforces the prices established by private parties. The State neither establishes prices nor reviews the reasonableness of the price schedules.

445 U.S. at 105.[21]

The key issue in this appeal is whether Respondent can demonstrate compliance with prong two: that the KTC actively supervised the Kentucky Association's tariff. The threshold issue under prong two is whether the KTC ensures that state legislative policy objectives (rates are "reasonable" and not "excessive") are achieved. As the Supreme Court has stated that

> [T]he purpose of the active supervision inquiry is not to determine whether the State has met some normative standard, such as efficiency, in its regulatory practices. Its purpose 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. Much as in causation inquiries, the analysis asks whether the State has played a substantial role in determining the specifics of the economic policy.

Ticor, 504 U.S. at 634-35; Resp. App. at 30 ¶¶ 1, 3, 4. As the Supreme Court has held, the active supervision requirement further serves to assign political responsibility for a decision to displace free market with regulation: "[I]nsistence on real compliance . . . will serve to make clear that the State is responsible for the price fixing it has sanctioned and undertaken to control." *Ticor*, 504 U.S. at 636; Resp. App. at 30 ¶ 6.

The Supreme Court has made very clear that the active supervision standard is a rigorous one. The Court has held that the gravity of the antitrust violation of price-fixing requires a clear "finding of active state supervision." *Ticor*, 504 U.S. at 639; Resp. App. at 31 ¶ 9. Active

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[21] As the Court noted, such scant state involvement could not exempt the private action from antitrust enforcement because "[t]he national policy in favor of competition cannot be thwarted by casting such a gauzy cloak of state involvement over what is essentially a private price fixing arrangement." *Id.* at 106.

supervision requires that the state must "have *and* exercise ultimate authority" over the challenged anticompetitive conduct. *Patrick v. Burget*, 486 U.S. 94, 101 (1988) (emphasis added). The state's supervision must be so comprehensive that private agreements will be shielded only when the "the State has effectively made [the challenged] conduct its own." *Id.* at 106; *Ticor*, 504 U.S. at 635; Resp. App. at 30 ¶ 5. Active supervision requires state officials to engage in a "pointed re-examination" of the private conduct. *Midcal*, 445 U.S. at 106. State oversight must be "implemented in its specific details." *Ticor*, 504 U.S. at 633; Resp. App. at 30 ¶ 2.[22]

In *Ticor*, the Supreme Court quoted language from the First Circuit's decision in *New England Motor Rate Bureau*, setting out a list of organizational and procedural characteristics relevant to an effective state program:

> [T]he state's program is in place, is staffed and funded, grants to the state officials ample power and the duty to regulate pursuant to declared standards of state policy, is enforceable in the state's courts, and demonstrates some basic level of activity directed towards seeing that the private actors carry out the state's policy and not simply their own policy. . .

504 U.S. at 637.

Critically, the Court rejected the First Circuit's standard as "insufficient to establish the requisite level of supervision." *Ticor*, 504 U.S. at 637. Rather, the proper approach to determining whether active supervision exists involves an inquiry into whether "state officials

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[22] In an apparent attempt to distinguish its own conduct from that challenged in *Ticor*, Respondent highlights three facts of *Ticor* which have little bearing on the instant proceeding: (1) the Respondents in *Ticor* were the insurance companies rather than a rate bureau; (2) the price-fixing activity challenged in *Ticor* was not the respondents' core service or product; and (3) the *Ticor* respondents composed 57% of the national gross revenue of the title insurance business. Resp. App. at 28-29. The points are legally insignificant and were fully addressed in Complaint Counsel's Post-Trial Reply Brief. CC Reply at 16-17.

have undertaken the *necessary steps* to determine" whether there has been "a decision by the State" to substantively approve the rates. 504 U.S. at 638 (emphasis added); Resp. App. at 30-31 ¶ 8. As stated in the ID,

> 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.

ID at 35.[23] As correctly noted in the ID, and summarized in the paragraphs that follow, a determination that none of the steps identified by the courts have been taken by the KTC "can only lead to the conclusion that the KTC does not actively supervise the collective ratemaking process." ID at 37.[24]

1. THE KTC COMMITS LIMITED RESOURCES TO REVIEWING AND SUPERVISING COLLECTIVE TARIFFS.

In *Ticor*, as noted above, the beginning point of an effective state program exists where

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[23] The Supreme Court opinion in *Ticor* did not recite all of the state supervisory steps examined by the Commission but it noted that there were "detailed findings, entered by the ALJ and adopted by the Commission, which demonstrate that the potential for state supervision was not realized in fact." 504 U.S. at 638; ID at 39. More recently, the Commission has identified regulatory steps to be examined in determining whether there is active supervision. In the Analyses to Aid Public Comment issued in conjunction with several consent decrees, the Commission "identifie[d] the specific elements of an active supervision regime that it will consider in determining whether the active supervision prong of state action is met in future cases." *See, e.g., Indiana Household Goods and Warehousemen, Inc.*, C-4077, at 5 (Mar. 18, 2003) (Analysis to Aid Pubic Comment) ("Indiana Analysis"). In the following discussion, we address several of the elements noted by the Commission.

[24] Respondent also notes that *Ticor* did not provide a "checklist" of steps necessary to established active supervision and asserts that a "one-size-fits-all" test for active supervision is inappropriate. Resp. App. at 32. However, Respondent cites no authority in support of its argument that *Ticor* established a sliding scale test for supervision. *Id.* Nor does Respondent cite any authority for the proposition that intrastate movers are entitled to violate the antitrust laws while being subject to less supervision that other industries. *Id.*

there is staff in place with funding and the power and duty to regulate conduct pursuant to declared standards of state policy. 504 U.S. at 637; Indiana Analysis at 6. KTC has only one part-time employee who works on tariffs, and most of his time is spent making sure movers do not discount from the collective rates in the tariff rather than examining whether the rates themselves are reasonable. ID at 37. Thus, the ID properly finds that "[t]he 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 declared standards of state policy." ID at 38.[25]

2. THE KTC DOES NOT COLLECT ADEQUATE DATA.

In examining the question of active supervision, courts consider whether a state "monitors conditions" in the market subject to regulation. ID at 39 (*citing Union Carbide Corp. v. Fla. Power & Light Co.*, 1993 U.S. Dist. LEXIS 21203 at *28 (M.D. Fla. 1993); *Ticor*, 112 F.T.C. at 434, 432). For instance, courts evaluate whether the state requires firms to furnish business data generated in the course of their operations. *United States v. Southern Motor Carriers Rate Conf., Inc.*, 467 F. Supp. 471, 477 (N.D. Ga. 1979) ("freight bills and information concerning other expenses").[26] Courts also have examined whether the state participated in on-site review and independent verification of financial information from carriers' books and

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[25] Respondent's brief criticizes the ALJ's decision as providing "no indication as to what type of resources would be satisfactory to support a finding of 'active supervision.'" Resp. App. at 41. As explained in detail below, however, the ID, with extensive citation to the relevant case law, details the steps courts look at in determining whether active supervision exists. ID at 38-45.

[26] *See also Ticor*, 112 F.T.C. at 437 (*Comm. Op.*) (cost and expense data); *Ticor*, 504 U.S. at 639.

records. *Id.* Where the state does not require review of all possible data, courts have looked to see if the state engaged in sound sampling techniques to determine whether the state's review constituted active supervision. *Ticor,* 112 F.T.C. at 428 (*Comm. Op.*); 504 U.S. at 640.

The Kentucky legislature itself has indicated that the state should review carriers' revenue and cost data. Kentucky statute KY. REV. STAT. ANN. § 281.680(4) requires the KTC to have procedures that assure that movers' "respective revenues and costs . . . are ascertained."

KTC does no such thing. It does not require movers to "submit cost and expense data," nor does it "collect or verify data" from movers. ID at 39.[27] Mr. Debord visits movers but does not review balance sheets, income statements or documents that would allow him to analyze movers' profits. ID at 40. The Kentucky Association also does not collect movers' data. *Id.*

3. THE KTC DOES NOT REQUIRE JUSTIFICATION OF RATE INCREASES.

Another factor courts have examined in determining whether there is active supervision is whether the state reviews private parties' rate increases. *A. D. Bedell Wholesale Co. v. Philip Morris, Inc.,* 263 F.3d 239, 264 (3d Cir. 2001). "Rubber stamp approval of private action does not constitute state action." *Id*. at 260; ID at 41.[28] Even where private parties make annual

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[27] The ID echoes the Commission's statement that the State should "independently verif[y] the accuracy of financial data submitted." Indiana Analysis at 8. Respondent dismisses the Commission's Analysis to Aid Public Comment in Iowa and Indiana as a "mythical regulatory program enthusiastically crafted by the Commission" containing "more of a 'wish-list' than an analysis." Resp. App. at 33. However, Respondent has failed to identify any specific aspect or aspects of the Analyses which lack legal foundation.

[28] This case is one of a number of active supervision cases cited in the ID. Respondent argues that such cases do not "involve household goods transportation rates" and that "[m]oreover, they are easily further distinguished by a complete lack of identity of issue with this case." Resp. App. at 21-22. Respondent fails, however, to articulate the distinction which it argues exists. In fact, the cases cited in the ID are directly on point because they describe activities courts consider in determining whether there is active supervision. Perhaps

reports of their activities to the state, "reporting alone does not indicate active supervision because the Bureau does no more than review the reports." *Yeager's Fuel,*, 22 F.3d 1260, 1271 (3d Cir. 1994); ID at 40.[29]

KTC receives virtually no justification for Respondent's rate increases. The Kentucky Association does not provide KTC with "any business records, economic study, cost studies, or cost justification data." ID at 42.[30] On some occasions, the Kentucky Association sends in a cover letter with its documentation regarding a rate increase. Resp. App. at 9. The cover letters forward *intra*state rate increases that are higher than the *inter*state rate increases cited to in the letters. As noted in the ID, proposed rate increases in *inter*state rates do not support an increase in the *intra*state rates,

> [I]ncreases in *inter*state rates provide little justification to increases in *intra*state rates because movers are permitted to and do discount from the interstate rates and because KTC has not computed or evaluated interstate rates.

ID at 42.[31]

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more importantly, the cases interpret the requirements of *Midcal* and *Ticor* in light of the relevant state regulatory schemes. It is these cases along with Supreme Court cases such as *Midcal* and *Ticor*, not the "arbitrary whims – or even the 'good faith' wishes – of employees of the federal government" (Resp. App. at 8), that define the contours of the active supervision requirement.

[29] The *Yeager's Fuel* court found active supervision on other grounds. 22 F.3d at 1271; ID at 40.

[30] In *Ticor*, the states received profit data, but the Commission "found active supervision absent because the State did not obtain information on what lay behind the profit figures." ID at 41 (*citing Ticor*, 112 F.T.C. at 416, 432).

[31] Respondent seems to concede that KTC does not equate *inter*state rates with *intra*state rates because the two tariff requirements are different. Resp. App. at 44 ("The record shows KTC's position regarding federal regulation of interstate Movers. KTC's position is that [federal] regulation is not consistent with KTC's beliefs as to what is necessary to protect the moving public in Kentucky.").

Mr. Debord, Kentucky Association President Tolson, and Tariff Committee Chairman Mirus all were questioned extensively about justifications for rate increases and none could recall the justifications given for various rate increases.[32] Prior to some rate increases, Mr. Debord attended Kentucky Association meetings where rates were discussed and had informal discussions with movers about costs. ID at 41-42; Resp. App. at 8. Courts have rejected the proposition that informal discussions with regulators constitutes active supervision. In the *Ticor* case, on remand from the Supreme Court, the Third Circuit discussed the Commission and ALJ's findings in Connecticut and upheld the Commission's decision that there was no active supervision. The court reached this conclusion despite noting that, "[a] state insurance official testified that he reviewed the rate increase with care and discussed various components of the increase with the rating bureau." *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). In addition, "because these are meetings of competitors, movers provide only general information and do not disclose details about their costs, revenues, or profit margins." ID at 42.[33]

In contrast, courts have found active supervision where the state has affirmatively

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[32] CX 116 (Debord, Dep. II at 101-102, 111-113, 115-116, 120, 142); CX 129 (Tolson, Dep. at 139, 140-141, 143, 155, 239-240); CX 117 (Mirus, Dep. at 60,151-152, 196-197, 203-204, 209-211). Respondent has suggested that "[I]t would be appropriate for . . . this proceeding to be remanded to the ALJ with instructions to hear evidence from the Kentucky Association and the KTC with regard to [all 82 Kentucky Association] rate increases." Resp. App. at 42. The notion that this matter should be remanded is preposterous because these witnesses were questioned extensively about rate increases (by Complaint Counsel and by Respondent's counsel) and have already provided all of the information they could recall.

[33] Respondent seems to suggest that ALJ's findings were premised on the notion that, "[T]he methods of analysis employed by KTC" were in some respect "fabricated or untrue." Resp. App. at 43. Complaint Counsel do not contend that any KTC official's testimony was fabricated or untrue.

inquired into the reasonableness of rates. *DFW Metro Line Svc. v. Southwestern Bell Tel. Corp.*, 988 F.2d 601, 606 (5th Cir. 1993) ("The record reflects numerous references to the PUC's inquiry into the reasonableness of Bell's rates."); ID at 42. Here, "the record does not reflect the KTC's request for or review of justifications for rate increases." ID at 42.

Another factor courts look at in determining whether there has been active supervision is whether the state has ever rejected tariffs based upon the level of rates. *New England Motor Rate Bureau*, 112 F.T.C. at 267, 279 (*Comm. Op.*). The Kentucky Association has sought 82 rate increases but, despite the lack of justification for the rate increases, KTC has never rejected a single proposed increase in the collective rate.[34] As the ALJ stated, "[Y]ear after year the KTC has permitted the private actor's collective rates and rate increases to go into effect as proposed." ID at 46.

4. THE KTC DOES NOT ANALYZE RATES OR RATE INCREASES UNDER ANY STATE STANDARD.

Courts have also examined whether state supervision includes specific measures, standards, or formulae to determine whether rates meet state criteria. As the ID stated, "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." ID at 40 (*citing Ticor*, 112 F.T.C at 382). Courts have also looked at whether states calculate firms' rates

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[34] Resp. App. at 6, 9; RX 1 - RX 67; RFF ¶ 6; RPL ¶ 16 (under KY. REV. STAT. ANN. § 281.690(2) a tariff cannot be rejected without a hearing); CX 116 (Debord, Dep. II at 92-95). Respondent erroneously states that "KTC has suspended proposed rates." Resp. App. at 9. At most the record shows that Mr. Debord has sent letters to movers inquiring about "routine" tariff "discrepancies" (e.g., RX 219) and that, after the Commission began its investigation, Mr. Debord asked two movers filing individual rates to provide him with more information. (CX 116 (Debord, Dep. I at 47)). *See* Complaint Counsel's Reply to Respondent's Proposed Findings of Fact, April 16, 2004 at 43 ¶ 98.

of return, operating ratios, or profits. Significantly, in *Ticor* the Supreme Court observed that a regulatory scheme which included a specified rate of return could provide comprehensive supervision:

> [W]e do not here call into question a regulatory regime in which sampling techniques or a specified rate of return allow state regulators to provide comprehensive supervision without complete control, or in which there was an infrequent lapse of state supervision.

504 U.S. at 640.[35] In *Southern Motor Carriers*, the court also took note that state officials, prior to a hearing to determine whether to grant a rate increase, used carriers' cost and expense data to derive an operating ratio which was submitted as evidence at the hearing. 467 F. Supp. at 477. The Commission also has looked at whether states review industry participants' profit levels. In *New England Motor Rate Bureau*, the Commission held supervision to be inadequate where the state never "look[ed] behind the filed rates to determine whether they accurately reflect a carrier's profits and costs." 112 F.T.C. at 267, 279 (*Comm. Op.*).

KTC does not perform any quantitative analysis of the economic impact the rates have on industry participants or consumers. ID at 40, 43.[36] Years ago, Kentucky maintained a spreadsheet containing movers' operating ratios but Mr. Debord was told not "not to bother" his supervisors with that analysis. ID at 40.

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[35] The Supreme Court also analogized to *324 Liquor Corp. v. Duffy*, 479 U.S. 335, 344 n.6 (1987) which stated that a state statute specifying the margin between wholesale and retail prices might satisfy the active supervision requirement.

[36] The ID's examination of whether Kentucky has measures in place to analyze rates is consistent with the Commission's statement that state supervision "to the maximum extent practicable, should include an express quantitative assessment, based on reliable economic data, of the specific likely impact [the rates have] upon consumers." Indiana Analysis at 8.

5. KTC DOES NOT ISSUE A WRITTEN DECISION.

Written statements explaining the state's reasons for approving or disapproving rates also have been a factor in determining whether active supervision is present. Courts have looked positively upon efforts by states to issue a written order or decision.[37]

The KTC issues no written decision. Resp. App. at 8. It merely stamps the tariff "received" and after thirty days the rates take effect. ID at 44.[38] KTC has never issued a written statement explaining why it allows movers to raise rates to consumers. *Id*.

Another factor courts have considered is whether internal studies have been conducted or commissioned by a state to evaluate rates. *Yeager's Fuel*, 22 F.3d at 1271 ("final staff report reviewing PP&L's programs in response to inquiries from the legislature and protests by fossil fuel dealers"); *Southern Motor Carriers*, 467 F. Supp. at 477 (staff prepares an "independent study"); *New England Motor Rate Bureau*, 112 F.T.C. at 233 (*I.D.*), 266, 279-80 (*Comm. Op.*)

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[37] *New England Motor Rate Bureau*, 112 F.T.C. at 282 (*Comm. Op.*); *Vernon v. Southern Cal. Gas Co.*, 92 F.3d 1191 (unpublished disposition), 1996 WL 138554, *3 (9th Cir. 1996) ("The CPUC issued two orders on the issue, which contain lengthy consideration of the parties' positions, findings of fact and conclusions of law, and a detailed explanation of the CPUC's reasons for denying Vernon's requested wholesale rate. Additionally, the CPUC's orders indicate that it considered the competitive effects of its decision."); *Green v. Peoples Energy Corp*, 2003 WL 1712566, *7 (N.D. Ill. March 28, 2003) ("[u]pon conclusion of the hearings, the ICC issued lengthy orders approving the tariffs..."); *DFW Metro Line Svc., Inc.*, 988 F.2d at 606 ("published decisions reflect that the PUC has conducted other broad-based ratemaking proceedings); *N. Star Steel Tex., Inc. v. Entergy Gulf States, Inc.*, 33 F. Supp. 2d 557, 566 (S.D. Tex. 1998); Indiana Analysis at 7.

[38] Respondent objects to the ID's failure to cite to a "motor carrier tariff regulatory program where a 'written decision' is either warranted or provided as part of the regulatory process." Resp. App. at 43. *But see New England Motor Rate Bureau*, 112 F.T.C. at 282 (*Comm. Op.*) (Rhode Island always issues an order when deciding whether or not to allow rates to become effective). Section C. below also discusses Oregon's procedures for reviewing household goods tariffs.

(active supervision not found because, *inter alia*, the state had "never conducted an economic study of the intrastate trucking industry nor of the effects of its regulatory policy on intrastate trucking industry within the state"); *Alabama Trucking Association, Inc.*, D-9307, at 7 (Oct. 30, 2003) (Analysis to Aid Pubic Comment). KTC neither requires nor prepares any studies of movers. ID at 42 ("Respondent does not submit, nor does KTC require, any . . . economic study, [or] cost studies.").

6. KTC DOES NOT CONDUCT HEARINGS.

Whether a state holds hearings to evaluate rates is also highly material to courts' determination of active supervision. In *Ticor*, the Supreme Court noted that the government conceded that prong two of *Midcal* was met in *Southern Motor Carriers*, where the District Court found that "although 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.[39] While public input has been treated favorably by the Supreme Court and other

[39] *TEC Cogeneration, Inc. v. Fla. Power & Light Co.*, 86 F.3d 1028, 1029 (11th Cir. 1996) ("eleven-month contested administrative proceeding" and "extensive and contested agency proceedings"); *Destec Energy, Inc. v. S. Cal. Gas Co.*, 5 F. Supp. 2d 433, 457 (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. Pub. Svc. 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"); *Green v. Peoples Energy Corp.*, 2003 WL 1712566, *6 and*7 (rate approved only "after holding lengthy hearings which could span several months"); *Yeager's Fuel, Inc. v. Pa. Power & Light Co.*, 804 F. Supp. 700, 712 (E.D. Pa. 1992) (hearings held in a contested tariff proceeding and in an investigation of complaints by private organization and state legislators regarding anticompetitive effects); *DFW Metro Line Svc.*, 988 F.2d at 606 ("broad-based ratemaking proceedings"); *City of Vernon*, 1996 WL 138554, *3 ("extensive proceedings before the CPUC"). *See also*, Indiana Analysis at 6-7. The Indiana Analysis noted that under the Administrative Procedure Act approval of tariffs filed by

courts examining the active supervision requirement, inadequate state supervision was found in *Ticor* where there were no hearings on rate increases. *Ticor*, 112 F.T.C. at 381 (*I.D.*) (Connecticut); *id.* at 385 (*I.D.*) (Wisconsin); *id.* at 388 n.229 (*I.D.*) (Arizona); *id.* at 444 (*Comm. Op.*).[40]

Here, the Kentucky legislature has identified public hearings as a way KTC is expected to consider rates. RPL ¶¶ 8, 16-17. Yet Kentucky has held no hearings on rates since the state first approved collective rate-making in the 1950's or 1960's. ID at 45; Resp. App. at 8.[41] And KTC has received no public input into rates because even the Kentucky Association meetings attended by Mr. Debord were not open to the public. ID at 45. In fact, although a Kentucky regulation requires notice of rate changes to be published in the newspaper so interested parties

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common carriers are typical examples of rulemaking proceedings, citing 5 U.S.C. § 551(4). Respondent points out that in *In the Matter of Union Oil Co. of Cal.*, Docket No. 9305, Complaint Counsel also took the position that under the APA, ratemaking should be considered rulemaking and not adjudication. Resp. App. at 35.

[40] In one of those states, Montana, there had been hearings on legislation unrelated to rates three years prior to the formation of the rate bureau. *Id.* at 444 (*Comm. Op.*).

[41] Respondent asserts that the hearings in the 1950's provided sufficient supervision for all subsequent supplements to the tariff. Resp. App. at 9. However, failure to hold hearings recently has been found to indicate a lack of supervision even where hearings have been held in the past. In *New England Motor Rate Bureau*, the state of Massachusetts was held to have engaged in inadequate supervision where the state had not held any public hearings either to investigate or to suspend a motor carrier's rate in the six years preceding the case. Compare this with the state of Rhode Island, which had issued public notice and held at least one formal public hearing in the recent past before granting a general rate increase. *New England Motor Rate Bureau*, 112 F.T.C. at 267, 282 (*Comm. Op.*). Even assuming rates were once reasonable, a state cannot allow rates to be left in place without reexamination. *Ticor*, 112 F.T.C. at 438 (*Comm. Op.*); Indiana Analysis at 6 ("[I]f the private conduct is to remain in place for an extended period of time, then periodic state reviews of that private conduct using current economic data are important to ensure that the restraint remains that of the State, and not of the private actors."); *Stanislaus v. Pac. Gas & Elec. Co.*, 1994 U. S. Dist. LEXIS 21032, *78 (E.D. Cal. 1994) (supervision found where, *inter alia*, state requires "annual reasonableness reviews" to evaluate "rates charged to consumers").

could file a protest with the KTC, such notices were never published. ID at 38-39.[42]

C. COMPARISON WITH OREGON FURTHER SHOWS THAT KTC DOES NOT ENGAGE IN ACTIVE SUPERVISION.

KTC's lack of supervision is further illustrated by documents excluded by the ALJ showing the extensive supervision undertaken in Oregon. In determining whether active supervision is present, courts and the Commission have looked at the supervision in one state and compared it with the supervision in another state. For example, in *New England Motor Rate Bureau*, 112 F.T.C. at 282 (*Comm. Op.*), the Commission compared the supervision in one New England state to the supervision in another state in reaching its conclusions regarding whether there was active supervision. Similarly, when *Ticor* was remanded to the Third Circuit, the court examined the level of supervision in Arizona when determining whether supervision was present in Connecticut. *Ticor* (on remand), 998 F.2d at 1140.

Respondent makes the sweeping claim that "KTC takes substantial efforts to insure that rates in the Tariff meet [Kentucky statutory] standard[s]." Resp. App. at 6. However, documents showing the extensive supervision undertaken in Oregon illustrate, by way of sharp contrast, the lack of supervision by the KTC.

In 1994 and 1999, movers in Oregon sought to increase the rates contained in their tariff.

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[42] Respondent spends considerable effort arguing that holding hearings on rates and posting notices of proposed rate increases in newspapers "would add nothing to the regulatory process" and shows that the Commission has "no notion of the history and significance of transportation regulatory standards." Resp. App. at 33-38. Nowhere does Respondent even acknowledge that hearings are anticipated by the Kentucky legislature or that the newspaper publication requirement was established by the KTC.

Both rate increases were granted by the state.[43] The documents illustrate procedural steps undertaken by the state, including three notices for public hearings on petitions filed to increase household goods rates. CX 120, CX 126, CX127. The documents also note that Oregon Draymen and Warehousemen's Association's ("OD&W") published a notice of the hearing in "a newspaper of general circulation in the Portland area at least ten (10) days prior to the hearing." CX 119, CX 123. The documents show that the state issues a written decision when approving rate increases. CX 118, CX 119, CX 121, CX 123. Oregon at 3-4.

The documents indicate that Oregon collected business data from intrastate moving firms. The state requires movers to file annual reports. CX 121. The documents reveal that state officials also performed a traffic study which analyzed carriers' "shipment data such as transportation revenue, extra labor revenue, packing material, valuation revenue, other revenue, tariff miles, round-trip miles, billed weight, drivers hours, packers and helper hours, and number of invoices." CX 121. The documents also indicate that the state made an effort to assure the reliability of the data by subjecting it to an audit by state officials. CX 119. Oregon at 4.

The documents show Oregon's quantitative analysis of the proposed rates. The Public Utility Commission of Oregon, and later the Oregon Department of Transportation ("ODT"), used data from a sample of movers to determine the operating ratio being achieved by movers in Oregon. CX 119. Then, using a computer program (CX 122), the state calculated the percentage rate increase needed to permit movers to achieve the state's target operating ratio of 96%. CX

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[43] Much like Kentucky, Oregon state law provides that household goods movers must file tariffs setting forth "just, reasonable and fair" rates. OR. REV. STAT. § 825.224; KY. REV. STAT. ANN. § 281.690. The laws of both Kentucky and Oregon require that carriers' rates not be discriminatory or preferential. OR. REV. STAT. § 825.224; KY. REV. STAT. ANN. § 281.590; Oregon at 4-5.

119. This calculation was performed by what the documents describe as a revenue-need study which considered factors such as "current and future operating expenses, debt service costs, effective income tax rate, and a fair return on the carrier's operating assets." CX 118, CX 119, CX 121, CX123. Oregon at 4. Several of the steps taken by Oregon are similar to steps taken years ago by the KTC: requiring annual reports, auditing data and calculating operating ratios. However, the documents show that unlike the KTC, Oregon has continued to take extensive regulatory steps to review rates filed by movers.

Ruling that the Oregon documents were irrelevant, the ALJ did not admit them into evidence.[44] However, even under the Federal Rules, the test of relevance is a liberal one.[45] And it is well established that "evidence that might not be admissible in court may be admitted in an agency adjudication."[46] As indicated above, courts have compared supervision in one state when

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[44] PHC Tr. at 9. Respondent filed a motion *in limine* to exclude the Oregon documents. Respondent's Motion *In Limine*, February 2, 2004. The motion argued only that the documents were not relevant. *Id*. at 3. The Oregon documents and a summary thereof were submitted to the ALJ as Appendix A of Complaint Counsel's Proposed Findings of Fact and Conclusions of Law, April 2, 2004.

[45] "Even if a district court believes the evidence is insufficient to prove the ultimate point for which it is offered, it may not exclude the evidence if it has even the slightest probative worth." *Douglass v. Eaton Corp.*, 956 F.2d 1339, 1344 (6th Cir. 1992).

[46] ABA Section of Antitrust Law, Antitrust Law Developments (5th ed. 2002) at 685 (citing *Rhodes Pharmacal Co. v. FTC*, 208 F.2d 382, 387 (7th Cir. 1953), *rev'd in part to reinstate* FTC order, 348 U.S. 940 (1955)); *see also FTC v. Cement Inst.*, 333 U.S. 683, 705-06 (1948). A recent ALJ decision to deny a motion *in limine* recognized this policy:

> It is evident in administrative adjudications that there is no need to insulate a jury from the possible contamination from any inappropriate evidence since the administrative law judge is charged with resolving both motions in limine and the admissibility of evidence in the course of the trial. Since there is no jury to taint, unless a motion in limine will eliminate plainly irrelevant evidence or relevant evidence that would be an obvious waste of time for the Court at trial, e.g., needlessly cumulative evidence, the Court believes the more prudent course is to

determining whether there is supervision in other states and the similarities in the Oregon and Kentucky laws regarding movers further illustrate their relevance to the issue of active supervision in this case.

While Respondent did not raise the grounds in its motion, the ALJ also excluded the Oregon documents on the grounds that they "lack proper foundation and . . . are hearsay and unreliable." PHC Tr. 9.[47] The Oregon documents can be admitted under the public records and

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> deny such motions and to defer judgment on the particular issues raised in the motions in limine until they actually arise at trial.

In the Matter of Rambus, Inc., Docket No. 9302, 2003 WL 21223850, Order on Motions in Limine (F.T.C. April 21, 2003) (McGuire, A.L.J.).

[47] The ALJ's use of the term "lack of proper foundation" presumably is a suggestion that the documents lack authenticity or proper identification. Had Complaint Counsel been given the opportunity to address this issue, we would have urged that documents "authorized by law to be recorded or filed and in fact recorded or filed in a public office," as well as any "purported public record, report, statement, or data compilation, in any form," from the public office where it is kept, are reliable and satisfy the requirements of admissibility under Commission Rule 3.43(b)(1). *See* Fed. R. Evid. 901(b)(7). (Indeed, Rule 901 indicates that such evidence conforms with the authentication and identification requirements for admissibility under the Federal Rules of Evidence. Fed. R. Evid. 901(a), (b)). Alternatively, Complaint Counsel would have sought official notice of the pertinent facts contained in the Oregon documents under Commission Rule 3.43(d) and Federal Rule 201(b)(2). 16 C.F.R. § 3.43(d), Fed. R. Evid. 201. *See, e.g., In the Matter of South Carolina Board of Dentistry*, Docket No. 9311, Opinion and Order of the Commission Denying Motion to Dismiss, at 11-12 (July 30, 2004) (*citing United States v. Ritchie*, 342 F.3d 903, 908-09 (9th Cir. 2003)) (ALJ Report and matters contained in public records such as judicial decisions, statutes, regulations, and "records and reports of administrative bodies."); *In the Matter of Avnet, Inc.*, 82 F.T.C. 391, 464 n.31 (1973) (regularly compiled and published reports of the U.S. Census Bureau); *In the Matter of Ethyl Corp.*, 101 F.T.C. 425, 666 n.12 (1983) (economic report of the president); *In the Matter of Beauty-Style Modernizers, Inc.*, 83 F.T.C. 1761, 1779 n.7 (1974) (instructional publication by the Federal Reserve Board). Tariffs filed with a government agency are regularly judicially noticed. *Intelecom, Inc. v. Cable & Wireless USA, Inc.*, 2000 WL 33309374, *2 (S.D. Ind. 2000) (tariff filed with the FCC); *Smith v. Sprint Commun. Co.*, 1996 WL 1058204, *2 (N.D. Cal. 1996) (tariffs filed with California PUC and FCC). Like the content of the government documents in those cases, the information contained in the documents issued by the Oregon Public Utilities Commission and the Department of Transportation are suitable for official notice.

reports exception to the hearsay rule.[48] The Oregon documents contain official rulings by Oregon state agencies approved by state ALJs. The state staff studies attached to support the Orders are filed with the respective state agencies and referenced in the discussion in the Order. Along with the Orders, these studies are part of the public record. Additionally, the Notices of Hearings are issued directly by state agencies in preparation of state orders. These documents are "activities of the office or agency,"[49] "matters observed pursuant to duty imposed by law,"[50] and "factual findings resulting from an investigation made pursuant to authority granted by law."[51] Accordingly, there is ample legal precedent for admitting the Oregon documents into the record in this matter so the Commission can consider how another state supervises household goods tariffs.

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[48] "The following are not excluded by the hearsay rule, . . . : (8) Records, reports, statements, or data compilations, in any form, or public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, . . ., or (C) in civil actions and proceedings . . . , factual findings resulting from an investigation made pursuant to authority granted by law. . ." Fed. R. Evid. 803(8).

[49] *United States v. Johnson*, 722 F.2d 407, 410 (8th Cir. 1983) (firearm serial number report kept by Bureau or Alcohol, Tobacco and Firearms); *United States v. Rojas*, 53 F.3d 1212, 1216 (11th Cir. 1995), *cert. denied*, 516 U.S. 976, 116 (1996) (certificate executed pursuant to statute by government of Panama, consenting to search of Panamanian vessel by U.S. authorities).

[50] *United States v. Arias*, 575 F.2d 253, 254 (9th Cir. 1978), *cert. denied*, 439 U.S. 868 (1978) (transcript of court report, to prove testimony was given); *United States v. Torres*, 733 F.2d 449, 455 n.5 (7th Cir. 1984), *cert. denied*, 469 U.S. 864 (1984) (copies of tribal roll, containing certificates of enrollment of defendants, kept by tribal enrollment clerk).

[51] *Local Union No. 59, Int'l Bhd. of Elec. Workers v. Namco Elec., Inc.*, 653 F.2d 143, 145 (5th Cir. 1981) (results of NLRB investigation); *Henry v. Daytop Vill., Inc.* 42 F.3d 89, 96 (2d Cir. 1994) (decision of ALJ for state department of labor that employee had not made misrepresentation to employer). Notably, "factual findings" includes opinions and conclusions of a factual nature. *E.g., Beech Aircraft v. Rainey*, 488 U.S. 153 (1988).

D. INTERVENTION BY KTC DOES NOT ESTABLISH ACTIVE SUPERVISION.

Respondent argues that the ALJ should have given "deference" to KTC in this "highly sensitive and unique area of household goods moving." Resp. App. at 40-41. In support of this argument, Respondent states repeatedly that the KTC is content with its current level of supervision.[52] However, the fact that KTC intervened in this matter and is apparently content with its level of supervision is of little legal significance.

The law is now clear that it is not enough that the state believes its level of supervision is adequate. As the Supreme Court has noted, states do not have unfettered discretion to determine the level of supervision that is adequate: "[t]he national policy in favor of competition cannot be thwarted by casting such a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement." *Midcal*, 445 U.S. at 106. In *Ticor*, the conduct at issue also had the approval of the state agency. 504 U.S. at 644 (Rehnquist, C.J., *dissenting*).[53] But, the state's view of what is adequate supervision was not dispositive; rather, the federal antitrust laws

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[52] The Kentucky Association's brief states that: "KTC conducts audits of household goods carriers. These audits are sufficient for KTC's regulatory purposes." (Resp. App. at 8); "The fact is that KTC has determined that the methods which it now employs to regulate household goods carriers are effective as implemented and practiced." (Resp. App. at 40); "KTC has made a determination as to what resources are appropriate and has committed those resources to its regulatory program." (Resp. App. at 41); "The record identifies the type of data which is considered by KTC to be appropriate for its regulatory purposes." (Resp. App. at 42); "KTC receives rate justification which it has determined is sufficient for its regulatory purpose." (*id*.); "KTC believes that hearings are not necessary." (Resp. App. at 43).

[53] In *Ticor*, several states filed as *amici curiae* arguing that the Respondent's broad interpretation of the state action defense would not be in the states' best interests. ID at 47 (*citing* 504 U.S. at 635; *see also* 504 U.S. at 623-24). However, several states also filed as *amici curiae* arguing in favor of Respondent's broad interpretation of the state action defense. 504 U.S. at 624-25.

require the state to review the details of the rates filed. 504 U.S. at 638.

Here, the KTC simply does not take the steps necessary to supervise rates, and the ID properly held that fact the KTC intervened does not alter that. ID at 46-47 ("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.").[54]

Respondent asserts that KTC's involvement in this case sets forth the "position" of "the Commonwealth of Kentucky." Resp. App. at 2. But KTC speaks for KTC and not for the Commonwealth of Kentucky. The Commonwealth of Kentucky took a position in the *Ticor* matter that was completely contrary to the position taken here by KTC. Kentucky was one of over 30 states that filed a brief of *amici curiae* in *Ticor* in support of the Federal Trade Commission's position, arguing that the active supervision test was a rigorous one that could only be met if the state carried out the steps necessary to make the rates the states' own. 504 U.S. at 623-24; States' *Amici* Brief at 6, 14.[55] The brief argued strenuously that the Supreme Court should reject the *New England Motor Rate Bureau* standard (quoted above at 27), which it referred to disparagingly as "Little more than a 'bodies, buildings and budget' standard." States' *Amici* Brief at 7. The brief went on to argue that active supervision could not be found

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[54] Respondent accuses the ALJ of ignoring KTC's position: "It was error for the ALJ to refuse to consider these positions of the Kentucky Transportation Cabinet." (Resp. App. at 18, 19). This is simply wrong. The ID addresses KTC's role in this matter and its position on supervision. The ID notes that KTC's motion to intervene was granted and that it filed a brief. ID at 3. More significantly, an entire subsection of the ID discusses the KTC's intervention, its brief and that KTC asserted that it actively supervised the tariffs. ID at 46-47.

[55] The *Amici* Brief was submitted by Kentucky's Attorney General. As pointed out in the brief, "[A]ttorneys general are the chief law officers of their states" and represent "the primary victims of the anticompetitive conduct" engaged in by Respondent. States' *Amici* Brief at 2.

because state regulators did little more than "receive submissions for filing [and] check some of them for mathematical accuracy." States' *Amici* Brief at 14. The brief also argued that active supervision was not present where, among other things, state regulators did not "hold a hearing," nor "determine if [the rates] were 'excessive, inadequate or unfairly discriminatory.'" State's *Amici* Brief at 14.

E. ISSUANCE OF A CEASE AND DESIST ORDER AGAINST RESPONDENT IS APPROPRIATE.

Where a violation of Section 5 of the Federal Trade Commission Act is found, the Commission is empowered to enter an appropriate order to prevent a recurrence of the violation.[56] The ALJ proposed an order requiring Respondent to cease and desist from collective ratemaking. ID at 49. The order would require Respondent's members to cancel or withdraw existing tariffs and to cease and desist from developing future tariffs that contain collective rates. Pursuant to paragraph VII., the order would remain in effect until active supervision is demonstrated to the Commission. *Id.*

The Commission has issued orders with similar provisions in prior litigated matters

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[56] The ALJ correctly noted in the ID,

> [U]pon determination that the challenged practice is an unfair method of competition, the Commission "shall issue. . . Aa order requiring such . . . Corporation to cease and desist from using such method of competition or such act of 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 a 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 the proven Violations. *Jacob Siegel Co. v. FTC*, 327 U.S. 608, 611 (1946); *National Lead*, 352 U.S. at 429.

ID at 48.

involving trucking firms. *New England Motor Rate Bureau*, 112 F.T.C. at 300; *Mass Movers*, 102 F.T.C. at 1228. The provisions in the order are also similar to order terms contained in a series of recent household goods consent orders accepted by the Commission. Indiana Household Goods and Warehousemen, Inc., C-4077 (April 25, 2003); Iowa Movers and Warehousemen's Association, C-4096 (Sept.10, 2003); Minnesota Transport Services Association, C-4097 (Sept.15, 2003); Alabama Trucking Association., D-9307 (Dec. 4, 2003); Movers Conference of Mississippi, Inc., D-9308 (Dec. 4, 2003).

One paragraph of the order issued by the ALJ differs from the corresponding paragraph in the orders issued by the Commission in the recent consents. Paragraph VII. of the Commission's consent orders reads:

> **IT IS FURTHER ORDERED** that this Order shall terminate twenty (20) years from the date on which it was issued by the Commission.

Paragraph VII. of the ALJ's order reads:

> **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 of vacated by the Commission.

ID at 54. As written, the ALJ's order does not contain the 20 year "sunset" provision common to most orders. The sunset provision in the consented orders reflects a Commission policy adopted in 1995. 60 Fed. Reg. 58514 (1995) ("Under this Policy Statement . . . the Commission will ordinarily sunset future competition and consumer protection administrative orders automatically after 20 years.") That policy supports a similar twenty year term in this case.

In addition, the ALJ's order explicitly anticipates that Respondent may seek to modify the order if, in the future, KTC engages in active supervision.[57] Section 5(b) of the FTC Act provides the standards under which a respondent may seek modification of its order. The Commission has adopted Rule 2.51, 16 C.F.R. § 2.51, to implement the Act.[58] The statute and rule set forth the conditions that must exist before the Commission will reopen, modify or set aside an order. Including language in the order itself that references, but does not track exactly, the language of the statute or rule might create the impression that some showing will be required *other* than an adequate showing under Section 5(b) or Rule 2.51.[59] For this reason, past

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[57] Respondent states that "This proceeding should be stayed to permit the Respondent Kentucky Transportation Cabinet and the Commission to resolve the Commission's concerns." Resp. App. at 45. This suggestion misperceives the Commission's need to obtain an order barring an ongoing violation of the antitrust laws in the form of a horizontal agreement on price. A similar issue arose in the *Ticor* litigation where the state of Montana went so far as enacting legislation giving state regulators additional powers to review and reject excessive commissions paid to agents - a key issue in the Commission's case. The Commission rejected the notion that such subsequent legislation obviated the need for a Commission order:

> The state's subsequent enactment of legislation cannot cure the legal violation that occurred earlier. Otherwise, states would have carte blanche to enact laws retroactively immunizing entities from liability after they had violated federal statute.

Ticor, 112 F.T.C. 444.

[58] In the Analyses to Aid Public Comment accompanying the issuance of the five household goods consent agreements noted above, the Commission stated that, "Respondent can seek to modify the proposed Order to permit it to engage in collective rate-making if it can demonstrate that the 'state action' defense would immunize its conduct." *See e.g.*, Indiana Analysis at 2.

[59] Additionally, a showing sufficient to require reopening an order does not necessarily require *modifying* the order (much less terminating it in full). *See e.g., United States v. Louisiana-Pacific Corp.*, 967 Fed 1372, 1376-77 (9th Cir. 1992) ("A decision to reopen does not necessarily entail a decision to modify the order. Reopening may occur even where the petition itself does not plead facts requiring modification.").

Commission orders have not included language that provides for how, or under what conditions, an order may be modified and adding such language in this order should be avoided. The Commission may, of course, explain in its Opinion what Respondent would be expected to show in any request for an order modification. Thus, should the Commission decide to adhere to its policy of including a sunset provision, the Commission should issue a final order with a paragraph VII. that reads:

> **IT IS FURTHER ORDERED** that this Order shall terminate twenty (20) years from the date on which it becomes final.

F. THE ALJ PROPERLY REJECTED UNRELIABLE HEARSAY.

Respondent has appealed the ALJ's decision to exclude two documents from evidence. Resp. App. at 3-4. Both documents were written on the eve of trial: one is a declaration by the KTC's Secretary of Transportation and the other was written by Respondent's corporate counsel belatedly recanting a prior letter that stated that the KTC engaged in little or no supervision of Respondent's tariff.[60] The Commission should affirm the ALJ's decision to exclude these self-serving, hearsay documents or, in the alternative, give them little weight due to their unreliability. The ALJ excluded these documents as unreliable hearsay.[61] As out-of-court, unsworn statements, the documents Respondent seeks to admit plainly qualify as hearsay under Federal Rule of Evidence 801(c). Fed. R. Evid. 801(c). No exception to that rule would allow their admittance. In addition to being hearsay, the documents were properly excluded as

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[60] Motion and Declaration of Proposed Intervenor Kentucky Transportation Cabinet, RX 227; Letter sent to Complaint Counsel by James Liebman, Respondent's corporate counsel, RX 226.

[61] PHC Tr. at 12, 15.

unreliable.[62] They contain statements by a party to the litigation (the head of KTC, which intervened as a Respondent in the case) and statements by a lawyer representing Respondent prepared long after the close of discovery. The documents' authors were not deposed about the self-serving statements.[63]

Respondent seeks to admit RX 226 which is a letter written by Respondent's corporate counsel. The letter attempts to explain away damaging admissions, contained in CX 110, that the state does not review Respondent's tariff filings and has never done more than stamp the tariff filings approved.[64] The President of the Kentucky Association, Mr. Tolson, testified that Respondent's corporate law firm, Liebman & Liebman, which prepared CX 110, had been long-time counsel to the Kentucky Association,[65] and that the firm had extensive experience ("perhaps even on almost a daily basis") practicing before the KTC on matters relating to household goods movers including tariff issues.[66] CX 110 was written on July 25, 2002, when Liebman &

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[62] Under Commission Rule of Practice 3.43(b)(1), "[i]rrelevant, immaterial, and unreliable evidence shall be excluded." 16 C.F.R. § 3.43(b).

[63] KTC's Motion to Intervene and supporting declaration of Secretary Bailey and Mr. Liebman's letter are both dated February 18, 2004. Discovery was formally closed 2½ months earlier on December 1, 2003, and final proposed witness and exhibit lists were due by December 30, 2003.

[64] The letter states that "[t]he state has never formally or informally commented, discussed, criticized, or audited any of the KHGCA filings under any Kentucky statute or regulation. And, the state does not grant official or unofficial conclusions regarding the tariff besides stamping each of the filings as approved." CX 110.

[65] CX 129 (Tolson, Dep. at 242-43).

[66] CX 129 (Tolson, Dep. at 236-37, 242-45).

Liebman was acting as counsel for the Respondent regarding the FTC's investigation.[67] RX 226 was filed on the eve of trial (almost 19 months after CX 110 and long after the close of discovery), ensuring that Mr. Liebman was never deposed about the self-serving statements in RX 226.

The declaration by Secretary Bailey, the head of the KTC, RX 227, contains conclusory, self-serving statements in support of Respondent's claim that KTC has engaged in active supervision. The KTC had known of the FTC's investigation since mid-2002. Closing Tr. at 125-126; CX 128.[68] Yet KTC waited until February 18, 2004, to file its motion to intervene and supporting declaration – less than a month before trial. In the March 10, 2004, Order granting the KTC's motion, the ALJ gave the KTC the opportunity to call Secretary Bailey as a witness at trial so long as he was deposed first, but the KTC decided not to expose Secretary Bailey to a deposition on the subject of active supervision.

The declaration by Secretary Bailey also should carry little weight because Mr. Bailey

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[67] Mr. Thompson's letter, CX 110, was sent in response to a document request by Complaint Counsel during the investigational stage of this case. Mr. Thompson signed the letter as "Counsel for Kentucky Household Goods Carriers Association." Thus, CX 110 was properly admitted as an admission by party-opponent consistent with Federal Rule 801(d)(2) (a statement made by an agent of the Respondent within the scope of the agency during the existence of the agency relationship). CX 110 was admitted into evidence without objection by Respondent. PHC Tr. at 7.

[68] CX 128 is meeting minutes for the August 18, 2002 meeting of the KHGCA. At the meeting, Mr. Thompson spoke to KHGCA members regarding the FTC's investigation, and Mr. Debord was in attendance. Mr. Debord had previously been interviewed by Commission staff on June 7, 2002, and again (along with a KTC Assistant General Counsel for Hearings) on August 15, 2002. Respondent's brief quotes KTC's lawyer telling the ALJ at closing argument that the KTC "never knew or had any knowledge about this until the Complaint had been filed [July 9, 2003]." Resp. App. at 16. This was plainly false. Respondent's counsel acknowledged at the closing argument that he was aware that Commission staff had had prior conversations with KTC "functionaries." Closing Tr. 126-127.

had little knowledge of the content of the declaration. Secretary Bailey had only been with KTC since January 1, 2004, just over six weeks at the time the declaration was made. Mr. Debord's supervisor and Director of the Division of Motor Carriers of the KTC, Ms. Denise King, spent only one to two percent of her time on household goods matters. IDF ¶ 50. Ms. King demonstrated her own unfamiliarity with tariffs in testifying that she: had never given any instructions on how to evaluate rates (IDF ¶ 51); had never discussed with her supervisor the rates contained in the tariff and had never been given any written instructions by her supervisor as to how she should analyze the rates contained in the tariff (IDF ¶ 52); and neither she nor her predecessors had any standards for reviewing household goods carriers' rates (IDF ¶ 53). Ms. King testified that she reported to the Commissioner of the Department of Vehicle Registration, who in turn reported to the Deputy Secretary of Transportation, and it was the Deputy Secretary who reported directly to the Secretary. IDF ¶ 49. In light of Ms. King's unfamiliarity with activities undertaken to supervise household goods moving rates, it strains credulity to believe that Secretary Bailey had actual knowledge of such activities.

The documents Respondent seeks to admit are hearsay and were properly excluded by the ALJ as unreliable under Commission Rule 3.43(b). Should the Commission consider the documents, however, they should be accorded little weight in light of their self-serving and untimely nature.

IV. CONCLUSION

Subject to the possible modifications noted above, the Initial Decision and Order should be sustained.

Respectfully submitted,

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Dated: August 31, 2004

CERTIFICATE OF SERVICE

This is to certify that on August 31, 2004, I caused a copy of Answering Brief of Counsel Supporting the Complaint to be served upon the following persons by facsimile, U.S. Mail or Hand-Carried:

by hand delivery to:

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