UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

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

COMPLAINT COUNSEL'S MEMORANDUM IN OPPOSITION TO RESPONDENT'S MOTION FOR SUMMARY DECISION

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I. INTRODUCTION

The Complaint in this matter charges the Kentucky Household Goods Carriers Association ("Kentucky Association") with unlawfully fixing the price of intrastate moving in Kentucky. The movers in the Kentucky Association agree upon what price will be charged to consumers, and then institute it by filing a "tariff" that requires the movers to charge the prices they have agreed upon. In its motion for summary decision, Respondent claims that the Commonwealth of Kentucky has authorized and supervised this activity as part of its regulation of the moving industry, and therefore conduct that would otherwise be illegal *per se*, is permissible. While decades ago the Kentucky Transportation Cabinet ("KTC") undertook steps to supervise movers' rates, state officials charged with overseeing this activity currently do little more than passively observe and rubber-stamp the rates agreed-upon by the movers. Thus, the state action defense raised by Respondent must fail.

II. LEGAL STANDARD FOR SUMMARY DECISION

To obtain summary decision, Respondents must show that "there is no genuine issue as to any material fact and that the moving party is entitled to such decision as a matter of law." Commission Rule of Practice 3.24(a)(2), 16 C.F.R. § 3.24 (a)(2). As the party moving for summary decision, Respondent bears the initial burden of identifying evidence that demonstrates the absence of any genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).[1] Complaint Counsel, as the non-moving party, are entitled to have the evidence viewed in the light most favorable to them, and to have all factual inferences made in their favor.

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[1] The Commission applies its summary decision rule consistently with case law construing the equivalent provision in the Federal Rules of Civil Procedure. *In re* Kroger Corp., 98 F.T.C. 639, 726 (1981).

Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

In the case at bar, Respondent concedes that the agreement among competitors would be illegal if its actions are not covered by the state action defense: "In order to prevail in this proceeding, Respondent has the burden of establishing a 'State Action Defense.'" Memorandum of Respondent Kentucky Household Goods Carriers Association, Inc. in Support of Motion for Summary Decision, December 19, 2003 ("Respondent's Memo") at 7.[2] Thus, in order to succeed in this motion, Respondent must establish that there is no material issue of fact in dispute, and that it has met its burden of production and persuasion that the state action defense applies. The facts read in the light most favorable to Complaint Counsel make out a violation of the antitrust laws and do not support Respondent's state action defense. Therefore, Respondent's motion fails, and summary decision must be denied.

III. FACTUAL BACKGROUND

The Kentucky Association files with the state a collective tariff for intrastate household goods movers in Kentucky. The tariff sets forth the rates these would-be competitors must charge for their moving services. The state has statutes in place establishing that rates are to be reasonable and not excessive to consumers. However, the state officials responsible for tariff issues take virtually no steps to review the substance of the tariffs. They do not collect business

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[2] The case law supports the proposition that the Respondent bears the burden of proof with respect to its state action defense. *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 625 (1992) (state action immunity was "[o]ne of the principal defenses" asserted); *In the Matter of New England Motor Rate Bureau, Inc.*, 112 F.T.C. 200, 278 (1989), *rev'd on other grounds sub. nom., New England Motor Rate Bureau v. FTC*, 908 F.2d 1064 (1st Cir. 1990) ("We therefore conclude that 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. Pennsylvania 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.").

data, they take no procedural steps to assure public input on rate levels, and they do not conduct a substantive review of the rates in the tariffs. Thus, the state fails to actively supervise the Kentucky Association, which defeats Respondent's claim that the actions of the Kentucky Association are protected by the state action defense.

A. Kentucky Household Goods Carriers Association

The Kentucky Household Goods Carriers Association, founded in 1957, prepares a collective tariff for intrastate household goods moving in Kentucky on behalf of its 93 members. CCS ¶ 4-8, 10.[3]

The tariff, which is applicable to all of its members, has several sections. One part of the tariff contains the rates movers must charge for local moves, which are defined as moves within 25 miles of a carrier's situs. Local rates are either charged at a flat rate per room or determined by hourly fees for labor and equipment. 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 as a function of the distance traveled and the total weight of the shipment. CCS ¶ 7, 20. Respondent's members have agreed to establish "peak" season which runs from May 15th through September 30th, during which the rates in the tariff are higher. CCS ¶ 16.

Another section of the tariff sets the rates for additional services, such as packing, moving particular bulky or heavy items, and moves involving flights of stairs. The members also agree on what constitutes "overtime:" any packing or unpacking performed on the weekends or after 5 p.m. during weekdays. The tariff's terms are precise. For example, packing a "Drum, Dish-

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[3] CCS ¶ ___ is a reference to Complaint Counsel's Separate and Concise Statement of Material Facts as to Which There Is a Genuine Issue for Trial, which is being filed herewith.

Pack" costs $14.60 regular time and $20.40 on overtime. Packing a wardrobe carton cost $3.60 regular time and $4.95 overtime. CCS ¶ 8. Moving an automobile is $134.70, and moving jet skis costs $84.15. CCS ¶ 18, 19.

Respondent regularly institutes collective increases in the rates contained in the tariff. Such increases can be instituted either by Respondent's Board of Directors or through a vote of the general membership. CCS ¶ 11-14, 16-17. For example, on October 13, 1999, Respondent agreed to seek a 10% increase in the intrastate transportation rates then in effect. CCS ¶ 12. Similarly, on October 11, 2000, Respondent agreed to seek an 8% increase in the intrastate transportation rates then in effect. CCS ¶ 13. This chart sets forth some examples of rate increases collectively implemented by Respondent:

Supplement No.	Effective Date	Increase
71	4-1-02	5% Intrastate rates, items
66	1-1-01	8% Intrastate rates
63	4-1-00	10% Certain items and local moves
61	1-1-00	10% Intrastate rates
56	1-1-99	5% Intrastate rates
51	1-1-98	8% Across the board general increase
46	10-1-96	5% Across the board
30	7-1-94	8% General increase
21	5-1-92	4.5% Intrastate rates

CCS ¶ 14. These rate increases are substantial. For instance, the April 26, 1985 annual meeting minutes state, "Rates have increased 42% since 1980." CCS ¶ 15.

Respondent orchestrates any change in the tariff so that all members will be able to

carefully track changes in the rates and any possible variation in those rates sought by member firms. CCS ¶ 9, 21-24. And the evidence shows that Respondent has applied 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. 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. Mr. Mirus took detailed notes of his conversation with Mr. Boyd. First, Mr. Mirus told him that his proposed change "was in conflict with provisions of the tariff." Mr. Mirus, "Also 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." The notes of the conversation make clear that even after agreeing to go along with the majority Mr. Boyd continued to believe that his proposed change was in the best interests of the consumer. CCS ¶ 22.

B. Kentucky Statutes Regarding Household Goods Carriers

Kentucky has enacted several statutes relating to the household goods industry. One statute, KY. REV. STAT. ANN. § 281.680, requires that all movers file a tariff with the KTC. CCS ¶ 29. In addition, there are several statutory provisions that establish guidelines for the level of the rates movers can charge. State officials interpret these provisions as requiring the state to protect the interests of consumers. CCS ¶ 30-33. For instance, Kentucky purports 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; CCS ¶ 30. Similarly, KY. REV. STAT. ANN. § 281.590 declares that it is state policy to have rates that provide "economical and efficient service." CCS ¶ 31. KY. REV. STAT. ANN. § 281.690(2) provides that if the Department believes that a proposed tariff is unreasonable, it may hold a hearing, and that a hearing must be held if the tariff is protested by an outside party. If, at the hearing, the Department finds that the tariff is "unjust, unreasonable, or unjustly discriminatory," it sets an alternative rate that is "just and reasonable." CCS ¶ 33. And KY. REV. STAT. ANN. § 281.695(1) states that if, after a hearing, the Department determines that the rates are "excessive," it may "determine the just and reasonable rate." CCS ¶ 32.

Under KY. REV. STAT. ANN. § 281.685, movers must charge the exact rate set by the tariff - no discounting is permitted. CCS ¶ 34. Nevertheless, Respondent's members occasionally try to offer discounts to consumers. CCS ¶ 26-28. For example, a letter from A. Arnold, a Kentucky Association member, complains that a competitor is 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."). CCS ¶ 26. Two other exhibits show movers attempting to discount 30% off the collective rates in the tariff. CCS ¶ 27-28.

C. Lack of State Supervision

The Division of Motor Carriers in the KTC is the office that is responsible for matters relating to household goods carriers. There is one part-time employee, William Debord, who is responsible for, among his other tasks, dealing with the household goods tariff. Aside from

ministerial tasks associated with maintaining the tariff, the KTC has undertaken no formal procedural steps to review or evaluate the tariff and that the KTC officials do no serious, substantive review of the actual rates contained in the tariff. For instance, as Mr. Debord testified at his deposition, the KTC does not hold hearings to consider rate increases, issues no written decisions approving rates or rate increases, undertakes no formal economic analyses of the household goods industry in Kentucky and has established no formal standards to analyze whether the rates contained in the tariff satisfy the statutory requirements established by the Kentucky legislature.

It should be noted that even Respondent's counsel during the investigation of this matter stated that no meaningful supervision of filed tariffs is undertaken. In a cover letter accompanying the Kentucky Association's document production, counsel wrote:

> 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. CCS ¶ 36.

As detailed below, counsel had the facts about right.

1. The KTC Commits Very Limited Resources to Tariff Issues

The person at the KTC responsible for intrastate movers matters is William Debord. Mr. Debord works part-time: only 100 hours per month. CCS ¶ 37. Not all of that time is committed to household goods moving, though. Mr. Debord also has responsibility for passenger carrier issues and trucking matters in general. In fact, it appears that Mr. Debord spends only 60% of his time on household goods matters. CCS ¶ 38.

Further, Mr. Debord performs numerous ministerial tasks associated with tariffs, such as

compliance, and thus has little time to review tariff rates. The bulk of his time is spent working on non-rate household goods matters. Fully 20% of his 100 hours is spent driving to the offices of regulated firms to conduct limited reviews of the firms' records. These reviews are done to make sure movers are not offering discounts to consumers. In addition, Mr. Debord spends time investigating unlicensed movers, conducting seminars, updating powers of attorney forms, and handling inquiries from the public. CCS ¶ 39.

Mr. Debord does not get any guidance from his supervisor about tariff issues. He has authority over such matters, and has not reported to anyone in that regard since 1979. CCS ¶ 40.

2. The KTC Does Not Receive Reliable Data

The KTC does not require household goods movers to submit business data to the state. For instance, movers do not routinely submit balance sheets and income statements to the KTC. CCS ¶ 41. Although Mr. Debord refers to his limited reviews of firms' records as "audits," they do not resemble financial audits. He only looks at certain documents that movers keep on individual moves. He does not review balance sheets, income statements, payroll documents, documents that show information about cost of capital, or documents that would allow him to analyze movers' profitability. CCS ¶ 44.

It has not always been the case that the KTC failed to collect business data. Years ago, the KTC required all household goods movers to file detailed annual financial reports. These reports were routinely audited in the 1970's and 1980's. The KTC would check their accuracy by comparing the data sent to the state to the firms' ICC filings, which could be 200 pages long. CCS ¶ 42.

In fact, according to minutes of the April 15, 1966 board meeting, Respondent considered

hiring a consultant to prepare information for the KTC because, "It was decided that due to the amount of information which maybe required by D.M.T., it would be feasible and probably more economical to call in an outside rates firm . . . ." The expert under consideration had many years experience at the Interstate Commerce Commission, where he supervised "between 30 and 40 employees whose duties were to develop cost formulae for the determination of rail, motor carrier . . . pay 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." CCS ¶ 43. Apparently, Respondent never did hire a consultant, and the state later dropped the requirement that all movers file reports.

The KTC's decision to stop collecting cost and revenue data from movers appears to conflict directly with a statutory requirement. KY. REV. STAT. ANN. § 281.680(4) provides that the KTC's collective rate making procedures "shall assure that the respective revenues and costs of carriers . . . are ascertained." CCS ¶ 31; *see also* Respondent's Memo at 31.

The Kentucky Association also does not compile accurate data on movers' costs or rates. If a member of Respondent files for an exception to an item in the tariff, files to change the level of its rate, or charges a rate that is different from the collective rate in the tariff, the Kentucky Association requires the carrier to fill out a Form 4268 and submit it to the Chairman of the Tariff Committee. (These Form 4268's are received by the Kentucky Association's Tariff Committee, but are not routinely filed by the Kentucky Association with the KTC). CCS ¶ 46. Respondent's files contained many such Form 4268's. They are devoid of data. Many of Respondent's member firms have changed their rates without even filling out the "justification"

section of the Form 4268. Other forms have only minimal information in the "justification" section. For instance, many forms simply say "Increase in operating costs" or contain a simple statement that the mover wishes to raise its rates. CCS ¶ 47.

3. The KTC Does Not Issue a Written Decision

The KTC does not issue a written decision with respect to Respondent's tariff. 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, the change takes effect. Aside from stamping the document, there is no statement issued by the state. As Mr. Debord testified, "No action is approval." CCS ¶ 48-49.

4. The KTC Does Not Hold Hearings

Aside from the original hearings in the 1950's or 1960's, where the state first approved the Kentucky Association's tariff, the state has never held a hearing to examine or analyze the collective rates contained in the Kentucky Association tariff. CCS ¶ 50. Since the only way the KTC could formally reject the Kentucky Association's collective tariff rate under Kentucky law the would be by setting the rates for a hearing, the KTC has obviously never formally rejected a tariff filed by Respondent. CCS ¶ 51.

The KTC also does not receive any informal input from groups advocating on behalf of consumers. CCS ¶ 52. A Kentucky administrative regulation, 601 KY. ADMIN. REG. ("KAR") 1:070(c), contains requirements that must be followed if movers change the tariff rates. The requirements include the following: "if the change in the rates and charges involves an increase, then he shall also, and at the same time, cause a notice to be printed in a newspaper of general

circulation in the area of his situs which shall give notice of the proposed increase, the old rates and charges, the proposed rates and charges, and which shall state that any interested party may protest said increase by filing a protest with the Transportation Cabinet in accordance with its rules and administrative regulations." Respondent's Memo at 37. Mr. Debord testified in response to a leading question by Respondent's counsel that the KTC enforced 601 KAR 1:070. CX 116 (Debord Tr., I) 71:13-72:6. However, there is no evidence that any such notices have been published in newspapers and Respondent has cited to no documents in support of its contention that this provision is enforced. In addition, none of Respondent's exhibits supports the contention that notices of this type are published in newspapers.

5. The KTC Does Not Receive Justification for Rate Increases

When Respondent seeks a rate increase, it submits a list of the changes it is making and, at most, a one page cover letter requesting that the increase be permitted to take effect. CCS ¶ 54. Respondent does not submit, nor does the KTC require, any business records, economic study, or cost justification data. CCS ¶ 54. And while Mr. Debord alludes to informal verbal discussions he may have with movers prior to the KTC's receipt of requests for rate increase, Respondent does not cite a specific example of such a conversation. Respondent's Rule 3.24 Separate Statement of Material Facts as to Which There is no Genuine Issue, at ¶ 62; CCS ¶ 56.[4]

For instance, in December 2000, Respondent sought an 8% rate increase. The only written justification for that increase was a cover letter. Mr. Debord characterized that letter as an "extra courtesy" and said that tariff filings were not normally accompanied by such a

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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. CCS ¶ 71.

justification letter. Mr. Debord also could not recall any oral statements made to justify this rate increase. Nevertheless, the rate increase was allowed to go into effect. CCS ¶ 54.

As another example, in 1999, Respondent filed Supplement 61, seeking a 10% increase in intrastate rates. There was no written justification provided to the state other than the cover letter which discussed a 5% interstate increase. CCS ¶ 55. Similarly, in 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. CCS ¶ 56.

6. The KTC Does not Analyze Rates or Rate Increases Under any State Standard

The Kentucky legislature has determined that the rates movers can charge must be, among other things, reasonable and not excessive. CCS ¶ 31-33. State officials believe these laws are intended to protect consumers, among others. *Id.* Yet, the KTC has no standards or measures in place for determining whether the rates they allow to go into effect meet these legislative norms. As Mr. Debord stated, there is no "written rule within the Cabinet that requires specific standards to be followed." CCS ¶ 65. Similarly, the state does not have any way of knowing whether a rate increase will increase movers' profits or result in rate levels that exceed the statute's guideline that prices cannot be "excessive." CCS ¶ ¶ 53, 57.

In addition to not having standards in place to review the collective rate increases at issue in this case, the state also does not have standards in place to review rates members file that vary from the collective rates. In one instance, a member moving firm, named the Planes moving company, filed an exception whereby it would charge 20% more than the highest intrastate rates

in the tariff. Another firm, Weil-Thoman, filed an exception whereby it would charge 38% more than the highest intrastate rates in the tariff. Both of these firms operate in the same geographic region. Mr. Debord does not remember the justification for these very substantial price surcharges. And, in neither instance could Mr. Debord identify a standard that the state would use to determine whether these rates complied with the statutory requirement that rates not be "excessive." CCS ¶ 59. The state also does not have any standard in place to evaluate rates charged by non-member firms. A moving company that is not a member of the Kentucky Association, Apartment Movers, filed for individual rates. Mr. Debord testified that he had no "specific standards" for determining whether those rates would be acceptable. CCS ¶ 58. (Non-member rates are not challenged in the instant suit, but we note by way of analogy that the state has no standards in place in those instances as well.)

The state has not always taken such a hands-off approach to regulation. Three decades ago, the KTC had a staff of three auditors and others who did cost studies involving statistical analysis of for-hire carriers. CCS ¶ ¶ 60, 63. In the 1970's, the KTC routinely compiled a spreadsheet which contained the calculated operating ratios for all household goods movers. CCS ¶ 62. Mr. Debord himself was involved in deriving movers' operating ratios, and he would then prepare monthly written reports to the Commissioner analyzing rate applications. However, some time in the 1980's, the Commissioner told him "not to bother them with those things" or "Don't bother us with that." (It is somewhat unclear why the state tracked firms' operating ratios since it never developed a written policy setting forth an acceptable level of movers' operating ratios. CCS ¶ 64). Following the Commissioner's directions, Mr. Debord has since discontinued preparing written analyses of tariff rates. CCS ¶ 61.

IV. LEGAL DISCUSSION

A. Agreement on Price

Agreements among competitors to fix or set prices have been historically condemned as *per se* illegal. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 218 (1940).[5] Because the anticompetitive effects of horizontal price fixing are presumed, courts are not required to conduct an elaborate analysis into the precise harm caused by the restraint or the business justification for its use. So long as the agreement "ordinarily encompasses behavior that past judicial experience and current economic learning have shown to warrant summary condemnation" and there is no "legitimate justification" for the restraint, the fixing of prices between actual or potential competitors is unlawful. *In the Matter of PolyGram Holding, Inc.*, (*"Three Tenors"*) F.T.C. Docket No. 9298, slip op. at 29 (July 24, 2003).

Rate making associations, in which members are otherwise competitors, that establish rates which apply to and across the membership constitute illegal price-fixing arrangements, and absent the existence of an antitrust law defense, have been proscribed by the courts for nearly 60 years. *Georgia v. Pennsylvania R.R.*, 324 U.S. 439 (1945). More recently, instances of collective rate making have been found to constitute *per se* violations of the antitrust laws. *United States v. Southern Motor Carriers Rate Conference*, 467 F. Supp. 471, 486 (N.D. Ga. 1979), *aff'd,* 702 F.2d 543 (5th Cir. Unit B 1983), *rev'd on other grounds,* 471 U.S. 48 (1985). Even where members agree that rates may vary, such conduct is still illegal:

> Nor can an agreement respecting joint tariffs be justified on the grounds that the

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[5] *See also Arizona v. Maricopa County Med. Soc'y*, 457 U.S. 332 (1982); ABA Section of Antitrust Law, Antitrust Law Developments (5th Ed. 2002), at 82 (citing *United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927)).

> association or its members have not fixed a uniform price to consumers because movers are free to select one of 10 rate schedules, or alternatively may file exceptions to the agency schedule, or may file an independent schedule. While any of these options may result in price variations, concerted activity to influence or tamper with the *level* of prices, which putative competitors may either accept or reject, is violative of the antitrust laws as a conspiracy aimed at absolute uniformity.

In the Matter of Massachusetts Furniture and Piano Movers Ass'n, 102 F.T.C. 1176, 1201 (1983) (Initial Decision ("*Int. Dec.*")), *rev'd on other grounds,* 773 F.2d 391 (1st Cir. 1985). The Commission also held, "It is beyond cavil that agreements among competitors to set price levels or price ranges are *per se* illegal under the antitrust laws." 102 F.T.C. at 1224.

In *FTC v. Ticor Title Ins. Co.*, 112 F.T.C. 344 (1989), Respondents argued that under *Broadcast Music, Inc. v. CBS*, 441 U.S. 1 (1979), their conduct should not automatically be treated as a *per se* violation of the antitrust laws. The Commission rejected this argument: "Respondents have not advanced, and we cannot conceive of, any plausible efficiency justification for their price-fixing activities." 112 F.T.C. at 464 (*Commission Opinion* ("*Comm. Op.*")). The Commission's decision was affirmed by the Supreme Court, which stated, "This case involves horizontal price fixing . . . . No antitrust offense is more pernicious than price fixing." *Ticor*, 504 U.S. at 639. Thus, a rate bureau that prepares a collective tariff cannot assert a legitimate justification for its horizontal agreement. As a result, unless the conduct is shielded by the state action defense, it will be found to violate Section 5 of the Federal Trade Commission Act.

B. State Action

The critical issue in this case is whether Respondent can sustain its burden of establishing that its conduct is subject to a valid state action defense. 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. This basis for the state action defense was reaffirmed by the Supreme Court in *Ticor*, where the Court emphasized, "Our decision [in *Parker*] was grounded in principles of federalism." 504 U.S. at 633.

While the state action defense may shield private actors from antitrust scrutiny when their activities are conducted pursuant to state authority, a state may not simply provide a defense "to those who violate the Sherman Act by authorizing them to violate it, or declaring that their action is lawful." *Parker v. Brown*, 317 U.S. at 351. The state must instead substitute its own control of the activity for that of the market – the private activity must be both authorized by the state *and* supervised by the state. Specifically, for the state action defense to prevail, the state must meet the two-prong standard articulated in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980) (quoting *City of Lafayette v. Louisiana 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 the active supervision test was failed. As the Court put it,

> 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.[6] Thus, unless an antitrust defendant can show that it meets both prongs of the standard, it will not be entitled to the defense provided under *Parker v. Brown.*

The key issue in this case is whether Respondent can demonstrate compliance with prong two, under which it is the Respondent's burden to substantiate the claim that the state actively supervised the tariff filed by Respondent. The threshold issue under prong two is whether the state has controls in place that ensure that state policy objectives are achieved. As the Court has stated,

> [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.

Ticor, 504 U.S. at 634-35. Thus, the active supervision requirement will shelter only "the particular anticompetitive acts of private parties that, in the judgment of the State, actually further state regulatory policies." *Patrick v. Burget*, 486 U.S. 94, 100-01 (1988). Where a state has a regulatory policy in place that calls for "reasonable" rates or rates that are not "excessive," prong two requires that the state make a judgment that those statutory goals are met. As the Supreme Court has held, the supervision requirement further serves to assign political responsibility for a decision to displace free market with regulation: "[I]nsistence on real

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[6] As the Court noted, such scant state involvement could not immunize the private action 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.

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.

It cannot be emphasized enough that 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 exceptionally clear evidence of the state's decision to supplant competition. *Ticor*, 504 U.S. at 639. Active supervision requires that the state must "have *and* exercise ultimate authority" over the challenged anticompetitive conduct. *Patrick v. Burget*, 486 U.S. at 101 (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. The Supreme Court has also held that active supervision requires state officials to engage in a "pointed re-examination" of the private conduct. *Midcal,* 445 U.S. at 106. As the *Ticor* Court put it, "[m]uch as in causation inquiries, the analysis asks whether the State has played a substantial role in determining the specifics of the economic policy." 504 U.S. at 635; Respondent's Memo at 16.

In *Ticor*, the Supreme Court quoted language from earlier lower court cases setting out a list of organizational and procedural characteristics relevant as the "beginning point" of 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 (citations omitted). However, while Respondent must prove that the state has in place an administrative body charged with the necessary review of filed tariffs and capable of

developing a factual record to do so, the Court found that this level of supervision alone is not enough to constitute active supervision. *Id.* at 637-38. Rather, the Court insisted that state officials look with great specificity at the actual rates involved: "the party claiming the immunity must show that state officials have undertaken the necessary steps to determine the specifics of the price-fixing or ratesetting scheme." *Id.* at 638. The Commission has similarly held that "generalized assertions of review do not withstand scrutiny." *Ticor*, 112 F.T.C. at 434 (*Comm. Op.*).[7]

Instead, courts have set forth a number of the specific factors to be considered in assessing whether active supervision has been established. One such factor is whether the state collects and verifies data from industry participants. For instance, courts evaluate whether the state requires firms to furnish business data generated by the firms in the course of their operations. *Southern Motor Carriers*, 467 F. Supp. at 477 (N.D.Ga. 1979) ("freight bills and information concerning other expenses"); *Ticor*, 112 F.T.C. at 437 (*Comm. Op.*) (cost and expense data); *Ticor*, 504 U.S. at 639. The Commission has inquired whether legitimate justifications were submitted with even minor rate amendments and adjustments. *Ticor*, 112 F.T.C. at 438 (*Comm. Op.*). Courts have also examined whether the state participated in on-site review and independent verification of financial information from carriers' books and records.

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[7] In *Ticor*, the Commission found no active supervision based in part on testimony by a state official that he "didn't have any idea what an efficient company's expenses would be for search and examination services," and that in his opinion he would have to "study the search and examination expenses of the individual companies to effectively regulate the charges for search and examination expenses." *Id.* The Supreme Court opinion in *Ticor* did not recite all of the record facts bearing on active supervision but 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.

Southern Motor Carriers, 467 F. Supp. at 477. 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 of participants' financial records constituted active supervision. *Ticor*, 112 F.T.C. at 428 (*Comm. Op.*); 504 U.S. at 640. Such efforts to collect and verify industry data have been highlighted by the courts as activities states can and should engage in to ensure that they rise to an adequate level of active supervision.

Written analysis by the state of its decision-making process has a direct bearing on the active supervision requirement. Courts have looked positively upon efforts by states to issue a written order, whether issued after a public hearing on the rate or issued in compliance with a state determined standard. *New England Motor Rate Bureau, Inc.*, 112 F.T.C. at 282 (*Comm. Op.*). Courts have also considered separate, independent studies conducted or commissioned by a state that evaluate the necessity of proposed rate increases as critical to understanding how actively the state supervises. *Southern Motor Carriers*, 467 F. Supp. at 477; *New England Motor Rate Bureau*, 112 F.T.C. at 233, 266, 279-80 (*Int. Dec.*, *Comm. Op.*, *Comm. Op.*) (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").[8]

Whether a state holds hearings to evaluate rates is also highly material to courts'

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[8] The Commission's decision in *New England Motor Rate Bureau* was reversed by the First Circuit, *New England Motor Rate Bureau v. FTC*, 908 F.2d 1064 (1st Cir. 1990), but the Supreme Court later explicitly held the First Circuit's standard for active supervision to be "insufficient" in *Ticor*. 504 U.S. at 637. Complaint Counsel's use of the Commission Opinion is intended to illuminate the factors reviewed and highlighted by the Commission in a prior case evaluating the active supervision requirement.

determination of active supervision. In *Southern Motor Carriers*, the government conceded that prong two of *Midcal* was met where the District Court found that "although the submitted rates could go into effect without further state activity, the State had ordered and held ratemaking hearings on a consistent basis, using the industry submissions as the beginning point." *Ticor*, 504 U.S. at 639; *see also Southern Motor Carriers*, 471 U.S. at 66. The Supreme Court favorably cited to these findings of active supervision in *Ticor*. 504 U.S. at 639. The facts of *Southern Motor Carriers* also demonstrated that the state's rate conference, the body which submitted rates for motor carriers throughout the state, also held public meetings prior to submitting a rate proposal, to which shippers (the customers) were often invited and often attended. *Southern Motor Carriers,* 467 F. Supp. at 476. Thus, public input and consideration of industry data have been given favorable treatment by the Supreme Court. Conversely, in the four states where inadequate state supervision was found in *Ticor*, there were no hearings on rate increases. *Ticor*, 112 F.T.C. at 381 (*Int. Dec.*) (Connecticut); *Id.* at 385 (*Int. Dec.*) (Wisconsin); *Id.* at 388 n. 229 (*Int. Dec.*) (Arizona); *Id.* at 444 (*Comm. Op.*).[9] Even where hearings have been held in the past, failure to hold hearings in the recent past has been found to indicate a lack of supervision. *New England Motor Rate Bureau*, 112 F.T.C. at 267 (*Comm. Op.*).[10]

Courts also look for continuous review of the rate setting activities, as well as whether the

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[9] 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.*).

[10] In *New England Motor Rate Bureau*, the state of Massachusetts was held to have 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. *Id.* at 282.

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.*). Isolated or infrequent instances of review are not sufficient. *Ticor*, 112 F.T.C. at 428 (*Comm. Op.*).[11] Nor, as noted above, can a state allow numerous amendments to take effect without meaningful review. *Ticor*, 112 F.T.C. at 438 (*Comm. Op.*). Even assuming rates were once reasonable, a state cannot allow rates to be left in place without reexamination. *Id.* Rather, review of rate making activities should be continuous in nature. *Ticor,* 504 U.S. at 640.[12]

Finally, courts have placed substantial emphasis on ensuring that state supervision includes specific measures, standards, or formulae to prove that the state's judgment was brought to bear on the rates being charged, not merely a ministerial checking of the information submitted, such as the mere checking of filed rates for mathematical accuracy. *Id.* at 638. Specifically, courts have looked at whether states calculate firms' rates of return, operating ratios, profits, or returns on capital. Significantly, in *Ticor* the Supreme Court observed that a regulatory scheme which included a specified rate of return could provide comprehensive supervision:

> And we 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. *Cf. 324 Liquor Corp. v. Duffy*, 479 U.S.

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[11] *See also* 1 Areeda & Hovenkamp, Antitrust Law p. 470 (2d ed. 2000) ("Supervision will be adequate when a public official must approve each private decision as part of "extensive and continuing" supervision."), citing *Health Care Equalization Comm. v. Iowa Medical Socy.*, 851 F.2d 1020, 1027 (8th Cir. 1988) ("Here by contrast, the Commissioner's supervision is extensive and continuing.").

[12] The Supreme Court stated that it would not call into question a regulatory scheme that had "an infrequent lapse of state supervision." *Id.*

335, 344, n. 6 (1987) (a statute specifying the margin between wholesale and retail prices may satisfy the active supervision requirement).

504 U.S. at 640. In *Southern Motor Carriers*, the court also took note that state officials used industry data to arrive at their own figure for an operating ratio to submit as evidence at the state hearing. 467 F. Supp. at 477. The Commission has also 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 "[looked] behind the rates to determine whether they accurately reflect a carrier's profits and costs." 112 F.T.C. at 267, 279 (*Comm. Op.*). And in *Ticor*, states were supplied with profit data and actual rates of return on capital, but even so the Commission found active supervision absent because the state did not get information on what lay behind the profit figures. 112 F.T.C. at 416, 432 (*Int. Dec.*, *Comm. Op.*); *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).[13] Thus, a finding of state supervision involves more than mere submission and approval of rates; it involves quantitative analysis of the economic impact the rates have on industry participants.

V. ARGUMENT

A. Respondent has Coordinated an Illegal Agreement on Price

Plainly, Respondent has coordinated a price fixing agreement. Respondent's actions facilitate members' agreement on a schedule of local and interstate rates, as well as agreements

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[13] The facts of the Commission's decision in *Ticor* demonstrate that the state of Connecticut had a private consultant do a study in support of a rate increase that concluded that the increase would result in a 2.78 percent return on capital. 112 F.T.C. at 382 (*Int. Dec.*). However, the state did not know the basis of profit figures, specifically commissions paid to agents, which were a key component of the rates.

on specific rates for additional tasks such as hauling a car or moving jet skis. The members, through Respondent's efforts, collectively agree to institute rate increases. At least once every year for many years, Respondent has filed a tariff supplement raising the rates that members must charge. Over this period, increases have ranged from approximately five to ten percent per year. Members also have agreed to establish uniform hours for overtime charges and have agreed to specific "peak" summer dates when members increase their rates. These are the types of horizontal agreements courts have found to be *per se* illegal in the past. Under *Three Tenors*, the burden shifts to Respondent to offer a "legitimate justification" for these horizontal restraints. *Three Tenors*, slip op. at 29. Respondent has offered no such justification, and there is no plausible justification for this type of agreement.

B. Kentucky does Not Engage in Active Supervision as Required by the State Action Defense

Kentucky's review of the rate filings made by Respondent falls far short of the "active supervision" required by *Ticor* and other pertinent cases. The state takes no procedural steps such has holding hearings or issuing written decisions. Nor does it collect business data or require the submission of cost studies or economic studies when Respondent files for higher rates. More importantly, the state does no substantive review of the rates filed. And although the statute requires that state regulators consider whether the service being provided is "economical and efficient" and not "excessive," the state has no standards by which to measure the impact of the filed rates on consumers.

Respondent urges this Tribunal to find active supervision based on two factors: the existence of state laws and regulations pertinent to household goods movers and Mr. Debord's

self-serving statements that, because of his experience, he can judge whether rates are reasonable based on his informal discussions with movers and his review of general industry information. As discussed below, this minimal level of state activity fails to meet the law's required showing for active supervision.

Respondent places great emphasis on the statutes and regulations Kentucky has in place that pertain to movers. Respondent's Memo at 24-42. At one time, showing that a state had a department in place with adequate authority to provide review of private agreements went a long way toward establishing the state action defense. *New England Motor Rate Bureau*, 908 F.2d at 1077.[14] However, in the case that Respondent now concedes is controlling, *Ticor* explicitly rejected as inadequate the mere presence of a regulatory program. The *Ticor* Court specifically stated that having a program in place may be a starting point for determining active state supervision, but that supervision will not be shown merely where:

> the 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 (citations omitted). Instead, as we have detailed elsewhere in this memorandum, *Ticor* requires that the state actually perform a substantive review of the rates.

Respondent would have this Tribunal find active supervision under the rigorous *Ticor* standard because Mr. Debord has asserted that in his judgment rates are reasonable – that is where his judgment is informed merely through his informal discussions with movers and his

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[14] In an earlier motion, Respondent argued that this case set forth the standard for active supervision. Respondent Kentucky Household Goods Carriers Association, Inc.'s Opposition to Complaint Counsel's Motion to Consolidate, August 7, 2003 at 4-5.

review of general information such as the *Wall Street Journal*. Respondent cites no case where such an informal and minimalistic level of state activity has been held to constitute active supervision. And Complaint Counsel's research has certainly uncovered no case that so holds. Rather, courts addressing the active supervision doctrine have identified specific state supervisory activities an antitrust defendant must show to sustain its burden. Each relevant supervisory activity (e.g., that the state collects accurate business data, conducts hearings, issues a written decision, conducts economic studies, reviews profit levels and develops standards or measures such as operating rations) will be reviewed in turn in the following paragraphs. While a court could have a difficult task determining the presence or absence of active supervision where a state undertakes some but not all of these activities, Kentucky presents no such challenge because it undertakes none of these steps.

One set of factors courts have looked at to determine whether active supervision is present deals with the collection of data. Courts have repeatedly noted the importance of states' diligence in gathering business data on the firms subject to regulation. *Southern Motor Carriers* focused on the state's review of freight bills and other information, and it also noted the importance of on-site review and verification of business data. 467 F. Supp. at 477. *Ticor* made favorable mention of the state's use of the industry submissions in *Southern Motor Carriers* and it also referred favorably to a regulatory program that used "sampling techniques." 504 U.S. at 639, 640. And the Commission opinion in *Ticor* noted the importance of whether tariff filings were accompanied by "cost or expense data." 112 F.T.C. at 437 (*Comm. Op.*). Kentucky no longer has a program in place to obtain any reliable business data from movers. While it once required movers to submit annual performance reports, that requirement has been discontinued.

Now, despite the fact that Kentucky statute KY. REV. STAT. ANN. § 281.680(4) requires the KTC to collect information so that it can make sure that movers' "respective revenues and costs . . . are ascertained," the state has no program in place requiring moving firms to submit any sort of business data.

A second set of factors courts have looked at in determining the presence or absence of active supervision is whether the state issues a written analysis of its decision-making process. For instance, in *New England Motor Rate Bureau*, the Commission noted that all rate changes were accompanied by a written order issued by one of the states. 112 F.T.C. at 282 (*Comm. Op.*). *New England Motor Rate Bureau* found an absence of active supervision in another state because, among other things, the state had "never conducted an economic study of the intrastate trucking industry nor of the effects of its regulatory policy on the intrastate trucking industry." 112 F.T.C. at 233 (*Int. Dec., Comm. Op.*). *Southern Motor Carriers* noted that the state did a separate independent study of any proposed rate increase. 467 F. Supp. at 477. Here again, Kentucky does none of these activities. When Respondent files for a rate increase, the state stamps the document "received," period. No economic studies are performed. No independent study is performed. No written decision is issued by the state. As Mr. Debord stated, "No action is approval."

Courts also consider the transparency of a state's review process. In *Ticor*, the Supreme Court noted that in *Southern Motor Carriers*, the Public Service Commission "had ordered and held ratemaking hearings on a consistent basis." *Ticor*, 504 U.S. at 639. *Southern Motor Carriers* also contained evidence that the rate bureau had received input from consumers at meetings where rates were discussed. 467 F. Supp. at 476. Kentucky never holds hearings to

consider the collective rates in Respondent's tariff, and Respondent has never had consumers represented at its Board meetings. Respondent notes in Respondent's Rule 3.24 Separate Statement of Material Facts as to Which There is No Genuine Issue, at ¶ 40, that Kentucky did hold hearings in the 1950's or 1960's. *Ticor*, of course, has made clear that state review must be continuous in nature, and a 50 year span since the last hearing held on movers' rates is plainly unacceptable. 504 U.S. 640.

Respondent expends considerable effort addressing whether particular due process measures are appropriate for the supervision of firms in the household goods moving industry. Respondent's Memo at 18-23. The fact is, however, that the Kentucky legislature has specifically identified public hearings as one of the ways the KTC is expected to consider rates. *See e.g.* KY. REV. STAT. ANN. §§ 281.640, 281.690(2), 281.695(1). In addition, a Kentucky administrative regulation, 601 KAR 1:070(c), contains a requirement that movers must put a notice in the newspaper when rates are increased, but it appears that the KTC does not require adherence to that regulation.[15]

Courts also place great emphasis on the state's substantive review of the rate levels. The Supreme Court has said that in order for state supervision to be adequate, state officials must engage in a "pointed re-examination" of the private conduct, *Midcal,* 445 U.S. at 106, and that the state must "have and exercise ultimate authority" over the challenged anticompetitive

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[15] Another factor that is taken into account is whether the state has ever rejected a rate. *New England Motor Rate Bureau* found an absence of active supervision because, among other things, the state had never rejected a tariff based on the level of the rates. 112 F.T.C. at 267, 279 (*Comm. Op.*). Here, Kentucky has never formally rejected a tariff submitted by Respondent nor has it formally rejected any proposed rate increase sought by Respondent. CCS ¶ ¶ 50-51.

conduct. *Patrick v. Burget*, 486 U.S. at 101. As Respondent correctly cites in the instant motion, *Ticor* requires state officials to exercise "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." *Ticor,* 504 U.S. at 634-35; Respondent's Memo at 16. Similarly, Respondent correctly cites *Ticor's* requirement that "the party claiming the immunity must show that state officials have undertaken the necessary steps to determine the specifics of the price fixing or ratesetting scheme." *Ticor,* 504 U.S. at 638; Respondent's Memo at 17.

In the case of Kentucky, active supervision would involve analyzing the rates from the standpoint of, among other things, whether the consumer was paying a reasonable rate for moving services. KY. REV. STAT. ANN. §§ 281.590; 281.690; 281.695. Courts have identified several analytical tools that states have used to review the reasonableness of rates. In *Ticor*, the Supreme Court noted that a "specified rate of return" analysis "allow state regulators to provide comprehensive supervision" of rates. 504 U.S. at 640. The Commission opinion in *Ticor* noted that the state of Connecticut had a private consultant do a study in support of a rate increase that concluded that the increase would result in a 2.78 percent return on capital. 112 F.T.C. at 382 (*Int. Dec.*). *Southern Motor Carriers* found active supervision where, among other things, the state reviewed requests for an increase in motor carrier rates by analyzing motor carriers' operating ratios. 467 F. Supp. at 477. And in *New England Motor Rate Bureau*, the Commission found an absence of active supervision, in part, because the state did not look at the relationship between rates and carriers' profits. 112 F.T.C. at 267, 279 (*Comm. Op.*).

At one point, Kentucky did use one of these methods; it maintained a spreadsheet

containing calculations of all movers' operating ratios. CCS ¶ 62. This method of analyzing rates is still in effect in some states, such as Oregon. *Id.* However, sometime in the 1980's, Mr. Debord was told not to bother his supervisors with that analysis. Now Kentucky has no standards or formulae for reviewing rates or for reviewing rate increases. The state routinely allows the Kentucky Association rate increases to take effect without any way to measure whether they comply with Kentucky statutes. And, movers have been permitted to charge surcharges of up to 38% more than the collective rate without any measure or standard for assessing the level of those rates. CCS ¶ 59.

Respondent has fallen far short of showing that Kentucky takes any of the steps necessary to demonstrate active supervision under *Ticor* and other active supervision cases. Of all of the factors identified above that courts have looked at to determine the absence or presence of active supervision, Kentucky performs not one.

Respondent's motion also states that the Commission's Analysis to Aid Public Comment in Iowa (or Indiana) represents a statement of what the law ought to be rather than a statement of the present state of the law. Respondent's Memo at 18. Respondent's motion does not identify any specific aspect or aspects of the Analysis which purport to lack legal foundation. Complaint Counsel note that the Commission has issued a total of six Analyses to Aid Public Comment. (Indiana Household Goods and Warehousemen, Inc., March 18, 2003; Iowa Movers and Warehousemen's Association, Inc., August 1, 2003; Minnesota Transport Services Association, August 1, 2003; Alabama Trucking Association, Inc., October 30, 2003; Movers Conference of Mississippi, Inc., October 30, 2003; and, New Hampshire Motor Transport Association, October 30, 2003.) The Analyses are similar, although the Alabama and Mississippi Analyses provide

more details than do the other four on the specific reasons the Commission found a lack of active supervision. Complaint Counsel are unaware of any statements in the Analyses that conflict with current law as it pertains to Respondent's failure to establish the presence of active supervision.

VI. CONCLUSION

As set forth herein, Complaint Counsel urge this Tribunal to deny Respondents' motion for summary decision.

Respectfully submitted,

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