

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

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**DOCKET NO. 9309**

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

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**REPLY BRIEF ON APPEAL OF**  
**RESPONDENT KENTUCKY**  
**HOUSEHOLD GOODS CARRIERS**  
**ASSOCIATION, INC.**

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***September 11, 2004***

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

CC App.	Complaint Counsel's Appeal Brief; August 31, 2004
CX	Complaint Counsel's Exhibit
ID	Initial Decision
Kentucky Association	Kentucky Household Goods Carriers Association, Inc.
KTC	Kentucky Transportation Cabinet
RX	Respondent's Exhibit
Resp. App.	Respondent's Appeal Brief; July 30, 2004 (joined by KTC)
5/19/04 Hearing Tr.	Transcript of Hearing before ALJ; May 19, 2004; vol. 2.

## INTRODUCTORY STATEMENT

Respondent herewith submits its Reply Brief in this proceeding pursuant to the provisions of Rule 3.52 of the Commission's Rules of Practice.

The headings in this Reply Brief have been arranged so as to correspond with those headings and subject matter contained in the Answering Brief of Counsel Supporting the Complaint which are addressed.

In the Introduction to their Answering Brief, Complaint Counsel comment on "[Respondent's] assertion that the [state action] defense applies where the state does little more than passively rubber stamp privately-set prices." CC App. 1; ¶ 1.

Respondent has never made this assertion.

Respondent asserts that the record shows that KTC does not "rubber stamp" tariff rate *proposals* which are submitted by the Kentucky Association.

The actions taken by KTC are performed by a KTC representative who has engaged in this activity for three (3) decades and have been amply described in Respondent's Appeal Brief. Resp. App. 5-10; 15-18; 41-44.

However, the record also shows that Complaint Counsel and the Initial Decision have "rubber-stamped" every available judicial and administrative decision, no matter how unrelated to the subject matter at hand, construing, explaining, or speculating on the "state action" doctrine, and used them in this proceeding to avoid application of the simple formulation described in the only case that counts - - *Ticor*.

Contrary to the repeated misleading statements of Complaint Counsel, there is no agreement in this case among competitors. None exists and none has been conceded by Respondent or its Counsel. The Kentucky Association submits tariff proposals to KTC;

only KTC has the authority to establish household goods transportation rates. The record contains no evidence of any agreement among Respondent or its Members, nor any evidence that Respondent or any of its Members have engaged (a) in any unlawful activity; or (b) any activity in violation of Kentucky law or regulations.

KTC gathers and analyzes such economic data as it deems necessary to perform its rate regulatory functions.

The ID faults Respondent for finding no case where the level of supervision at bar has been held sufficient. More to the point, there exists no case where regulatory supervision exists over regulated carriers of household goods to the extent proven in this case where the presence of State Action has been successfully challenged.

Respondent does not now “attempt to revive the standard for active supervision established in *New England Motor Rate Bureau, Inc. v. FTC.*” ( CC App. 3-4) However, unlike Complaint Counsel, Respondent asks the Commission to rule on the basis of *Ticor* and not of the basis of the reversed and pre-*Ticor* cases so frequently cited by Complaint Counsel.

## II. COMPLAINT COUNSEL’S STATEMENT OF THE CASE

### A. COMPLAINT COUNSEL’S STATEMENT OF FACTS

#### 1. Complaint Counsel’s Unsupported Claim That the Kentucky Association - - and not KTC - - Established Collective Rates for Movers

Complaint Counsel’s recital of the facts includes many familiar statements that are incorrect.

Respondent's Members have not "agreed" to establish a "peak season," (CC App. 3), though they have agreed to authorize the Kentucky Association to file a proposed tariff containing such a proposal on their behalf.

Respondent does not "regularly institute rate increases" (CC App. 4) as only KTC has the legal authority to establish rates for the transportation of household goods in the Commonwealth of Kentucky.

There is no evidence in the record to support the conclusion or inference that the Kentucky Association takes steps to orchestrate changes in the tariff or that Kentucky Association Members use this information to keep rates elevated. (CC App. 5)

There is no evidence in the record to support the conclusion or inference that Respondent has ever exerted pressure on any Member with respect to any tariff matter. (CC App. 5)

2. Complaint Counsel's Statement With Respect to Kentucky Statutes Regarding Household Goods Carriers

Contrary to the claim that KTC applies no standards with respect to the establishment of household goods transportation rates, the statutes described in the ID and referred to by Complaint Counsel provide the standard. (CC App. 6)

There is no evidence in the record to support the conclusion or inference that Respondent's Members "often try to offer discounts to consumers." (CC App. 6)

3. Complaint Counsel's Claim that KTC Provided "Minimal" Supervision of Rates

The letter referred to by Complaint Counsel (CX 110) from a sadly ill-informed prior Kentucky Association Counsel (CC App. 7) who understood neither the nature nor



purpose of the FTC “inquiry” into what were taken to be matters of compliance with State law, was subsequently recanted in a *further* letter (RX 226) from the subject law firm offered as evidence and excluded at trial. (Respondent’s current Counsel informed Complaint Counsel of the incorrectness of prior Counsel’s letter shortly after the commencement of this proceeding.) Respondent believes that it was error for the ALJ to exclude the subsequent letter from evidence.

a. Complaint Counsel says that “Once Upon A Time” the KTC Reviewed Tariff Rates”

It is noteworthy that for much of the “once upon a time” period described by Complaint Counsel, the same person who *now* administers the Kentucky household goods regulatory program had the same or similar responsibilities with KTC’s motor carrier regulatory program. Complaint Counsel acknowledges this. (CC App. 9; ¶ 2)

b. Complaint Counsel says that KTC *Now* Commits “Limited Resources” To Reviewing Tariffs

Although Complaint Counsel has advanced this proposition, no evidence has been offered with respect to it. The record contains no evidence as to what constitutes “limited resources.” Yet there is substantial evidence of the commitment of KTC to its rate regulatory function.

Complaint Counsel professes confusion as to “[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.” (CC App. 9; n. 2)

Here is the answer.

KTC continued the regulation of household goods in a thorough and aggressive manner by retaining the services of its most competent and experienced transportation professional to administer the regulatory program. If and when William Debord leaves the employment of the State, it may be necessary for KTC to make other arrangements which will involve increased or alternate staffing. In fact, KTC is holding a meeting on September 15<sup>th</sup> to discuss changes which may be made necessary by this proceeding.

The dramatic change in the state regulatory landscape effected by the ICC Termination Act of 1995 was a complicated event that had a significant impact on State staffing on all levels. Its effect goes far beyond the issues in this case, but it was surely a subject upon which discovery was available to Complaint Counsel during the proceeding.

b. **Complaint Counsel says that KTC does Not Collect  
"Adequate Data"**

The arrogance of the allegation that "Mr. Debord visits movers' offices to make sure that they are not offering discounts to consumers" (CC App. 10-11) can speak for itself. Respondent doubts that this is the type of respect or even "common courtesy" warranted by "federalism." KTC efforts at gathering information are documented in the record.

foundation. (CC App. 30; n. 27) To the extent that those documents speculatively expand on the holding of *Ticor*, as does the position of Complaint Counsel in this proceeding, these documents are entirely without merit. So much should be clear from the position of Respondent as expressed in this case.

d. Complaint Counsel says that KTC Does Not Analyze Rates or Rate Increases Under any State Standard

The applicable State standard is found in Kentucky law and regulations.

The “spreadsheet” which William Debord was told “not to bother” with (CC App. 34) was a document which had no purpose except for his personal use. (Resp. App. 17) The selective “cherry-picking” of this language by Complaint Counsel to create a false picture of apparent lack of interest by KTC is a use which is entirely out of context. This specific issue was addressed by KTC Counsel in his Closing Statement at trial. (Resp. App. 17)

e. Complaint Counsel observes that KTC Does Not Issue Written Decisions

Neither Kentucky law nor *Ticor* requires written decisions.

f. Complaint Counsel says that KTC Does Not Hold Hearings

There is no evidence in the record that KTC has failed to hold a hearing at any time when required by law. *Ticor* does not require KTC to hold hearings.

Complaint Counsel claims that they - - or someone - - has been “misled” by the “[suggestion] that the KTC takes some affirmative step prior to the rates becoming effective.” (CC App. 15; n. 7) Fortunately, the record documents the actions taken by

KTC and Respondent in connection with rate filings. It is surely “misleading” for Complaint Counsel to suggest otherwise.

B. PROCEEDINGS BELOW

Perhaps the most “misleading” aspect of this proceeding is the effort made by Complaint Counsel and the ID to somehow create the impression that the Kentucky Transportation Cabinet’s participation in this case has been less than vigorous and enthusiastic.

KTC made an application to intervene in this case *as a party*.

KTC asked to join in Respondent’s Motion for Summary Decision, and joined in all of the documents constituting the Motion. The ALJ failed to even comment on this fact.

KTC joined in the Pre-Trial and Post-Trial Submissions made by Respondent, in all respects. The ALJ attached no significance to this fact, and failed to comment on it.

KTC Counsel’s Closing Statement at the trial, as was the case with the Statement of Policy which constituted a part of its Motion for Leave to Intervene, set forth the State’s interest in collective ratemaking in a clear and compelling manner.

The participation of KTC, which spans all aspects of this case, has been virtually ignored by Complaint Counsel and the ID, except for the institutional disrespect shown for this agency in every aspect of the administrative process which has surrounded this case.

This is a curious approach indeed to what should properly be characterized as a good faith inquiry into the political responsibility of the State for its activity in regulating commerce within its borders.

### III. ARGUMENT

#### A. COMPLAINT COUNSEL'S INSISTENCE THAT THERE ARE HORIZONTAL AGREEMENTS ON PRICE IN THIS CASE AND THAT SUCH ALLEGED HORIZONTAL AGREEMENTS ARE *PER SE* ILLEGAL

There are no agreements regarding price in this case.

There are no issues regarding price.

There are issues regarding transportation rates which are established, as a matter of law, by KTC.

The Kentucky Association and its Members do not establish or agree on rates.

The Kentucky Association and its members agree on rate *proposals* which are submitted to KTC for its approval.

KTC establishes rates.

On the issue of a "justification" defense for collective ratemaking, the record clearly demonstrates the value of collective ratemaking as being in the public interest.

This justification was provided by KTC.

Complaint Counsel says that "[Respondent] cites no authority in support of its argument that *Ticor* established a sliding scale test for supervision." (CC App. 28; n.24.)

Respondent hasn't said that there is a "sliding scale" - - Respondent has referred to the language of *Ticor* itself to interpret what *Ticor* means. But Respondent does say that there is a difference between a nuclear power plant and a 10,000 pound truck with a

driver and a helper loaded with someone's used furniture. An intelligent reading of *Ticor* allows for the rules described in the case to be sensibly applied to the regulation of each.

The ID and Complaint Counsel acknowledge that *Ticor* does not include a "laundry list" of specifically enumerated factors. ID 35; CC App. 28.

*United States v. Southern Motor Carriers Rate Conference, Inc.*, 467 F. Supp. 471 (N.D. Ga. 1979) is a case which was subsequently reversed, and where the issue of "active supervision" was not even in the case as it was stipulated by the parties. Its inclusion by Complaint Counsel is somewhat surprising without reference to these facts.

**B. THE KENTUCKY TRANSPORTATION CABINET'S ACTIVE SUPERVISION OF RATES SATISFIES THE REQUIREMENTS OF THE STATE ACTION DEFENSE**

This issue has been adequately briefed in Respondent's Appeal Brief.

**C. COMPLAINT COUNSEL'S DOCUMENTS REGARDING THE STATE OF OREGON WERE PROPERLY EXCLUDED BY THE ADMINISTRATIVE LAW JUDGE**

All documents relating to the State of Oregon were properly excluded by the Administrative law Judge and Complaint Counsel should not now be permitted to raise arguments in favor of their admissibility which were not raised at trial.

**D. WHILE INTERVENTION BY KTC DOES NOT ESTABLISH ACTIVE SUPERVISION, KTC'S VIEWS ARE ENTITLED TO CONSIDERABLE DEFERENCE IN THIS PROCEEDING**

Complaint Counsel appears to be making a fairly serious accusation regarding KTC Counsel's representations to the ALJ during Closing Argument. (CC App. 50; n.

68) The point being made by KTC Counsel was that if Complaint Counsel were acting in good faith or in the public interest, they would have attempted to effect changes at KTC without litigation. KTC Counsel, who also happens to be KTC's Deputy General Counsel, told the ALJ that if he were aware of the true concerns of the FTC, that KTC would have worked with FTC to change its procedures. Of course, Complaint Counsel was seeking information to prepare a Complaint in the referenced interview - - not to solve a problem.

E. WHILE A CEASE AND DESIST ORDER OF ANY KIND IS INAPPROPRIATE, ARTICLE VII OF THE ORDER PROPOSED BY THE ADMINISTRATIVE LAW JUDGE IS ENTIRELY PROPER IF THE INITIAL DECISION IS TO BE AFFIRMED

The specific portion of the proposed remedy contained in Article VII of the ID's proposed Order would allow for remedial action without the punitive effect of an immediately adverse ruling in this case. This would be entirely proper in particular view of certain of the underlying facts involved including the following: (1) a highly successful regulatory program is being dismantled and time will be required to replace it; (2) a strictly punitive Order in this proceeding would needlessly encourage baseless private actions which could expose KTC, Respondent and its Members to unwarranted and unjustified litigation and attendant expense; (3) there has been no suggestion in this proceeding that Respondent or its Members acted in "bad faith" or in a manner inconsistent with the belief that they were in full compliance with all applicable requirements of State and Federal Law.

At the present time, KTC is preparing to implement a program of regulatory activity which it believes will comply with the legal standard described in the ID. Accordingly, an application of the type contemplated by the proposed remedy is likely to be forthcoming. A Meeting to address this issue has been scheduled at the offices of KTC for September 15, 2004.

This is not a case where public rights need to be immediately vindicated. In fact, the record is painstakingly clear that no harm whatsoever has been suffered by any consumer, competitor, government agency, or any person whatsoever - - by reason of the conduct described in the Complaint.

Respondent has also requested a stay of this proceeding for the purpose of achieving three (3) objectives which Respondent believes are consistent with the interests of the Commission in this proceeding.

*First*, a stay would provide KTC with the opportunity to come forward with a modified regulatory program which is consistent with the requirements of law as described by the Commission.

*Second*, a stay would permit a solution to the issues raised by the Commission in the Complaint in a manner which would allow for continued regulation of Kentucky household goods carriers by KTC in the public interest.

*Third*, a stay would be consistent with the constructive and positive mission of the Commission in protecting the interests of consumers rather than acting in a prosecutorial, punitive role, which potentially exposes innocent businesses to economic harm and conflict and consumers to fraud by disreputable Movers, for no lasting or legitimate public purpose.



*Fourth*, acting in this manner would recognize the integrity of the Commonwealth of Kentucky as a co-ordinate sovereign in the regulatory process and demonstrate the Commission's respect for the State in a manner consistent with the federalism contemplated by *Parker v. Brown*.

F. THE ALJ ACTED IMPROPERLY IN  
EXCLUDING THE EVIDENCE  
OFFERED AT TRIAL BY RESPONDENT

It was error for the ALJ to exclude RX 226, which stated the position of attorney James Liebman, Esq. and recanted earlier positions, if a prior letter from his firm, CX 110, was to be received in evidence.

All of the arguments made by Complaint Counsel as to the Letter seeking to recant the prior position should apply to the earlier letter (CX 110) as well. Either both should be received in evidence, or neither should be received in evidence.

RX 227 is a statement of the Kentucky Secretary of Transportation which was filed in this proceeding on February 18, 2004. (CC App. 50) Complaint Counsel did not oppose the Motion seeking leave to Intervene. The Motion and the supporting papers became part of the record at that time. There is no prejudice connected to receiving the document as evidence. It describes the position of the Chief Executive of the Kentucky Transportation Cabinet and the resources of the federal government have been actively at work for a year to disprove its allegations and insult the reputations of those connected with it.

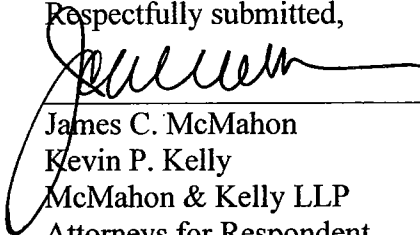
This is a case about political responsibility. In RX 227 a Kentucky Cabinet official assumes political responsibility for the actions of his agency. It was error for the ALJ to exclude it from evidence.

## VII. CONCLUSION

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

Dated: New York, NY  
September 11, 2004

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

This is to certify that on September 11, 2004, I caused a copy of the attached Reply Brief of **Appellant Kentucky Household Goods Carriers Association, Inc.** to be delivered Express Mail to the persons listed below:

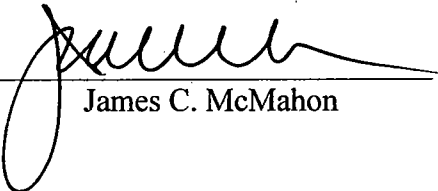
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