

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

In the Matter of

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

a corporation.

Docket No. 9309

**POST TRIAL BRIEF OF RESPONDENT KENTUCKY
HOUSEHOLD GOODS CARRIERS ASSOCIATION, INC.**

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I. INTRODUCTORY STATEMENT

In this proceeding, Complaint Counsel uses the rules of evidence to achieve, by indirection, what it could not and should not be able to achieve lawfully, namely, the destruction of a highly effective State program for the regulation of household goods movers and intrastate household goods transportation rates which has successfully protected the consumers of Kentucky for more than half a century.

The antitrust laws would not permit a challenge to the real party in interest in this proceeding, namely, the Commonwealth of Kentucky. Accordingly, Respondent is compelled to provide a defense to both Kentucky and itself, while the small businesses which constitute Respondent's Membership and the Kentucky moving public are both placed at risk by this proceeding.

However, in a situation which is virtually unprecedented in antitrust jurisprudence, the State regulatory body whose conduct has been both challenged and insulted in this proceeding has sought to intervene *as a Respondent*. It is respectfully submitted that this fact should weigh heavily in the Initial Decision to be made herein. The fact is that there could be no more dramatic indication of the existence of "active supervision" than the conduct of KTC with respect to this proceeding.

In an action which demonstrates Complaint Counsel's utter lack of interest in the merits of this proceeding, except for the furtherance of a political agenda which bears no relationship to the applicable law, Complaint Counsel has previously refused to consent to KTC's intervention in this case - - and has been completely silent with respect to it.

Dismissal of the Complaint is warranted since the active supervision of the Kentucky Association's household goods tariff collective ratemaking activities by the

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The State's involvement in the rate approval process is not under any circumstances a "rubber stamp" type of approval. The State is actively involved in the process from start to finish. RFF 112.

Rates do not become effective by the filing of a Tariff - - they become effective by reason of the approval of KTC. RFF 88.

The Tariff which is the subject of this proceeding consists of the original tariff filing, and some 82 Supplements (collectively, the "Tariff") - - each of which has been approved by KTC. RFF 6.

There is a standard established by State Law and KTC Regulations which provides that rates must be fair and reasonable. RFF 9-61, 30, 49-50, 62-67, 82-83.

KTC takes substantial efforts to insure that rates in the Tariff meet this standard. RFF 112.

The State collects business data from Members of the Kentucky Association, and a State Official with 30 years of transportation regulatory experience involving household goods rates is responsible for administering the Kentucky regulatory program. RFF 75-76, 92-93,, 101, 104-105, 112, 115-116, 120.

Mr. William Debord is principally responsible for administering the State's program. RFF 70-72.

Debord acts as a "consumer advocate."

Debord conducts a substantive review of the rates in the Tariff. RFF 112.

The Kentucky Association files the Tariff on behalf of its Members. RFF 5.

The Tariff contains many rate levels, and Movers are free to select the rates which they wish to be published for their account, so long as the rate is contained in the KTC-approved Tariff.

Respondent does *not* institute increases in the Tariff; Respondent institutes *rate proposals* for submission to KTC for KTC approval. RFF 26, 43.

The Kentucky Association does not “orchestrate” Tariff changes.

There is no evidence that the Kentucky Association has ever put “pressure” on any Member or interfered with any Mover’s right of independent action to charge whatever Tariff rate it deemed appropriate.

There are a number of statutes and regulations which govern the filing of tariffs and the standard which must be met for household goods transportation rates. Tariff charges must be reasonable and charges must be made without unjust discrimination, unjust preference or advantage, or unfair or destructive competitive practices. RFF 86.

There is a State Transportation Policy which forms part of the standard for household goods transportation rates. RFF 14.

If KTC finds a rate unreasonable, it has the authority to establish a reasonable rate. RFF 30, 66..

Offering discounts from regulated rates is unlawful, as this would constitute rate discrimination. RFF 50, 67, 81, 85, 94, 110.

KTC reviews the Tariff rates to insure that they comply with the legal standard. RFF 112.

KTC has not recently held hearings regarding rates, as Debord discusses the rates with Kentucky Association representatives prior to the time that proposed Supplements containing the rates are formally filed with KTC. RFF 101, 117, 120, 122, 123.

KTC issues no written decision with regard to rates, as this is not required by law and the approval process is deemed by the State to be sufficient for the purposes of its regulatory program.

Debord is constantly receiving information regarding “business data” of Movers. He attends the Kentucky Association’s Board of Directors and Membership Meetings and has done so for decades. RFF 74-80; 92-93; 101-102; 120, 122.

KTC conducts audits of household goods carriers. These audits are sufficient for KTC’s regulatory purposes and provide KTC with information which it uses in the ratemaking process, including information regarding Movers’ costs and revenues. RFF 73, 104-105, 115-116.

No law or case requires KTC to hold hearings to satisfy the Supreme Court’s active supervision requirement.

No law or case requires KTC to issue written decisions to satisfy the Supreme Court’s active supervision requirement.

No law or case requires KTC or the Kentucky Association to satisfy the whims of Complaint Counsel by maintaining or conducting useless exercises, not required by law, in order to avail themselves of the State Action Defense.

The Commonwealth of Kentucky held extensive hearings when the Tariff was first approved in the 1950s. All Supplements filed since that time have their origin in that

original hearing process; it has been an amendment and “supplementing” process since that time.

KTC has elected to comply with its statutory responsibility to collect cost and revenue information (KRS § 281.680[4]) by the current methods it employs to determine such information.

It is not necessary for KTC to “formally reject” Kentucky Association or other Tariff filings because through its involvement in the rate-setting process from start to finish, KTC is able to advise the Kentucky Association regarding what proposals would be accepted or rejected by KTC. RFF 99, 102.

KTC has suspended proposed rates. RFF 98.

This method of operation has been determined by KTC to be more appropriate than conducting hearings.

Complaint Counsel has offered no evidence which would tend to show that KTC’s method of operation - - in this or any other regard - - in any way fails to comply with the law governing the availability of the State Action Defense.

The record contains numerous examples of “justification” being submitted to KTC or discussed with KTC in connection with Kentucky Association Tariff proposals. In many cases, appropriate justification is described in a cover letter.

Complaint Counsel has identified no law or case which states that this form of justification is in any way insufficient.

There is no case or law which states that rate justification of this type in any way deprives Respondent of the availability of the State Action Defense.

In many cases, justification for rate changes is based on the most commonly used tariff which governs the *inter*state transportation of household goods. While the basis for Complaint Counsel's objection to this fact is not entirely clear, Complaint Counsel seems to be saying that this approach is not legally sufficient because KTC Tariffs do not exactly "mirror" the provisions of the interstate tariff. Provisions in the interstate tariff are among the items of information employed by KTC to establish Kentucky intrastate transportation rates. There is no law or case which suggests that this approach in any way deprives the Kentucky Association of the State Action Defense.

Complaint Counsel's position would be more plausible if the Federal Trade Commission were either (a) a State Legislature; or (b) a State motor carrier regulatory agency. The FTC is neither of these.

The Commonwealth of Kentucky has "standards" in place for determining the reasonableness of rates. These standards are governed by, among other things, KTC Regulations and the methods chosen by KTC to comply with them. RFF 73.

Complaint Counsel's apparent preoccupation with the way things were in the 1950s, 1960s, 1970s, and 1980s may be of historical interest, but the law which governs the availability of the State Action Defense - - in the form of Ticor and Midcal - - is of more contemporary origin.

**V. RESPONDENT HAS ESTABLISHED THE ELEMENTS OF
THE STATE ACTION DEFENSE UNDER *PARKER V. BROWN*.**

Respondent Kentucky Association and the Kentucky Transportation Cabinet have established that the Kentucky Association's actions in preparing and submitting collective rate proposals to KTC satisfy the criteria first announced by the Supreme Court in Parker v. Brown, 317 U.S. 341 (1943).

In Parker v. Brown, the Supreme Court held that the Sherman Act did not apply to the actions of local agricultural cooperatives in developing marketing policies for the California raisin crop. 317 U.S. at 351. The Supreme Court found that the actions of an "Advisory Commission" comprised of private actors was exempt from application of the federal antitrust laws because of the involvement of the State in the statutory program.

"In Parker v. Brown, this Court found in the Sherman Act no purpose to nullify state powers. Because the Act is directed against 'individual and not state action,' the Court concluded that the State's regulatory programs could not violate it. California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc., 445 U.S. 97, 104 (1980).

The cases which Complaint Counsel have relied upon at trial - - other than Ticor and Midcal - - are almost uniformly unsuited to an analysis of the issues in this proceeding.

The District Court Decision in U.S. v. Southern Motor Carriers Rate Conference, 467 F. Supp. 471 (N.D. Ga. 1979) was, as Complaint Counsel has previously acknowledged, ultimately reversed by the Supreme Court. More significantly, in the Supreme Court, the issue of "active supervision" was *conceded* by the Government.

Active supervision was not even *considered* by the Administrative Law Judge or the U.S. Court of Appeals which subsequently reversed his and the Commission's

position in Matter of Massachusetts Furniture & Piano Movers Ass'n, 773 F. 2d 391 (1st Cir. 1985).

The other cases previously cited by Complaint Counsel in Footnotes 14 and 15 of their Pre-Trial Brief do not involve household goods transportation rates. Moreover, they are easily further distinguished by a complete lack of identity of issue with this case.

And, *most* significantly, these cases have discussed written decisions, hearings, and the like because the regulatory bodies subject to review in these cases have determined that written decisions, hearings, and the like have been appropriate to their respective methods of operation. This has not been so in Kentucky - - where KTC has operated in a manner which *it* believes is sufficient for its purposes and which also complies with the standards laid down in Midcal and Ticor.

Neither Ticor nor Midcal require hearings, written decisions, or newspaper notices to household goods transportation consumers who would have no reason to comment on them. Inquiry into the specifics of the Kentucky regulatory program at issue in this case will disclose the availability of the State Action Defense as shown by Respondent.

A. The Commonwealth of Kentucky’s Household Goods Transportation Regulatory Program is consistent with the “Active Supervision” Requirement described in *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*

In California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc., 445 U.S. 97 (1980), the State of California Supreme Court had previously ruled that the subject wine pricing scheme violated the Sherman Act and “. . . held that because the State played only a passive part in liquor pricing, there was no Parker v. Brown immunity for the program.” 445 U.S. at 101.

A review of each item of the program before the Court in Midcal, compared to the corresponding factor of the Kentucky regulatory program at issue in this proceeding, confirms the availability of the State Action Defense to Respondent so far as the activity challenged in the Complaint is concerned.

The pricing scheme before the U.S. Supreme Court in Midcal involved, among other things, division of the State of California into “three trading areas for administration of the wine pricing program.” 445 U.S. at 99. This factor is not of particular significance as far as the KTC program of collective ratemaking in *this* case is concerned.

“The State [had] no direct control over wine prices. . .” 445 U.S. at 100. In *this* case, KTC has control over the rates charged by household goods carriers.

The State “[did] not review the reasonableness of the prices set by wine dealers.” 445 U.S. at 100. Undisputed deposition testimony in *this* case confirms that the reasonableness of household goods transportation rates is reviewed by KTC.

“[S]tate regulations [provided] that the wine prices posted by a single wholesaler within a trading area [bound] all wholesalers in that area.” 445 U.S. at 100. No such regulation exists under the KTC regulatory program at issue in *this* case.

“The [California] Court of Appeal ordered the Department of Alcohol Beverage Control not to enforce the resale price maintenance and price posting statutes for the wine trade. The Department . . . did not appeal the ruling in this case. An appeal was brought by the California Retail Liquor Dealers Association, an intervenor. The California Supreme Court declined to hear the case, and the Dealers Association sought certiorari from this Court.” 445 U.S. at 102. This point of procedure is irrelevant in *this* proceeding, where there has been no complaint or grievance by any person respecting the conduct challenged in the Complaint except for the FTC.

The issue for determination in Midcal was “. . . whether California’s plan for wine pricing violates the Sherman act.” 445 U.S. at 102. A parallel issue exists in *this* proceeding by reason of the provisions of Section 5 of the FTC Act.

The Supreme Court commented on the State’s “less than enthusiastic interest” in the regulatory program which was subject to challenge, 445 U.S. at 112, in language which is critical to an understanding of the application of Midcal to the facts of the case at bar. The Court stated at note “12,” 445 U.S. at 113 as follows:

“As the unusual posture of this case reflects, the State of California has shown less than an enthusiastic interest in its wine pricing system. As we noted, the state agency responsible for administering the program did not appeal the decision of the California Court of Appeal. See *supra* at 101-102; Tr. Of Oral Arg. 20. Instead, this action has been maintained by the California Retail Liquor Dealers Association, a private intervenor. But neither the intervenor nor the State Attorney General, who filed an *amicus curiae* in support of the legislative scheme,

has specified any state interests protected by the resale price maintenance system other than those noted in the state-court Opinions cited in text.”

It is noteworthy that in *this* proceeding, the Commonwealth of Kentucky *has* “enthusiastically” come forward in an effort to preserve the regulatory program under scrutiny, as is demonstrated by KTC’s Motion for Leave to Intervene as a Respondent and the statements by the Kentucky Secretary of Transportation in KTC’s Post Trial Brief- - which also describe the State’s interests in protecting collective ratemaking for Kentucky intrastate household goods transportation rates.

In Midcal, the Supreme Court was asked to rule on the correctness of a determination made by a *State*’s highest Court that a *State* regulatory program violated the Sherman Act. The fact that the highest Court of the State whose regulatory program was before the Supreme Court for review had found an absence of antitrust immunity in favor of the private actors weighed heavily in the Court’s decision. The Court stated as follows at 445 U.S. 113:

“We have no basis for disagreeing with the view of the California courts that the asserted state interests are less substantial than the national policy in favor of competition. That evaluation of the resale price maintenance system for Wine is reasonable, and is supported by the evidence cited by the State Supreme Court in *Rice*. . . . The unsubstantiated state concerns put forward in this case simply are not of the same stature as the goals of the Sherman Act.”

There has been no previous judicial or administrative determination in *this* case.

Confronted with a price-fixing arrangement which was clearly without public purpose and which was characterized by a complete lack of state involvement,

participation, or oversight, the Supreme Court took the opportunity to comment on the elements of a successful State Action Defense.

It is significant that under the wine pricing scheme in Midcal, “[a] single fair trade contract or schedule for each brand [set] the terms for all wholesale transactions in that brand within a given trading area.” 445 U.S. at 99. There was not even the pretense or appearance of State involvement. In the instant case, it cannot be seriously disputed that irrespective of the nature and extent of the involvement of private actors (i.e., members of the rate bureau), the proposed rates cannot, as a matter of law, become effective solely by reason of the action of those private actors.

“[The] State’s role [was] restricted to enforcing the prices specified by the producers.” 445 U.S. at 100. As a matter of law, the circumstances of Midcal bear virtually no relationship to the process under examination in the case, where the State possesses a broad range of powers, other than enforcement, with respect to intrastate household goods transportation rates.

The regulatory program before the Court in Midcal is so dramatically dissimilar to the Kentucky regulatory program at issue in this case that it provides no support for Complaint Counsel’s position.

The specific, positive guidance with regard to the State Action Defense offered by the Supreme Court in Midcal consisted of the following statement at 445 U.S. 105:

“These decisions establish two standards for antitrust immunity under Parker v. Brown. First, the challenged restraint must be ‘one clearly articulated and affirmatively expressed as state policy’, second, the policy must be ‘actively supervised’ by the State itself.

Any other instruction from the Court came in the form of specific comments directed to the California wine pricing program's failure to satisfy the requirements for antitrust immunity.

B. The Conduct Challenged in the Complaint is Immune under the Most Recent Explanation of the “State Action Doctrine” found in *F.T.C. v. Ticor Title Guarantee*.

F.T.C. v. Ticor represents the Supreme Court’s most recent statement on the “State Action” defense. However, the case must be read bearing in mind some important elements *not* present in the proceeding at bar.

First, in Ticor, the F.T.C. brought its administrative proceeding against the individual title insurance companies which were members of the rate bureaus - - and not the rate bureaus themselves.

Second, the price fixing activity challenged by the F.T.C. was not the core, regulated insurance business of the respondents and their rate bureaus, but a collateral and, apparently, not *specifically* exempted component of the service offered by Respondents. The particular rates at issue were not “title insurance” rates but “title search and examination fees. The Commission made no allegations respecting those aspects of the title insurance business which involved insurance.

Third, the Respondents accounted for 57% of the gross revenues of the title insurance business on a national basis shortly before the Complaint was filed. While no statistics are in the record, the portion of household goods moving services performed by movers pursuant to the Tariff in this case would unquestionably be negligible.

The actual, specific holding of Ticor was “. . . that there was no active supervision in either Wisconsin or Montana.” In support of its holding, the Supreme Court took the following positions:

1. Inaction by a state regulatory agency in a so-called “negative-option” rate filing system does not signify substantive approval. The record in *this* proceeding demonstrates activity by KTC with respect to every Kentucky Association rate filing.

2. The potential for state supervision was not realized in these states. Examination of the record in *this* proceeding confirms realization of the “potential” contemplated and mandated by Kentucky statutes and regulations.
3. At most, rate filings were checked for mathematical accuracy. KTC activity with regard to Kentucky Association filings at issue in *this* proceeding included substantive analysis of the proposed rates submitted.
4. Some rate filings were unchecked altogether. No Kentucky Association filing was “unchecked” by KTC in *this* case.
5. A Montana rate filing became effective in spite of the fact that the rate bureau failed to comply with an information request about the filing. The record in *this* proceeding confirms that the Kentucky Association complied with all KTC information requests.
6. A Wisconsin rate filing remained effective for a period of seven (7) years during which the rate bureau failed to provide requested information relating to the filing. The record in *this* proceeding confirms that the Kentucky Association complied with all KTC information requests.

The foregoing constitutes the sole basis articulated by the Supreme Court for its determination that state regulatory agency action on the non-insurance rate bureau filings in Ticor failed to satisfy the “Active Supervision” Standard described in Midcal.

The Supreme Court’s guidance of the availability of the State Action Defense was both sparing and direct. The Court offered the following statements:

1. “Our decisions make clear that the 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.”
504 U.S. at 634.

2. The action of the State in displacing competition must be “both intended by the State and implemented in its specific details.” 504 U.S. at 633.
3. The State must [exercise] sufficient independent judgment and control so that the detail of the rates or prices have been established as a product of deliberate State intervention, not simply by agreement among private parties.” 504 U.S. 634-635.
4. The State must “[play] a substantial role in determining the specifics of the economic policy.” 504 U.S. at 635.
5. The “anticompetitive scheme” must be “the State’s own.” 504 U.S. at 635.
6. “States must accept political responsibility for actions they intend to undertake.” 504 U.S. 636.
7. “[Particular] anticompetitive mechanisms [must] operate because of a deliberate and intended state policy.” 504 U.S. at 636.
8. “Where prices or rates are set as an initial matter by private parties, subject only to a veto if the State chooses to exercise it, the party claiming immunity must show that state officials have undertaken the necessary steps to determine the specifics of the price fixing or ratesetting scheme. 504 U.S. at 638.
9. “Our decision should be read in light of the gravity of the antitrust offense, the involvement of private actors throughout, and the clear absence of state supervision.” 504 U.S. at 639.
10. “We do not imply that some particular form of state or local regulation is required to achieve ends other than the establishment of uniform prices.” 504 U.S. at 639.

The Supreme Court in Ticor made it very clear that it was not prepared to specify a particular formula for what constitutes “active supervision” and what would satisfy the

second prong of the Midcal test. This matter was left to the States with the benefit of the direction provided by the Court.

Although the Supreme Court has decided that “active supervision” cannot be analyzed in a test tube, the Commission has wrongfully decided that its jurisdiction and authority are sufficient to override not only the Supreme Court, but the Kentucky Legislature as well.

**C. The Position of the Commission Described
In the Analysis of Proposed Consent Order
To Aid Public Comment in Indiana Household
Goods and Warehousemen, Inc. sets forth a
Completely Erroneous Standard for the State
Action Defense.**

In its “Analysis of Proposed Consent Order to Aid Public Comment,” In re Iowa Movers and Warehousemen’s Association (File No. 021-0115) (“Iowa Analysis”), the Commission advanced a detailed interpretation of the State Action Defense which bears little relationship to the state of the law on this issue. The Iowa Analysis is more of a “wish-list” than an analysis. While it might be appropriate to accompany State Legislation which actually said the things the Iowa Analysis invents, it surely is completely inappropriate as a guide to understanding the law as it has been articulated by the Supreme Court in Mical and Ticor.

The mythical regulatory program enthusiastically crafted by the Commission in the Iowa Analysis would be appropriate if the Commission were either Congress or the Kentucky Legislature. As it stands, it is a fanciful vision of intrastate motor common carrier rate regulation by a Federal agency that appears to have no notion of the history and significance of transportation regulatory standards. More significantly, the Iowa Analysis is neither justified nor supported by the Supreme Court’s decisions in Midcal and Ticor.

The FTC’s position regarding the “publication” of proposed rate changes demonstrates a lack of understanding of the purpose and elements of a transportation regulatory program such as exists in Kentucky.

The Commission's "due process" type analysis does not comport with the realities of regulation and compliance with it would serve no rational purpose. The concept of tariff "publication" as it exists in Kentucky mirrors the tariff "publication requirements contained in the Interstate Commerce Act and successor federal legislation governing tariffs covering the interstate transportation of household goods.

A conventional Administrative Procedure Act ("APA") program of notice, hearing, and newspaper publication would add nothing to the regulatory process for several reasons.

First, the individual household goods shipper would have no interest in any rate proceeding due to the sporadic and occasional nature household moving. People are only interested in the cost of household transportation when they are moving. The subject holds no interest otherwise.

Second, the Kentucky Legislature has determined that the *constant and permanent* availability of rate information at (1) the premises of each individual Mover; (2) KTC; and (3) the rate bureau, is the most effective means of informing and apprising the public of household goods transportation rate information.

Third, the Kentucky regulatory program has as its centerpiece the determination of the appropriateness of rates by KTC - - an administrative body with expertise in the rate regulation area.

Fourth, the very existence of the Kentucky regulatory program reflects a determination by the State that the nature of the household goods transportation service and its rates require the special expertise of an administrative agency in order to protect the public interest. The statutory and regulatory method selected by the State (1) is a

substitute for; and (2) has been determined to be superior to an APA type notice and hearing process - - for the protection of the public interest.

In Hannah v. Larche, 363 U.S. 420 (1960), the Supreme Court ruled on a “due process” challenge to the validity of rules of procedure adopted by the U.S. Commission on Civil Rights. The Court stated that “the requirements of due process frequently vary with the type of proceeding involved.” 363 U.S. at 440. The Court also noted the importance of the fact that the procedures under review were consistent with the methods employed by agencies with similar functions. The Court said at 363 U.S. 444:

“[W]e think it is highly significant that the Commission’s procedures are not historically foreign to other forms of investigation under our system. Far from being unique, the Rules of Procedure adopted by the Commission are similar to those which, as shown by the Appendix to this Opinion, have traditionally governed the proceedings of the vast majority of governmental investigating agencies.”

In this case, the Kentucky rate regulation program is (1) “historically” consistent with the manner of tariff publication prescribed by the Interstate Commerce Commission and its successor agency, the U.S. Surface Transportation Board, from 1887 until the present day; and (2) identical to the rules which have “traditionally governed” tariff rate filings.

In 1997, the U.S. Surface Transportation Board (“S.T.B.”) adopted regulations governing household goods tariffs. The regulations were made necessary by reason of the ICC Termination Act of 1995. The regulations were codified as Part 1310, Title 49, C.F.R. entitled “Tariff Requirements for Household Goods Carriers.”

The S.T.B. decision on which accompanied publication of the household goods tariff regulations in regards to household goods tariffs (S.T.B. Ex Parte No. 555, 2/4/97), explained the provisions of proposed 49 C.F.R. 1310.2 relating to “Availability of tariffs for inspection by the Board and Shippers.” The decision noted the current position of S.T.B. with regard to tariff publication and notification requirements for interstate household goods shipments. The notice and publication requirements parallel those traditionally observed by transportation tariffs and are consistent with the approach taken by the KTC regulatory program.

The Supreme Court also commented on the distinction, relevant here, between determinations of a “quasi-judicial nature” and “fact-finding investigations.”

The Court stated the following at 363 U.S. 446:

“Due process is an elusive concept. Its exact boundaries are undefinable, and its content varies according to specific factual contexts. Thus, when governmental agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative that those agencies use the procedures which have traditionally been associated with the judicial process. On the other hand, when governmental action does not partake of an adjudication, as for example, when a general fact-finding investigation is being conducted, it is not necessary that the full panoply of judicial procedures be used. Therefore, as a generalization, it can be said that due process embodies the differing rules of fair play, *which through the years, have become associated with differing types of proceedings.* Whether the Constitution requires that a particular right obtain in a specific proceeding depends on a complexity of factors. The nature of the alleged right involved, the nature of the proceeding, burden and *the possible on that proceeding,* are all considerations which must be taken into account.”
[Emphasis added.]

The procedural rules in Hannah v. Larche, which protected the identity of complainants alleging racial discrimination in the deprivation of voting rights in

Louisiana in 1959, were a matter of great concern to the Supreme Court - - arguably far more than the approval of intrastate household goods transportation rates. However, the Court made it clear that fear of “collateral consequences” did not affect its decision. The Court said at 363 U.S. 443:

“It is probably sufficient merely to indicate that the rights claimed by respondents are normally associated only with adjudicatory proceedings, and that since the Commission does not adjudicate, it need not be bound by adjudicatory procedures. Yet, the respondents contend, and the court below implied, that such procedures are required since the Commission’s proceedings might irreparably harm those being investigated by subjecting them to public opprobrium and scorn, the distinct likelihood of losing their jobs, and the possibility of criminal prosecutions. That any of these consequences will result is purely conjectural. There is nothing in the record to indicate that such will be the case or that past Commission hearings have had any harmful effects upon witnesses appearing before the Commission. However, even if such collateral consequences were to flow from the Commission’s investigations, they would not be the result of any affirmative determinations made by the Commission, and they would not affect the legitimacy of the Commission’s investigative function.”

The Court also noted the increased burden that would be imposed on administrative agencies by requiring unnecessarily cumbersome processes as part of their methods when not justified by their legislative responsibilities. The Court stated the following at 363 U.S. 443-444:

“Fact-finding agencies without any power to adjudicate would be diverted from their legitimate duties and would be plagued by the injection of collateral issues that would make the investigation interminable. Even a person not called as a witness could demand the right to appear at the hearing, cross-examine any witness whose testimony or sworn affidavit allegedly defamed or incriminated him,

and call an unlimited number of witnesses of his own selection. This type of proceeding would make a shambles of the investigation and stifle the agency in its gathering of facts.”

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

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

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

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

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

Section 196 of the Kentucky Constitution provides, among other things, that the transportation of freight by common carrier “. . . shall be so regulated, by general law, as

to prevent unjust discrimination.” The section further states that “[n]o common carrier shall be permitted to contract for relief from its common law liability.”

Statutes Actively Administered
By KTC

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

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

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

KRS 281.012 contains definitions including “Suburban area,” and “Commercial area.”

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

1. to provide for fair and impartial regulation of all transportation subject to the provisions of Chapter 281;
2. to administer regulation so as to recognize and preserve the inherent advantage of each type of motor transportation;
3. to promote safe service;
4. to promote adequate service;
5. to promote economical service;

6. to promote efficient service;
7. to foster sound economic conditions in transportation;
8. to foster sound economic conditions among the several carriers;
9. to encourage the establishment of reasonable charges for transportation service;
10. to encourage the maintenance of reasonable charges for transportation service;
11. to avoid unjust discrimination in the establishment and maintenance of reasonable transportation charges;
12. to avoid undue preference in the establishment and maintenance of transportation charges;
13. to avoid undue advantage in the establishment and maintenance of transportation charges;
14. to avoid unfair competitive practices in the establishment and maintenance of transportation charges;
15. to avoid destructive competitive practices in the establishment and maintenance of transportation charges;
16. to cooperate with the several states and the duly authorized officials thereof;
17. to do all of the foregoing to the end of (a) developing; (b) coordinating; and (c) preserving, a state transportation system bny motor vehicles as defined in Chapter 281 adequate to meet the needs of the Commonwealth of Kentucky.

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

KRS 281.600 describes the administrative functions and powers of the KTC

“Department of Vehicle Regulation” which include the following:

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

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

KRS 281.624 includes a definition of “household goods,” (by reason of the structure of the section) as “personal effects and property used or to be used in a dwelling, when part of the equipment or supply of the dwelling, and similar property if the transportation of the effects or property is: (a) Arranged and paid for by the householder, including transportation of property from a factory or store when the

property is purchased by the householder with intent to use in his or her dwelling; or (b) arranged and paid for by another party.”

KRS 281.625 describes the process of hearings on applications for a certificate, permit, amendment, sale, transfer, lease, change in route, or abandonment of a certificate or permit. The section requires the following: (a) the fixing of a time and place for a hearing on the filing of an application; (b) ***mailing of written notice of the hearing and the right to file a protest to (i) the applicant; (ii) every authorized carrier, including railroads, serving any part of the route proposed to be served or abandoned by applicant; (iii) any other person who, in the opinion of the Department, may be interested in or affected by the application;*** (c) the holding of a hearing if a protest is filed and the right to filing of a protest ***by any person having an interest in the subject matter;*** (d) granting of a non-profit bus certificate without hearing if no protest is filed under certain circumstances; (e) dispensing with a hearing if the application is for rights previously granted by the ICC; (f) issuance of a certificate without a hearing for transportation of commodities exempted by the ICC; (g) granting of an irregular route common carrier certificate where a certificate authorizing similar operations has been issued by the ICC; and (h) granting of a so-called U-drive-it” permit without a hearing.

KRS 281.640 describes the method of conduct of hearings before the Department, and specifically provides that nothing in the section shall prevent the commissioner of the Department “ . . . ***from holding or conducting any hearing referred to in this section, in regard to rates, fares, and charges.***” [Emphasis added.]

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

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

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

1. *common carriers and irregular route common carriers* of passengers and *household goods must maintain a schedule of rates, charges, and classifications;*
2. a carrier must *“keep open for public inspection* such parts of its schedule of rates, charges, and classifications as the Department deems necessary for public information;
3. a carrier *“may become a participating party to a tariff published or issued by a tariff publishing agency;*
4. the *“tariff – issuing agent” must file the carrier’s tariff with the Department;*
5. *“the tariff – issuing agent may not represent any carrier in any matters before the department;”*
6. [the] department may, by administrative regulation, require carriers to file a schedule of their rates, fares, charges, and classifications;”
7. each of the foregoing provisions is required to occur *“[u]nder administrative regulations*

promulgated by the department under KRS Chapter 13A. [Emphasis added.]

KRS 280.680(2) requires that a contract carrier's transportation contracts must be maintained on file with the department and requires that the contract carrier must "*keep open for public inspection at designated offices such contracts as the department deems necessary for public information.*" The subsection further provides that the foregoing shall take place "[u]nder administrative regulations promulgated by the department under KRS Chapter 13A." [Emphasis added.]

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

KRS 280.680(4) provides the following:

1. the department must establish *collective ratemaking procedures.*
2. the department's *collective ratemaking procedures* must apply to all (a) commodities, and (b) services; for which the department *prescribes (i) rates; (ii) charges; and (iii) classifications.* [Emphasis added.]
3. the department's *collective ratemaking procedures* must assure that the revenues and costs of carriers are ascertained. [Emphasis added.]
4. the department's *collective ratemaking procedures* must be established for the purpose of "ensuring non-discriminatory rates, charges, and classifications for all shippers and users of transportation services for which the department *prescribes rates,*" [Emphasis added.]

KRS 281.685(1) prohibits a common carrier or irregular route common carrier of household goods from charging an amount different than its tariff rate or charge

for any regulated transportation service. The section also prohibits any refund, unreasonable preference, or rate discrimination.

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

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

KRS 281.690(2) allows the department to schedule a hearing concerning the lawfulness of a proposed tariff rate change on its own motion or on the filing of a protest to the rate change. In the event of such a hearing, the following provisions apply:

1. the department is obligated to mail written notice of the hearing to the applicant, protestant, and any other person who may be interested in or affected by the rate in the department's opinion;
2. the department may suspend the proposed rate for 6 months from the proposed effective date by an order stating the reasons for the suspension;
3. the department must determine the just and reasonable rate if it finds the rate to be objectionable after hearing.

KRS 281.695(1) provides that the department has the authority to fix and approve common carrier rates and insure adequate and convenient transportation service.

In the event that the department finds a rate to be objectionable after a hearing, the

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

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

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

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

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

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

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

*Regulations Actively Administered
By KTC*

601 KAR 1:029 contains definitions including “authorized carrier” and “Property.”

601 KAR 1:030 describes procedures in department hearings on motor carrier applications including applications for authority to transport household goods. Upon receipt of an application for household goods operating authority, the department is

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

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

601 KAR 1:040 describes the application procedure for Kentucky intrastate household goods operating authority. The following must be submitted to KTC: (1) Application; (2) filing fee; (3) certificate of good standing, if applicant is a corporation; (4) Kentucky process agent, if applicant is a foreign corporation; and (5) financial statement. The section also addresses, among other things, (a) temporary authority applications; (b) approval of transfer of certificates; and (c) registration of *interstate* operation authority with KTC. [Emphasis added.]

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

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

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

1. tariffs and supplements must be received at KTC at least 30 days prior to the proposed effective date;
2. the foregoing 30 day requirement does not apply to a tariff being filed (a) pursuant to an Order fixing rates; or (b) as the result of a hearing.
3. specific provisions governing the form and size of tariffs and information included in tariffs;
4. a requirement that each common carrier and irregular route common carrier *must maintain a copy of its intrastate tariffs at each of its terminals at which an agent is employed and its principal place of business;*
5. carriers' employees are “. . . *required to give any desired information contained in such tariffs, to lend assistance to seekers of information therefrom, and to afford inquirers opportunity to examine any of such tariffs without requiring the inquirer to assign any reason for such desire.*”
6. a tariff “title page” must contain a substantial number of items of specific information including (a) tariff consecutive number, preceded by “KYTD”; (b) tariff numbers of previously filed tariffs that have been canceled by this tariff; (c) tariff supplement numbers and supplement numbers of previous supplements being canceled or changed; (d) name of carrier or agent issuing tariff; (e) description of territory or points between which tariff applies; (f) classification information where tariff names rates by classes; (g) date issued and date effective; (h) the (i) name, (ii) title, (iii) street address, and (iv) town, of the (A) carrier, or (B) agency, by whom the tariff is issued; and

(i) rates may be shown on the title page of a single page tariff.

7. Tariffs must contain the following : (a) table of contents; (b) list of participating carriers, where applicable; (c) index of commodities; (d) explanation of abbreviations, symbols, and reference marks; (e) rules and regulations; (f) rates and charges expressed in dollars and cents per 100 pounds per mile or otherwise, as indicated; and (g) mileage or method of determining mileage where rates are based on distance from point of origin to point of destination.
8. Powers of attorney and Concurrences must be provided to a tariff publishing agent and filed with KTC;
9. An Adoption Notice must be filed with KTC upon sale or other disposition of a motor carrier certificate;
10. Tariff Rules affecting common carriers of property and irregular route common carriers of specific commodities may include items regarding the following : (a) reasonable joint through rates; (b) commodity rates & exception ratings; (c) interchange of freight; (d) bill of lading; (e) collection of freight charges; and (f) handling of c.o.d. shipments.

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

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

1. at or immediately prior to the time of filing the tariff or supplement containing the proposed changed rate or charge, the carrier must “*notify all competing and connecting carriers having a situs within fifty (50) miles of his situs of such change*”:

2. *“[s]imilar notice must be given to any shipper or interested party requesting same”;*
3. *“if the change in the rates and charges involves an increase, then he shall also, and at the same time, cause a notice to be printed in a newspaper of general circulation in the area of his situs which shall give notice of the proposed 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.”*[Emphasis added.]

601 KAR 1:070(d) contains further requirements respecting the process of notice to shippers and other interested persons regarding tariff rate changes. The subsection contains the following requirements:

1. (A) Regular and irregular route common carrier truck operators (which includes household goods carriers), and (B) tariff publishing agencies (such as Respondent) must maintain a list of (i) shippers, and (ii) interested parties.
2. Any shipper desiring notice of rate changes of any carrier may request such carrier or its tariff publishing agent to be placed on the list for notices of rate changes.
3. Once on the list, any such shipper or interested party must be provided with notice of any change in rates.
4. The department may provide carriers or tariff publishing agencies with lists of interested persons who must be provided with notice of tariff changes.

601 KAR 1:075 contains rules governing the presentation and handling of claims for loss and damage to transported property by regular and irregular route common carriers (i.e., household goods carriers).

601 KAR 1:080(1) contains provisions relating to the determination of weights by household goods carriers. The subsection includes specific requirements relating to (1) Tare weight; (2) Gross weight; (3) Net Weight; (4) Constructive Weight; (5) Part Loads; and (6) Driver's Weight Certificate.

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

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

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

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

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

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

601 KAR 1:080(7) contains provisions relating to the issuance of a Freight Bill, at the time of delivery of goods by household goods carriers, and the information which must be included thereon.

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

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

1. the estimate can be made only after a visual inspection of the goods by the estimator;
2. the estimate must be on a form approved by KTC;
3. the estimate form must be fully executed in accordance with the instructions thereon;

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

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

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

601 KAR 1:080(12) prohibits a household goods carrier from accepting a household goods shipment for transportation which appears to be subject to the

minimum weight provision in the carrier's tariff without first notifying the shipper of this fact.

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

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

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

Reference is made to Respondent’s Post Trial Findings of Fact & Conclusions of Law filed simultaneously herewith for a complete description of the evidence which confirms the satisfaction of the “Active Supervision” element of the “State Action” defense.

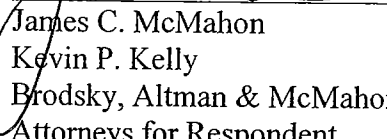
Reference is also made to the Post Trial Brief submitted on behalf of the Kentucky Transportation Cabinet, which conclusively establishes the availability of the State Action Defense to the Respondent Kentucky Household Goods Carriers Association, Inc. in this proceeding.

VII. CONCLUSION

For all the foregoing reasons, Respondent Kentucky Household Goods Carriers Association, Inc. respectfully requests that the Administrative Law Judge 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 Administrative Law Judge grant such other and further relief as shall be appropriate.

Dated: New York, NY
April 2, 2004

Respectfully submitted,



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CERTIFICATE OF SERVICE

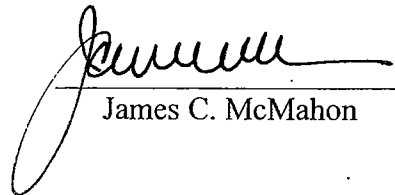
This is to certify that on April 2, 2004, I caused a copy of the attached **Respondent's Post Trial Brief** to be served upon the following persons by hand delivery:

Hon. D. Michael Chappell
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Dated: New York, NY
April 2, 2004

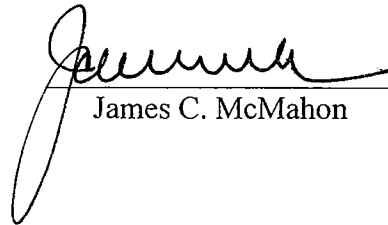

James C. McMahon

CERTIFICATE OF SERVICE

This is to certify that on April 2, 2004, I caused a copy of the attached **Respondent's Post Trial Brief and Respondent's Post Trial Proposed Findings of Fact & Conclusions of Law** to be served upon the following persons by U.S. First Class Mail:

Todd Shipp, Esq.
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Dated: New York, NY
April 2, 2004


James C. McMahon