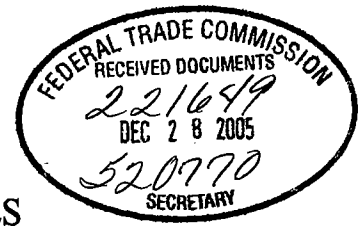

No. 05-4042

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

KENTUCKY HOUSEHOLD GOODS CARRIERS ASSOCIATION, INC.,
Petitioner,

v.

FEDERAL TRADE COMMISSION,
Respondent.

On Petition for Review of a Final Order
of the Federal Trade Commission

Opinion of the Commission: Chairman Deborah Platt Majoras
Initial Decision: Administrative Law Judge D. Michael Chappell

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AMICUS CURIAE BRIEF OF THE COMMONWEALTH OF KENTUCKY

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GLOSSARY

ALJ	Administrative Law Judge
Appx.	Joint Appendix
CX	Complaint Counsel's Exhibit
Dep.	Deposition (+ volume number)
IDF	Initial Decision Finding of Fact
JX	Joint Exhibit
KTC	Kentucky Transportation Cabinet
Op.	Opinion of the Commission, Dkt. No. 9309 (June 21, 2005)
Pet. Br.	Petitioners' Brief
RX	Respondent's [Petitioner in this appeal] Exhibit

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INTEREST OF AMICUS CURIAE AND AUTHORITY TO FILE

As discussed more fully below, in matters of the anti-trust and competition policy of the Commonwealth of Kentucky, the Attorney General speaks for the Commonwealth and as such has a direct interest in this case, because it involves the public interest in a consumer protection matter explicitly entrusted to the Attorney General by statute. Additionally, because the Kentucky Constitution requires close scrutiny of the State activity involved, the Attorney General is the only controlling voice as to such constitutional matters. The Kentucky Attorney General has a long history of aggressive antitrust enforcement, including filing an *amicus curiae* brief, along with thirty-two sister states, before the U.S. Supreme Court in the state action landmark case *FTC v. Ticor Title Insurance Co.*, 504 U.S. 621 (1992).

The Attorney General explores in this *amicus* brief the concordance between Kentucky law and public policy, and federal law and public policy concerning market based pricing of goods and services, and the very strong Constitutional preference, as expressed by Kentucky's highest Court, for competitive market prices free from State interference.

Pursuant to Fed. R. App. P. 29, a state may file an amicus curie brief without the consent of the parties, or leave of the Court.

SUMMARY OF ARGUMENT

As mentioned above, the primary focus of this *amicus curiae* brief will be upon Kentucky law, and will address the questions of concordance of the FTC's Decision and Order and Kentucky law and public policy. As to discussion of Federal authority, Respondent's brief is adopted without extended republication herein. The conclusion reached herein is that the FTC's Decision and Order is consistent with and fully supported by Kentucky law, and should be upheld.

ARGUMENT

1. THE ATTORNEY GENERAL OF KENTUCKY IS, BY STATUTE AND CONSTITUTION, THE PRINCIPAL ENFORCEMENT OFFICER OF COMPETITION LAW IN THE COMMONWEALTH OF KENTUCKY.

Petitioner repeatedly asserts that the Commonwealth of Kentucky has taken the position in these proceedings that the "collective ratemaking" activities at issue here provide an important purpose, and that the citizens of Kentucky will be harmed if the FTC's cease and desist Order is implemented. Pet. Br. At 14-15, 17, 20, 38, 31. However , it is the Attorney General, not the not the state agency whose conduct is in question, who is the controlling authority on consumer protection matters; and the Attorney General has expressed no such opinions. To the contrary, the Attorney General, representing the Commonwealth, submitted an amicus brief to the Commission supporting the ALJ's decision, which the Commission correctly upheld.

Prior to 1972, the Commonwealth of Kentucky had no designated single voice on consumer protection activities. The many state agencies conducting consumer protection activities, each often answerable to different elected constitutional Officers, frequently contradicted each other. In

response, the General Assembly enacted the "Consumer Protection Act", KRS 367.110 et seq. which provided for, *intra alia*, a Consumer Protection Division of the Office of the Attorney General [the Department of Law]. KRS 367.150 sets out the "Functions, powers and duties" of the Division, the first of which is "(1) To promote the coordination of consumer protection activities of all departments, divisions, and branches of state, county and city government, concerned with activities involving consumer interests". Any remaining confusion as to this function is resolved in KRS 367.160 which provides that "All departments, agencies, officers, and employees of the Commonwealth shall fully cooperate with the Attorney General in carrying out the functions of KRS 367.120 to 367.300." Stamm, *The A G Goes to Market* Ky Bench and Bar 14 (April 1977).

The principal competition statutes in Kentucky are set out in the Consumer Protection Act. KRS 367.170 provides that "unfair, false, misleading, or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful." The next section, relating to competition law, is set out in KRS 367.175(1), (2):

> (1) Every contract, combination in the form of trust and otherwise, or conspiracy, in restraint of trade or commerce in this Commonwealth shall be unlawful.

> (2) It shall be unlawful for any person or persons to monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize any part of the trade or commerce in this Commonwealth.

Enforcement of the Consumer Protection Act is expressly reserved to the Attorney General by KRS 367.190(1). Additionally the Attorney General is a Constitutional officer, and is by statute the chief law officer and advisor to the Commonwealth of Kentucky. KRS 15.020. Finally the Kentucky Supreme Court in a certification of law has opined that KRS 15.020 supercedes other statutes purporting to limit the Attorney General's antitrust powers. *Commonwealth of Kentucky v. Southern Belle Dairy Co.*, 801 S.W.2d 60 (Ky. 1990).

II. THE ALJ DECISION AND ORDER DOES NOT IMPLICATE FEDERALISM CONCERNS BECAUSE IT DOES NOT CONFLICT WITH KENTUCKY LAW OR PUBLIC POLICY.

Petitioner's brief seems to reflect a misunderstanding of the underlying principles of federalism addressed in *Parker v. Brown* and *FTC v. Ticor Title Insurance Co.*[1] The state action doctrine is a means for dealing

[1] *Parker v. Brown,* 317 U.S. 341 (1943); *FTC v Ticor Title Insurance Co.*, 504 U.S. 621 (1992).

with any conflict between state law and federal competition policy.[2] Where there is no clash between the fundamental law and public policy of the state and federal systems, as is the case here, the supposed conflict does not exist. Petitioner's discussion of the supposed conflicts between the state's "collective ratemaking" and the procedural steps discussed in the Commission's decision ignores the Kentucky Constitution and a long line of Kentucky Supreme Court constitutional decisions relating to interference with market-based pricing by private parties pursuant to state sanction. Extended discussion of the KTC's satisfaction with it's existing procedures is also inapposite, since the system would surely fail to pass muster under existing Kentucky constitutional jurisprudence.

As discussed below, Kentucky has a very high constitutional standard for interference with market-based pricing by state agencies. Should the Kentucky General Assembly choose to enact legislation which does not violate the Kentucky Constitution, and which produces the necessary level of judgmental choice by the state required in setting prices, the Order clearly would not interfere with such a (very) hypothetical system. An examination of the Order in the case at bar shows that no agency or officer

[2] *See* Herbert Hovenkamp, *Antitrust and the Regulatory Enterprise,* 2004 Colum. Bus. L. Rev. 335 (2004); Robert P. Inman, Daniel L. Rubenfeld, *Making Sense of the Antitrust State -Action Doctrine: Balancing Political Participation and Economic Efficiency in Regulatory Federalism*, 75 Tex. L. Rev. 1203 (1997).

of the Commonwealth is impacted directly. The Order is carefully tailored and clearly avoids unnecessary interference with legitimate state concerns. Claims of litigants not withstanding, the Order does not appear to set a higher standard than that set by the State's Constitution, and in fact, is likely a much lower threshold barrier than the Kentucky Constitution would require. Therefore, there is no conflict and the ALJ Decision and Order should be upheld.

III. THE KENTUCKY CONSTITUTION DEMANDS THAT STATE INTERFERENCE IN MARKET-BASED PRICING MUST REFLECT JUDGMENTAL CHOICE BY THE STATE.

Kentucky has a long history of holding unconstitutional state statutes which interfere with market-based pricing. In *General Electric Co. v. American Buyers Cooperative,* 316 S.W.2d 354 (Ky. 1958), a case predating the passage of the Consumer Protection Act, Kentucky's highest court unanimously held unconstitutional the part of the "Fair Trade Act" purporting to allow enforcement of a minimum retail price agreement on non-signatories to the contract. "[T]his statute, we think, is a legislative invasion of the broad constitutional liberty of the people to acquire and protect their property and engage in fair trade." 316 S.W.2d at 361. The court specifically referenced Kentucky Constitution Section 1 relating to

property rights and Kentucky Constitution Section 2 which prohibits the exercise of arbitrary power by the Commonwealth.[3]

In a later case, very close in point, the Kentucky Supreme Court addressed the very question presented here – did a price-setting statute in which a Kentucky agency responsible for state approval of prices set by private individuals in the industry, but without independent judgmental choice by the state as to the prices, violate Section 1 of the Sherman Act. After a full discussion and analysis of *Parker v. Brown,* 317 U.S. 341 (1943), and the then recently decided case of *California Liquor Dealers v.*

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[3]The Kentucky Supreme Court said:

> Our Bill of Rights declares as one of 'the great and essential principles of liberty and free government' and as 'inherent and inalienable * * * the right of acquiring and protecting property.' [Kentucky Constitution] § 1, Fifth. This is free enterprise. Our economic system is founded upon competition – 'the life of trade.' It is an established principle that the constitutional guaranty of the right of property protects it not only from confiscation by legislative edicts and from the physical taking for public or private use, but also (subject to reasonable regulation based upon some reasonable ground for the public good) from any unjustifiable impairment or abridgement of this right [. . . .] The right of the owner to fix the price at which his property shall be sold is an inherent attribute of the property itself. [. . .] Supplemental to this property right provision is § 2 of the Constitution which forbids the exercise of arbitrary power of government over the 'property of free men.' This statute, we think, is a legislative invasion of the broad constitutional liberty of the people to acquire and protect their property and engage in free trade.

316 S.W.2d at 360-61.

Midcal Aluminum, 445 U.S. 97 (1980), the court found such price-fixing to be a violation of the Sherman Act:

> In the California wine case [*Midcal*] the State did nothing but enforce prices fixed by private individuals. In the instance of Kentucky the State participates in fixing prices only to the extent that it adds statutory minimum mark-ups to prices fixed by private individuals. From the standpoint of 'State Action' the difference is merely superficial, because it does not permit any judgmental choice by the state with respect to the resulting price. It is only a mechanical progress from the initial price set by the producer.

Alcoholic Beverage Control Board v. Taylor Drug Stores, Inc., 635 S.W.2d 319, 324 (Ky. 1982). The lesson of the Supreme Court is clear - absent a showing of "judgmental choice by the state with respect to the resulting price" such conduct is illegal.[4]

In it's most recent, and most definite, statement on the issue, in *Milk Marketing and Anti-Monopoly Commission v. The Kroger Co.*, 691 S.W.2d 893 (Ky. 1985), the Kentucky Supreme Court held unconstitutional a price-fixing statute in which the state agency apparently would have passed the "judgmental action" test the Court had recently articulated. The statute in

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[4]The Kentucky Supreme Court in the *Alcoholic Beverage* case based its decision on the Sherman Act, not the Kentucky Constitution (635 S.W.2d at 322), on the narrow grounds that the broad principles announced in *General Electric, supra,* did not apply to the regulation of alcoholic beverages, which occupies a special place under the Kentucky Constitution. 635 S.W.2d at 322-23. No such special constitutional status attaches to the regulation of household goods movers.

question, KRS 260.675 *et seq.* (since repealed) set up an extensive agency review procedure charged with controlling retail milk prices pursuant to a detailed "judgmental action" system described fully in the opinion. The trial court below had held the statute was an unconstitutional violation of the Kentucky Constitution, Section 1 and 2, as well as a violation of the Sherman Act. The Kentucky Supreme Court, however, did not even reach the Sherman Act issue, instead declaring that any such price-fixing statute is a violation of the Kentucky Constitution:

> As we have previously said, the statutory purpose of the law, is to prevent monopolies and unfair practices in the sale of milk and milk products. As we have also said, the law is in reality and in practice not an anti-monopoly statute, but is rather, a minimum mark-up law. We believe an enactment of such a nature is an arbitrary exercise of power of the General Assembly over the lives and property of free men.

691 S.W.2d at 899-900.

A brief comparison between the statutes in issue in the *Kroger* case and those in the case at bar should remove all doubt as to the likely outcome of a constitutional challenge here. In all respects, the milk marketing oversight more nearly met the requirements for state action than the state agency oversight presented here. The Court describes at length a system in which "costs" are defined in detail by statute and administrative regulation,

prices are filed in advance, there is authority by the regulator to carefully scrutinize filings, conduct independent investigations, and impose extensive penalties. 691 S.W.2d at 895-99. Nonetheless, the Kentucky Supreme Court condemned these statutes as violations of the Kentucky Constitution. In fact, the language of the Court condemns generally "an enactment of such a nature" (691 S.W.2d at 900) as interfering with the constitutional protection for free-market pricing.

Finally, it should be noted that Petitioners extended argument that Kentucky consumers would be harmed if the FTC's remedy is put into effect is simply old wine in new bottles. In *Alcoholic Beverage Control Board v. Taylor Drug Stores Inc.,* the state agency in question cited voluminous statutes and regulations as support for the price fixing in question, leading the Court to comment that "It does not follow, however that because a law is on the books it is carried out in practice" *op cit* at 321. The factual background as to what was actually done in terms of active oversight here is clear, and likewise does not pass muster. However, even a state agency that did very substantial active oversight was condemned by the Kentucky Supreme Court because, *intra alia,* of concerns for public interest. "The effect ... is price fixing by requiring minimum mark-ups. This certainly, by any criteria, is arbitrary and is inimical to the public interest. It is an

invasion on the right of merchants to sell competitively, and of the public to buy competitively in the open market.." *Milk Marketing and Anti-Monopoly Commission v. Kroger Co., op cit* at 900.

In short, it is not only federal "state action doctrine" principles that demand active supervision by Kentucky state agencies in any system of regulation of market prices, but also fundamental principles of free enterprise embedded in the Kentucky Constitution. Absent judgmental choice by the state with respect to the resulting price, a state system of market price regulation in Kentucky is likely to be unconstitutional under the Constitution of the Commonwealth.

CONCLUSION

The Commission's Order does not implicate federalism concerns because it does not conflict with Kentucky law or public policy. The Kentucky Constitution demands that state interference in market-based pricing must reflect judgmental choice by the State. The Commission's well supported finding of no active supervision of the collective rate filings by the Petitioner strongly suggests that the lack of regulatory oversight as

executed by the Kentucky Transportation Cabinet exceeds the bounds of the Kentucky Constitution. The Commission's Order should be upheld.

Respectfully submitted,

THE COMMONWEALTH OF KENTUCKY

By: _____

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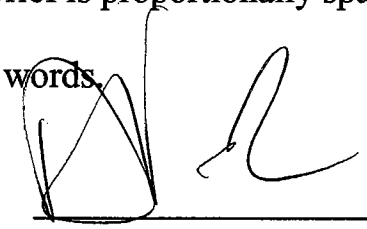
December 19, 2005

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R.. App. 32(a)(7)(C) and 6 Cir. R. 32(a), I certify that the attached Amicus Curiae Brief is proportionally spaced, has a typeface of 14 points, and contains 2,763 words.



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This is to certify that on December 19, 2005, I caused a copy of *Amicus Curiae* Brief of the Commonwealth of Kentucky to be served by U.S. Mail, upon the following persons:

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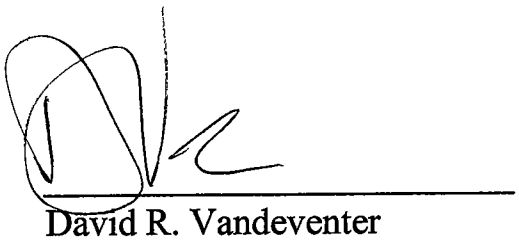

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