UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of	)	
	)	
ALABAMA TRUCKING ASSOCIATION, INC.,	)	**Docket No. 9307**
	)	
a corporation.	)	

In the Matter of	)	
	)	
MOVERS CONFERENCE OF MISSISSIPPI, INC.,	)	**Docket No. 9308**
	)	
a corporation.	)	

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

RESPONDENT KENTUCKY HOUSEHOLD GOODS CARRIERS ASSOCIATION, INC.'S OPPOSITION TO COMPLAINT COUNSEL'S MOTION TO CONSOLIDATE

Respondent Kentucky Household Goods Carriers Association, Inc. ("Kentucky Association"), by its attorney, James C. McMahon, submits this Opposition to Complaint

Counsel's Motion to Consolidate this proceeding with two (2) other presently pending proceedings.

Each of these three (3) cases involves (a) a ***different*** series of State statutes; (b) a ***different*** series of State regulations; (c) ***different*** state regulators; (d) a completely ***unique*** history of regulation by State regulators; and (e) completely ***different*** facts incident to the motor carrier regulatory process. Complaint Counsel's Motion contains no evidence or factual basis which suggests otherwise.

Consolidation of these cases will result in increased expense and prejudice to the Kentucky Association due to the multiplicity of parties and issues which will be added to the case without factual or legal justification.

Other avenues for economizing on judicial and administrative resources can and should be explored which will not be as costly and prejudicial to Respondent.

I. Complaint Counsel's "Overview of Cases"

While the "Complaints" in these proceedings may be identical, there is no indication that there is an identity of factual issues. It is true that the Kentucky Association will raise the State Action Defense. However, the fact- intensive inquiry attendant upon the "active supervision" prong of the defense will be the

real issue for resolution in the case. This issue, by definition, will be unique in all three (3) cases.

It is also questionable whether informed and well intentioned notions of federalism warrant the "grouping" of these States together in the manner suggested by Complaint Counsel's Motion.

II. Common Question of Law

It is surprising that Complaint Counsel would reference *Massachusetts Furniture and Piano Movers Ass'n*, 102 F.T.C. 1176, 1224 (1983), without citing its ***full*** history, and even more surprising that it would appear in their Motion for any purpose. In *Massachusetts Furniture & Piano Movers Ass'n v. F.T.C.*, 773 F.2d 391 (1st Cir., 1985), the Court of Appeals reversed a Commission determination that the Massachusetts motor carrier ratemaking statute did not satisfy the first prong of the state action defense. In effect, the First Circuit, in circumstances strikingly similar to those at bar in the *Kentucky Association* case, agreed with the household goods movers in Massachusetts that their collective tariff activity was being lawfully conducted pursuant to a clearly articulated state policy. The Court stated as follows at 773 F.2d at 396-397:

> We agree with the Association on this issue. The Court in *Southern Motor Carriers* concluded that for purposes of the first prong of *Midcal*, a clearly articulated policy is one that has been approved by a state legislature or a state supreme court. 105 S. Ct. at 1730. Although the Court referred to Mississippi's *amicus* brief in its opinion, it did so only to describe the nature and functioning

> of the Mississippi regulatory scheme. *Id.* at 1724, 1730. When trying to adduce the legislature's intent to regulate intrastate motor carriers, the Court referred only to the Mississippi statute, concluding that its permissive language had received the sanction of the state and was sufficient to satisfy the first prong of *Midcal*. *Id.* at 1730-31. Therefore, faced with Mass. Gen. Laws Ann. Ch. 159B, and language that is comparable to that of the Mississippi statute, we conclude, notwithstanding Massachusetts' claims in its *amicus* brief to the contrary, that Chapter 159B clearly establishes that state's interest to countenance collective rate setting among motor carriers. We note moreover that even were we to consider evidence of legislative intent beyond the statutory language discussed, the Commonwealth's claim that its statutes and regulations evidence a neutral policy toward collective rate making is not the type of authority which could supplant the clear meaning of the statute. Accordingly, the Association met its first burden in establishing *Parker* immunity."

Subsequent to the First Circuit's Decision, the Commission dismissed its Complaint on its own motion. It did so without pursuing proceedings on remand on the issue of "active supervision" directed by the Court, ". . .after determining that continued prosecution of the case [was] no longer in the public interest." *In re Massachusetts Furniture & Piano Movers Ass'n.,* 51 F.R. 15465 (April 24, 1986).

Similarly, in *New England Motor Rate Bureau, Inc. v. F.T.C.*, 908 F.2d 1064, 1077 (1st Cir., 1990), the First Circuit addressed the issue of "active supervision" in a manner which is applicable to the case at bar:

> In summary, the statute here clearly calls for the active supervision of the rates filed. We know, further, that a regulatory agency has been established and funded to carry out that statutory mandate, and that state officials are positioned to carry out their statutory duties. furthermore, the stipulations in the case indicate that unreasonable rates will be rejected and that the failure

> to suspend or reject a rate indicates a determination that the rate has been found to meet the regulatory criteria of the statute, orders, rules, and regulations. There is an administrative mechanism in place for aggrieved parties to register their complaints and be heard. Further, the Massachusetts courts are available and are empowered to force the regulators to act at the suit of aggrieved parties. In addition, the majority of the rates in question have previously been filed with and investigated by the ICC.
>
> "We hold that a showing of this magnitude is sufficient, without more, to meet the "active supervision" prong of the *Midcal* test for qualifying to invoke the "state action" defense of *Parker*. Specifically, Massachusetts both *has* and *exercises* relevant regulatory power. *Patrick,* 486 U.S. at 101. The FTC commissioners erred by trying to gauge in too particular a way the degree of actual effectiveness or ineffectiveness exhibited by the Massachusetts regulators."

It is noteworthy that in an F.T.C. proceeding involving the Pennsylvania household goods movers' intrastate rate bureau, virtually identical to the case at bar, Complaint Counsel represented to the Commission, after prevailing at a Commission trial, that ". . . all the elements of a state action defense as articulated by the Supreme Court in *Southern Motor Carriers Rate Conference v. United States, 105 S.Ct. 1721 (1985),* are available to the respondent." *In re Tristate Household Goods Tariff Conference, Inc.*, 50 F.R. 28902 (July 17, 1985). The Commission dismissed the Complaint on motion of Complaint Counsel. 50 F.R. at 28902.

III. Common Questions of Fact

Much of Complaint Counsel's discussion under this heading of its Motion is based on what is described as "guidance" recently issued by the Commission in

connection with the settlement of a proceeding brought by the Commission against the Indiana Household Goods Movers Association. (Motion to Consolidate; p.7.) The document referred to as "guidance" is a fairly presumptuous, self-serving manifesto which is more a description of the law the way that Complaint Counsel believes it ***should*** be than a statement reflecting any position which has been adopted by the Supreme Court.

The subject document contains no description of the type of supervision employed or challenged in Indiana. This limits its effectiveness for any purpose.

If the Bureau of Competition were the Kentucky State Legislature, the "guidance" might possibly be appropriate. As it is, the document has no weight and should have no place in this proceeding.

The questions of fact that exist in these three (3) cases will all bear on the issue of "active supervision." Contrary to the apparent belief of Complaint Counsel, State Legislatures and State Regulatory Agencies are not fungible. It is respectfully submitted that the Kentucky Association and the Commonwealth of Kentucky should be entitled to a fair, separate, independent inquiry into the practices challenged in this proceeding and the manner in which the State has conducted itself.

IV. Complaint Counsel's Claim that Consolidation Will Result in Judicial Economy

Opportunities abound for limiting the use of judicial resources in this proceeding which would still allow the Kentucky Association and the Commonwealth of Kentucky to have a fair and independent opportunity to be heard clearly in this case. These could include the following, all of which can be explored prior to determination of the within Motion: (1) a stipulation by the parties as to the existence of a clearly articulated and affirmatively expressed state policy in favor of the activity challenged in the Complaint thereby limiting issues for discovery and trial to those related to "active supervision;" (2) limiting the number of trial witnesses, exhibits and discovery methods to focus on a limited inquiry into the activity and intent of the Kentucky Transportation Cabinet with respect to the Kentucky Association's tariffs; and (3) directing Complaint Counsel to seek appropriate discovery from the Commonwealth of Kentucky before further proceedings are had in this case.

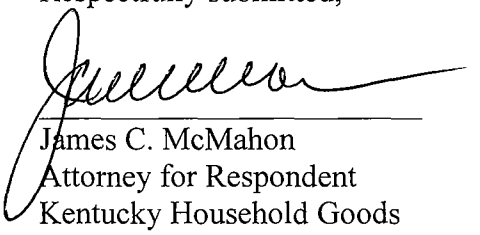
Complaint Counsel references a Commission decision in *New England Motor Rate Bureau* as support for its position on this Motion. However, in that case, only ***one*** rate bureau operating in ***multiple States*** was a Respondent. This situation is readily distinguishable. *New England Motor Rate Bureau, Inc. v. F.T.C.,* 908 F.2d 1064 (1st Cir., 1990).

V. Conclusion

Based on the foregoing, the Kentucky Association respectfully requests that Complaint Counsel's Motion to Consolidate be in all respects denied, and that the Administrative Law Judge grant such other and further relief as shall be appropriate.

Dated: New York, NY
August 7, 2003

Respectfully submitted,



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CERTIFICATE OF SERVICE

This is to certify that on August 18, 2003, I caused a copy of the attached **Respondent's Opposition to Complaint Counsel's Motion to Consolidate** to be served upon the following persons by U.S. Express Mail:

Hon. Richard Dagen
Associate Director
Federal Trade Commission
601 New Jersey Avenue, N.W.; Room 6223
Washington, D.C. 20580

Dated: New York, NY
August 18, 2003

James C. McMahon

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