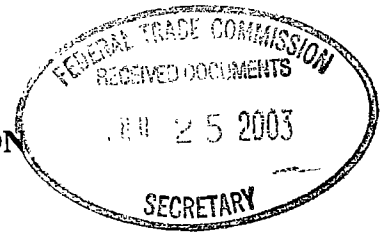

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

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

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

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

COMPLAINT COUNSEL'S MOTION TO CONSOLIDATE

Pursuant to § 3.41(b)(2) of the Commission's Rules of Practice, Complaint Counsel moves to consolidate: In the Matter of Alabama Trucking Association, Inc., Docket No. 9307; In the Matter of Movers Conference of Mississippi, Inc., Docket No. 9308; and In the Matter of

Kentucky Household Goods Carriers Association, Inc., Docket No. 9309. Rule 3.41(b)(2) authorizes the Administrative Law Judge to consolidate actions when they involve a common question of law or fact in order to avoid unnecessary costs and delays. The captioned matters involve a common question of law and very similar facts. The rule has been invoked in the past on a similar showing. The interests of judicial economy will be served by consolidation.

I. Overview of Cases

Respondents in these three cases are rate bureaus that have filed collective rates on behalf of member movers. The complaints in these matters are virtually identical and allege that the tariffs at issue constitute price agreements entered into by household goods movers. Thus, each complaint contains a paragraph entitled "**NATURE OF THE CASE**" that states:

> This matter concerns horizontal agreements among competing household goods movers that, through respondent, file tariffs for intrastate moving services in [the respective state]. The tariffs contain collective rates that participating movers charge consumers for moving services. Through these tariffs, the participating movers engage in a horizontal agreement to fix prices for their services.

Similarly, each complaint states in its respective paragraph 7 that:

> For many years and continuing up to and including the date of the filing of this complaint, respondent, its members, its officers and directors, and others have agreed to engage, and have engaged, in a combination and conspiracy, an agreement, concerted action or unfair and unlawful acts, policies and practices, the purpose or effect of which is, was, or may be to unlawfully hinder, restrain, restrict, suppress, or eliminate competition among household goods movers in the intrastate [respective state] household goods moving industry.

The complaints then proceed to charge respondents with filing tariffs which contain collective rates.

Perhaps more significantly, it is likely that each respondent will defend its actions on the

grounds that the agreements on price are covered by the state action defense.[1] That defense will require respondent to prove two things: that the state has clearly articulated a policy to displace competition and that the state has engaged in "active supervision" of the rates filed by respondents.

In addition, the proposed relief is the same in each instance. Thus, these matters involve similar facts and a common issue of law and should be consolidated to achieve judicial economy.

II. Common Question of Law

The three complaints involve a common issue of law: whether the respondents' actions, filing tariffs that contain agreements on price, are covered by the two-pronged state action defense.

As we explain in more detail below, the respondents have filed tariffs containing collective rates. Courts routinely condemn as *per se* illegal agreements among competitors to set or fix prices. *See* Antitrust Law Developments (Fifth) at 82, citing *United States v. Trenton Potteries Co.* 273 U.S. 392 (1927). One such type of agreement arises when competitors join a rate making association which has, as one of its functions, the establishment of rates that apply to the members. Such arrangements have been considered price-fixing under the antitrust laws for over half a century. *Georgia v. Pennsylvania Railroad,* 324 U.S. 439 (1945). More recently, the courts have found such collective rate making activities *per se* violations of the antitrust laws:

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[1] *See* FTC press release in docket numbers 9307, 9308 and 9309 (July 9, 2003). (*Available at* http://www.ftc.gov/opa/2003/07/moversassn.htm).

> [T]he practice of collective rate publication easily fits the classic description of a "naked price restraint." Since *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 60 S.Ct. 811, 84 L.Ed. 1129 (1940), it has been established law that price fixing among competitors is a *per se* violation of Section 1 of the Sherman Act.

United States v. Southern Motor Carriers Rate Conference, 467 F. Supp. 471, 486 (N.D.Ga. 1979), *aff'd* 702 F.2d 543 (5th Cir. Unit B 1983), *rev'd on other grounds* 471 U.S. 48 (1985).

Similarly, the Commission held in *Mass. Movers*, "It is beyond cavil that agreements among competitors to set price levels or price ranges are *per se* illegal under the antitrust laws." *Massachusetts Furniture and Piano Movers Ass'n*, 102 F.T.C. 1176, 1224 (1983).

The Commission opinion in *Ticor* stated that the rate setting activity of the title insurance bureaus was:

> . . . inherently suspect and an appropriate candidate for *per se* analysis, under the reasoning we employed previously in *Massachusetts Board of Registration in Optometry.*

Ticor Title Insurance Company et al., 112 F.T.C. 344 at 424 (1989). The Commission's decision was affirmed by the Supreme Court, which stated, "This case involves horizontal price fixing . . . . No antitrust offense is more pernicious than price fixing." *FTC v. Ticor Title Insurance Co.*, 504 U.S. 621, 639 (1992).

Each of the three states at issue require moving firms to file tariffs. Rather than comply with these laws by filing individual tariffs, movers file, through respondents, tariffs which contain collective rates. Because respondents have coordinated these agreements on price, each case is expected to raise the same issue of law: whether the state action defense applies to those agreements.

The state action defense dates back to the Supreme Court's opinion in *Parker v. Brown*

which held that in light of states' status as sovereigns and given basic principles of federalism, Congress would not have intended that the Sherman Act to apply to the activities of states themselves. 317 U.S. 341 (1943). As the Court explained:

> We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by the legislature. In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress.

Id. at 350-51.

This basis for state action immunity was reaffirmed by the Supreme Court in *FTC v. Ticor Title Insurance Co*, where the Court emphasized, "Our decision [in *Parker*] was grounded in principles of federalism." 504 U.S. at 633.

However, not all activity that is reviewed or approved by the state receives antitrust immunity. *Parker* noted, for instance, that "a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful." 317 U.S. at 351. Rather, the underlying private activity must be both authorized by the state and supervised by the state. Specifically, the courts determine whether the defense shields otherwise illegal conduct by applying the two-pronged standard set out in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*: "the challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy'" and "the policy must be 'actively supervised' by the State itself." 445 U.S. 97 at 105 (1980) (quoting *City of Lafayette v. Louisiana Power & Light*, 435 U.S. 389, 410 (1978)); *Ticor*, 504 U.S. at 631. Thus, to prevail, respondents will have to sustain their burden on both prongs of this test.

1. Prong One - Clear Articulation

One common legal issue will be whether respondents meet prong one of the *Midcal* test. In each instance, respondent will have the burden of identifying the relevant statutes and showing that their respective state has clearly articulated the goal of replacing competition with a state regulatory scheme. As described below, each state has similar household goods moving statutes.

2. Prong Two - Active Supervision

The second common legal issue under the state action defense is whether the three respondents can carry their heavy burden of showing that their actions satisfy the second prong of *Midcal,* which requires active state supervision of private parties. The active supervision test operates by according state action protection only when the challenged conduct can be said to be that of the state rather than private actors. The test thus seeks to determine "whether the State has exercised sufficient independent judgment and control so that the details" of the restraint "have been established as a product of deliberate state intervention, not simply by agreement among private parties." *Ticor,* 504 U.S. at 634. "Much as in causation inquiries, the analysis asks whether the State has played a substantial role in determining the specifics of the economic policy." *Id.* at 635.

The active supervision requirement further serves to assign political responsibility for the state's actions:

> States must accept political responsibility for actions they intend to undertake. . . . Federalism serves to assign political responsibility, not to obscure it. Neither federalism nor political responsibility is well served by a rule that essential national policies are displaced by state regulations intended to achieve more limited ends. For States which do choose to

> displace the free market with regulation, our insistence on real compliance with both parts of the *Midcal* test will serve to make clear that the State is responsible for the price fixing it has sanctioned and undertaken to control.

Id. at 636.

The Commission has recently issued guidance on this prong of the state action defense. In accepting a settlement form the Indiana Household Goods Movers Association, the Commission stated in its Analysis to Aid Public Comment that:

> [C]lear articulation requires that a State enunciate an affirmative intent to displace competition and to replace it with a stated criterion. Active supervision requires the State to examine individual private conduct, pursuant to that regulatory regime, to ensure that it comports with that stated criterion. Only then can the underlying conduct accurately be deemed that of the State itself, and political responsibility for the conduct fairly be placed with the State.[2]

The Commission further identified "specific elements of an active supervision regime that it will consider in determining whether the active supervision prong of state action is met." They are:

> (1) the development of an adequate factual record, including notice and opportunity to be heard; (2) a written decision on the merits; and (3) a specific assessment – both qualitative and quantitative – of how the private action comports with the substantive standards established by the state legislature.

Id. In each of these three instances, respondents will bear the heavy burden of showing that each of these three aspects of supervision have been met.

III. Common Questions of Fact

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[2] *Indiana Household Movers and Warehousemen, Inc.*, File No. 021-0115 (Mar. 18, 2003) (proposed consent order, *available at* <http://www.ftc.gov/os/2003/03/indianahouseholdmoversanalysis.pdf) ("Indiana Analysis") at 5.

These three matters also concern common issues of fact. Specifically, all three involve moving tariffs which constitute agreements on price. In addition, under the state action defense, it is expected that respondents will attempt to meet their burden of showing first, that similar statutes in the three states clearly express an intent on the part of the state to displace competition. Further, it is expected that each respondent will attempt to meet its burden of showing that the second prong of the state action defense has been met - which will involve a review of common elements of regulatory oversight to determine if the states have undertaken active supervision of respondents' collective rate filings.

A. Common Facts Regarding Tariffs

Each of the three respondents files a tariff containing collective rates household goods movers must charge their customers. Complaint counsel contends that the collective rates contained in the tariffs constitute an illegal agreement on price. While each respondent files a different tariff, the tariffs bear significant similarities. For instance, each tariff has a section that outlines the rules for applying the tariff. For example, they detail the information that must appear on the bill of lading. Each tariff also has a section that lists rates for local moves. In each instance, respondents have issued tariffs in which movers agree to charge local rates that are hourly fees for labor and equipment. Also, each of respondent's tariffs has agreed-to intrastate rates where the rate varies depending on the distance traveled and the total weight of the shipment. Finally, each tariff has a section which sets rates for additional services, such as packing, moving particular bulky or heavy items, and moves involving flights of stairs. Thus, while these tariffs are not identical, they have many of the same types of pricing provisions.

B. Common Facts Regarding Prong One

Respondents are expected to attempt to carry their burden of establishing a state action defense. Under prong one, respondents will have to show that their respective states have clearly articulated an intent to replace competition with a regulatory scheme. While each state has enacted its own set of statutes, and it is unclear to complaint counsel exactly what statutes respondent will assert show clear articulation, there is substantial similarity among possibly relevant statutes in each of the states. For instance, each of these three states have enacted laws that require that rates be reasonable. For example:

Kentucky's current statute regulates motor carriers in order:

> to encourage the establishment and maintenance of reasonable charges for such transportation service, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices.

KY. REV. STAT. ANN. § 281.590 (2002).

Mississippi's statute requires:

> that sound economic conditions in such transportation and among such carriers may be fostered; that the service by motor carriers may be adequate, economical, and efficient; that reasonable charges may be made therefor, without unjust discriminations, undue preferences or advantages, and unfair or destructive competitive practices.

MISS. CODE ANN. § 77-7-3.

Alabama law also requires that motor carriers charge "just and reasonable" rate. ALA CODE § 37-3-19(b). The Public Service Commission has the authority to review the rates and if it determines that the rates "will be unjust or unreasonable." ALA CODE § 37-3-19(d). Thus, the prong one analysis will likely involve analysis of statutes with similar provisions.

C. Common Facts Regarding Prong Two

If, as expected, respondents take on the burden of showing that their rate setting agreements have been actively supervised by state officials, each respondent will be attempting to show common types of state activity. Based on prior case law, the Commission has identified many factual elements that it would expect a respondent to address in attempting to show adequate supervision. First, respondents will need to show that procedures are in place in their respective states. As the Commission has stated, "respondent would need to show that the State had in place an administrative body charged with the necessary review of filed tariffs and capable of developing an adequate factual record." Indiana Analysis at 6. Also respondent would be expected to show that the state has provided interested parties with adequate notice with regard to collective rates. Indiana Analysis at 7. Further, respondent will need to assess the extent to which the state has issued a written decision when approving or disapproving rates. *Id.* In each of these three states, these similar issues will be examined because each state has a regulatory body in place that receives respondents' tariff filings.

In addition, each respondent will be required to show that its collective rates were subject to, among other things, qualitative and quantitative analysis under standards set out in state law, analysis based on accurate, timely data, and an analysis based on the impact the rates have on consumers. Indiana Analysis at 7-9. Here, the three cases will be similar in that the inquiry into the state activity will be similar in scope.

IV. Consolidation Will Result in Judicial Economy

Consolidating these matters will result in significant judicial economy. First, because these respondents carry out similar functions in the same industry and all three matters involve the same legal issue, consolidation will avoid unnecessary duplication of effort. Moreover, because the same complaint counsel will be handling all three matters, consolidation will avoid scheduling conflicts that otherwise could slow all three proceedings. If consolidation is granted, the parties can agree on a common scheduling order with common deadlines for discovery and other important pre-trial events thus ensuring that all three issues move forward in a timely fashion.

Consolidation will also provide for an opportunity for consistent relief if complaint counsel prevails.[3] Moreover, consolidation will provide the Commission with an opportunity to review these related matters in a unified way as it did in the *Ticor* matter. That matter involved several title insurance firms operating in eight states, yet the Commission issued one opinion. 112 F.T.C. 344 at 421. Similarly, in *New England Motor Rate Bureau* the Commission issued one opinion in a matter that involved three separate New England states. *New England Motor Rate Bureau, Inc.,* 112 F.T.C. 200, 264 (1989).

Consolidation has been ordered in the past where three respondents were in the same industry and were charged with similar violations. *In re Automotive Breakthrough Sciences, Inc., et al.,* Docket Numbers 9275, 9276, 9277, 1995 FTC LEXIS 378 (Dec. 18, 1995). Even in those cases where there were inadequate common facts to warrant consolidation, the Chief Administrative law judge reassigned the cases to a single ALJ because "the handling of these

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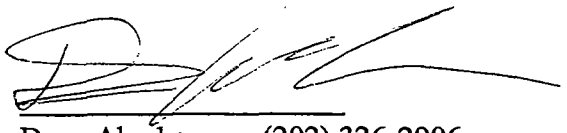
[3] Even with consolidation, we believe that in the event complaint counsel prevails, separate orders should issue against each respondent.

cases by one law judge could achieve some cost savings." *In re Chrysler Motors Corp., et al.,* Docket Numbers 9072, 9073, 9074, 1976 FTC LEXIS 448, *9 (March 19, 1976). *See also, In re Motor Up Corp., et al.,* Docket Numbers 9291, 9292, (June 11, 1999).

V. Conclusion

Under rule 3.41(b)(2), the Administrative Law Judge is authorized to consolidate actions when they involve a common question of law or fact in order to avoid unnecessary costs and delays. The captioned matters involve common fundamental questions of law and substantially similar facts. As a result, in the interests of judicial economy, these three matters should be consolidated. A proposed order is attached.

Respectfully submitted,



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Dated July 25, 2003

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

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

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

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

ORDER CONSOLIDATING CASES FOR DISCOVERY AND HEARING

UPON MOTION of complaint counsel pursuant to § 3.41(b)(2) of the Commission's

Rules of Practice, and

IT APPEARING TO THE COURT that the captioned cases involve common issues of fact and law, and that consolidating them would conserve judicial resources; it is hereby

ORDERED that the captioned cases are consolidated for purposes of hearing before _____, Administrative Law Judge. The Administrative Law Judge may issue further orders as necessary to ensure the orderly and efficient administration of discovery and hearing.

_____
Stephen J. McGuire
Chief Administrative Law Judge

_____
D. Michael Chappell
Administrative Law Judge

Dated: _____, 2003

CERTIFICATE OF SERVICE

This is to certify that on July 25, 2003, I caused a copy of the attached Complaint Counsel's Motion to Consolidate to be served upon the following persons by facsimile, U. S. Mail or Hand-Carried:

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