

Kentucky Household Goods Carriers Association, Inc., Docket No. 9309. Rule 3.41(b)(2)

whether or not the Administrative Law Judge to consolidate actions when they involve a common

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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

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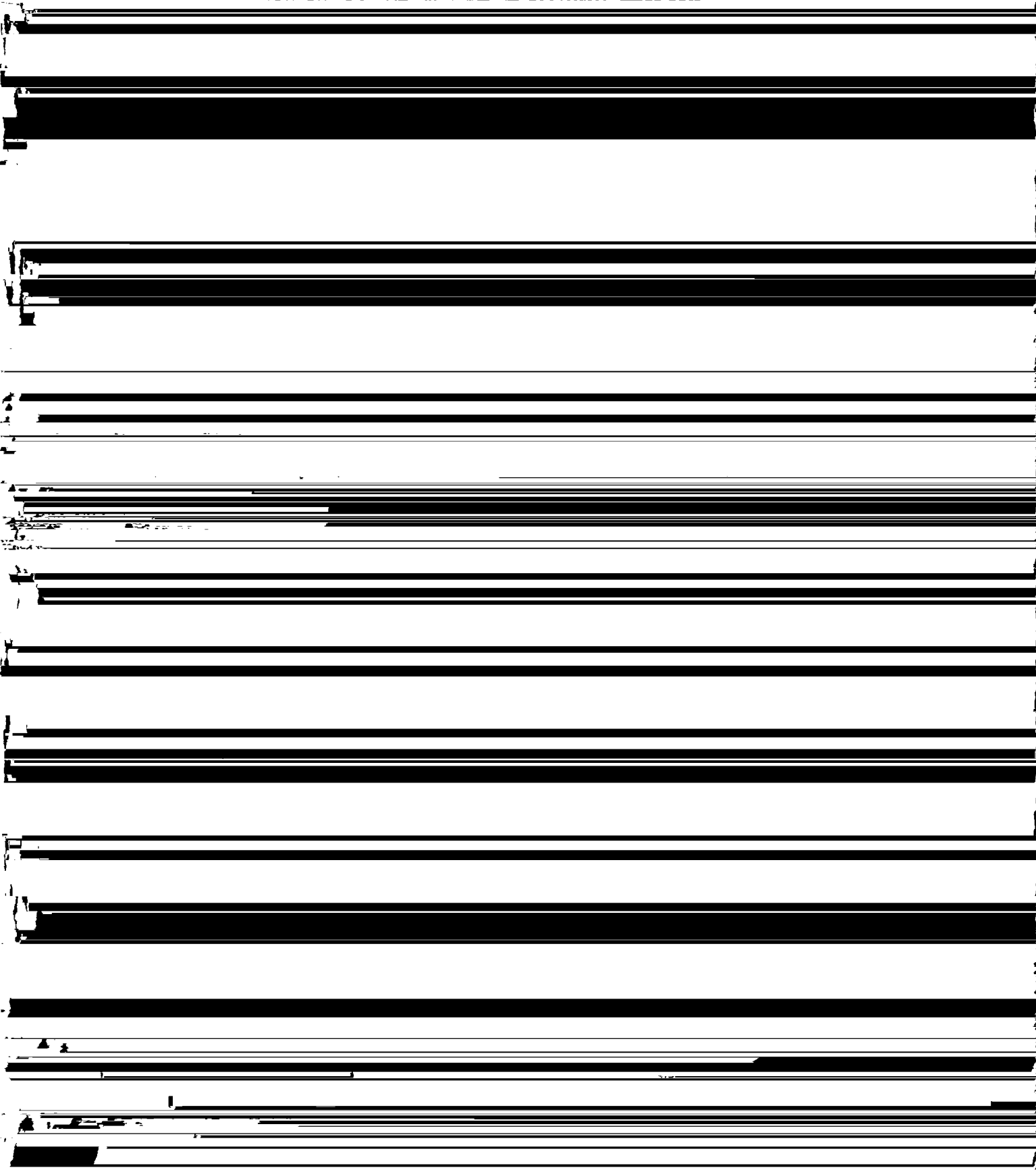
similar facts and a common issue of law and should be consolidated to achieve judicial economy.

[REDACTED]

[REDACTED]

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[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 F.2d 1300 (1949), 31-1 U.S. 11-11-11



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

[REDACTED]

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

requires the state to have a substantial role in the challenged conduct, so that it can be said to be

responsible for the price fixing it has sanctioned and undertaken to control

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

Respondents are expected to attempt to carry their burden of establishing 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

created its own set of statutes, and it is unclear to respondent counsel whether state

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

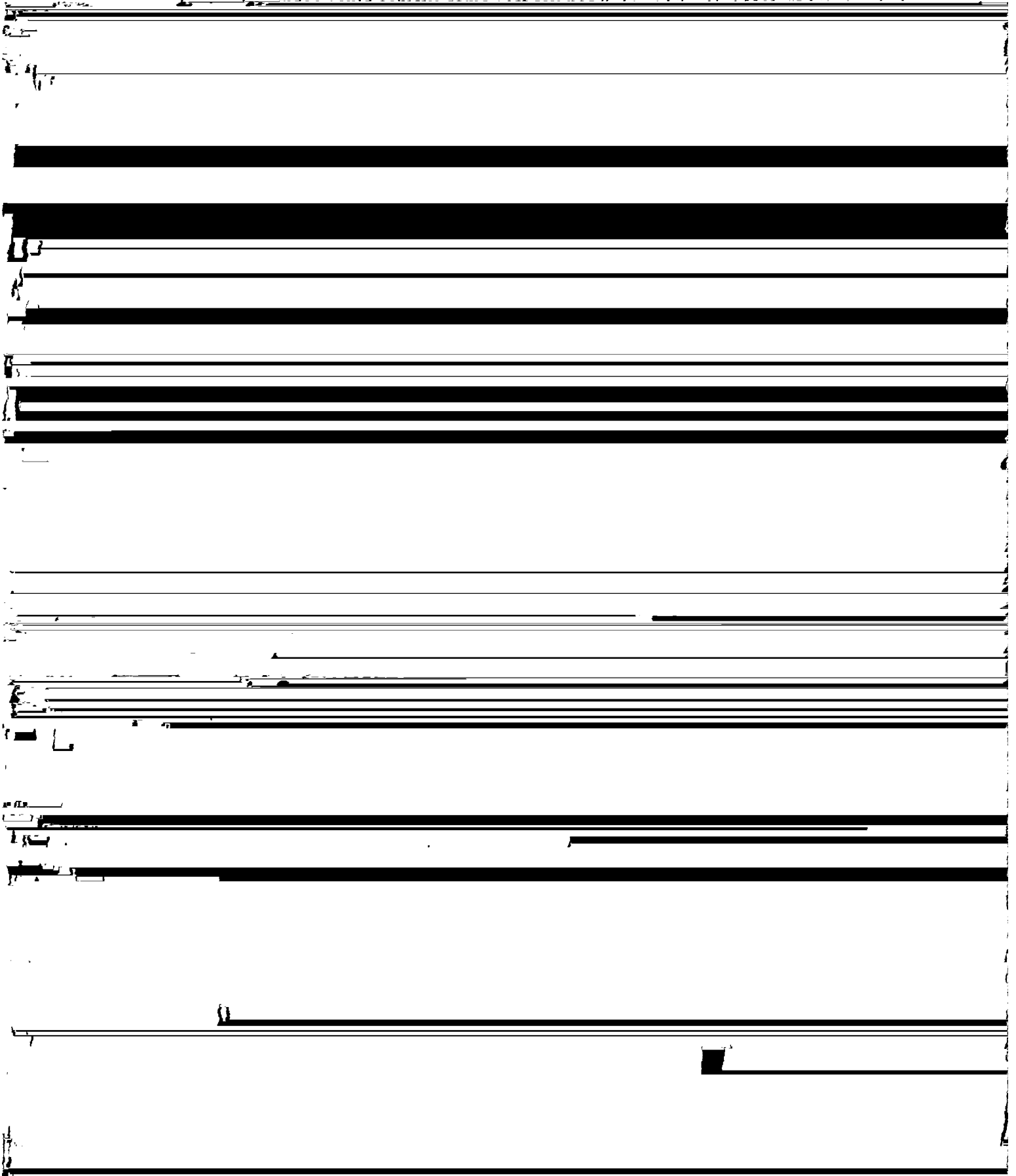
had in place an administrative body charged with the necessary review of filed tariffs and capable

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 agree on a common scheduling order with common deadlines for discovery and

[REDACTED]

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



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 mentioned~~

[REDACTED]

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:

The Honorable Stephen J. McGuire
Chief Administrative Law Judge
Federal Trade Commission


600 Pennsylvania Avenue NW

Washington, DC 20580

The Honorable D. Michael Chappell
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, DC 20580

Selby A. Ireland, Esquire
Butler, Snow, O'Mara, Stevens & Cannada, PLLC
AmSouth Plaza
17th Floor
210 East Capitol Street
Jackson, Mississippi 39201
(601) 985-4500 *facsimile*

Counsel for the Movers Conference of Mississippi


Dana Abrahamsen