

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

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**In the Matter of** )  
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 )  
 **KENTUCKY HOUSEHOLD** )  
 **GOODS CARRIERS** )  
 **ASSOCIATION, INC.,** )  
 )  
 **a corporation.** )  

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**Docket No. 9309**

**MEMORANDUM OF RESPONDENT KENTUCKY  
HOUSEHOLD GOODS CARRIERS ASSOCIATION, INC.  
IN SUPPORT OF MOTION FOR SUMMARY DECISION**

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KRS 281.675

KRS 281.680

KRS 281.685

KRS 281.690

KRS 281.695

KRS 281.700

KRS 281.705

KRS 281.880

KRS 281.900

KRS 281.905

### **STATE REGULATIONS**

601 Kentucky Administrative Regulations (“KAR”) 1:029

601 KAR 1:030

601 KAR 1:031

601 KAR 1:040

601 KAR 1:045

601 KAR 1:050

601 KAR 1:060

601 KAR 1:065

601 KAR 1:070

601 KAR 1:075

601 KAR 1:080

601 KAR 1:095

601 KAR 1:101

**OTHER AUTHORITIES**

“Analysis of Proposed Consent Order to Aid Public Comment;” Iowa Movers and Warehousemen’s Association; File No. 021-0115;  
[www.ftc.gov/os/2003/08/imwaanalysis.htm](http://www.ftc.gov/os/2003/08/imwaanalysis.htm).

In this proceeding, Complaint Counsel uses the rules of evidence to achieve, by

under the federal antitrust laws because that conduct was undertaken as part of a State initiated and sponsored activity, adopted by the State pursuant to a clearly articulated and affirmatively expressed State policy, which was actively supervised by the State.

Complaint Counsel has adduced no evidence to contradict the position of KTC which has been advanced in this proceeding.

## **II. BACKGROUND**

An inquiry into the factual circumstances surrounding the so-called “collective-ratemaking” activities of the Respondent acting pursuant to Kentucky law and regulations is fact-intensive and is the subject of Respondent’s Rule 3.24 Separate Statement of Material Facts as to Which there is No Genuine Issue (“Rule 3.24 Statement”). Reference is made to Respondent’s Rule 3.24 Statement for a description of the background facts necessary to determination of the within motion.



**III. THE RECORD DEMONSTRATES THAT RESPONDENT HAS ESTABLISHED THE ELEMENTS OF THE STATE ACTION DEFENSE UNDER *PARKER V. BROWN*.**

In order to prevail on its State Action Defense, Respondent must establish that its 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).

- 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.



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, KTC *has* “enthusiastically” come forward in an effort to preserve the regulatory program under scrutiny, as is demonstrated by the facts contained in Respondent’s Rule 3.24 Statement - - which also describes 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

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*

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

**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

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. [McM. Decl. Para. 8; Ex. 5]

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 subjectin

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

**IV.**



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

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 discrimina

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

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*





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.

*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)

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(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.

**C. 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 Rule 3.24 Statement for the evidence which confirms the satisfaction of the “Active Supervision” element of the “State Action” defense.

CONCLUSION

For all the foregoing reasons, Respondent respectfully requests that its motion for summary decision dismissing the complaint be in all respects granted, and that the Administrative Law Judge grant such other and further relief as shall be appropriate.

Dated: New York, NY  
December 19, 2003

Respectfully submitted,

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