COMPLAINT COUNSEL'S PRETRIAL BRIEF

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UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

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

COMPLAINT COUNSEL'S PRETRIAL BRIEF

I. INTRODUCTION

The Complaint in this matter charges, and the evidence will show, that the Kentucky Household Goods Carriers Association ("Kentucky Association") has unlawfully fixed the price of intrastate moving in Kentucky. The movers in the Kentucky Association agree upon what prices will be charged to consumers, and then institute them by filing a "tariff" that requires the movers to charge the prices they have agreed upon. Respondent claims that the Commonwealth of Kentucky has authorized and supervised this activity as part of its regulation of the moving industry, and therefore conduct that would otherwise be illegal *per se*, is permissible. While decades ago the Kentucky Transportation Cabinet ("KTC") undertook steps to supervise movers' rates, state officials charged with overseeing this activity currently do little more than passively observe and rubber-stamp the rates agreed upon by the movers. As a result, the Kentucky Association has violated the antitrust laws and should be required to cease and desist fixing

from May 15th through September 30th, during which the rates in the tariff are higher. CCF ¶ 16.

Another section of the tariff sets the rates for additional services, such as packing, moving particular bulky or heavy items, and moves involving flights of stairs. The members also agree on what constitutes "overtime:" any packing or unpacking performed on the weekends or after 5 p.m. during weekdays. The tariff's terms are precise. For example, packing a "Drum, Dish-Pack" costs $14.60 regular time and $20.40 on overtime. Packing a wardrobe carton costs $3.60 regular time and $4.95 overtime. CCF ¶ 8. Moving an automobile is $134.70, and moving jet skis costs $84.15. CCF ¶ ¶ 18, 19.

Respondent regularly institutes collective increases in the rates contained in the tariff. Such increases can be instituted either by Respondent's Board of Directors or through a vote of the general membership. CCF ¶ ¶ 11-14, 16-17. For example, on October 13, 1999, Respondent sought a 10% increase in the intrastate transportation rates then in effect. CCF ¶ 12. Similarly, on October 11, 2000, Respondent's members agreed to seek an 8% increase in the intrastate transportation rates then in effect. CCF ¶ 13.

to valuation charges. Buddy stated that he did not want to 'upset the program' or work against the majority of tariff participants. Therefore, he withdrew the requested exception as shown on this form." The notes of the conversation make clear that Mr. Boyd believed that his proposed price decrease was in the best interests of the consumer, but agreed to go along with the majority. CCF ¶ 22.

B. KENTUCKY STATUTES REGARDING HOUSEHOLD GOODS CARRIERS

Several Kentucky statutes relate to the household goods industry. One statute, KY. REV. STAT. ANN. § 281.680, requires that all movers file a tariff with the KTC. CCF ¶ 29. In addition, there are several statutory provisions that establish guidelines for the level of the rates movers can charge. For instance, Kentucky purports to regulate all 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; CCF ¶ 30. Similarly, KY. REV. STAT. ANN. § 281.590 also declares that it is state policy to have rates that provide "economical and efficient service." CCF ¶ 31. KY.

tariff – no discounting is permitted. CCF ¶ 34. Nevertheless, Respondent's members occasionally try to offer discounts to consumers. CCF ¶ 25-28. For example, a letter from A. Arnold, a Kentucky Association member, complains that a competitor is offering a 52% discount. (A. Arnold brought this matter to the state's attention in a letter stating, "[w]e at A. Arnold appreciate and respect fair and honest competition. However, in our regulated state we do not condone dishonest business practices."). CCF ¶ 26. Two other exhibits show movers attempting to discount 30% off the collective rates in the tariff. CCF ¶ 27-28.

C. Lack of State Supervision

The Division of Motor Carriers in the KTC is the office that is responsible for matters relating to household goods carriers. There is one part-time employee, William Debord, who is responsible for, among his other tasks, dealing with household goods tariffs.[2] Mr. Debord does not get any guidance from his supervisor about tariff issues and has not reported to anyone in that regard since 1979. CCF ¶ 40. Aside from ministerial tasks associated with maintaining the tariff, the KTC has undertaken no formal procedural steps to review or evaluate the tariff, and KTC officials do no material, substantive review of the actual rates contained in the tariff. For instance, as Mr. Debord testified at his deposition, the KTC does not hold hearings to consider rate increases, issues no written decisions approving rates or rate increases, undertakes no formal

[2] Mr. Debord works a total of 100 hours per month, spending only 60% of this time on household goods matters. CCF ¶ 37-38. The bulk of his time is spent working on non-rate household goods matters. Fully 20% of his 100 hours is spent driving to the offices of regulated firms to conduct limited reviews of the firms' records. These reviews are done to make sure movers are not offering discounts to consumers. In addition, Mr. Debord spends time investigating unlicensed movers, conducting seminars, updating power of attorney forms, and handling inquiries from the public. CCF ¶ 39.

[3] The Kentucky Association also does not compile accurate data on movers' costs. CCF ¶ 46. The record shows that the only attempt Respondent makes to obtain financial information from its members is when members file for an exception to an item in the tariff. In

It has not always been the case that the KTC failed to collect business data. Years ago, the KTC required all household goods movers to file detailed annual financial reports. These reports were routinely audited in the 1970's and 1980's. The KTC would check their accuracy by comparing the data sent to the state to the firms' ICC filings, which could be 200 pages long. CCF ¶ 42.

In fact, according to minutes of the April 15, 1966, board meeting, Respondent considered hiring a consultant to prepare information for the KTC because, "It was decided that due to the amount of information which maybe required by D.M.T. [state transportation department], it would be feasible and probably more economical to call in an outside rates firm . . . ." The expert under consideration had many years experience at the Interstate Commerce Commission, where he supervised "between 30 and 40 employees whose duties were to develop cost formulae for the determination of rail, motor carrier . . . pay costs, to prepare cost studies . . . [and] to furnish cost data to the Suspension Board and other members of the Commission staff for use in determining the reasonableness of rates for rail carriers, motor carriers, and barge carriers and to introduce cost and other evidence in proceedings before the I.C.C." CCF ¶ 43. Apparently, Respondent never did hire a consultant, and the state later dropped the requirement that all movers file reports.

The KTC's decision to stop collecting cost and revenue data from movers appears to conflict directly with a statutory requirement. KY. REV. STAT. ANN. § 281.680(4) dictates that

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filling out the "justification" section of the Form 4268. Other forms have only minimal information in the "justification" section. For instance, many forms simply say "Increase in costs." *See, e.g.*, CX 82, or contain a simple statement that the mover wishes to raise its rates. CCF ¶ 47.

the KTC's collective rate making procedures "shall assure that the respective revenues and costs of carriers . . . are ascertained." CCF ¶ 31.

2. The KTC Does Not Issue a Written Decision

The KTC does not issue a written decision with respect to Respondent's tariff. When the Kentucky Association institutes a change to the tariff – typically the change involves an increase in rates – it informs Mr. Debord of the change, and he stamps the document requesting the change "received." After 30 days, the change takes effect. Aside from stamping the document, there is no statement issued by the state. As Mr. Debord testified, "No action is approval." CCF ¶ 48-49.

3. The KTC Does Not Hold Hearings

Since the original hearings in the 1950's or 1960's, where the state first approved the Kentucky Association's tariff, the state has not held hearings to examine or analyze the collective rates contained in the Kentucky Association tariff. CCF ¶ 50. Since the only way the KTC could formally reject the Kentucky Association's collective tariff rate under Kentucky law would be by setting the rates for a hearing, the KTC has obviously never formally rejected a tariff filed by Respondent. CCF ¶ 51.

The KTC also does not receive any informal input from groups advocating on behalf of consumers. CCF ¶ 52. A Kentucky administrative regulation, 601 KY. ADMIN. REG. ("KAR") 1:070(c), contains requirements that must be followed if movers change the tariff rates. The requirements include the following: "if the change in the rates and charges involves an increase, then he shall also, and at the same time, cause a notice to be printed in a newspaper of general circulation in the area of his situs which shall give notice of the proposed increase, the old rates

[4] There are many Kentucky Association meeting minutes where rates or rate increases were discussed that indicate that Mr. Debord is not in attendance. *See, e.g.,* CX 14, CX 15, CX 19, CX 20, CX 25, CX 26, and CX 47.

[5] A general rate increase will involve adjusting upward hundreds of prices

5. The KTC Does Not Analyze Rates or Rate Increases Under any State Standard

The Kentucky legislature has determined that the rates movers can charge must be, among other things, reasonable and not excessive. CCF ¶ ¶ 31, 33. State officials admit that these laws are intended to protect consumers, among others. *Id*. Yet the KTC has no standards or measures in place for determining whether the rates they allow to go into effect meet these legislative norms. As Mr. Debord stated, there is no "written rule within the Cabinet that requires specific standards to be followed." CCF ¶ 66. Similarly, the state does not have any way of knowing whether a rate increase will increase movers' profits or result in rate levels that exceed the statute's guideline that prices cannot be "excessive." CCF ¶ ¶ 53, 57.

In addition to not having standards in place to review the collective rate increases at issue in this case, the state also does not have standards in place to review rates filed by particular members that exceed the collective rates challenged in this matter. Thus, it cannot be argued that the state has effectively evaluated collective rates by comparing them to other rates that were subject to substantive review. In one instance, for example, a member moving firm, named the

Id

Association, Apartment Movers, filed for individual rates. Mr. Debord testified that he had no "specific standards" for determining whether those rates would be acceptable. CCF ¶ 58.

The state has not always taken such a hands-off approach to regulation. Three decades ago, the KTC had a staff of three auditors and others who did cost studies involving statistical analysis of for-hire carriers. CCF ¶ ¶ 61, 63, 64. In the 1970's, the KTC routinely compiled a spreadsheet which contained the calculated operating ratios for all household goods movers. CCF ¶ 63. Mr. Debord himself was involved in deriving movers' operating ratios, and he would then prepare monthly written reports to the Commissioner analyzing rate applications. However, some time in the 1980's, the Commissioner told him "not to bother them with those things" or "Don't bother us with that." CCF ¶ ¶ 62. (It is somewhat unclear why the state tracked firms' operating ratios since it never developed a policy setting forth an acceptable level of movers' operating ratios. CCF ¶ 65). Following the Commissioner's directions, Mr. Debord has since discontinued preparing written analyses of tariff rates. CCF ¶ ¶ 61, 63.

III. LEGAL DISCUSSION

A. AGREEMENT ON PRICE

Agreements among competitors to fix or set prices have been historically condemned as *per se* illegal. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 218 (1940).[7] Because the anticompetitive effects of horizontal price fixing are presumed, courts are not required to conduct an elaborate analysis into the precise harm caused by the restraint or the business justification for its use. So long as the agreement "ordinarily encompasses behavior that past

[7] *See also Arizona v. Maricopa County Med. Soc'y*, 457 U.S. 332 (1982); ABA Section of Antitrust Law, Antitrust Law Developments (5th Ed. 2002), at 82 (citing *United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927)).

judicial experience and current economic learning have shown to warrant summary condemnation" and there is no "legitimate justification" for the restraint, the fixing of prices between actual or potential competitors is unlawful. *In the Matter of PolyGram Holding, Inc.*, F.T.C. Docket No. 9298, slip op. at 29 (July 24, 2003) ("*Three Tenors")*.

Rate-making associations, in which members are otherwise competitors, that establish rates which apply to and across the membership constitute illegal price-fixing arrangements, and absent the existence of an antitrust law defense, have been proscribed by the courts for nearly 60 years. *Georgia v. Pennsylvania R.R.*, 324 U.S. 439 (1945). More recently, instances of collective rate-making have been found to constitute *per se* violations of the antitrust laws. *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). Even where members agree that rates may vary, such conduct is still illegal:

> Nor can an agreement respecting joint tariffs be justified on the grounds that the association or its members have not fixed a uniform price to consumers because movers are free to select one of 10 rate schedules, or alternatively may file exceptions to the agency schedule, or may file an independent schedule. While any of these options may result in price variations, concerted activity to influence or tamper with the *level* of prices, which putative competitors may either accept or reject, is as violative of the antitrust laws as a conspiracy aimed at absolute uniformity.

In the Matter of Massachusetts Furniture and Piano Movers Ass'n, 102 F.T.C. 1176, 1201 (1983) (Initial Decision ("*I.D.*")), *aff'd* at 102 F.T.C 1176, 1224-26 (Commission Opinion ("*Comm. Op.*"), *and rev'd on other grounds*, 773 F.2d 391 (1st Cir. 1985). The Commission also held, "It is beyond cavil that agreements among competitors to set price levels or price ranges are *per se* illegal under the antitrust laws." 102 F.T.C. at 1224.

In *FTC v. Ticor Title Ins. Co.*, 112 F.T.C. 344 (1989), Respondents argued that under

Broadcast Music, Inc. v. CBS, 441 U.S. 1 (1979), their conduct should not automatically be treated as a *per se* violation of the antitrust laws. The Commission rejected this argument: "Respondents have not advanced, and we cannot conceive of, any plausible efficiency justification for their price-fixing activities." 112 F.T.C. at 464 (*Comm. Op.*). 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 Ins. Co.*, 504 U.S. 621, 639 (1992). Thus, a rate bureau that prepares a collective tariff cannot assert a legitimate justification for its horizontal agreement. As a result, unless the conduct is shielded by the state action defense, it must be found to violate Section 5 of the Federal Trade Commission Act.

B. STATE ACTION

The critical issue in this case is whether Respondent can sustain its burden of establishing that its conduct is subject to a valid state action defense. The defense dates to *Parker v. Brown*, 317 U.S. 341 (1943), which held that in a dual system of government, states are sovereigns and entitled to direct their own affairs according to their own laws, subject only to constitutional limitations. As such, Congress would not have intended that the Sherman Act restrain state officials from engaging in activities directed by their state legislature. *Id.* at 350-51. This basis for the state action defense was reaffirmed by the Supreme Court in *Ticor*, where the Court emphasized, "Our decision [in *Parker*] was grounded in principles of federalism." 504 U.S. at 633.

While the state action defense may shield private actors from antitrust scrutiny when their activities are conducted pursuant to state authority, a state may not simply provide a

defense "to those who violate the Sherman Act by authorizing them to violate it, or declaring that their action is lawful." *Parker v. Brown*, 317 U.S. at 351. The state must instead substitute its own control of the activity for that of the market – the private activity must be both authorized by the state *and* supervised by the state. "Rubber stamp approval of private action does not constitute state action." *A. D. Bedell Wholesale Co. v. Philip Morris, Inc.*, 263 F.3d 239, 260 (3d Cir. 2001). Specifically, for the state action defense to apply, the state must meet the two-prong standard articulated in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980) (quoting *City of Lafayette v. Louisiana Power & Light*, 435 U.S. 389, 410 (1978)): "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." *Accord Ticor*, 504 U.S. at 631. In *Midcal*, the price setting requirement was sufficiently set forth in the legislation to meet the first requirement of the state action defense – a clear purpose to permit resale price maintenance – but the active supervision test failed. As the Court put it,

> The State simply authorizes price setting and enforces the prices established by private parties. The State neither establishes prices nor reviews the reasonableness of the price schedules.

445 U.S. at 105.[8] Thus, unless an antitrust defendant can show that it meets both prongs of the standard, it will not be entitled to the defense provided under *Parker v. Brown*.

The key issue in this case is whether Respondent can demo apbsitycompliance with prong two, under which it is the Respondent's burden to substantiate the claim that the state actively

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[8] As the Court noted, such scant state involvement could not immunize the private action because "[t]he national policy in favor of competition cannot be thwarted by casting such a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement." *Id.* at 106.

supervised the tariff filed by Respondent.[9] The threshold issue under prong two is whether the state has controls in place that ensure that state policy objectives are achieved. As the Supreme Court has stated,

> [T]he 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. Its purpose is to determine whether the State has exercised sufficient independent judgment and control so that the details of the rates or prices have been established as a product of deliberate state intervention, not simply by agreement among private parties. Much as in causation inquiries, the analysis asks whether the State has played a substantial role in determining the specifics of the economic policy.

Ticor, 504 U.S. at 634-35. Thus, in Kentucky, where statutes call for "reasonable" rates and rates that are not "excessive," prong two requires that the state make a judgment that those statutory goals are met. As the Supreme Court has held, the supervision requirement further serves to assign political responsibility for a decision to displace free market with regulation: "[I]nsistence on real compliance . . . will serve to make clear that the State is responsible for the price fixing it has sanctioned and undertaken to control." *Ticor*, 504 U.S. at 636.

It cannot be emphasized enough that the Supreme Court has made very clear that the active supervision standard is a rigorous one. The Court has held that the gravity of the antitrust violation of price fixing requires exceptionally clear evidence of the state's decision to supplant

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[9] The case law supports the proposition that the Respondent bears the burden of proof with respect to its state action defense. *Ticor*, 504 U.S. at 625 (state action immunity was "[o]ne of the principal defenses" asserted); *In the Matter of New England Motor Rate Bureau, Inc.*, 112 F.T.C. 200, 278 (1989), *rev'd on other grounds sub. nom., New England Motor Rate Bureau v. FTC*, 908 F.2d 1064 (1st Cir. 1990) ("We therefore conclude that NEMRB, as the proponent of the state action defense, had the burden of demonstrating that state officials engaged in a substantive review of NEMRB's rate proposals."); *Yeager's Fuel, Inc. v. Pennsylvania Power & Light Co.*, 22 F.3d 1260, 1266 (3d Cir. 1994) ("state action immunity is an affirmative defense as to which [defendant] bears the burden of proof.").

similarly held that "generalized assertions of review do not withstand scrutiny," *Ticor*, 112 F.T.C. at 434 (*Comm. Op.*).[11]

The proper approach to determining whether active supervision exists involves an inquiry into whether "state officials have undertaken the *necessary steps* to determine" whether there has been "a decision by the State" to substantively approve the rates. *Ticor*, 504 U.S. at 638 (emphasis added).[12] Courts have set forth a number of specific "steps" courts can consider in assessing whether active supervision has been established. One such step is whether the state collects and verifies data from industry participants. For instance, courts evaluate whether the

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[11] In *Ticor*, the Commission found no active supervision based in part on testimony by a state official that he "didn't have any idea what an efficient company's expenses would be for search and examination services," and that in his opinion he would have to "study the search and examination expenses of the individual companies to effectively regulate the charges for search and examination expenses." *Id.* The Supreme Court opinion in *Ticor* did not recite all of the record facts bearing on active supervision but noted that there were "detailed findings, entered by the ALJ and adopted by the Commission, which demonstrate that the potential for state supervision was not realized in fact." 504 U.S. at 638.

[12] The Commission has issued six Analyses to Aid Public Comment discussing active supervision in the context of household goods movers. (Indiana Household Goods and Warehousemen, Inc., March 18, 2003; Iowa Movers and Warehousemen's Association, Inc., August 1, 2003; Minnesota Transport Services Association, August 1, 2003; Alabama Trucking Association, Inc., October 30, 2003; Movers Conference of Mississippi, Inc., October 30, 2003; and, New Hampshire Motor Transport Association, October 30, 2003.) The Analyses stress that the standard for establishing the state action defense is a rigorous one. In the Analyses the Commission also "identifies the specific elements of an active supervision regime that it will consider in determining whether the active supervision prong of state action is met in future cases." *See, e.g.,* Indiana Analysis at 5.

inquired whether legitimate justifications were submitted with even minor rate amendments and adjustments. *Ticor*, 112 F.T.C. at 438 (*Comm. Op.*). Courts have also examined whether the state participated in on-site review and independent verification of financial information from carriers' books and records. *Southern Motor Carriers*, 467 F. Supp. at 477. Where the state does not require review of all possible data, courts have looked to see if the state engaged in sound sampling techniques to determine whether the state's review of participants' financial records constituted active supervision. *Ticor*, 112 F.T.C. at 428 (*Comm. Op.*); 504 U.S. at 640. Such efforts to collect and verify industry data have been highlighted by the courts as activities states can and should engage in to ensure that they rise to an adequate level of active supervision.

Written analysis by the state of its decision-making process has a direct bearing on the active supervision requirement. Courts have looked positively upon efforts by states to issue a written order or decision, whether issued after a public hearing on the rate or issued in compliance with a state-determined standard. *New England Motor Rate Bureau, Inc.*, 112 F.T.C. at 282 (*Comm. Op.*).[13] Courts have considered separate, independent studies conducted or commissioned by a state that evaluate the necessity of proposed rate increases as critical to

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[13] *See also City of Vernon v. Southern Cal. Gas Co.*, 92 F.3d 1191 (unpublished disposition), 1996 WL 138554, *3 (9th Cir. 1996) ("The CPUC issued two orders on the issue, which contain lengthy consideration of the parties' positions, findings of fact and conclusions of law, and a detailed explanation of the CPUC's reasons for denying Vernon's requested wholesale rate. Additionally, the CPUC's orders indicate that it considered the competitive effects of its decision."); *Green v. Peoples Energy Corp*, 2003 WL 1712566, *7 (N.D. Ill. March 28, 2003) ("[u]pon conclusion of the hearings, the ICC issued lengthy orders approving the tariffs..."); *DFW Metro Line Svc.*, 988 F.2d at 606 ("published decisions reflect that the PUC has conducted other broad-based ratemaking proceedings); *North Star Steel Texas, Inc. v. Entergy Gulf States, Inc.*, 33 F. Supp. 2d 557, 566 (S.D. Tex. 1998).

[14] *Yeager's Fuel, Inc.*, 22 F.3d at 1271 ("final staff report reviewing PP&L's programs in response to inquiries from the legislature and protests by fossil fuel dealers"); *Southern Motor Carriers*, 467 F. Supp. at 477; *New England Motor Rate Bureau*, 112 F.T.C. at 233, 266, 279-80 (*I.D.*, *Comm. Op.*, *Comm. Op.*) (active supervision not found because, *inter alia*, the state had "never conducted an economic study of the intrastate trucking industry nor of the effects of its regulatory policy on intrastate trucking industry within the state"). (The Commission's decision in *New England Motor Rate Bureau* was reversed by the First Circuit, *New England Motor Rate Bureau v. FTC*, 908 F.2d 1064 (1st Cir. 1990), but the Supreme Court later explicitly held the First Circuit's standard for active supervision to be "insufficient" in *Ticor*. 504 U.S. at 637. Complaint Counsel's use of the Commission Opinion is intended to illuminate the factors reviewed and highlighted by the Commission in a prior case evaluating the active supervision requirement.)

[15] Complaint Counsel have cited

which ratepayers and the public were represented"); *Lease Lights Inc. v. Public Svc. Co of Okla.*, 849 F.2d 1330, 1334 (10th Cir. 1988) ("the Commission conducted three days of public hearings involving extensive testimony and over 100 exhibits); *Green v. Peoples Energy Corp.*, 2003 WL 1712566, *6 and*7 (only entered orders approving rates "after holding lengthy hearings which could span several months"); *Yeager's Fuel, Inc. v. Pennsylvania Power & Light Co.*, 804 F. Supp. 700, 712 (E.D. Pa. 1992) (hearings held in a contested tariff proceeding and in an investigation of complaints by private organization and state legislators regarding anticompetitive effects); *DFW Metro Line Svc.*

numerous amendments to take effect without meaningful review. *Ticor*, 112 F.T.C. at 438 (*Comm. Op.*). Even assuming rates were once reasonable, a state cannot allow rates to be left in place without reexamination. *Id.*; *Yeager's Fuel*, 804 F. Supp.at 713-14 ("continually refining this scheme [for evaluation and supervision] to make clearer programs that further the state policy"); *Yeager Fuel's*, 22 F.3d at 1271. Rather, review of rate-making activities should be continuous in nature. *Ticor*, 504 U.S. at 640.[20]

Finally, courts have placed substantial emphasis on ensuring that state supervision includes specific measures, standards, or formulae to prove that the state's judgment was brought to bear on the rates being charged, not merely a ministerial checking of the information submitted, such as the mere checking of filed rates for mathematical accuracy. *Id.* at 638. Specifically, courts have looked at whether states calculate firms' rates of return, operating ratios, profits, or returns on capital. Significantly, in *Ticor* the Supreme Court observed that a regulatory scheme which included a specified rate of return could provide comprehensive supervision:

> And we do not here call into question a regulatory regime in which sampling techniques or a specified rate of return allow state regulators to provide comprehensive supervision without complete control, or in which there was an infrequent lapse of state supervision. *Cf. 324 Liquor Corp. v. Duffy*, 479 U.S. 335, 344, n. 6 (1987) (a statute specifying the margin between wholesale and retail prices may satisfy the active supervision requirement).

504 U.S. at 640. In *Southern Motor Carriers*, the court also took note that state officials used industry data to arrive at their own figure for an operating ratio to submit as evidence at the state hearing. 467 F. Supp. at 477. The Commission has also looked at whether states review

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[20] The Supreme Court stated that it would not call into question a regulatory scheme that had "an infrequent lapse of state supervision." *Id.*

general industry information. As discussed below, this minimal level of state activity fails to meet the law's required showing for active supervision.

Kentucky has in place statutes and regulations pertaining to movers. At one time, showing that a state had a department in place with adequate authority to provide review of private agreements went a long way toward establishing the state action defense. *New England Motor Rate Bureau*, 908 F.2d at 1077.[22] However, in the case that Respondent now concedes is controlling, *Ticor* explicitly rejected as inadequate the mere presence of a regulatory program. The *Ticor* Court specifically stated that having a program in place may be a "starting point" for

[22] In a motion filed early in this litigation, Respondent argued that this case set forth the standard for active supervision. Respondent Kentucky Household Goods Carriers Association, Inc.'s Opposition to Complaint Counsel's Motion to Consolidate, August 7, 2003 at 4-5.

such an informal and minimalistic level of state activity has been held to constitute active supervision. And Complaint Counsel's research has certainly uncovered no case that so holds. Rather, courts addressing the active supervision requirement have identified specific state supervisory activities that a court will consider in determining whether an antitrust defendant can sustain its burden. Each relevant supervisory activity (e.g., that the state collects accurate business data, conducts hearings, issues a written decision, conducts economic studies, reviews profit levels and develops standards or measures such as operating ratios) will be reviewed in turn in the following paragraphs. While a court might have a difficult task determining the presence or absence of active supervision where a state undertakes most but not all of these activities, Kentucky presents no such challenge because it undertakes none of these steps.

One set of factors courts have looked at to determine whether active supervision is present deals with the collection of data. Courts have repeatedly noted the importance of states' diligence in gathering business data on the firms subject to regulation. *Southern Motor Carriers* focused on the state's review of freight bills and other information, and it also noted the importance of on-site review and verification of business data. 467 F. Supp. at 477. *Ticor* made favorable mention of the state's use of the industry submissions in *Southern Motor Carriers* and it also referred favorably to a regulatory program that used "sampling techniques." 504 U.S. at 639, 640. And the Commission opinion in *Ticor* noted the importance of whether tariff filings were accompanied by "cost or expense data." 112 F.T.C. at 437 (*Comm. Op.*). Kentucky no longer has a program in place to obtain any reliable business data from movers. While it once required movers to submit annual performance reports, that requirement has been discontinued. Now, despite the fact that Kentucky statute KY. REV. STAT. ANN. § 281.680(4) requires the

[23] Mr. Debord does look at movers' bill to make sure that they are not offering discounts to consumers. State enforcement of a price fixing agreement does not constitute state supervision of a price fixing agreement - and is thus irrelevant to this inquiry. *A.D. Bedell Wholesale Co.,* 263 F.3d at 264 ("The States here are actively involved in the maintenance of the scheme, but they lack oversight or authority over the tobacco manufacturers' prices and production levels.").

[24] As was the case in *Ticor,* Kentucky law establishes a "negative option" system where the private rates take effect unless the state affirmatively acts. KY. REV. S

[25] Another factor that is taken into account is whether the state has ever rejected a rate.

as a product of deliberate state intervention, not simply by agreement among private parties." *Ticor*, 504 U.S. at 634-35. *Ticor* also specifies that "the party claiming the immunity must show that state officials have undertaken the necessary steps to determine" whether there has been "a decision by the State" to substantively approve the rates. *Ticor*, 504 U.S. at 638.

In the case of Kentucky, active supervision would involve analyzing the rates from the standpoint of, among other things, whether the consumer was paying a reasonable rate for moving services. KY. REV. STAT. ANN. §§ 281.590; 281.690; 281.695. Courts have identified several analytical tools that states have used to review the reasonableness of rates. In *Ticor*, the Supreme Court noted that a "specified rate of return" analysis "allow state regulators to provide comprehensive supervision" of rates. 504 U.S. at 640. The ALJ opinion in *Ticor* noted that the state of Connecticut had a private consultant do a study in support of a rate increase that concluded that the increase would result in a 2.78 percent return on capital. 112 F.T.C. at 382 (*I.D.*). *Southern Motor Carriers* found active supervision where, among other things, the state reviewed requests for an increase in motor carrier rates by analyzing motor carriers' operating ratios. 467 F. Supp. at 477. And in *New England Motor Rate Bureau*, the Commission found an absence of active supervision, in part, because the state did not look at the relationship between rates and carriers' profits. 112 F.T.C. at 267, 279 (*Comm. Op.*).

At one point, Kentucky did use one of these methods; it maintained a spreadsheet containing calculations of all movers' operating ratios. CCF ¶ 63. This method of analyzing rates is still in effect in some states, such as Oregon.[26] However, sometime in the 1980's,

[26] CCF ¶ 72. Oregon's statutes governing household goods movers are similar to Kentucky's. CCF ¶ 73. Oregon provides an illustration of a state that undertakes extensive review of movers' rates. It holds hearings on proposed rate increases, it issues a written decision

V. CONCLUSION

The evidence in this matter will establish that Respondent has engaged in illegal price-fixing and that its conduct is not shielded from liability by the state action defense.

Respectfully submitted,

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