

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

In the Matter of

KENTUCKY HOUSEHOLD  
GOODS CARRIERS  
ASSOCIATION, INC.,

Docket No. 9309

POST TRIAL BRIEF OF RESPONDENT KENTUCKY

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A. The Commonwealth of Kentucky's

A. Kentucky State Transportation Policy and Statutory Provisions and Regulations relating to household goods transportation rates set forth a clearly articulated and affirmatively expressed State policy sufficient to satisfy the first prong of the *Midcal* Test

Cabinet conclusively demonstrates that the private

Conduct challenged in the Complaint is "actively

TABLE OF AUTHORITIES

CASES

California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc., et al., 445 U.S.  
97 (1980).....16, 17, 18, 19, 20, 21, 24, 26, 27, 29, 30

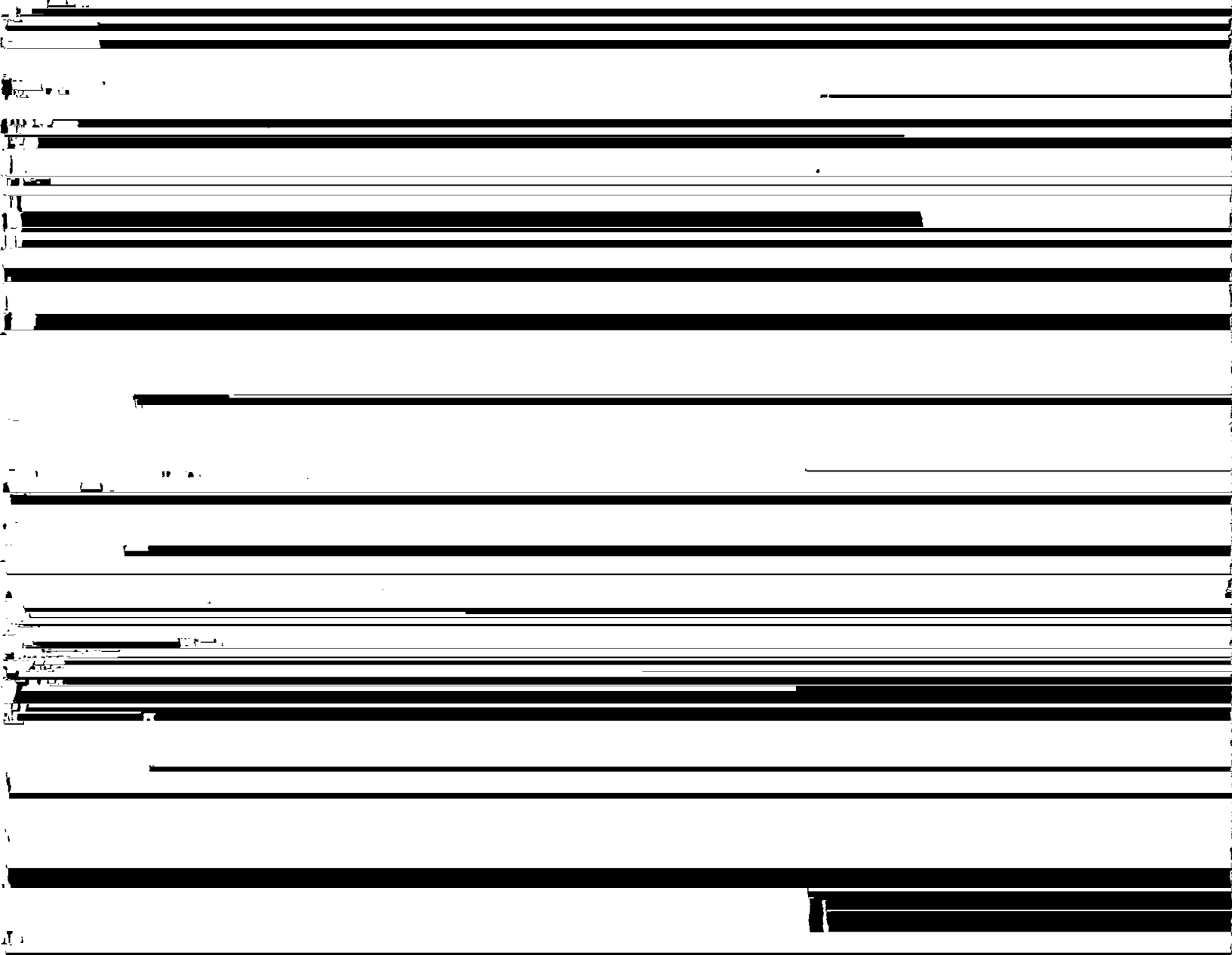
Federal Trade Commission v. Timex Corp., 406 U.S. 198 (1972).....

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601 KAR 1:070.....44, 45  
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**OTHER AUTHORITIES**

"Analysis of Public Law 101-508, 112 Stat. 2473"



I. INTRODUCTORY STATEMENT

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

indirection, what it could not and should not be able to achieve lawfully, namely, the  
destruction of a highly effective State program for the regulation of household goods

**I. INTRODUCTORY STATEMENT**

In this proceeding, Complaint Counsel uses the rules of evidence to achieve, by indirection, what it could not and should not be able to achieve lawfully, namely, the

movers and intrastate household goods transportation rates which has successfully

protected the consumers of Kentucky for more than half a century.

The antitrust laws would not permit a challenge to the real party in interest in this proceeding, namely, the Commonwealth of Kentucky. Accordingly, Respondent is

compelled to provide a defense to both Kentucky and itself while the small business

The State's involvement in the rate approval process is not under any circumstances a "rubber stamp" type of approval. The State is actively involved in the process from start to finish. RFF 112.

Rates do not become effective by the filing of a Tariff - - they become effective by reason of the approval of KTC. RFF 88.

The Tariff which is the subject of this proceeding consists of the original tariff filing and some 82 Supplements (collectively, the "Tariff") each of which has been

approved by KTC. RFF 6.

There is a standard established by State Law and KTC Regulations which



The Tariff contains many rate levels, and Movers are free to select the rates which

they wish to be published for their account, so long as the rate is contained in the KTC-  
approved Tariff.

KTC has not recently held hearings regarding rates as Debord discusses the rates

with Kentucky Association representatives prior to the time that proposed Supplements containing the rates are formally filed with KTC. RFF 101, 117, 120, 122, 123.

KTC issues committee decision with respect to the proposed rates.

and the approval process is deemed by the State to be sufficient for the purposes of its

regulatory program.

original hearing process; it has been an amendment and “supplementing” process since that time.

KTC has elected to comply with its statutory responsibility to collect cost and

revenue information (KRS § 281.680[4]) by the current methods it employs to determine such information.

Tariff filings because through its involvement in the rate-setting process from start to finish, KTC is able to advise the Kentucky Association regarding what proposals would be accepted or rejected by KTC. RFF 99, 102.

KTC has suspended proposed rates. RFF 98.

This method of operation has been determined by KTC to be more appropriate

In many cases, justification for rate changes is based on the most commonly used tariff which governs the *interstate* transportation of household goods. While the basis for

*General Tariff* of the Interstate Commerce Commission, which is the basis for the

[REDACTED]

[REDACTED]

**V. RESPONDENT HAS ESTABLISHED THE ELEMENTS OF THE STATE ACTION DEFENSE UNDER *PARKER V. BROWN*.**

Respondent Kentucky Association and the Kentucky Transportation Cabinet have established that the Kentucky Association's 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 citizens was not a state action.

position in Matter of Massachusetts Furniture & Piano Movers Ass'n 773 F.2d 391 (1<sup>st</sup>

Cir. 1985).

The following is a list of the cases cited in the opinion:

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

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.

A review of each item of the program before the Court in *Midcal* compared to the

“[S]tate regulations [provided] that the wine prices posted by a single wholesaler



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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

contract or schedule for each brand [set] the terms for all wholesale transactions in that brand within a given trading area.” 445 U.S. at 99. There was not even the pretense or

appearance of State involvement. *Id.* at 100. *Id.* at 101.

Any other instruction from the Court came in the form of specific comments

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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 cases

*First, in Ticor, the F.T.C. brought its administrative proceeding against the*

[REDACTED]

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

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 schemes are not automatically

second prong of the Midcal test. This matter was left to the States with the benefit of the direction provided by the Court.

~~Although the Supreme Court has decided that "active supervision" cannot~~

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be analyzed in a test tube, the Commission has wrongfully decided that its jurisdiction and authority are sufficient to override not only the Supreme Court, but the Kentucky Legislature as well.

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**

~~Complete Exemption Standard for the State~~

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



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

to the protection of the public interest

The S.T.B. decision on which accompanied publication of the household goods

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

"It is probably sufficient merely to indicate that the rights claimed by respondents are normally associated

and call an unlimited number of witnesses of his own

selection. This type of proceeding would make a shambles  
of the investigation and stifle the agency in its gathering

**VI. THE KENTUCKY LEGISLATURE HAS ADOPTED  
A CLEARLY ARTICULATED AND AFFIRMATIVELY**

**RATES THROUGH TARIFF FILINGS AND COLLECTIVE**

to prevent unjust discrimination.” The section further states that “[n]o common carrier shall be permitted to contract for relief from its common law liability.”

*Statutes Actively Administered*  
*By KTC*

provisions governing the regulation of motor common carriers of household goods in the Commonwealth of Kentucky.

KRS 281.010 contains definitions including “certificate,” “interstate commerce,”

to provide efficient service.

transportation;

8. to foster sound economic conditions among the

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 discrimination in the establishment



[REDACTED]

“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.
- [REDACTED]
- [REDACTED]

property is purchased by the householder with intent to use in his or her dwelling; or (b) arranged and paid for by another party.”

KRS 281.625 describes the process of hearings on applications for a certificate

or permit. The section requires the following: (a) the fixing of a time and place for a hearing on the filing of an application; (b) *mailing of written notice of the hearing and*

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.”

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*

promulgated by the department under KRS  
Chapter 13A. [Emphasis added.]

KRS 280.680(2) requires that a contract carrier's transportation contracts must be maintained on file with the department and requires that the contract carrier must "*keep open for public inspection at designated offices such contracts as the department deems necessary for public information.*" The subsection further provides that the foregoing shall take place "[u]nder administrative regulations promulgated by the department under KRS Chapter 13A." [Emphasis added.]

*concerning the control of rates and contracts under its administrative regulations.*" [Emphasis added.]

for any regulated transportation service. The section also prohibits any refund, unreasonable preference, or rate discrimination.

KRS 291.600(1) contains the procedure for changes in the rates of

1. changes in rates must be on 30 days notice to KTC;

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

KRS 281.900 establishes the Kentucky Motor Carrier Advisory Committee and prescribes its functions and methods of operation.

KRS 281.905 contains further information regarding the operations of the Kentucky Motor Carrier Advisory Committee including its (a) duties; (b) meetings; (c) chairman; and (d) annual report.

KRS 281.910 contains information regarding the operations of the

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 property involved; (3)

address of applicant; (4) docket number assigned; (5) statement that anyone having an

601 KAD 1.060

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601 KAD 1.060



(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

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

8. Powers of attorney and Concurrences must be provided to a tariff publishing agent and filed with KTC.

2. *“[s]imilar notice must be given to any shipper or*

*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 and charges, the proposed rates and charges, and which shall state that any*

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

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 liability - G 1

shipment; and (c) the purchase of liability insurance by a household goods carrier.

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;

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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;

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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.

**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 Post Trial Findings of Fact &  
Conclusions of Law filed simultaneously herewith for a complete description of  
the evidence which confirms the satisfaction of the “Active Supervision” element  
of the “State Action” defense.

Reference is also made to the Post Trial D.C. Findings of Fact & Conclusions of Law

[REDACTED]

VII CONCLUSION

For all the foregoing reasons, Respondent Kentucky Household Goods Carriers Association, Inc. respectfully requests that the Administrative Law Judge enter an Order dismissing the Complaint herein on the grounds that

the conduct which is described in the Complaint is immune from challenge under



[REDACTED]

Respondent's Post Trial Brief to be served upon the following persons by hand

delivery:

CERTIFICATE OF SERVICE

This is a true and correct copy of the original filed on April 2, 2004.

**Respondent's Post Trial Brief and Respondent's Post Trial Proposed Findings of Fact & Conclusions of Law** to be served upon the following persons by U.S. First Class