

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

COMMISSIONERS: **Deborah Platt Majoras, Chairman**
 Thomas B. Leary
 Pamela Jones Harbour
 Jon Leibowitz

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

**ORDER DENYING RESPONDENT’S MOTION FOR RECONSIDERATION
OR, IN THE ALTERNATIVE, FOR A STAY OF FINAL ORDER
PENDING REVIEW BY U.S. COURT OF APPEALS**

On July 20, 2005, Respondent Kentucky Household Goods Carriers Association, Inc. (“Kentucky Association”) moved the Commission for reconsideration of its June 21, 2005 final order in this case, in light of proceedings that have taken place before the Kentucky Transportation Cabinet (“KTC”) with regard to a tariff filing by the Kentucky Association proposing a rate increase.¹ Respondent argues that these proceedings demonstrate that the KTC’s current procedures for reviewing the Kentucky Association’s collective rate-making satisfy the “active supervision” requirement of the state action defense. In the alternative, Respondent seeks a stay of the Final Order pending review by an appropriate court of appeals. Complaint Counsel opposes Respondent’s motion. For the reasons stated below, we deny Respondent’s motion in its entirety.

I. Motion for Reconsideration

Pursuant to Commission Rule 3.55, 16 C.F.R. § 3.55, a petition for reconsideration “must be confined to new questions raised by the decision or final order and upon which the petitioner had no opportunity to argue before the Commi

¹ Respondent’s motion is cited herein as “Resp. Mot.”

opinion and order as an “extraordinary remedy which should be used sparingly.”

Chicago Bridge & Iron Co. N.V., Dkt. No. 9300, 2005 FTC LEXIS 70, at *6 (May 10, 2005) (citation omitted).

Respondent’s argument – that proceedings at the KTC with respect to the Kentucky Association’s most recent proposed rate increase (Special Supplement No. 86) demonstrate active supervision by the KTC – is not a new question raised by our decision and final order in this case. On the day of oral argument before the Commission, Respondent filed a motion for a stay, in which it argued that the KTC’s adoption of new procedures and the KTC’s actions with regard to Special Supplement No. 86 demonstrated active state supervision.² The Commission’s opinion specifically considered and rejected this argument. The Commission concluded that, although the KTC had taken some “initial steps” to augment its level of supervision over the Kentucky Association’s collective rate-making, Respondent had failed to show that the KTC’s new procedures satisfied the active supervision requirement articulated by the Supreme Court in *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621 (1992), and other relevant decisions. Opinion (“Op.”) at 27. The Commission stated:

Most importantly, Respondent has not shown with precision what information the KTC will require to support proposed rate adjustments and what criteria the KTC will apply to assess the reasonableness of proposed rate adjustments. These are not questions that are likely to be answered satisfactorily merely by awaiting the KTC’s action with regard to the Kentucky Association’s most recent tariff filing. Rather, as Respondent itself has indicated, development of a new program of supervision will take some time.

Id. at 27-28.

In its present motion, Respondent asserts that proceedings at the KTC that have taken place since Respondent filed its prior motion for a stay warrant reconsideration of the Commission’s decision. However, a motion that “merely seeks to provide additional factual support for a position that Respondent[] ha[s] already argued . . . does not meet the mandatory requirement of Rule 3.55 that the petition present only new questions raised by Commission decisions or orders.” *Chicago Bridge & Iron Co.*, 2005 FTC LEXIS 70, at *9. *See also Novartis Corp.*, Docket No. 9279, 1999 FTC LEXIS 212, at *1 (July 2, 1999) (denying a petition for reconsideration where the respondent “could have introduced the recent factual developments upon which it now relies before this late stage”).

² See Respondent’s Motion for a Stay of Proceedings Pending Action by Kentucky Transportation Cabinet, filed on Jan. 24, 2005 (hereinafter cited as “1/24/05 Mot. for Stay”).

Moreover, the materials submitted here by Respondent suffer from the same shortcomings as the materials upon which Respondent based its prior motion for a stay. Although the KTC has conducted a hearing on the Kentucky Association's proposed rate increase, it apparently has yet to issue a decision on the matter. Thus, we still do not know what analysis the KTC will undertake or what criteria it will apply to assess the reasonableness of the proposed rate increase. Also, the materials submitted by Respondent do not clearly indicate what information the KTC will require to support the proposed rate increase. It is not clear, for example, whether the KTC will consider the information provided at the hearing regarding the costs of a single "test case" – the moving company operated by the Kentucky Association's president – to be adequate to justify the general rate increase proposed by the Kentucky Association. And although the hearing transcript indicates that the KTC has received some sort of financial statement from movers, no information is given regarding what information is contained in these financial statements. We thus conclude that Respondent has not met its burden under our rules for reconsideration of the decision and final order issued in this case. We therefore deny this portion of Respondent's motion under Commission Rule 3.55.

II. Motion for a Stay

Section 5(g) of the Federal Trade Commission Act, 15 U.S.C. § 45(g)(2), provides that Commission adjudicative orders (except divestiture orders) take effect "upon the sixtieth day after" their date of service, unless "stayed, in whole or in part and subject to such conditions as may be appropriate, by . . . the Commission" or "an appropriate court of appeals." A party seeking a stay must first apply for such relief to the Commission, as Respondent has done here. *California Dental Ass'n* ("CDA"), Docket No. 9259, 1996 FTC LEXIS 277, at *2 (May 22, 1996).

Pursuant to Commission Rule 3.56(c), 16 C.F.R. § 3.56(c), a motion for a stay must address the following four factors: (1) "the likelihood of the applicant's success on appeal;" (2) "whether the applicant will suffer irreparable harm if a stay is not granted," (3) "the degree of injury to other parties if a stay is granted," and (4) "why the stay is in the public interest." Rule 3.56(c) further provides that a motion for a stay must be supported by "supporting affidavits or other sworn statements, and a copy of the relevant portions of the record." *Id. See Toys "R" Us, Inc.*, Docket No. 9278, 1998 FTC LEXIS 224, at *2 (Dec. 1, 1998). Here, none of the four factors supports Respondent's motion.

A. Likelihood of Success on Appeal

Respondent's assertions of a likelihood of success on appeal merely revisit arguments that the Commission already considered and rejected in its June 21, 2005 opinion. Respondent's principal assertion is that the Commission failed to accord proper significance to the KTC's intervention in this case and views regarding the adequacy of its level of supervision over

³ Respondent also asserts, without elaboration or explanation, that it believes the Commission wrongly interpreted the legal standards for “active supervision” contained in the Supreme Court’s decisions in *Ticor* and

Conclusion

We find that Respondent has not met its burden under our rules for reconsideration of the Commission's decision in this case. We also find that the relevant factors do not support a stay of the Commission's final order. Accord

unlawful. Respondent has thus attempted to minimize the harm to the public interest while focusing on the provisions that create the greatest harm to itself.”).