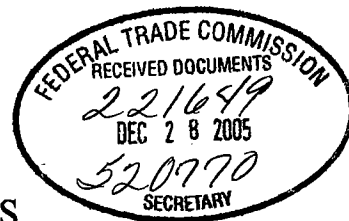


No. 05-4042



IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[REDACTED]

[REDACTED]

v.

[REDACTED]

Respondent.

On Petition for Review of a Final Order
of the Federal Trade Commission

Opinion of the Commission: Chairman Deborah Platt Majoras
Initial Decision: Administrative Law Judge D. Michael Chappell

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OTHER AUTHORITY

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

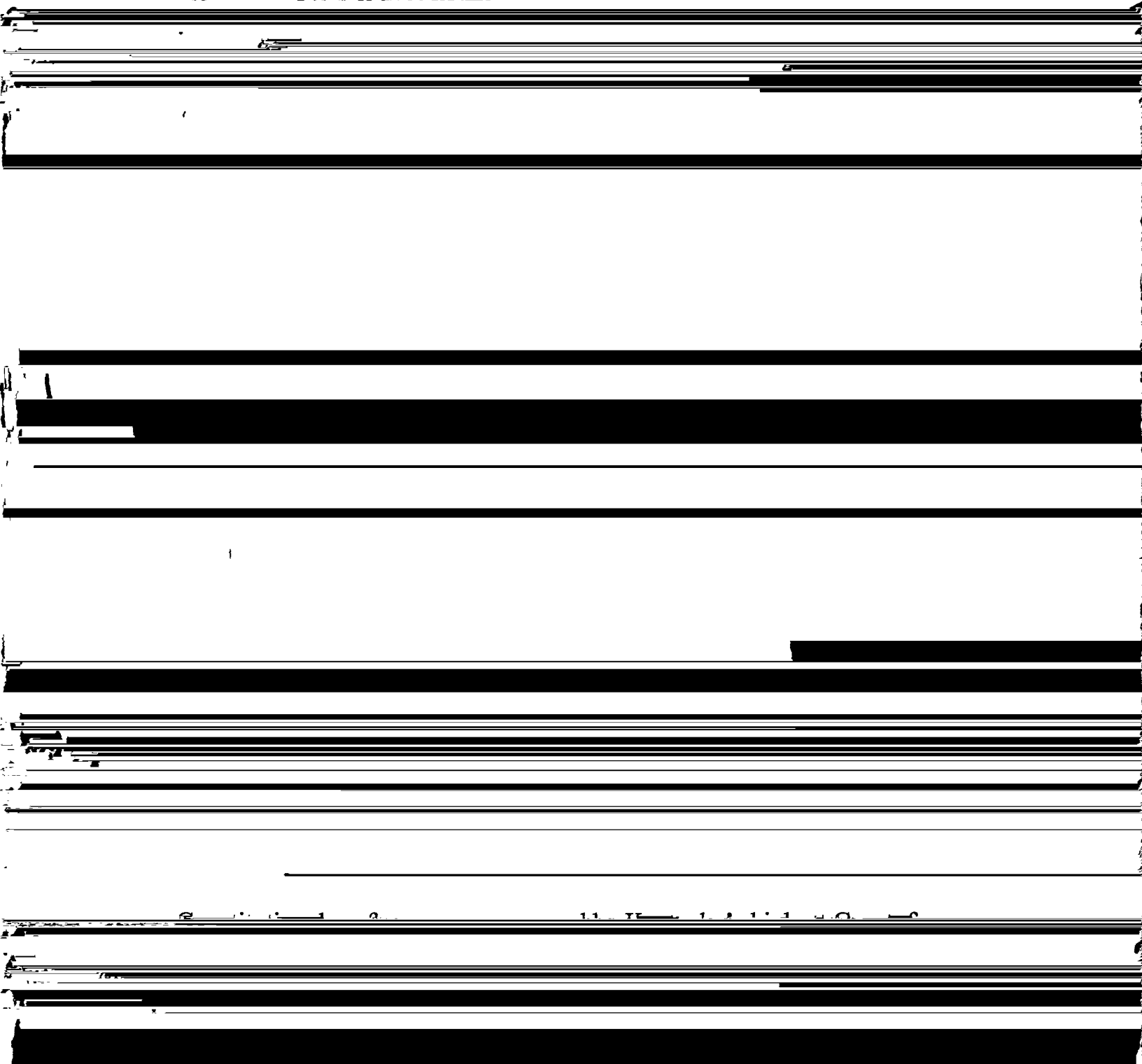
[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

The Attorney General explores in this *amicus* brief the concordance between Kentucky law and public policy, and federal law and public policy



ARGUMENT

1. THE ATTORNEY GENERAL OF KENTUCKY IS, BY STATUTE AND CONSTITUTION, THE PRINCIPAL ENFORCEMENT OFFICER OF COMPETITION LAW IN THE COMMONWEALTH OF KENTUCKY.

Petitioner repeatedly asserts that the Commonwealth of Kentucky has taken the position in these proceedings that the “collective ratemaking” activities at issue here provide an important purpose, and that the citizens of Kentucky will be harmed if the ETC’s cease and desist Order is

implemented. But De At 14, 15, 17, 20, 29, 31. However, it is the Attorney

response, the General Assembly enacted the "Consumer Protection Act"

KRS 367.110 et seq. which provided for, *intra alia*, a Consumer Protection Division of the Office of the Attorney General [the Department of Law].

KRS 367.150 sets out the "Functions, powers and duties" of the Division, the first of which is "(1) To promote the coordination of consumer protection activities of all departments, divisions, and branches of state, county and city government, concerned with activities involving consumer interests" A remaining provision as to this function is located in KRS

(2) It shall be unlawful for any person or persons
to monopolize or attempt to monopolize or

to monopolize or attempt to monopolize or

with any conflict between state law and federal competition policy.² Where there is no clash between the fundamental law and public policy of the state and federal systems, as is the case here, the supposed conflict does not exist.

Petitioner's discussion of the supposed conflicts between the state's

"collective ratemaking" and the procedural matters discussed in the

Commission's decision ignores the Kentucky Constitution and a long line of

Kentucky Supreme Court constitutional decisions relative to interference

and clearly avoids unnecessary interference with legitimate state concerns

exercise of arbitrary power by the Commonwealth.³

In a later case, very close in point, the Kentucky Supreme Court

addressed the same question presented here. It did so twice, setting aside in

Midcal Aluminum, 445 U.S. 97 (1980), the court found such price-fixing to be a violation of the Sherman Act:

In the California wine case [*Midcal*] the State did nothing but enforce prices fixed by private individuals. In the instance of Kentucky the State participates in fixing prices only to the extent that it adds statutory minimum mark-ups to prices fixed by private individuals. From the standpoint of 'State Action' the difference is merely superficial, because it does not permit any judgmental choice by the state with respect to the resulting price. It is only a mechanical process from the initial price set by the producer.

Alcoholic Beverage Control Board v. Taylor Drug Stores, Inc., 635 S.W.2d 319, 324 (Ky. 1982). The lesson of the Supreme Court is clear - absent a showing of "judgmental choice by the state with respect to the resulting price" such conduct is illegal.⁴

In its most recent, and most definite, statement on the issue, in *Milk Marketing and Anti-Monopoly Commission v. The Kroger Co.*, 691 S.W.2d

803 (Ky. 1985) - the Kentucky Supreme Court held unconstitutional a price



fixing statute in which the state agency apparently would have passed the

question, KRS 260.675 *et seq.* (since repealed) set up an extensive agency

review procedure charged with controlling retail milk prices pursuant to a

prices are filed in advance, there is authority by the regulator to carefully scrutinize filings, conduct independent investigations, and impose extensive penalties. 691 S.W.2d at 895-99. Nonetheless, the Kentucky Supreme Court condemned these statutes as violations of the Kentucky Constitution. In fact, the language of the Court condemns generally “an enactment of such a nature” (691 S.W.2d at 900) as interfering with the constitutional protection for free-market pricing.

Finally, it should be noted that Petitioners extended argument that

invasion on the right of merchants to sell competitively, and of the public to

buy competitively in the open market." *Milk Marketing and Anti-Monopoly*

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

In short, it is not only federal "state action doctrine" principles that demand active supervision by Kentucky state agencies in any system of

executed by the Kentucky Transportation Cabinet exceeds the bounds of the

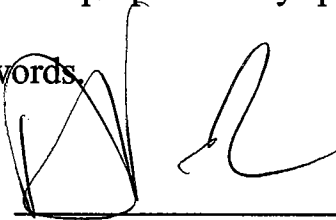
Kentucky Constitution. The Commission's Order should be upheld.

Respectfully submitted,

THE COMMONWEALTH OF KENTUCKY

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. 32(a)(7)(C) and 6 Cir. R. 32(a), I certify that the attached Amicus Curiae Brief is proportionally spaced, has a typeface of 14 points, and contains 2,763 words.

A handwritten signature in black ink, appearing to read 'D. Vandeventer', is written over a horizontal line.

David R. Vandeventer
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CERTIFICATE OF SERVICE

This is to certify that on December 19, 2005, I caused a copy of *Amicus Curiae* Brief of the Commonwealth of Kentucky to be served by U.S. Mail, upon the following persons:

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via Office of the Secretary, Room H-159
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A handwritten signature in black ink, consisting of a large, stylized 'D' and 'V' followed by a smaller 'R' and a flourish.

David R. Vandeventer