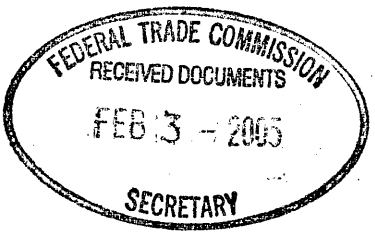

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

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

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

COMPLAINT COUNSEL'S OPPOSITION TO RESPONDENT'S MOTION FOR STAY OF PROCEEDINGS PENDING ACTION BY KENTUCKY TRANSPORTATION CABINET

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Dated: February 3, 2005

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I. INTRODUCTION.

On January 24, 2005, the day of the Commission's oral argument in this case, and without prior notice to Complaint Counsel or the Commission, Respondent Kentucky Household Goods Carriers Association, Inc. (the "Kentucky Association") filed a motion seeking to stay this proceeding.[1] The Motion asks for a stay pending resolution by the Kentucky Transportation Cabinet ("KTC") of yet another collectively-filed amendment to the collectively-set intrastate

[1] Respondent's Motion for Stay of Proceedings Pending Action By Kentucky Transportation Cabinet ("Motion"), January 24, 2004. Complaint Counsel first learned of the Motion during the oral argument. Because Complaint Counsel had never seen or been made aware of Respondent's Motion until Respondent argued the Motion to the Commission, this is Complaint Counsel's first opportunity to respond to the actual filing.

rates that have been charged for decades by the 93 moving companies that are members of the Kentucky Association. This Motion is both procedurally and substantively defective and should be denied.

The Motion, though denominated as a request for a stay, is in effect an invitation by the Respondent for the Commission not to adjudicate the issue of the state action defense on the basis of the record developed in this proceeding. The Motion invites the Commission instead to assess the state action defense based on belated steps taken by the Kentucky Transportation Cabinet since August 2004, after the Initial Decision ("ID") was rendered below. But rather than justifying a stay of this proceeding, these recent events make clear that the illegal collective rate-setting by the Kentucky Association continues. Although the KTC may at last have begun to turn its attention to the horizontal price fixing, collectively-set rates continue to go into effect without meaningful supervision. For example, the Kentucky Association still has not provided, and the KTC has not received, revenue and cost data to assess the reasonableness of the collectively-set rates.

The Commission should deny the Motion and act promptly to affirm the Initial Decision. The record in this proceeding demonstrates decades-long price-fixing by the Kentucky Association without active supervision by the state. As the Supreme Court recognized in *Ticor*, "[n]o antitrust offense is more pernicious than price fixing,"[2] and the Commission should act forcefully against the antitrust offense clearly established by the record here.

The recent activities of the KTC do not establish active supervision necessary for a state action defense, and the Commission should resist Respondent's effort to sidestep the record

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[2] *FTC v. Ticor Title Insurance Co.*, 504 U.S. 621, 639 (1992).

below and circumvent a finding of liability. In the event that the KTC, at some future time, may in fact implement a program of active supervision for household goods moving rates, then any assessment of those changed circumstances should occur in the fashion anticipated by the Commission's rules – pursuant to a Rule 2.51 petition to reopen and modify the Commission's Order, based on a fully-developed showing of change in fact demonstrating active state supervision. In the meantime, the collective rate-setting by the Kentucky Association is an antitrust law violation that should be stopped.

II. RESPONDENT'S TWELFTH-HOUR ATTEMPT TO BYPASS THE RECORD IN THIS CASE SHOULD BE REJECTED.

Respondent has filed its Motion requesting a "stay" of these proceedings pursuant to Rule 3.54(c), which provides that during an appeal the Commission may seek additional information and views for the purpose of considering the "form and content of the rule or order to be issued," and at its discretion, "may withhold final action pending the receipt of such additional information." 16 C.F.R. § 3.54(c).

In the past, pursuant to Rule 3.54(c), the Commission has considered information that could affect the specific implementation of the relief provided by a prospective Commission order. For example, the Commission has used the rule to collect information concerning an order in a related action against a respondent, and then modified particular provisions of its own order in order to coordinate with the relief in the related case.[3] In that instance, the Commission took

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[3] In *In the Matter of Holiday Magic, Inc., et al.*, 83 F.T.C. 1590, FTC Docket No. 8834, Interlocutory Order, April 29, 1974, the Commission granted a 30-day extension to submit additional information pertaining to orders in another proceeding. The information resulted in the Commission adding a stay provision to one paragraph of its order, which remained in effect "so long as [respondent] remain[ed] in compliance with the order entered in [the related matter] ... insofar as that order requires the payment by [respondent] of monies." *In the Matter of*

care that the information collected was "thoroughly evaluated by counsel" and was "not likely to delay final disposition" of the case, and asked Respondent's counsel to provide specific alternative language for the order assuming that the Commission would ultimately implement the basic relief recommended by the ALJ.[4]

In contrast, the Respondent here invokes Rule 3.54(c) not for the purpose of modifying the form of the proposed Order, but rather in hopes of preventing a finding of liability.[5] It offers a small number of documents accumulated over the last few months, and the vague possibility of more in the future, in hopes that the Commission will re-frame the question of its liability as a question of the "form and content" of the Commission's Order. The Commission should resist the gamesmanship[6] of the Respondent's Motion, and its attempt to avoid liability for a price-fixing regime that has gone on without active state supervision for decades. The motion is an

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Holiday Magic, Inc., et al., 84 F.T.C. 748, FTC Docket No. 8834, Final Order, October 15, 1974.

[4] The Commission specifically invited respondents' counsel there, in collecting the information, "to assume *arguendo* that the findings of violations of law recommended by the administrative law judge are affirmed, and suggest in that regard specific alternative order provisions." *Holiday Magic*, 83 F.T.C. 1590.

[5] Respondent's Motion states that Respondent should "be spared the hardship . . . that might result from the entry of an Order." Motion at 2.

[6] Gamesmanship lies not only in the timing of the Motion, which despite being based on documents accumulated over several months, was not filed until the day of oral argument. It lies more fundamentally in the possibility that the Kentucky Association (and conceivably respondents in other cases), facing an adverse initial decision on the record below, could use such motions based on new or future evidence to postpone indefinitely a Commission finding of liability. As detailed below, the materials submitted by Respondent show, at most, that the KTC has taken only the most preliminary steps in what may be a lengthy process of correcting its flawed regulatory program. When (if ever) this starting point will mature into "active supervision" is unknown. Staying the proceedings now for consideration of further evidence that does not yet exist would lead the Commission into a game of wait-and-see with no apparent end in sight.

inappropriate mechanism by which to review and modify the ALJ's Initial Decision.

More importantly, the motion does not even claim that the Kentucky Association has stopped its practice of filing collective rates, and in fact, the supporting documents show a lack of supervision of private price fixing. For more than thirty years, the Kentucky Association has established and implemented collective rates through the filing of a tariff on behalf of its members. The tariff and its contents are arrived at by movers' joint action. The tariff sets various schedules of transportation rates and identifies the particular schedule to which each particular mover agrees to adhere. ID at 6 ¶ 18, 8-9 ¶ 31. The tariff also sets forth many specific prices for particular services for which the vast majority of members charge the precise price listed in the tariff.[7] Contrary to the suggestion of Respondent's counsel at oral argument,[8] the rates in the tariff are not maximum rates – movers must charge the precise rate set forth in the tariff. ID at 8 ¶ 30, 22 ¶ 14; CC Answering Brief at 3-4. Contrary to Respondent's representation at oral argument, all movers must identify a rate contained in the current version of the tariff – not rates contained in tariffs from decades ago. CX 2 at KHGCA 6936-47; Tr. at 24 lines 14-25. No discounting from those rates is allowed, and pressure is brought to bear on movers who try to get terms of the tariff changed for their individual firm. ID at 9 ¶ 32, 10-11

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[7] ID at 6 ¶¶ 19-20, 8 ¶ 30, 31; Answering Brief of Counsel Supporting the Complaint ("CC Answering Brief"), August 31, 2004, at 4 (citing the example of movers charging $174.30 to move an automobile). As a further example, on March 1, 2000, in Supplement 63, Respondent increased the rates for over 50 specific items (including raising the rate for moving an automobile). RX 50 at KHGCA 6861, 6878-6888; CX 16. At that time there were 101 moving firms participating in the tariff. RX 50 at KHGCA 6865-6876. Eighty seven of the movers agreed to each and every rate increase at precisely the level filed by Respondent. Only 14 movers filed for any variation in these rates - and usually for only a small number of the prices at issue. *Id.* at KHGCA 6895-6897.

[8] January 24, 2005, Oral Argument Transcript ("Tr.") at 25 lines 14-19.

¶¶ 36-40; CC Answering Brief at 5-6. Moreover, Respondent has successfully increased the rates in that tariff 81 times without objection. *See*, CC Answering Brief at 2; ID at 46. The main issue litigated below was whether the rates established over this long period were actively supervised by KTC officials. The Administrative Law Judge found a total lack of supervision and held against Respondent after considering the documentary evidence and the testimony in the record.

Record proof of such a violation of law is grounds for entry of an order by the Commission to end the antitrust violation, as the ALJ correctly noted in the initial decision here:

> [U]pon determination that the challenged practice is an unfair method of competition, the Commission "shall issue ... an order requiring such ... Corporation to cease and desist from using such method of competition or such act or practice." 15 U.S.C. 45(b); *FTC v. Nat'l Lead Co.*, 352 U.S. 419, 428 (1957) (Commission is authorized "to enter an order requiring the offender to 'cease and desist' from using such unfair method.")

ID at 48.

In accordance with prior Commission precedent, the Commission should reject Respondent's effort to bypass the unequivocal record evidence establishing an ongoing violation of the antitrust laws. The record establishes a horizontal agreement on price, precisely the kind of conduct condemned in *Ticor*. In *Ticor* itself the Commission entered relief despite extensive post-litigation changes in a state regulatory regime. Although the state of Montana went so far as enacting legislation giving state regulators additional powers to review and reject excessive commissions paid to agents – a key issue in the Commission's case there – the Commission rejected the notion that such subsequent legislation obviated the need for a Commission order:

> The state's subsequent enactment of legislation cannot cure the legal violation that occurred earlier. Otherwise, states would have carte blanche to enact laws retroactively immunizing entities from liability after they had violated federal statute.

In the Matter of Ticor Title Insurance Co., 112 F.T.C. 344, 444 (1989). Similarly, in *Massachusetts Board of Registration in Optometry*, 110 F.T.C. 549 (1988), the state repealed the regulations that were the subject of the Commission's complaint, but the Commission decided that issuance of an order was necessary, in part, because the state had not effectively shown that the conduct at issue had been discontinued and could not recur. 110 F.T.C. at 615-17.[9]

For decades, Respondent has engaged in unsupervised price-fixing and the Commission should put an end to that violation by entering a cease and desist order. If, in the future, facts change and Respondent can show that the KTC is engaging in active supervision of movers' rates, so that collective rate-setting is no longer an antitrust violation, then Respondent may seek to reopen and modify the order. Section 5(b) of the FTC Act provides the standards under which a respondent may seek modification of its order. The Commission has adopted Rule 2.51, 16 C.F.R. § 2.51, to implement the Act.[10] The statute and rule set forth the procedures to be followed and the conditions that must exist before the Commission will reopen and modify or set

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[9] In *Mass. Board,* the Commission also noted that the state's conduct had persisted after its conduct had become the subject of an FTC challenge (110 F.T.C. at 616), which is also true here. The KTC has known about the FTC's interest in this matter for two and a half years but apparently did not begin to revise its level of supervision until August 2004, several months after the issuance of the Initial Decision. Another factor noted by the Commission in *Mass. Board* was that the state had not disavowed its position concerning its conduct. *Id.* Here, the KTC has taken and continues to take the position that the KTC's level of supervision for the last several decades has been sufficient to meet the rigorous active supervision test set forth in *Ticor. See* KTC Notice of Appeal (July 30, 2004).

[10] In the Analyses to Aid Public Comment accompanying the issuance of the five household goods consent agreements in related household goods cases, the Commission confronted this same issue and stated that, "Respondent can seek to modify the proposed Order to permit it to engage in collective rate-making if it can demonstrate that the 'state action' defense would immunize its conduct." *See, e.g., Indiana Household Goods and Warehousemen, Inc.*, C-4077, at 2 (Mar. 18, 2003) (Analysis to Aid Pubic Comment).

aside an order.[11]

III. THE INFORMATION SUBMITTED BY RESPONDENT SHOWS THAT THE ANTITRUST VIOLATION CONTINUES, AND THAT THE KTC CONTINUES TO ALLOW HORIZONTAL AGREEMENTS ON PRICE TO TAKE EFFECT UNSUPERVISED.

The record evidence in this case establishes that for many years the members of the Kentucky Association have set prices through a collectively-set tariff. The materials submitted by the Respondent in support of its Motion, taken on their face,[12] show that this collective rate-setting is continuing, and that the KTC continues to permit collective rates to go into effect without the requisite active supervision.

A. THE COLLECTIVE RATE-SETTING THAT FORMS THE ANTITRUST VIOLATION HERE IS CONTINUING.

Sixty years ago, the United States Supreme Court held that collective rate filings by competitors are horizontal agreements on price that, absent an applicable defense, constitute a violation of federal antitrust law. *Georgia v. Pennsylvania R.R.*, 324 U.S. 439 (1945). While Kentucky law permits movers to file collective rates, the Supreme Court in *Ticor* made clear that such state legislation will only excuse a federal law violation if both prongs of the rigorous state

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[11] If the Commission found that changed circumstances warranted reopening the order, it could set aside the order completely or modify the order, for example, to require Respondent to submit information to the Commission on a regular basis that would allow the Commission to monitor the extent to which Respondent's collective tariff applications continue to receive active state supervision.

[12] Complaint Counsel presently have no information from any source other than the Respondent's Motion and supporting materials concerning the Kentucky Association's recent collective rate-setting activities or recent activities by the KTC. The ALJ excluded one KTC document as unreliable. CC Answering Brief at 48; Pre-hearing Conference Transcript, March 16, 2004 at 11-12.

action defense are met.[13] Like all business entities in the United States, movers in Kentucky must comply with both federal and state law. Since at least the *Ticor* decision in 1992, the movers in Kentucky have been on notice that they will not be able to escape liability under the federal antitrust laws for collective rate-setting unless there is active state supervision of the prices they have collectively fixed.[14]

The materials filed by the Kentucky Association in support of its Motion show that movers that otherwise would compete on price continue to set rates collectively. The materials indicate that on September 1, 2004, the Kentucky Association sent to the KTC Supplement 85 to its longstanding collective tariff, which contained rate increases for seven movers. Declaration of Dennis J. Tolson ("Tolson Decl.") Exhibits E & F.[15] Four of these six movers (Local Van Moving & Storage, Odle Movers, Sadler Movers and J.D. Taylor & Sons Moving) are located in the same city, Louisville. Tolson Decl. Exhibit F. After a brief delay, the KTC also permitted Larry's Movers to increase its rates. Tolson Decl. Exhibit I. Larry's Movers is also located in Louisville. Tolson Decl. Exhibit F.

The filed materials show that these rate changes were not filed by the particular firms acting individually, but by the Kentucky Association itself. Consistent with past practice, the

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[13] *Ticor*, 504 U.S. at 631.

[14] *Ticor*, 504 U.S. at 647 (O'Connor, J., *dissenting*) (the potential antitrust liability of an entity that engages in collective rate-setting relying on the state action defense will be subject to uncertainty because liability will turn on whether the state regulates its conduct adequately); *Id.* at 640-41 (Scalia, J., *concurring*) (accept uncertainty because no alternatives).

[15] Larry's Mover, Local Van Moving & Storage, Luther Transfer, Odle Movers, Sadler Movers, J.D. Taylor & Sons Moving and Blue Move all increased their rates in Supplement 85. Tolson Decl. Exhibit E.

Kentucky Association issued a "Tariff Bulletin" notifying all of its members when the KTC permitted Larry's Movers rate changes to become effective. Tolson Decl. Exhibit J. Although the materials filed with the Motion do not reflect whether any similar notification was circulated earlier with respect to the other rate changes made in Supplement 85, such notification would be consistent with longstanding practice of the Kentucky Association. ID at 7 ¶ 22.

Contrary to Respondent's assertion at the oral argument,[16] Respondent has always undertaken extensive efforts to circulate among its members the rates that firms plan to charge before they file the rates with the KTC. ID at 7 ¶¶ 21- 23; CC Answering Brief at 5. Typically, once the Board of Directors or members agree to raise rates, members are informed of the increase by a Tariff Bulletin sent to all members. ID at 7 ¶ 21. The Bulletin gives members a short time in which to protest any rates or rate changes they find objectionable.[17] Movers are aware that if they do not affirmatively exempt themselves from the terms of the proposed tariff rates, all firms will be obligated to charge the collective rates contained in the tariff. ID at 7 ¶ 23. The subject of whether there are protests by movers is discussed at Board meetings. CX 29. Under the established procedures of the Kentucky Association, it is only after these steps are taken that the collective tariff containing the higher rates is submitted to the KTC, to become effective 30 days after submission. ID at 7 ¶ 21; CX 36.

Continuing its collective rate-setting activities, the Kentucky Association on December 28, 2004, filed a further Supplement 86 to its collective tariff, which contains several adjustments

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[16] "[I]f tariff changes are made, 93 members are not notified. You don't have to tell 93 people and 93 people don't come back." Tr. at 75 lines 10-13.

[17] ID at 7 ¶ 22; *See also,* CX 12-CX 13; CX 18; CX 22; CX 35; CX 36.

in the collective rates applicable across the board to all members of the Kentucky Association. Tolson Decl. ¶ 15, Exhibits L & M. Among the collective changes in this supplement are the deletion of certain fuel surcharges, and increases totaling 11 percent in the general rate schedules applicable to Kentucky Association members. *Id.* The Motion seeks to delay the Commission's proceedings pending action by the KTC on this most recent collective rate filing.

In short, there can be little doubt that the Kentucky Association continues to engage in the collective rate-setting activities that it has carried on for more than thirty years and that constitute the antitrust violation demonstrated by the record below.

B. THE KTC CONTINUES TO PERMIT COLLECTIVE RATES SET BY THE KENTUCKY ASSOCIATION TO BECOME EFFECTIVE WITHOUT MEANINGFUL ACTIVE SUPERVISION.

Ticor makes clear that the burden of demonstrating active state supervision and establishing the state action defense lies on the private parties who wish to avoid federal antitrust liability for their collective rate-setting activities. CC Answering Brief at 25 n.20. The materials submitted by the Respondent in support of its Motion fall far short of establishing the defense for the Kentucky Association's recent and continuing collective rate-setting.

At the broadest level, the materials filed by the Respondent make clear that the KTC continues to lack the data necessary to assess the overall reasonableness of the collective tariff of the Kentucky Association. The record below shows that, despite a statutory requirement that movers' "respective revenues and costs ... are ascertained,"[18] the KTC for many years has not systematically collected any revenue and expense data from movers. ID at 14-15 ¶¶ 63-64, 70-71, 39; CC Answering Brief at 10-12. Respondent asserts that movers in the future will file

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[18] KY. REV. STAT. ANN. § 281.680(4).

reports containing such data (Tolson Decl. ¶ 8), and submits a letter from Mr. Debord of the KTC indicating that revenue and cost reports from regulated motor carriers for the year 2004 will be required to be filed with the KTC by April 1, 2005. Tolson Decl. Exhibit C. But the Respondent's supporting materials plainly indicate that such filings have not yet been made, and will not be for some time.

Nonetheless, the KTC continues to permit the Kentucky Association's jointly-set rates to become effective without having the statutorily-required revenue and cost information. The KTC has for many years permitted the privately established rates to be in effect and, in fact, permitted the Kentucky Association's rate changes in Supplement 85 to go into effect in the fall of 2004 (Tolson Decl. Exhibit J), without the general revenue and cost information to assess the overall reasonableness of the Kentucky Association's collective rates. As the *Ticor* case itself held, a regulator's willingness to continue to permit collective rate-setting activity, when it has not received crucial information necessary to assess the reasonableness of the collective rates, shows a lack of active supervision that defeats the state action defense.[19] The KTC cannot actively

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[19] The KTC's complete failure over many years to obtain any revenue and cost information to assess the reasonableness of the Kentucky Association's rates is much worse than the supervision by Connecticut officials which was found in *Ticor* to fail the active supervision test. The Commission found that Connecticut asked for information justifying a proposed rate increase in 1966, failed to receive it, yet allowed the rate to go into effect from 1966 until 1981. *Ticor*, 112 F.T.C. at 382 (ID), 431 (Commission Opinion ("Comm. Op.")). Later, in support of a 1981 proposed rate increase, the rate bureau submitted to Connecticut regulators an overall profitability analysis based on statistical reports of revenue and cost data collected by the Arthur D. Little consulting firm. The report, however, did not have information about one cost component – the commissions paid to insurance agents. The Commission found an absence of active supervision as to this filing because Connecticut undertook "no critical examination of what lay behind those profit figures." *Ticor*, 112 F.T.C. at 380-84 (ID), 430-432 (Comm. Op.). The Commission's holdings finding a failure of active supervision were upheld by the Third Circuit. *Ticor Title Ins. Co. v. FTC*, 998 F.2d 1129, 1140-41 (3d Cir. 1993) (on remand from S.Ct.), *cert. denied*, 510 U.S. 1190 (1994).

supervise collective rate-setting activity by simply requesting the information it needs to evaluate the reasonableness of rates; it must obtain the information and use it to make a meaningful, independent decision concerning the overall reasonableness of the rates.

More specifically, with respect to the particular rate changes made in the Kentucky Association's recent collective rate filings, the materials filed by the Respondent fail to establish active supervision by the KTC. According to the Respondent, the "Justification" for the various rate changes contained in Supplement 85 was contained in a cover letter that accompanied the collective filing. Tolson Decl. ¶ 11, Exhibit D. But the Kentucky Association's cover letter contained no detailed information supporting the particular rate changes sought by the seven firms affected by the rate modifications; it simply stated that the "requests for adjusted rates were supported by notations and comments" from the particular firms.[20] There is no indication that KTC made any inquiry into how the increased revenues requested for these firms compared with any cost increases, or indeed that the KTC sought or received any detailed information concerning the particular rate changes for six of the seven firms whose rates were affected by Supplement 85. As to six of the seven affected firms, the KTC apparently permitted the collectively-filed rates to go into effect without challenge or further explanation.[21] Only as to one

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[20] Tolson Decl. Exhibit D at 1. The cover letter refers to members' "notations and comments on Form 4268" concerning cost increases, but includes no numbers or details of any particular justifications. The past practice of the Kentucky Association has been that members of the Association have used Form 4268 to communicate rudimentary reasons for requesting cost increases to the Association, but that these forms have not been forwarded to the KTC. For examples of the minimal information contained on such forms in the past, *see* CX 57 - CX 103 (cited in ID at 17 ¶ 86). The Respondent's materials do not show that these Forms, or any information they contained, were ever provided to the KTC in connection with Supplement 85.

[21] Tolson Decl. Exhibit H ("All Tariff provision[s] with the exception of those relating to rates for the account of Larry's movers [are] hereby approved as filed.").

of the seven firms did the KTC seek further information before permitting the rates to go into effect. Tolson Decl. ¶ 12-13, Exhibits G, H, I & J.[22]

While this modest degree of scrutiny by the KTC exceeds that in the past, it is far short of establishing "active supervision," particularly given the Kentucky Association's thirty-year history of unsupervised collective rate-setting.[23]

C. ANY SHIFT OF POLICY BY THE KTC TO BEGIN ACTIVE SUPERVISION IS APPARENTLY FAR FROM BEING FULLY IMPLEMENTED.

Respondent has submitted materials in an apparent attempt to show that KTC has begun to actively supervise movers' collectively-filed rates. Any such change would be a dramatic shift from the decades-long pattern of unsupervised collective rate-setting demonstrated by the record

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[22] Respondent's counsel stated at the oral argument that this rate had been "suspended" and that as a consequence the rate was "cut off and nothing is going to happen until it's noticed for a hearing." Tr. at 32 lines 24-25; 34 lines 21-22. The rate was filed on September 1 (Tolson Decl. Exhibit E) and was "suspended" on September 21 (Tolson Decl. Exhibit H). However, these same materials show that the "suspension" was "revoked" on November 1 with no evidence that the KTC had undertaken a "pointed re-examination" of the rate established by the Association for the private party. Tolson Decl. Exhibit I; *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 106 (1980). Respondent's failure to provide the written justification allegedly produced to the KTC by Larry's Movers further demonstrates the procedural infirmities with Respondent's motion.

[23] The materials submitted by the Respondent also do not demonstrate the requisite active supervision of the particular rate changes in the pending Supplement 86. That collective rate filing contains several adjustments applicable across the board to all members of the Kentucky Association, including the deletion of certain fuel surcharges, and increases totaling 11 percent in the general rate schedules applicable to Kentucky Association members. Tolson Decl. ¶ 15, Exhibits L & M. The cover letter from the Association to the KTC accompanying Supplement 86 includes discussion of changes in fuel costs that the Association believes justify the rate changes, but fails to quantify the change in firms' revenues anticipated under the changes in the collective rates, or provide any meaningful means of quantitatively comparing any increased revenues with the stated fuel cost increases. *Id.* Apparently, the KTC has suspended automatic implementation of Supplement 86 pending a hearing on February 28 (*id.*, Tolson Decl. Exhibit N) but the materials submitted by the Respondent contain no other information about KTC's inquiries, if any, into these or other matters.

in this case. What the information submitted by Respondent shows, at most, is that the KTC is just now beginning to rethink its approach and embark on a new course. The following discusses the state of any such changes in light of the criteria for active supervision analysis.

1. STAFF IN PLACE AND FUNDED.

The record in this case shows that the KTC had minimal staffing for regulation of household goods matters, with Mr. Debord the only experienced individual involved, and with no real supervision by his superiors. ID at 12 ¶¶ 49-53, 13 ¶ 61; CC Answering Brief at 10.[24] The information submitted by Respondent shows some indication that the KTC may, in the future, increase its level of staffing. Tolson Decl. ¶ 14. A "Tariff Committee" has allegedly been formed, but the future makeup of the Committee remains unclear.[25] At present, the Committee apparently consists of persons holding the same positions as those who failed to supervise the collectively-set rates over the last many years. Tolson Decl. Exhibit K.[26] That may change in the future, however. Exhibit K indicates that "Tariff Review Analyst" and "Financial Advisor" slots have been created, but that individuals have not been named to those positions. Thus far, there is no indication that the KTC is considering having rates reviewed by groups or individuals representing the views of consumers or inviting officials from other state departments, such as the Attorney General's office, to have input into rate levels.

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[24] As noted in the Initial Decision, many years ago the "KTC had a staff of three auditors and others" to review tariffs. ID at 11 ¶ 44.

[25] In addition to the "Tariff Review Committee," the materials also mention a "State Tariff Committee;" it is not clear whether this is the same body. Tolson Decl. Exhibit B.

[26] Sonia Sanders is identified as the Director of the Division of Motor Carriers. Tolson Decl. ¶ 4, Exhibit A. She appears to have replaced Denise King who testified that she undertook no review of household goods rates. ID at 12 ¶¶ 49-53; CC Answering Brief at 9-10.

2. COLLECT ADEQUATE DATA.

As discussed above, the evidence in this record shows that, despite a statutory requirement that the KTC have procedures that assure that movers' "respective revenues and costs ... are ascertained,"[27] for years the KTC has not collected revenue and expense data from movers. ID at 14-15 ¶¶ 63-64, 70-71, 39; CC Answering Brief at 10-12. Respondent asserts that, in the future, movers will file reports containing such data. Tolson Decl. ¶ 8. The newly filed materials contain a letter written by Mr. Debord of the KTC indicating that the 2004 reports are due April 1, 2005 (Tolson Decl. Exhibit C), but they give no further guidance on what particular information will be demanded, how – if at all – it will be checked for accuracy, or how the information will be used.

3. REQUIRE JUSTIFICATION OF RATE INCREASES.

The record shows that Respondent has implemented 81 rate increases since 1988 and that on 13 of those occasions it accompanied its submission with a short cover letter. ID at 16 ¶ 83; *See also*, e.g. CC Answering Brief at 12-13. Mr. Debord and other witnesses could not recall what, if any, other justifications were offered for any rate increases. ID at 16-17 ¶¶ 81-84; CC Answering Brief at 13. Respondent's President asserts that, in the future, rate increases will be "supported by justification." Tolson Decl. ¶ 11.

As discussed above, however, the materials submitted by Respondent indicate that justification for the recent collective rate filings by the Kentucky Association has been minimal. Supplement 85 was filed with a one-page cover letter. Tolson Decl. Exhibit D. The letter states that these movers "supported" their rate increases with "notations and comments" that apparently

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[27] KY. REV. STAT. ANN. § 281.680(4).

were not sent to the KTC (Tolson Decl. Exhibit G), and higher rates for six of the seven affected firms were allowed to go into effect without any further justification submitted to the KTC. Respondent has provided the FTC with none of the written justification allegedly produced to the KTC by the seventh affected firm.

4. ANALYZE RATES OR RATE INCREASES UNDER A STATE STANDARD.

The record evidence shows that, in the distant past, the KTC analyzed rates to some degree by calculating firms' operating ratios. But such calculations were discontinued. ID at 11-12 ¶¶ 44-47; CC Answering Brief at 8-9.[28] The materials submitted by Respondent just before the oral argument indicate that it is aware that the KTC is obligated under Kentucky law to determine whether movers rates are reasonable, and indicates that the State Tariff Committee would "determine the reasonableness of the proposed rate adjustment ... based upon financial data and any other documentation submitted." Tolson Decl. Exhibit B.

There is, however, no indication that the KTC has begun to develop any way to measure or quantify what would constitute "reasonable" rate levels. Tolson Decl. Exhibit B states that the KTC will determine whether movers rate proposals will be reasonable, but no measure or means of determining acceptable increases is mentioned. In addition, there is no indication that the KTC has even begun to consider analyzing the reasonableness of the underlying rates currently charged by movers. Evaluation of the recent collective rate increases appear to have involved no fundamental assessment of the reasonableness of existing rate levels that have been collectively set without supervision for decades.

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[28] Respondent's claim at the oral argument that the KTC had a "formula" for analyzing rate increases (Tr. at 11 line 24 - 12 line 6) is flatly contradicted by the record evidence. ID at 17 ¶¶ 87-89; CC Answering Brief at 14.

Indeed, there is no indication that the state has or will apply any stated standard even to the recent or pending particular collective rate adjustments. When allowing Larry's Movers to increase its rates as part of Supplement 85, the KTC stated that "the proposed rate increase appears to be just and reasonable." Tolson Decl. Exhibit I. There is no indication, however, of why the proposed higher rate appeared reasonable. The recently filed Supplement 86, which includes an 11% across-the-board increase in rate schedules (Tolson Decl. Exhibit L) may present a particularly interesting set of issues. The two-page "Kentucky Association Letter of Justification" mentions that the increase will be in place of fuel surcharges. Three pages of information dealing with past fuel increases is attached. Tolson Decl. Exhibit M. There is no indication of how the KTC plans to determine the extent to which the current rates – inclusive of the fuel surcharge – will compare to the rates after the 11% rate increase. It is also unclear what information will be needed to do that calculation, when the information will be available, or when or how the KTC will develop a way to measure or quantify the reasonableness of the rates under either system.

5. ISSUE A WRITTEN DECISION.

The record shows that, in the past, the KTC did not issue a written opinion or analysis when allowing movers' rate increases to take effect. The KTC simply stamped the documents received, and the rates went into effect 30 days later. ID at 18 ¶ 94, 44; CC Answering Brief at 15. Or, as Respondent's Tariff Committee Chairman noted, "Take to Bill Debord for acceptance stamp." *Id.* (*citing* RX 102).

Respondent now indicates that, under some circumstances, "a written finding will be prepared." Tolson Decl. ¶ 8(e). But there is no indication in the filed materials concerning what

information such a written finding will contain. Respondent asserts that a one-page letter dated November 1, 2004, allowing Larry's Movers to raise rates constitutes a KTC "written decision." (Tolson Decl. ¶ 13). But that letter contains no articulation of the reasons for the KTC's decision or of the standard it applied. It simply declares that the firm's proposed increase "appears" reasonable. Tolson Decl. Exhibit I.

6. CONDUCT HEARINGS.

The record evidence shows that no hearings were held by the KTC on rates for decades and that the KTC did not even enforce its own regulation[29] requiring notices in the newspaper announcing movers' rate increases. ID at 24 ¶ 22, 38-39; CC Answering Brief at 15-16. There are indications in the newly-filed materials that KTC has begun to change its practice. For the first time, we see a notice published in a newspaper. Tolson Decl. Exhibit F. And, on the afternoon of the last business day before oral argument in this matter, a KTC lawyer faxed a letter to Respondent's antitrust lawyer stating that the KTC had scheduled a hearing on February 28, 2005, to consider Supplement 86. Tolson Decl. Exhibit N. Thus far, however, the KTC still has not conducted any hearing on any collective rate filing by the Kentucky Association, and there is no indication what, if any, meaningful oversight of the collective rate structure will occur by reason of the scheduled hearing on Supplement 86. Moreover, moreover, the KTC has scheduled the hearing to occur without having obtained any of the information it has requested from movers concerning their revenues and costs – information required by statute which KTC has neglected to collect for decades.

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[29] 601 KY. ADMIN. REG. 1:070(c).

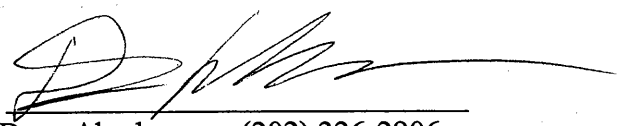
IV. CONCLUSION

Complaint Counsel urge the Commission to deny the Respondent's Motion for a stay, and act promptly to issue a cease and desist Order barring the price-fixing by the Kentucky Association. The materials filed by the Respondent, rather than justifying a stay of this proceeding, confirm that the unsupervised collective rate-setting by the Kentucky Association is ongoing. The activities of the KTC with respect to the recent collective rate-setting by the Association, though less modest than in the past, fail to rise to a level of active supervision that should be required to defend a thirty-year history of unsupervised collective rate-setting.

The initial decision clearly informs the Kentucky Association that its price fixing must be subject to active supervision. If and when the KTC implements a sufficiently active regulatory scheme to satisfy the state action doctrine, the Kentucky Association may seek to have the Commission reopen and modify its Order, pursuant to Section 5(b) of the FTC Act and

Commission Rule 2.51, 16 C.F.R. § 2.51. In the meantime, however, the ongoing collective rate-setting by the Kentucky Association is a decades-long antitrust law violation that should be stopped.

Respectfully submitted,



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Dated: February 3, 2005

CERTIFICATE OF SERVICE

This is to certify that on February 3, 2005, I caused a copy of Complaint Counsel's Opposition to Respondent's Motion for Stay of Proceedings pending Action by Kentucky Transportation Cabinet to be served upon the following persons by facsimile, U.S. Mail or Hand-Carried:

by hand delivery to:

The Commissioners
U.S. Federal Trade Commission
via Office of the Secretary, Room H-159
Federal Trade Commission
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