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

COMPLAINT COUNSEL'S POST TRIAL BRIEF

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FEDERAL TRADE COMMISSION

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

COMPLAINT COUNSEL'S POST TRIAL BRIEF

Complaint Counsel respectfully submit this post trial brief in support of our request that the Court adopt Complaint Counsel's Proposed Findings of Fact and Conclusions of Law and issue an Initial Decision finding that Respondent Kentucky Household Goods Carriers Association, Inc. ("Respondent" or "Kentucky Association") has violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, by entering into a horizontal agreement to fix prices affecting commerce as defined under the Federal Trade Commission Act.

I. INTRODUCTION

The Complaint in this matter charges, and the evidence shows, that the 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 Intervenor Kentucky Transportation Cabinet ("KTC") undertook steps to supervise movers' rates, state officials charged with overseeing this activity currently do little more than take part in "private discussions" with movers before rubber-stamping the rates agreed upon by the movers. As a result, the Kentucky Association has violated the antitrust laws, no defense shields its conduct, and it should be subject to a cease and desist order barring it from future price-fixing.

II. FACTUAL BACKGROUND

The Kentucky Association files with the state a collective tariff for intrastate household goods movers in Kentucky. The tariff sets forth the rates these would-be competitors must charge for their moving services. (Subsection A. below) The state has statutes in place establishing that rates are to be reasonable and not excessive to consumers. (Subsection B. below) In the past, the KTC had a large staff that took steps to determine whether the rates filed by movers in their collective tariff were in line with those statutory norms. (Subsection C. below) But that changed. Now responsibility for all household goods matters falls on one part-time KTC employee, William Debord, who is also tasked with many transportation responsibilities beyond household goods matters. (Subsection D. below) The record clearly reflects the steps that KTC officials do not take. KTC does not collect business data, undertakes no take procedural steps to assure public input on rate levels, and does not conduct a substantive review of the rates in the tariffs. (Subsection E. below) At best, the evidence shows that the KTC, through Mr. Debord, has engaged in some nonspecific, private conversations about rate levels with the movers he is obligated to regulate. But the record is devoid of specifics about who was involved in the discussions, when these conversations occurred, what financial

information was reviewed and which rate increase proposals were discussed. (Subsection F. below)

A. KENTUCKY HOUSEHOLD GOODS CARRIERS ASSOCIATION.

The Kentucky Household Goods Carriers Association, founded in 1957, prepares a collective tariff for intrastate household goods moving in Kentucky on behalf of its 93 members. CCF ¶¶ 7, 10-13, 17.[1] The tariff, which binds all association members, has several sections. One part of the tariff contains the rates movers must charge for local moves, which are defined as moves within 25 miles of a carrier's situs. Local rates are either charged at a flat rate per room or determined by hourly fees for labor and equipment. Another section of the tariff specifies the rates movers must charge for intrastate moves of more than 25 miles ("intrastate rate"). These rates are established under Section II of the tariff as a function of the distance traveled and the total weight of the shipment. CCF ¶ 14. Respondent's members tell the Kentucky Association to which schedule of prices (II-A through II-G, with II-G being the highest level of rates) within Section II they agree to adhere. This information is circulated to the other members prior to the time the final price level selections are sent to the KTC for its acquiescence. CCF ¶¶ 16, 24, 27.

Respondent's members have also agreed to establish a "peak" season which runs from May 15th through September 30th, during which the rates in the tariff are increased ten percent. CCF ¶ 23. Another section of the tariff sets rates that are added to the customer's bill 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

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[1] CCF ¶ ___ is a reference to Complaint Counsel's Proposed Findings of Fact, which is being filed herewith.

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 ¶ 15. Unpacking a drum, dish-pack costs $5.35 regular time and $7.50 on overtime, and unpacking a wardrobe carton costs $1.35 regular time and $1.95 overtime. CCF ¶ 15. Moving an automobile is $134.70, and moving jet skis costs $84.15. CCF ¶¶ 25- 26.

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 ¶ 19. For example, on October 13, 1999, Respondent sought a 10% increase in the intrastate transportation rates then in effect. CCF ¶ 19. Similarly, on October 11, 2000, Respondent's members agreed to seek an 8% increase in the intrastate transportation rates then in effect. CCF ¶ 20. This chart sets forth some examples of rate increases collectively implemented by Respondent:

Supplement No.	Effective Date	Increase
71	4-1-02	5% Intrastate rates & certain items
66	1-1-01	8% Intrastate rates
63	4-1-00	10% Certain items & local moves
61	1-1-00	10% Intrastate rates
56	1-1-99	5% Intrastate rates & certain items
51	1-1-98	8% Across the board
46	10-1-96	5% Across the board
30	7-1-94	8% Across the board
21	5-1-92	4.5% Intrastate rates

CCF ¶ 21. These rate increases add up to a 53.5% increase in the intrastate rate for the tens years depicted in the table. In a similar regard, the April 26, 1985 annual meeting minutes note the cumulative increase in rates that had occurred over the previous five year period, "Rates have increased 42% since 1980." CCF ¶ 22.

The Kentucky Association takes steps to orchestrate changes in the tariff. CCF ¶¶ 16, 29-31. In addition to circulating to members proposed changes in the tariff before they are submitted to the KTC, the evidence shows that Respondent has applied pressure to keep a mover from making a change in the price terms of the tariff. In early 1996, Boyd Movers sought an exception to the tariff whereby the firm would compensate the consumer more for damage done in a move – in effect, Boyd was proposing to decrease price. The head of the Kentucky Association's Tariff Committee (Mr. Mirus) called Mr. Buddy Boyd of Boyd Movers and urged him not to file his exemption. Mr. Mirus took detailed notes of his conversation with Mr. Boyd. First, Mr. Mirus told him that his proposed change "was in conflict with provisions of the tariff." Mr. Mirus "[a]lso requested that [Boyd] put-off (delay) filing this exception until a later date, this will allow time to see how the majority of parties to the tariff adjust to these new rules and items applicable 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." CCF ¶ 29. 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 follow the majority.[2]

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[2] Respondent's counsel asserted, without citation, that this situation involved "an item which would be illegal, and therefore, should not be included in the tariff." Trial Volume 1, March 16, 2004 ("Trial Tr.") at 28. The notes, however, indicate that the change would be

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 ¶¶ 9, 37. In addition, there are several statutory provisions that establish guidelines for the level of the rates movers can charge. For instance, a Kentucky statute sets forth a state policy whereby transportation officials are 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 ¶ 38. That statute also declares that it is state policy to have the KTC ensure that rates provide for "economical and efficient service." CCF ¶ 39. KY. REV. STAT. ANN. § 281.690(2) provides that if the KTC believes that a proposed tariff is unreasonable, it may hold a hearing, and that a hearing must be held if the tariff is protested. If, at the hearing, the KTC were to find that the tariff is "unjust, unreasonable, or unjustly discriminatory," it must set an alternative rate that is "just and reasonable." CCF ¶ 41. And KY. REV. STAT. ANN. § 281.695(1) states that if, after a hearing, the KTC were to determine that the rates are "excessive," it may "determine the just and reasonable rate." CCF ¶ 41.

Under KY. REV. STAT. ANN. § 281.685, movers must charge the exact rate set by the tariff – no discounting is permitted. CCF ¶ 42. Nevertheless, Respondent's members occasionally try to offer discounts to consumers. CCF ¶¶ 32-36. For example, a letter from A. Arnold, a Kentucky Association member, complained that a competitor was offering a 52% discount. A.

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considered in the future when the other members found it agreeable - an indication that Mr. Mirus thought the change could be legally implemented if proposed by the Kentucky Association.

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 ¶ 33. Two other exhibits show movers attempting to discount 30% off the collective rates in the tariff. CCF ¶¶ 34-35.

C. KTC'S PAST REVIEW OF TARIFF RATES.

Decades ago, the KTC had a staff of three auditors plus other employees who took substantial steps to oversee household goods movers. CCF ¶ 46. At that time, KTC required all household goods movers to file detailed annual financial reports containing cost and expense data. CCF ¶ 44. 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 with the firms' Interstate Commerce Commission filings, which could be 200 pages long. CCF ¶ 44.

In fact, according to minutes of the April 15, 1966, board meeting, Respondent considered hiring a consultant to prepare information for the state because, "It was decided that due to the amount of information which maybe required by D.M.T. [KTC's predecessor 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 ¶ 45.[3]

During this period, KTC took the information required to be submitted by regulated carriers and performed an analysis of the economic condition of the industry. Specifically, KTC would routinely perform "uniform cost stud[ies]" of for-hire carriers which involved a "mathematical formula" or a "statistical formula" that was used which was "very, very in depth or involved." CCF ¶ 46. This information was compiled on a spreadsheet which contained the calculated operating ratios for all household goods movers. CCF ¶ 47. Mr. Debord was involved in deriving movers' operating ratios, and he would then prepare monthly written reports to the Commissioner analyzing rate applications. CCF ¶ 48. However, that changed. 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 ¶ 49.

D. KTC'S CURRENT SUPERVISION OFFICIALS.

Over the years, the KTC's review of household goods matters has evaporated. KTC's review of household goods matters currently resides with its Division of Motor Carriers. Ms. Denise King, at the time of discovery, was the director of the Division of Motor Carriers. CCF ¶ 52. Prior to the FTC proceeding, Ms. King had never discussed household goods moving matters with her boss and had never received any instructions from her boss regarding how rates contained in the tariff should be analyzed. CCF ¶ 55. Ms. King, who admitted that she spent only one to two percent of her time on household goods matters, testified that Mr. William Debord was responsible for the KTC's program with respect to household goods tariffs. CCF ¶ 53.

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[3] It is unclear from the record whether Respondent actually hired a consultant.

Ms. King made clear that she had never developed, or discussed with Mr. Debord, any standards to determine whether movers' rates met the state's statutory goals. CCF ¶¶ 53-54, 56. Specifically, Ms. King testified that she had no standards for determining whether the rates were unjust or unreasonable; nor had she ever even had a discussion with Mr. Debord about standards for determining whether the rates were unjust or unreasonable. CCF ¶ 56. Ms. King also noted that she was unaware of any standards her predecessors had used to review household goods rates. CCF ¶ 56. Ms. King had no role in evaluating tariff rates and she was unaware of the factors Mr. Debord looked at in considering whether a percentage rate increase was appropriate. CCF ¶ 54.

Mr. Debord has had responsibility for household goods matters since 1979. He is now a part-time employee. He works a total of 100 hours per month. He spends 60% of this time on household goods matters. CCF ¶¶ 57-58. In addition to household goods matters, the KTC has tasked Mr. Debord with responsibility for tariff filings and other matters involving passenger carriers such as taxis, regular route busses, airport limousines, airport shuttles, charter bus operation as well as trucking matters in general. CCF ¶ 58.

Mr. Debord has many responsibilities involving household goods matters. The bulk of his time, however, is spent working on matters other than reviewing the rates contained in mover's tariffs. Mr. Debord spends time investigating unlicensed movers, conducting seminars, updating power of attorney forms, and handling inquiries from the public. CCF ¶ 59. By far the bulk of his time, in fact more than 50% of his time, is devoted to "compliance audits" which are on-site visits he makes to make sure movers are not offering discounts to consumers. CCF ¶ 59.

Mr. Debord confirmed Ms. King's testimony that he does not get any guidance from his

superiors about tariff issues and he has not reported to anyone in that regard since 1979. CCF ¶ 60. No one at the KTC other than Mr. Debord deals with household goods tariffs - no employees report to Mr. Debord. CCF ¶ 57.

E. STEPS THAT KTC DOES NOT CURRENTLY TAKE TO REVIEW RATES.

The record makes clear that there are many things that the KTC does not currently do to review the collective rates in the tariff.[4] Respondent's counsel during the investigation of this matter stated that no meaningful supervision of filed tariffs is undertaken. In a cover letter accompanying the Kentucky Association's document production, counsel wrote:

> The state has never formally or informally commented, discussed, criticized, or audited any of the KHGCA filings under any Kentucky statute or regulation. And, the state does not grant official or unofficial conclusions regarding the tariff besides stamping each of the filings as approved.

CCF ¶ 51. As detailed in the paragraphs below, counsel had the facts about right.

1. The KTC Does Not Receive Reliable Data.

The KTC does not require household goods movers to submit cost and expense data to the state. For instance, movers do not routinely submit balance sheets and income statements to the KTC. CCF ¶ 66. KTC does receive "a limited number" of movers' financial statements on a voluntary basis. However, Mr. Debord testified that such filings are so unreliable that they could "misrepresent the industry's economic conditions." CCF ¶ 66.

Mr. Debord does visit movers' offices to make sure that they are not offering discounts to consumers. However, during these visits he only looks at documents that movers keep on

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[4] The activities that the KTC does not engage in are relevant because, as discussed below in Section III, Legal Discussion, courts have considered such activities relevant evidence of the presence of active supervision.

individual moves. He does not review balance sheets, income statements, payroll documents, documents that show information about cost of capital, or documents that would allow him to analyze movers' profitability, CCF ¶ 67, even though KY. REV. STAT. ANN. § 281.680(4) dictates that the KTC's collective rate making procedures "shall assure that the respective revenues and costs of carriers . . . are ascertained." CCF ¶ 39.[5]

2. The KTC Does Not Issue a Written Decision.

The KTC does not issue a written decision with respect to Respondent's tariff filings. 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. As Mr. Debord testified, "No action is approval." CCF ¶ 61-62. When Respondent submitted papers to implement a price increase in 1994, the Association's notes of the filing bluntly stated, "Take to Bill Debord for acceptance stamp." RX 102.

Aside from stamping the document received, there is no statement issued by the KTC explaining why it permits the movers to increase prices to consumers. CCF ¶ 62.

3. The KTC Does Not Hold Hearings.

Since the hearings in the 1950's or 1960's, where the state first approved the Kentucky

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[5] The Kentucky Association also does not compile accurate data on movers' costs. CCF ¶ 69. 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 those instances, the Kentucky Association requires the carrier to fill out a Form 4268. These forms are received by the Kentucky Association's Tariff Committee, but are not routinely filed with the KTC. These documents are largely devoid of data. Respondent's member firms have changed their rates without even filling out the "justification" section of the form and other forms have only minimal information. CCF ¶ 70.

Association's tariff, the state has not held any hearings to examine or analyze the collective rates contained in the Kentucky Association tariff. CCF ¶ 63. Because the only way the KTC could formally reject the Kentucky Association's rates under Kentucky law would be by setting the rates for a hearing, the KTC has obviously never formally rejected the collective rates filed in the Kentucky Association's tariff. CCF ¶ 64.

The KTC also does not receive any informal input from groups advocating on behalf of consumers. CCF ¶ 65. The record is clear that Kentucky Association meetings are not open to the public and have never been attended by members of the public. CCF ¶ 65. As noted above, the movers have discussions with Mr. Debord at some Kentucky Association meetings. But, as Respondent has accurately stated in its proposed finding 109, these are "private discussions." Respondent's Proposed Findings of Fact and Conclusions of Law (March 5, 2004) ("RPFF") at 24.

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 and charges, the proposed rates and charges, and which shall state that any interested party may protest said increase by filing a protest with the Transportation Cabinet in accordance with its rules and administrative regulations." Mr. Debord testified in response to a leading question by Respondent's counsel that the KTC enforced 601 KAR 1:070. CX 116 (Debord, Dep. I at 71). However, there is no evidence that any such notices have been published in newspapers, and none of Respondent's

exhibits supports the contention that notices of this type, in fact, are published in newspapers.

4. The KTC Does Not Receive Justification for Rate Increases.

When Respondent seeks a rate increase, it submits a list of the changes it is making and, at most, a one page cover letter requesting that the increase be permitted to take effect. CCF ¶ 71. Respondent does not submit, nor does the KTC require, any business records, economic study, or cost justification data. CCF ¶ 71. The record contains numerous examples of collective rate increases. For instance, in December 2000 Respondent sought an 8% rate increase.[6] The only written justification for that increase was a cover letter. (RX 169) Mr. Debord characterized that letter as an "extra courtesy" and said that tariff filings were not normally accompanied by such a cover letter. Mr. Debord also could not recall any oral statements made to justify this rate increase. Nevertheless, the rate increase was allowed to go into effect. CCF ¶ 71.

As another example, in 1999 Respondent filed Supplement 61, seeking a 10% increase in intrastate rates. There was no written justification provided to the state other than the cover letter which discussed a 5% interstate rate increase.[7] CCF ¶ 72. Similarly, in Supplement 71, Respondent filed for a 5% increase on additional items contained in the tariff, such as the added cost of moving a car which increased from $128.30 to $134.70. Mr. Debord could not recall any

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[6] A general rate increase will involve adjusting upward hundreds of prices contained in the tariff's rate charts. Mr. Debord merely checks a few of the numbers for mathematical accuracy. CCF ¶ 93.

[7] Interstate movers publish the 400 Series Tariff. This tariff is not federally approved, nor is there any evidence showing the basis for the rates contained in that tariff. Moreover, the rates in the interstate tariff bear no relationship to the actual price to consumers because interstate movers discount from the posted rates. Thus, proposed increases in the interstate rate in no way justify increases in Respondent's tariff rates. CCF ¶¶ 94-100.

justification for that increase. CCF ¶ 74.

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 ¶ 41. KTC officials admit that these laws are intended to protect consumers, among others. CCF ¶ 41. 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. CCF ¶¶ 75-80. As Mr. Debord stated, there is no "written rule within the Cabinet that requires specific standards to be followed." CCF ¶ 77. 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 requirement that prices cannot be "excessive." CCF ¶¶ 76-77.

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 Planes moving company, filed an exception whereby it would charge 20% more than the highest intrastate rates in the tariff. CCF ¶ 79. Another firm, Weil-Thoman, filed an exception whereby it would charge 38% more than the highest intrastate rates in the tariff. CCF ¶ 79. Both of these firms operate in the same geographic region. In neither instance could Mr. Debord identify a standard that the state would use to determine whether these rates complied with the statutory requirement that rates not be "excessive." CCF ¶ 79. KTC permitted both Planes and Weil-

Thomas to charge these elevated rates. CCF ¶ 79.[8]

F. PRIVATE CONVERSATIONS WITH MR. DEBORD.

At best, the evidence in the record indicates that the KTC's involvement in household goods rate filings has consisted of informal verbal discussions Mr. Debord has had with movers. There is testimony in the record that he has attended some Kentucky Association board meetings where proposed rate increases were discussed prior to filing them with the KTC.[9]

Several observations about this testimony are in order. First, the record makes clear that there were many Kentucky Association meetings where rates or rate increases were discussed, and in some instances agreed upon, where Mr. Debord was not in attendance. CCF ¶ 90.

Second, the testimony concerning the substance of the discussions at these meetings is extremely vague. Mr. Debord, Kentucky Association President Mr. Tolson, and Kentucky Association Tariff Committee Chairman Mr. Mirus, were all questioned extensively about conversations concerning rates that occurred between KTC officials and Kentucky Association members. The testimony of these three witnesses is devoid of details. None could recall which rate increases had been discussed or what specific factors were reviewed when movers sought rate increases. CCF ¶¶ 81-90. Specifically, Mr. Debord was asked about justifications for two general rate increases and he could not recall the justifications given. CCF ¶ 81. Nor could he recall any specific justification given for any general rate increase. CCF ¶¶ 73, 82. He was then

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[8] The state also does not have any standard in place to evaluate rates charged by non-member firms. A moving company that is not a member of the Kentucky 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 ¶ 78.

[9] *See, e.g.* RPFF ¶¶ 109, 136 at 24, 27.

questioned about specific rate increases in the collective tariff and about rate increases by individual movers; he had no recall of any of these matters. CCF ¶ 83. Similarly, Mr. Tolson and Mr. Mirus were questioned about specific rate increases and general rate increases and they could not recall specific justifications. CCF ¶¶ 84-85, 88-89.

In addition, contemporaneous documents fail to evidence substantive conversations between KTC and Kentucky Association officials about rate filings. The Kentucky Association's document production in this matter contained numerous detailed notes taken by Mr. Mirus of conversations Respondent's officers had with individuals, including notes about conversations with Mr. Debord. *See,* e.g., CX 48 (detailed notes on conversation with Buddy Boyd). Yet Respondent's exhibits do not contain notes of conversations purporting to show Mr. Debord advising Respondent on an appropriate level of a prospective rate increase. The notes merely indicate that Mr. Debord told the Kentucky Association that its proposed rate increase would be allowed to take effect as proposed. CCF ¶ 92. Similarly, no document provided by the KTC provides any indicia of analysis or feedback done by Mr. Debord even though in discovery in this case the KTC "submitted everything [they] felt applied to household goods, whether it be rates or justification that was submitted."[10]

Finally, there is evidence in the record that the information available to Mr. Debord at the Kentucky Association meetings was only of a most general nature. CCF ¶ 91. Movers do not disclose details about their costs, expenses and profit margins at Kentucky Association meetings.

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[10] CX 116 (Debord, Dep. II at 116): "I'm sure there's specific things that's been sent in as a file we've tried to produce. We've tried to send everything that was requested. And, I'm sure in that there's specific information that's been submitted. . . [A]s I've said, we've submitted that – we've submitted everything that we felt applied to household goods, whether it be rates or justification that was submitted."

Mr. Tolson, President of Kentucky Association, testified about the lack of specific information disclosed in the verbal discussions that take place at Kentucky Association's board meetings: "you have to understand that these are -- men and women are competitors with one another, too, so that a lot of, you know, exact detailed financial information is not made available to -- for public consideration at that point. So, again, it's in terms of generalities . . ." CCF ¶ 91. Mr. Tolson's testimony makes clear that movers would not disclose at a such meeting such information as the exact wages they pay their workers, their actual cost of obtaining supplies such as boxes, or their margins on selling a box to a customer. Similarly, vendors, who are associate members of the Kentucky Association, do not divulge actual invoices showing what movers paid for their goods or services. CCF ¶ 91.

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).[11] 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.[12]

Rate-making associations, in which members are otherwise competitors, that establish rates that apply to and across the membership constitute illegal price-fixing arrangements, and

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[11] *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)).

[12] 2 Areeda & Hovenkamp, Antitrust Law §§ 305, 1910 (2d ed. 2000).

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 to rates that are not uniform, 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 ("*Int. Dec.*")), *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.[13]

In *FTC v. Ticor Title Ins. Co.*, 112 F.T.C. 344 (1989), the Commission was confronted with an assertion that, under *Broadcast Music, Inc. v. CBS*, 441 U.S. 1 (1979), tariffs containing

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[13] Without admitting that his client violated the antitrust laws, Respondent's counsel virtually conceded that Respondent's tariff arrangement fit well within the bounds of illegal price-fixing. *See* Trial Tr. at 23-24 ("I understand that cases have held that under circumstances where a tariff is filed, the courts will and have presumed that there is an illegal price fixing agreement, without even any of the conduct which Complaint Counsel has described."); Trial Tr. at 33 ("I've counted so far at least 11 exceptions to that rate, which I know for Sherman Act purposes does not change the legal analysis, . . ."); Trial Tr. at 33 ("I recognize for Sherman Act purposes, it wouldn't make a difference if there were 1000 different rates,...").

collective rates 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.*).[14] 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, and Respondent in this case has not attempted to raise one. As a result, unless the conduct here 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

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[14] Even if not *per se* unlawful, the Kentucky Association's agreement on price is easily condemned as "inherently suspect" with no "legitimate justification." *In the Matter of PolyGram Holding, Inc.*, F.T.C. Docket No. 9298, slip op. at 29 (July 24, 2003) ("*Three Tenors*"). Under the *Three Tenors* approach, so long as the agreement "ordinarily encompasses behavior that past 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.

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 active supervision was not present. 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.[15] Thus, unless an antitrust defendant can show that it meets both prongs of the

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[15] 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."

standard, it will not be entitled to the defense provided under *Parker v. Brown*.

The key issue in this case is whether Respondent can demonstrate compliance with prong two, under which it is the Respondent's burden to substantiate the claim that the state actively supervised the tariff filed by Respondent.[16] 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 active 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

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Id. at 106.

[16] As Respondent concedes (RPFF (Conclusion of Law ¶ 5) at 42 and Trial Tr. at 20), antitrust defendants bear 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.").

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 a clear "finding of active state supervision." *Ticor*, 504 U.S. at 639, *see also* Joshua Rosenstein, Comment, *Active Supervision of Health Care Cooperative Ventures Seeking State Action Antitrust Immunity*, 18 Seattle U.L. Rev. 329, 335 (1995). Active supervision requires that the state must "have *and* exercise ultimate authority" over the challenged anticompetitive conduct. *Patrick v. Burget*, 486 U.S. 94, 101 (1988) (emphasis added). The state's supervision must be so comprehensive that private agreements will be shielded only when the "the State has effectively made [the challenged] conduct its own." *Id.* at 106. Active supervision requires state officials to engage in a "pointed re-examination" of the private conduct. *Midcal,* 445 U.S. at 106.

In *Ticor*, the Supreme Court quoted language from *New England Motor Rate Bureau v. FTC*, 908 F.2d 1064, 1071 (1st Cir. 1990), setting out a list of organizational and procedural characteristics relevant as the "beginning point" of an effective state program:

> [T]he state's program is in place, is staffed and funded, grants to the state officials ample power and the duty to regulate pursuant to declared standards of state policy, is enforceable in the state's courts, and demonstrates some basic level of activity directed towards seeing that the private actors carry out the state's policy and not simply their own policy. . .

504 U.S. at 637. Even under this standard, it is doubtful that the Court would find that there was the requisite "basic level of activity directed towards seeing that the private actors carry out the state's policy and not simply their own policy" where the evidence established that the state always allowed the privately set rates to go into effect and the only evidence of supervision was

self-serving, vague testimony about informal, private discussions between the regulator and the private actors. However, the Court rejected the First Circuit's standard and found that level of supervision alone to be inadequate. *Id.* at 637-38.[17] Rather, the Court insisted that state officials look with great specificity at the actual rates involved. *Ticor*, 504 U.S. at 638. The Commission has similarly held that "generalized assertions of review do not withstand scrutiny," *Ticor*, 112 F.T.C. at 434 (*Comm. Op.*).[18]

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). Courts have considered particular "steps" in assessing whether states have actively supervised price setting arrangements entered into by private parties.[19]

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[17] The Fifth Circuit subsequently held that a regulatory structure which "provides for an active role for PUC" and a "forum for complaints" alone does not satisfy the active supervision requirement of *Midcal*. *DFW Metro Line Svc. v. Southwestern Bell Tel. Corp.*, 988 F.2d 601, 606 (5th Cir. 1993). "The PUC must actually fulfill the active role granted to it under the statute." *Id.* *See also* 1 Areeda & Hovenkamp, Antitrust Law p. 474 (2d ed. 2000); Rosenstein, *supra*, at 337.

[18] 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.

[19] 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

One such step courts consider is whether the state collects and verifies data from industry participants. For instance, courts evaluate whether the state requires firms to furnish business data generated by the firms in the course of their operations. *Southern Motor Carriers*, 467 F. Supp. at 477 (N.D.Ga. 1979) ("freight bills and information concerning other expenses").[20] The Commission has 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. The Kentucky legislature itself has indicated that the state should review carriers' revenue and cost data. Kentucky statute KY. REV. STAT. ANN. § 281.680(4) requires the KTC to have procedures that assure that movers' "respective revenues and costs . . . are ascertained."

Written statements explaining the state's reasons for approving or disapproving rates has also been a factor in determining whether active supervision is present. Courts have looked

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cases." *See, e.g.,* Indiana Analysis at 5.

[20] *See also Ticor*, 112 F.T.C. at 437 (*Comm. Op.*) (cost and expense data); *Ticor*, 504 U.S. at 639; *see also* Rosenstein, *supra*, at 350

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.[21] Courts have considered separate, independent studies conducted or commissioned by a state that evaluate the necessity of proposed rate increases as critical to understanding how actively the state supervises.[22]

Whether a state holds hearings to evaluate rates is also highly material to courts' determination of active supervision. In *Southern Motor Carriers*, the government conceded that prong two of *Midcal* was met where the District Court found that "although the submitted rates

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[21] *New England Motor Rate Bureau, Inc.*, 112 F.T.C. at 282 (*Comm. Op.*). Complaint Counsel acknowledge that 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). However, the First Circuit's lax standard for active supervision in *New England Motor Rate Bureau* was later explicitly rejected by the Supreme Court. In *Ticor*, the Court held that the First Circuit's standard for active supervision was "insufficient." 504 U.S. at 637. Therefore, the Supreme Court's decision in *Ticor* arguably validated the Commission's approach to evaluating active supervision in *New England Motor Rate Bureau*. At a minimum, the Commission Opinion illuminates the factors reviewed and highlighted by the Commission in a prior case evaluating the specific details of the active supervision requirement. *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).

[22] *Yeager's Fuel*, 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 (*Int. Dec.*, *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").

could go into effect without further state activity, the State had ordered and held ratemaking hearings on a consistent basis, using the industry submissions as the beginning point." *Ticor*, 504 U.S. at 639; *see also Southern Motor Carriers*, 471 U.S. at 66. The Supreme Court favorably cited to these findings of active supervision in *Ticor*. 504 U.S. at 639.[23] In other cases, courts have found public and administrative hearings critical to a finding of active supervision.[24] Thus, public input and consideration of industry data have been given favorable treatment by the Supreme Court and other courts examining the active supervision requirement. Conversely, in the four states where inadequate state supervision was found in *Ticor*, there were no hearings on rate increases. *Ticor*, 112 F.T.C. at 381 (*Int. Dec.*) (Connecticut); *id.* at 385 (*Int. Dec.*) (Wisconsin); *id.* at 388 n. 229 (*Int. Dec.*) (Arizona); *id.* at 444 (*Comm. Op.*).[25] Even where

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[23] Complaint Counsel cite *Southern Motor Carriers* as an example of active supervision where the state held ratemaking hearings. Other courts have cited to *Ticor*'s discussion of *Southern Motor Carriers* for the proposition that holding ratemaking hearings on a consistent basis supports the "active supervision" prong of the *Midcal* test. *See, e.g., Green v. Peoples Energy Corp.*, 2003 WL 1712566, *7.

[24] *TEC Cogeneration, Inc. v. Florida Power & Light Co.*, 86 F.3d 1028, 1029 (11th Cir. 1996) ("eleven-month contested administrative proceeding" and "extensive and contested agency proceedings"); *Destec Energy, Inc. v. Southern Cal. Gas Co.*, 5 F. Supp. 2d 433, 457 (S.D. Tex. 1997) (contested hearings, circulation of proposed resolutions for public notice and comment before being adopted, and a "fact-finding process" that "required public proceedings in 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.*, 988 F.2d at 606 ("broad-based ratemaking proceedings); *City of Vernon*, 1996 WL 138554, *3 ("extensive proceedings before the PUC").

[25] In one of those states, Montana, there had been hearings on legislation (unrelated to rates) three years prior to the formation of the rate bureau. *Id.* at 444 (*Comm. Op.*).

hearings have been held in the past, failure to hold hearings in the recent past has been found to indicate a lack of supervision. *New England Motor Rate Bureau*, 112 F.T.C. at 267 (*Comm. Op.*).[26]

Courts also look for continuous review of the rate-setting activities, as well as whether the state has ever rejected tariffs based upon the level of rates. *New England Motor Rate Bureau*, 112 F.T.C. at 267, 279 (*Comm. Op.*). Isolated or infrequent instances of review are not sufficient. *Ticor*, 112 F.T.C. at 428 (*Comm. Op.*).[27] Nor, as noted above, can a state allow 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's Fuel*, 22 F.3d at 1271. Rather, review of rate-making activities should be continuous in nature. *Ticor,* 504 U.S. at 640.[28]

Finally, courts have placed substantial emphasis on ensuring that state supervision

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[26] In *New England Motor Rate Bureau*, the state of Massachusetts was held to have engaged in inadequate supervision where the state had not held any public hearings either to investigate or to suspend a motor carrier's rate in the six years preceding the case. Compare this with the state of Rhode Island, which had issued public notice and held at least one formal public hearing in the recent past before granting a general rate increase. *Id.* at 282.

[27] *See also* 1 Areeda & Hovenkamp, Antitrust Law at 470 (2d ed. 2000) ("Supervision will be adequate when a public official must approve each private decision as part of "extensive and continuing" supervision."), citing *Health Care Equalization Comm. v. Iowa Medical Socy.*, 851 F.2d 1020, 1027 (8th Cir. 1988) ("Here by contrast, the Commissioner's supervision is extensive and continuing.").

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

includes specific measures, standards, or formulae to establish 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, prior to a hearing to determine whether to grant a rate increase, used carriers' cost and expense data to derive an operating ratio which was submitted as evidence at the hearing. 467 F. Supp. at 477. The Commission has also looked at whether states review industry participants' profit levels. In *New England Motor Rate Bureau*, the Commission held supervision to be inadequate where the state never "[looked] behind the rates to determine whether they accurately reflect a carrier's profits and costs." 112 F.T.C. at 267, 279 (*Comm. Op.*); *see also* Rosenstein, *supra*, at 350. And in *Ticor*, states were supplied with profit data and actual rates of return on capital, but even so, the Commission found active supervision absent because the state did not get information on what lay behind the profit figures. 112 F.T.C. at 416, 432 (*Int. Dec.*, *Comm. Op.*); *Ticor Title Ins. Co. v. FTC*, 998 F.2d 1129, 1140 (3d Cir. 1993) (on remand from Sup. Ct.), *cert. denied*, 510

U.S. 1190 (1994).[29] Thus, a finding of active state supervision requires more than mere submission and state acceptance of rates; there must be quantitative analysis by the state of the economic impact the rates have on industry participants.

IV. RESPONDENT HAS ENTERED INTO AN ILLEGAL AGREEMENT ON PRICE THAT IS NOT ACTIVELY SUPERVISED BY THE STATE

The evidence demonstrates that Respondent has engaged in an illegal agreement on price. Further, Respondent's state action defense fails because the evidence shows the state's failure to actively supervise Respondent's price-fixing activity.

A. RESPONDENT HAS COORDINATED AN ILLEGAL AGREEMENT ON PRICE.

Plainly, Respondent has coordinated a price-fixing agreement. Respondent's actions facilitate members' agreement on the schedule of local and intrastate rates that each will charge, as well as agreements on specific rates for additional tasks such as hauling a car or moving jet skis. The members, through Respondent's efforts, collectively agree to institute rate increases. At least once every year for many years, Respondent has filed a tariff supplement raising the rates that members must charge approximately five to ten percent per year. Members also have agreed to establish uniform hours for overtime charges and have agreed to specific "peak" summer dates when members increase their rates. These are the types of horizontal agreements courts have found to be *per se* illegal in the past. Even if Respondent were permitted to offer a "legitimate justification" for these horizontal restraints, *cf. Three Tenors*, slip op. at 29, Respondent has

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[29] In *Ticor,* a profitability analysis performed by a private consultant was submitted to the state of Connecticut. That analysis concluded that a proposed rate increase would result in a 2.78 percent return on capital. 112 F.T.C. at 382 (*Int. Dec.*). However, the state did not know the basis of profit figures, specifically commissions paid to agents, which were a key component of the rates.

offered no such justification, and there is no plausible justification for this type of agreement.

B. KENTUCKY DOES NOT ENGAGE IN ACTIVE SUPERVISION AS REQUIRED BY THE STATE ACTION DEFENSE.

Respondent argues that it meets its burden of showing active supervision. Respondent points out that Kentucky has in place statutes and regulations pertaining to movers. Respondent also asserts that Mr. Debord, because of his experience, can judge whether rates are reasonable based on his informal discussions with movers and his review of general industry information. However, the KTC's review of the rate filings made by Respondent falls far short of the "active supervision" required by *Ticor* and other pertinent cases.

At one time, showing that a state had a department in place with adequate authority to provide review of private agreements along with minimal activity on the part of the regulator, went a long way toward establishing the state action defense. *New England Motor Rate Bureau*, 908 F.2d at 1077.[30] However, in the case that Respondent now concedes is controlling, the Supreme Court in *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 determining active state supervision, but that supervision will <u>not</u> be shown merely where:

> the state's program is in place, is staffed and funded, grants to the state officials ample power and the duty to regulate pursuant to declared standards of state policy, is enforceable in the state's courts, and demonstrates some basic level of activity directed towards seeing that the private actors carry out the state's policy and not simply their own policy . . .

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[30] 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.

504 U.S. at 637 (quoting *New England Motor Rate Bureau*, 908 F.2d at 1071). Instead, *Ticor* requires that the state actually perform a substantive review of the rates.

Respondent would have this Court hold that *Ticor's* rigorous standard can be met where the evidence of supervision consists of Mr. Debord's assertions that in his judgment rates are reasonable. RPFF ¶ 136 at 27. Respondent asserts that Mr. Debord's judgment can pass for active supervision because: (a) Mr. Debord reviews general information such as the *Wall Street Journal,* RPFF ¶¶ 126, 127 at 26; (b) Mr. Debord attends meetings where movers discuss rates – but do not share specific cost and expense data, RPFF ¶ 109, *but see* CCF 91, and; (c) witnesses have testified that rate increases have been discussed beforehand, although the evidence of such discussions is provided by party witnesses who offer testimony totally lacking in specifics.[31]

Further, Respondent suggests that active supervision exists in this instance even though the record makes clear that the only input the state receives on the appropriate level of rates is provided in private discussions that take place between the movers and the person who is responsible for regulating them. CCF 65. The evidence shows that year after year the KTC has permitted the private actor's collective rates to go into effect as proposed. And for at least three decades the only input into the process has come from the firms KTC purports to regulate.

Respondent cites no case where such a minimal level of state activity has been held to constitute active supervision. And Complaint Counsel's research has uncovered no case that so holds. This Court would break new ground finding active supervision based on the minimal state

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[31] RPFF ¶ 135 at 27. Respondent fails to cite to specific discussions between its officers and Mr. Debord in which the Respondent provided the KTC with any specific justification for a rate increase. Given an opportunity to do so, Mr. Tolson, Mr. Mirus and Mr. Debord failed to recall specific reasons for particular rate increases. CCF ¶¶ 81-85, 88-89.

activity shown in this record.

Complaint Counsel maintain that 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). Courts addressing the active supervision requirement have identified specific state supervisory activities that they considered in determining whether the antitrust defendant could sustain its burden (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). 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. KTC 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 KTC to have procedures that assure that movers' "respective revenues and costs . . . are ascertained," the state has no program in place requiring moving firms to submit any sort of revenue of cost data.[32]

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[32] 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. *A.D. Bedell*, 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.").

A second set of factors courts have looked at in determining the presence or absence of active supervision is whether the state issues a written analysis of its decision-making process. Here, when Respondent files for a rate increase, the state stamps the document "received," period. No economic studies are performed. No independent study is performed. No written decision is issued by the state. As Mr. Debord stated, "No action is approval."[33] As one of Respondent's exhibits puts it, the Kentucky Association just takes its rate increases to Mr. Debord to get his "acceptance stamp."[34] RX 102.

Courts also consider the transparency of a state's review process. In *Ticor*, the Supreme Court noted that in *Southern Motor Carriers*, the Public Service Commission "had ordered and held ratemaking hearings on a consistent basis." *Ticor*, 504 U.S. at 639. Apparently, Kentucky held hearings in the 1950's or 1960's but not since.[35] The Kentucky legislature itself has specifically identified public hearings as one of the ways the KTC is expected to consider rates. *See, e.g.*, KY. REV. STAT. ANN. §§ 281.640, 281.690(2), 281.695(1). But the KTC has turned the Kentucky legislature's preference for open hearings on its head. The KTC never holds hearings

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[33] 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. STAT. ANN. § 281.690; *Ticor,* 504 U.S. at 629.

[34] Another factor that is taken into account is whether the state has ever rejected a rate. *New England Motor Rate Bureau* found an absence of active supervision because, among other things, the state had never rejected a collective tariff based on the level of the rates. 112 F.T.C. at 267, 279 (*Comm. Op.*). Here, Kentucky has not formally rejected collective rates submitted by Respondent nor has it formally rejected any proposed increase in collective rates sought by Respondent. CCF ¶ 64.

[35] *Ticor*, of course, made clear that state review must be continuous in nature, 504 U.S. 640, and a 40 or 50 year span since the last hearing held on movers' rates is plainly unacceptable.

nor does it receive input from any outside source other than the movers themselves. Rather, Mr. Debord attends the Kentucky Association's private meetings and, as Respondent put it in a proposed finding, takes part in "private discussions" with movers.

Courts also place great emphasis on the state's substantive review of the rate levels. 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. 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 including the use of a private consultant performing a return on capitol analysis to evaluate a proposed rate increase (*Ticor,* 112 F.T.C. at 382 (*Int. Dec.*)) and the use of operating ratios to evaluate a proposed increase in motor carrier rates. *Southern Motor Carriers*, 467 F. Supp. at 477. At one point, Kentucky did use one of these methods; it maintained a spreadsheet containing calculations of all movers' operating ratios. CCF ¶ 47. However, sometime in the 1980's, Mr. Debord was told not to bother his supervisors with that analysis. Now Kentucky has no standards or formulae for reviewing rates or for reviewing rate increases. The state routinely allows the Kentucky Association rate increases to take effect without any way to measure whether they comply with Kentucky statutes.

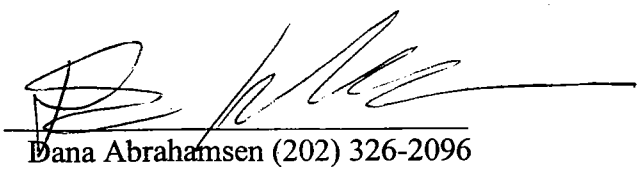
Respondent falls far short of showing that KTC undertakes active supervision under the rigorous standard set down in *Ticor* and other active supervision cases. Respondent asks this Court to go where no court has gone before and find active supervision based, at most, on private, informal interactions between the government official entrusted with regulating this

industry and the industry members themselves. In addition, KTC's failure to perform the supervisory steps identified by the courts is fatal to Respondent's burden of establishing active supervision.

V. CONCLUSION

The evidence in this matter establishes that Respondent Kentucky Association has engaged in illegal price-fixing and that its conduct is not shielded from liability by the state action defense. Therefore, a cease and desist order barring future price-fixing by the Kentucky Association should be entered by this Court. A proposed order is attached.

Respectfully submitted,



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Dated: April 2, 2004

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

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

COMPLAINT COUNSEL'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

COMPLAINT COUNSEL'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

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UNITED STATES OF AMERICA
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FINDINGS OF FACTS

I. INTRODUCTION

1. A Stipulated Exhibit Index prepared in accordance with Rule 3.46 of the Commission's Rules of Practice is attached as Appendix A. No witnesses testified at trial. (Trial Volume 1 at 5, 18 (March 16, 2004); *see* Rule 3.46(c) of the Commission's Rules of Practice).

2. The Stipulated Exhibit Index attached as Appendix A includes a description of exhibits offered but not admitted into evidence. These exhibits will be provided to the court reporter and retained in the record. (Rule 3.43(g) of the Commission's Rules of Practice; Pretrial Hearing at 9-10 (March 16, 2004)).

3. This case involves a horizontal price-fixing agreement involving 93 intrastate movers in Kentucky. Respondent Kentucky Household Goods Carriers Association, Inc. ("Respondent" or "Kentucky Association") is the trade organization (*see* ¶¶ 7 and 10, *infra*) that facilitates this price-fixing. *See* ¶¶ 7 through 36, *infra*.

4. Kentucky Association asserts that the Intervenor, Kentucky Transportation Cabinet ("KTC"), has actively supervised its price-fixing activity.

5. Kentucky Association fails to carry its burden of showing the presence of active

supervision of its price-fixing activity. In particular, KTC commits very limited resources to tariff issues, does not receive reliable data, does not employ procedural safeguards such as issuing written decisions or holding hearings, fails to analyze requests for rate increases, and does not analyze rates under any state standard. *See* ¶¶ 37 through 102, *infra*.

6. Kentucky Association cannot carry its burden of showing active supervision by referencing vague testimony to the effect that KTC officials are present at private meetings of Kentucky Association's members where they have nonspecific discussions about rate proposed rate increases. *See* ¶¶ 81 through 93, *infra*.

II. RESPONDENT KENTUCKY HOUSEHOLD GOODS CARRIERS ASSOCIATION, INC.

7. Respondent is the Kentucky Household Goods Carriers Association, Inc. (Respondent or "Kentucky Association"). Kentucky Association is a non-profit Kentucky Corporation incorporated in 1957. (CX 3; JX 1 ¶ 9). The membership of Kentucky Association consists of approximately 93 household goods moving companies that conduct business within Kentucky, receiving compensation for intrastate and local moves. (Respondent Kentucky Household Goods Carrier Association, Inc.'s Answer to ¶ 5 of the Complaint, ("Respondent's Answer"); JX 1 ¶ 10).

8. KY. REV. STAT. ANN. § 281.680 requires every household goods carrier operating in the Commonwealth of Kentucky to file a tariff containing its rates, charges, and rules with the KTC. (JX 1 ¶ 5).

9. A "tariff" contains a schedule of rates, fares, and prices that carriers charge. (CX 2; JX 1 ¶ 4).

10. One of the primary functions of Kentucky Association is the initiation, preparation, development, dissemination, and filing with the KTC's Division of Motor Carriers of tariffs and supplements thereto on behalf of and as agent for its members. (Respondent's Answer to ¶ 2; Respondent's November 19, 2003 Response to ¶ 13 of Complaint Counsels' Request for Admission issued October 31, 2003, ("Respondent's Admission"); JX 1 ¶ 11). This function is conducted through Kentucky Association's Tariff Committee. (Respondent's Answer to ¶ 5).

11. Under 601 KY. ADMIN. REG. 1:060, a "tariff publishing agent" may file a tariff on behalf of one or more household goods carriers. (JX 1 ¶ 8).

12. Collective ratemaking means that rates are collectively filed through a joint tariff publishing agency representing rates of more than one carrier or a group of carriers. (JX 1 ¶ 6).

III. RESPONDENT KENTUCKY ASSOCIATION HAS ENGAGED IN ILLEGAL PRICE-FIXING

13. KYDVR TARIFF NO.5 is the Kentucky Association's tariff which is applicable to Kentucky intrastate traffic. (Respondent's Admission ¶ 9; CX 1; CX 2). The members of Kentucky Association ("Participating Carriers") are required to charge the rates contained in Kentucky Association's KYDVR TARIFF NO. 5. (CX 1; CX 2; Respondent's Admission ¶ 18; JX 1 ¶ 10). Kentucky Association causes KYDVR Tariff No. 5 to be prepared and published. The Tariff was issued 3-1-88 with an effective date of 4-1-88, and includes all subsequent supplements. Complaint Counsel's CX 2 contains the Tariff and its supplements in effect during the discovery period in this matter, issued September 1, 2003 and effective October 1, 2003. (CX 2; Respondent's Admission ¶¶ 10, 11, and 14; JX 1 ¶ 12).

14. The tariff contains the rates movers must charge for local moves, which are those within 25 miles of the city limits of the carriers' situs. Local rates are either charged at a flat rate per room or determined by hourly fees for labor and equipment. The tariff also specifies the rates movers must charge for intrastate moves of more than 25 miles ("intrastate rate"). Intrastate rates are established as a function of the distance traveled and the total weight of the shipment. (CX 1; CX 2; Respondent's Admission ¶ 16; JX 1 ¶ 14).

15. Another part of the tariff gives the rates for additional services, such as packing, moving particular bulky or heavy items, and moves involving flights of stairs. (JX 1 ¶ 15). The tariff also establishes higher charges for work performed on "overtime:" any packing or unpacking performed on the weekends or after 5pm during weekdays. For example, packing a "Drum, Dish-Pack" costs $14.60 regular time and $20.40 on overtime. Unpacking a "Drum, Dish-Pack" costs $5.35 regular time and $7.50 on overtime. Packing a wardrobe carton cost $3.60 regular time, and $4.95 overtime. Unpacking a wardrobe carton cost $1.35 regular time, and $1.95 overtime. (CX 1; CX 2 at KHGCA 6977; Respondent's Admission ¶ 16; JX 1 ¶ 16).

16. Kentucky Association coordinates the rates charged by members by providing a copy of proposed supplements to Kentucky Association's KYDVR TARIFF NO.5 to all of the Participating Carriers. This provides the Participating Carriers the opportunity to request rates different than those contained in the supplement. This is done prior to the time Kentucky Association submits that supplement to the KTC. Participating Carriers that do want to file different rates do so by filing a Form 4286 with Kentucky Association's Tariff Committee. Information about any such different rates is then sent to all Participating Carriers. When the Kentucky Association circulates proposed rates and proposed rate changes to Participating Carriers, members are permitted to protest any rates or rate changes they find objectionable. (CX 11; CX 29;(CX 117 (Mirus, Dep. at 54-58)). Movers know that if they do not affirmatively exempt themselves in this way from the terms of the proposed tariff rates, their firms will be obligated to charge the collective rates contained in the tariff. (*See e.g.* CX 12; CX 13; CX 22; CX 57;

Respondent's Admission ¶¶ 12, 20; CX 117 (Mirus, Dep. at 53-54); CX 116 (Debord, Dep. at 60-61);[1] JX 1 ¶ 27).

17. The Participating Carriers cause Kentucky Association to file with the KTC the rates contained in Kentucky Association's KYDVR TARIFF NO.5 by granting Kentucky Association power of attorney to file their tariff with the KTC. (CX 1; CX 2; Respondent's Admissions ¶¶ 17, 20; *see e.g.* CX 4).

A. Respondent Kentucky Association files for Increases in the Collective Rates

18. The Participating Carriers regularly engage in collective action with regard to price. *See* ¶¶ 19 through 36, *infra*.

19. Kentucky Association regularly files supplements to the tariff that contain price increases for its members. The decision to increase rates can either be agreed to by a voice vote at a general membership meeting or by a vote of the Board of Directors. (CX 117 (Mirus, Dep. at 62-63; CX 15; JX 1 ¶ 13). For example, on October 13, 1999, the Kentucky Association, on behalf of its members (through its Board of Directors), agreed to seek a 10% increase in the transportation rates and charges then in effect in Sections II and VI of KYDVR TARIFF NO.5. (CX 19; Respondent's Admission ¶ 23).

20. Similarly, on October 11, 2000, Kentucky Association, on behalf of its members (through its Board of Directors), agreed to seek an 8% increase in the intrastate transportation rates and charges then in effect in Sections II and VI of KYDVR TARIFF NO.5. (CX 15; Respondent's Admission ¶ 24).

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[1] Citation to (CX 116 (Debord, Dep. II at ___)) refers to Volume Two of Mr. Debord's deposition transcript of November 14, 2003. Citation to (CX 116 (Debord, Dep. I at ___)) refers to Volume One of Mr. Debord's deposition transcript of November 13, 2003.

21. Other examples of rate increases that have been proposed by Kentucky Association and which have taken effect include the following (JX 1 ¶ 18):

Supplement No.	Effective Date	Increase	CX
71	4-1-02	5% Intrastate rates & certain items	CX 10 - CX 12; CX 14
66	1-1-01	8% Intrastate rates	CX 15
63	4-1-00	10% Certain items & local moves	CX 16
61	1-1-00	10% Intrastate rates	CX 17 - CX 19
56	1-1-99	5% Intrastate rates & certain items	CX 20; CX 21
51	1-1-98	8% Across the board	CX 22 - CX 26
46	10-1-96	5% Across the board	CX 27 - CX 30
30	7-1-94	8% Across the board	CX 32 - CX 36
21	5-1-92	4.5% Intrastate rates	CX 37 - CX 40

22. The April 26, 1985 annual meeting minutes state: "Rates have increased 42% since 1980." CX 44; JX 1 ¶ 19.

23. The movers have also agreed to charge higher rates during the peak (summer) moving season. All of the Participating Carriers, except Hammond-Pennyrile Mov/Stg. Co., Inc., charge 10% higher rates from May 15th through September 30th. (CX 1 at KTC 2098; CX 2 at KHGCA 7018; CX 45 - CX 47; Respondent's Admission ¶¶ 25, 26; JX 1 ¶ 17; CX 129 (Tolson, Dep. at 180)).

24. Kentucky Association also collectively amended the tariff to create a new set of intrastate rates. Those rates were placed in Schedule G of Section II of the tariff and were 15% higher than the rates then in effect in Schedule F of Section II of the tariff. (CX 31; CX 41).

25. The movers have also agreed to specific charges in the tariff. For instance, all but two Participating Carriers charge $134.70 to move an automobile. (CX 1 at KTC 2026; CX 2 at KHGCA 6989; Respondent's Admission ¶ 30, 31; JX 1 ¶¶ 20-21).

26. Similarly, all but two Participating Carriers agree to charge the rate of $84.15 to move jet

skis. (CX 1 at KTC 2026; CX 2 at KHGCA 6989; Respondent's Admission ¶ 35; JX 1 ¶¶ 22-23).

27. There is also considerable uniformity among movers with respect to intrastate rates. For example, all of the following firms charge the same intrastate transportation rates contained in Section II-B of KYDVR TARIFF NO. 5: A-1 Equipped Veteran's Mov/Stg., Inc.; Howard Ball Mov/Stg.; Carl Boyd, dba Harrison Movers; Brentwood Properties, LLC, dba Brentwood Mov/Stg.; Clark's Moving Co. dba Clarks Moving; Dahlenburg Trucking Co., Inc.; Ecton Movers, Inc.; Fallon Mov/Whsg.; Hall's Mov. Serv., Inc.; Hardin Mov/Del. Svc.; Shelby Hedger; H & O Transport, Inc.; Miller Mov/Stg., Inc.; Moyers Transfer, dba Leeman M. Moyer; Odle Movers (Robert Sadler, dba); Paducah Mov/Stg.; T. Peavler Mov. Sys., LLC; Sexton & Sons Mov/Stg., Inc.; Stevens Van Lines, Inc., dba Stevens Worldwide Van Lines; Whitis & Whitis, Inc., dba William H. Johnson Mov/Stg.; June Webb; Kimberley June Webb & Sharon Kay Webb (Webb Mov/Stg., dba). (CX 1; CX 2; Respondent's Admission ¶¶ 40, 41; JX 1 ¶¶ 24-26).

B. Kentucky Association Members Come to a Meeting of the Minds on Rates Through the Collective Tariff

28. Movers rely on the collective tariff to coordinate their rates. *See* ¶¶ 29 through 31, *infra*.

29. Where one Participating Carrier seeks to charge a different rate than what is prescribed in the tariff, the Kentucky Association brings pressure on the outlier to conform its rates. In early 1996, Boyd Movers sought an exception to the tariff whereby the firm would compensate the consumer more for damage done in a move. The Head of the Tariff Committee called Mr. Buddy Boyd of Boyd Movers and urged him not to file his exemption. The head of the Tariff Committee wrote that he spoke to Mr. Boyd and pressured him not to go against the will of the majority of Participating Carriers. The notes of the conversation state:

> Spoke to Buddy Boyd in regard to weakness of his justification for exception, and advised him that the $5,000.00 release liability was in conflict with provisions in the tariff.
>
> Also requested that put-off (delay) filing this exception until a later date, this will allow time to see how the majority of parties to the tariff adjust to these new rules and items applicable 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.

> He did say that, in his opinion, and in the interests of the customer, he would like to see a set of valuation charges (lower) that would apply to local moves. Also, would it be possible to increase the 60 cent release up to 80 cents.
>
> This is a matter for further review and discussion.

(CX 48; (Tolson, Dep. at 212-217)).

30. Likewise, Participating Carriers use the knowledge of the tariff rates to keep rates elevated. For instance, one mover increased his local rate (by submitting a Form 4286 to Kentucky Association), stating as his justification "Somewhat lower than our competition in this area." CX 49. Similarly, a mover filed a Form 4286 with Kentucky Association for a higher local rate stating as his justification, "Even with this rate increase we will still be the lowest priced hourly mover in the Owensboro area. We can raise our rates and still be in direct competition with the other moving companies." (CX 50).

31. Increases are implemented by majority vote. (CX 117 (Mirus, Dep. at 62-63; CX 15). Thus, there are instances where an increase is proposed but some movers "don't want an increase" because they "are getting along fine." (CX 117 (Mirus, Dep. at 163). If the movers opposing an increase in rates are in the minority, the majority decision will nevertheless result in an increase in the collective rates. (CX 16 - CX 19).

C. Movers Desire to Discount Rates

32. The collective rates in Kentucky Association's tariff exceed what many movers would otherwise charge; therefore, movers often seek to offer discounts from the collective rates. (CX 9). However, when this happens, other Participating Carriers complain to the Kentucky Association Board to prevent these discounts from occurring. (*See generally*, CX 129 (Tolson, Dep. at 34-40)). *See* ¶¶ 33 through 36, *infra*.

33. For example, one Participating Carrier, A. Arnold, complained that its competitor, Shelter Moving, was offering a 52% discount: "We at A. Arnold appreciate and respect fair and honest competition. However, in our regulated state we do not condone dishonest business practices." Mr. Debord, the KTC employee responsible for intrastate movers matters, sent Shelter Moving a warning letter telling him not to offer discounts. (CX 5; CX 6; CX 116 (Debord, Dep. II at 41); JX 1 ¶ 34).

34. Another mover, Rudy Miller, complained that his competitor, Berger, had offered a 30% discount from the tariff. (CX 7). Mr. Debord investigated this matter. (CX 116 (Debord, Dep. II at 44-45)).

35. Another mover alleged that Peters Movers was discounting 30% from the established

tariff. (CX 8). Mr. Debord conducted a rate compliance investigation of that firm but not in response to the letter. (CX 116 (Debord, Dep. II at 46-47)).

36. At times, consumers show estimates from one mover to another mover to try to get a lower price. If one of the movers presents the consumer with an estimate that includes a discount, Kentucky Association's officials will call the mover offering the discount and put a stop to it. (CX 129 (Tolson, Dep. at 37-39)).

IV. STATE STANDARD

37. All household goods movers must file a tariff with the Kentucky Department of Vehicle Regulation. KY. REV. STAT. ANN. § 281.680. (CX 53; Respondent's Answer to ¶ 3; JX 1 ¶ 5).

38. A Kentucky statute regulates 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. CX 51. A state official admits that this statute is intended to protect the interests of consumers, among others. (JX 1 ¶ 41).

39. The statute declares that it is state policy to have rates that provide "economical and efficient service." KY. REV. STAT. ANN. § 281.590. (CX 51). State officials acknowledge that this statute is intended to protect the interests of consumers, among others. (CX 116 (Debord, Dep. II at 31-32); CX 115 (King, Dep. at 17-18); JX 1 ¶ 42; *see also* CX 129 (Tolson, Dep. at 23)). The procedures established by the Department for setting rates "shall assure that respective revenues and costs of carriers engaged in the transportation of the particular commodity or service, for which rates are prescribed, are ascertained." KY. REV. STAT. ANN. § 281.680(4). (CX 53).

40. Under Ky. Rev. Stat. Ann. § 281.690(1), movers that make changes in their rates must "give notice of the proposed changes to other interested persons in such manner as the department directs in its rules and regulations." A Kentucky administrative regulation, 601 Ky. Admin. Reg. ("KAR") 1:070(c), contains the relevant requirements that must be followed: "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 and charges, the proposed rates and charges, and which shall state that any interested party may protest said increase by filing a protest with the Transportation Cabinet in accordance with its rules and administrative regulations."

41. If the Department believes that a proposed tariff is unreasonable, it may hold a hearing. KY. REV. STAT. ANN. § 281.690(2). (CX 53). A hearing must be held if the tariff is protested by an outside party. If, at the hearing, the Department finds that the tariff is

"unjust, unreasonable, or unjustly discriminatory," it sets an alternative rate that is "just and reasonable." KY. REV. STAT. ANN. § 281.690(2). (CX 53). If the Department finds the tariff "excessive," it may "determine the just and reasonable rate." KY. REV. STAT. ANN. § 281.695(1). (CX 52). A state official concedes that these statutes are intended to protect the interests of consumers, among others. (CX 116 (Debord, Dep. II at 33-34, 35-36); JX 1 ¶¶ 43-44; *see also* CX 129 (Tolson, Dep. at 25-26)).

42. Discounting from the tariff is not permitted; movers must charge the exact rate set by the tariff. KY. REV. STAT. ANN. § 281.685. (CX 53; Respondent's Answer to ¶ 3; *see also* CX 129 (Tolson, Dep. at 30-31)).

43. The acts and practices of Kentucky Association set forth in ¶¶ 7 through 36 have been and are now in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, as amended, and Kentucky Association is subject to the jurisdiction of the Federal Trade Commission. (JX 1 ¶ 51; Respondent's Answer to ¶ 6).

V. KTC PROVIDED MORE SUPERVISION OF RATES IN THE PAST

44. In the past, KTC did far more supervision of movers' rates. The KTC formerly required household goods movers to file annual financial reports but stopped requiring such financial reports. In years past, the KTC would get financial reports on firms' costs and expenses. The 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 with the firm's federal Interstate Commerce Commission filings, which could be 200 pages long. (CX 104; RX 129; CX 116 (Debord, Dep. II at 82-83, 86-89)).

45. In 1966, the Kentucky Association considered hiring a consultant to prepare information for the KTC. "It was decided that due to the amount of information which maybe required by D.M.T., it would be feasible and probably more economical to call in an outside rates firm . . . ." CX 107. 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." (CX 106).

46. In 1972, the KTC had a staff of three auditors and others who did "uniform cost stud[ies]" of for-hire carriers which involved a "mathematical formula" or a "statistical formula" that was used which was "very, very in depth or involved." There are no official cost studies done now for household goods movers. (CX 116 (Debord, Dep. II at 72-73)).

47. In the 1970's, the KTC routinely filled out a spreadsheet which contained the calculated operating ratio for all household goods movers. Those operating ratios varied from 92% for bigger carriers to over 100% for marginal carriers. (CX 116 (Debord, Dep. II at 88-89); JX 1 ¶ 48).

48. Years ago, Mr. Debord provided monthly written reports to the Commissioner which would analyze rate applications. (CX 116 (Debord, Dep. II at 74-76)).

49. But that changed. Some time in the 1980's, the Commissioner told him "not to bother them with those things" (CX 116 (Debord, Dep. II at 76)) and "Don't bother us with that." (CX 116 (Debord, Dep. II at 77)); JX 1 ¶ 47).

VI. CURRENT LACK OF SUPERVISION

50. The evidence demonstrates that the KTC currently fails to actively supervise the Kentucky Association because it commits very limited resources to tariff issues, does not receive reliable data, does not employ procedural safeguards such as issuing written decisions or holding hearings, fails to analyze requests for rate increases, and does not analyze rates under any state standard. *See* ¶¶ 51 through 102, *infra*.

51. The Kentucky Association has admitted that the state does not supervise it. In a letter to Complaint Counsel, Kentucky Association's counsel during the investigation of this matter wrote: "The state has never formally or informally commented, discussed, criticized, or audited any of the KHGCA filings under any Kentucky statute or regulation. And, the state does not grant official or unofficial conclusions regarding the tariff besides stamping each of the filings as approved." (CX 110; CX 109). The letter was written by a lawyer at the law firm of Liebman & Liebman. That firm has been long-time counsel to the Kentucky Association. (CX 129 (Tolson, Dep. at 242-243)). Lawyers at the firm have extensive experience ("perhaps even on almost a daily basis") practicing before the KTC on matters relating to household goods movers including tariff issues. (CX 129 (Tolson, Dep.) at 236-237; 242-245)). The letter was written at a time when the law firm of Liebman & Liebman was acting as counsel for the Kentucky Association regarding the Federal Trade Commission's investigation. (CX 129 (Tolson, Dep.) at 218)). Prior to Mr. Tolson's deposition in December of 2003, noone from the Kentucky Association took issue with the contents of the Liebman & Liebman letter. (CX 129 (Tolson, Dep.) at 220)).

A. The KTC Commits Very Limited Resources to Tariff Issues

52. Ms. Denise King has been Director of the Division of Motor Carriers of the KTC since May, 2003. At the time of her deposition, Ms. King reported to Mr. William M. Bushart, Commissioner of the Department of Vehicle Regulations. Commissioner Bushart reported to Deputy Secretary of Transportation Clifford Linkes, who in turn reported

directly to Secretary of Transportation James Codell, III. (JX 1 ¶ 29).

53. Ms. King spends one to two percent of her time on household goods matters. (CX 115 (King, Dep. at 14-15)). She has never given any written or oral instructions to Mr. Debord on how he should determine whether the rates contained in the Kentucky Association's tariff meet the state's statutory standards. (CX 115 (King, Dep. at 20-23)).

54. Ms. King has not given Mr. Debord any instruction on how to evaluate rate increase proposals and she has no role in determining whether to permit a rate increase to take effect; she has delegated such decisions to Mr. Debord. (CX 115 (King, Dep. at 29-31)).

55. Ms. King has never discussed with her boss the rates contained in the tariff, the standard to be used when reviewing rates and she has never been given any written instructions by her boss as to how she should analyze the rates contained in the tariff. In fact, prior to having discussions with Mr. Bushart about the litigation of this matter, Ms. King had never discussed household goods movers issues with her boss. (CX 115 (King, Dep. at 39-40)).

56. Ms. King has no standards for determining whether rates meet the statutory goal of being not being unjust or unreasonable. Ms. King has never discussed any such standard with Mr. Debord. Ms. King also is not aware of any standards that her predecessors used to review household goods carriers' rates. (CX 115 (King, Dep. at 43-44)).

57. The person at the KTC responsible for intrastate movers matters is William Debord. He has had responsibility for household goods matters since 1979. Mr. Debord is an "Administrative Specialist 3," employed by the Division of Motor Carriers. Mr. Debord works part-time: 100 hours per month. (CX 116 (Debord, Dep. I at 11-12); JX 1 ¶ 30). No KTC employees report to Mr. Debord. (CX 116 (Debord, Dep. II at 26); JX 1 ¶ 30).

58. Mr. Debord is responsible for more than household goods movers. He also has responsibility for tariff filings and other matters involving passenger carriers such as taxis, regular route busses, airport limousines, airport shuttles, charter bus operation as well as trucking matters in general. (CX 116 (Debord, Dep. II at 15); JX 1 ¶ 31). A document likely written by Mr. Debord's boss states that Mr. Debord spent 60% of his time on household goods matters. (CX 55; CX 116 (Debord, Dep. II at 25-26)).

59. Mr. Debord spends "a very high percent," over half, of his time performing household goods compliance audits. (JX 1 ¶ 33; CX 116 (Debord, Dep. II at 21)). In addition, Mr. Debord spends time investigating illegal movers, handling complaints about damage caused by movers, conducting seminars, updating power of attorney forms, and handling inquiries from the public. (CX 116 (Debord, Dep. II at 19, 21, 23, 24); JX 1 ¶ 31).

60. Mr. Debord does not get any guidance from his supervisor about tariff issues. He has

authority over such matters and has not reported to anyone in that regard since 1979. (CX 116 (Debord, Dep. II at 26-27); CX 115 (King, Dep. at 20-21; 23; 30-31)).

B. The KTC Does Not Issue a Written Decision

61. Kentucky uses a negative option approach to tariff filings. Under the law, if a tariff is filed and the state takes no action, the tariff is permitted to go into effect. KY. REV. STAT. ANN. § 281.690. Thus, when the Kentucky Association wants to change the tariff - to raise rates, for example - it informs Mr. Debord of the change, and he stamps the document requesting the change. (CX 108; *see also* RX 16 - RX 48). If the state does not act within 30 days, the change becomes effective. As Mr. Debord testified, "no action is approval." (CX 116 (Debord, Dep. II at 58-60)). As he further testified, "So, after the thirty days notice, then it becomes an approved tariff." (CX 116 (Debord, Dep. II at 60)).

62. The KTC does not issue a written decision when it permits rate increases to go into effect. (CX 116 (Debord, Dep. II at 77-78); CX 115 (King, Dep. at 34); CX 129 (Tolson, Dep. at 56, 130)). It does not set forth in writing any analysis of the collective rates contained in the tariff. (CX 129 (Tolson, Dep. at 130)).

C. The KTC Does Not Hold Hearings

63. Aside from the hearings in the 1950's or 1960's when the tariff was first developed, the state has not held hearings to examine or analyze the collective rates contained in the Kentucky Association tariff. (CX 116 (Debord, Dep. I at 49); CX 116 (Debord, Dep. II at 67-69); CX 115 (King, Dep. at 33); JX 1 ¶ 45).

64. The only way the KTC could formally reject the Kentucky Association's collective tariff rates would be by setting them for a hearing, which the KTC has not done. KY. REV. STAT. ANN. § 281.690(2). (CX 53; CX 116 (Debord, Dep. II at 92-95); CX 129 (Tolson, Dep. at 73-74)).

65. The KTC does not receive any input from groups advocating on behalf of consumers. (CX 116 (Debord, Dep. II at 109-110)). In fact, in the limited hearings that are held on issues involving individual moving firms, the state does not allow people in the hearing room unless they represent a mover. CX 117 (Mirus, Dep. at 98-99. The Kentucky Association Board meetings are not publicly announced, and no group or individual representing consumers have ever attended a Board meeting. (CX 129 (Tolson, Dep. at 145)).

D. The KTC Does Not Receive Reliable Data

66. Household goods movers do not routinely submit balance sheets and income statements to the KTC. (CX 116 (Debord, Dep. II at 53-54); CX 115 (King, Dep. at 32); CX 129

Tolson, Dep. at 48)). KTC does still receive "a limited number" of movers' financial statements on a voluntarily basis. However, Mr. Debord testified that such filings are so unreliable that they could "misrepresent the industry's economic conditions." (CX 116 (Debord, Dep. II at 82-83)).

67. When Mr. Debord does a tariff compliance investigation he looks at certain documents that movers keep on individual moves. He does not routinely look at balance sheets, income statements, payroll documents, documents that show information about cost of capital or documents that would allow him to analyze movers' profitability. (CX 116 (Debord, Dep. II at 78-81)).

68. The KTC does not get any formal data on the percentage of movers' interstate moves versus their intrastate moves. (CX 116 (Debord, Dep. II at 84-85); JX 1 ¶ 46).

69. Nor does the Kentucky Association compile business data on movers' costs. (CX 129 (Tolson, Dep. at 85); CX 117 (Mirus, Dep. at 78-79). If a Participating Carrier wants to file for an exception or make a change in its rate, the Kentucky Association requires the carrier to fill out a Form 4268 and send it to the Chairman of the Tariff Committee. (CX 12 - CX 13; CX 116 (Debord, Dep. II at 62-63)). The Form 4268's that are sent by Participating Carriers to the Kentucky Association's Tariff Committee are not routinely filed with the KTC. (CX 116 (Debord, Dep. II at 63-65)). Mr. Debord has never given the Kentucky Association any formal instructions about what information should be on the Form 4268. (CX 116 (Debord, Dep. II at 66-67)); *see also* CX 129 (Tolson, Dep. at 66)).

70. The information contained on the Form 4268's in the Kentucky Association's files are devoid of data. Many Participating Carriers have changed their rates without even filing out the Form 4268 or the information contained on the forms that are filled out is minimal. Many simply assert that costs have risen or that the Participating Carrier wishes to raise its rates. (CX 57 - CX 103; JX 1 ¶ 28; CX 129 (Tolson, Dep. at 65)).

E. The KTC Does Not Require Justification for Rate Increases

71. Virtually no justification is provided to the KTC in support of movers' requests for rate increases. Kentucky Association does not submit, nor does the KTC require, any business records, economic study, or cost justification data. (CX 116 (Debord, Dep. II at 72, 73-74, 109, 111-112, 115-116, 119-120, 124-126)). For instance, in December 2000, Kentucky Association sought an 8% rate increase in Supplement 66. The only written justification for that increase was a cover letter. (RX 169). Mr. Debord characterized that letter as an "extra courtesy" and said that normally tariff filings were not accompanied by such a justification letter. (CX 116 (Debord, Dep. II at 97-101)). Mr. Debord also could not recall any oral statements justifying this rate increase made during the time the Kentucky Association was preparing the rate increase. (CX 116 (Debord,

Dep. II at 102-103)). The rate increase was allowed to go into effect. (CX 116 (Debord, Dep. II at 105)).

72. As another example, in 1999 Kentucky Association filed Supplement 61, seeking a 10% increase in intrastate rates. There was no written justification provided to the state other than the cover letter which discussed a 5% interstate increase. (RX 164; CX 116 (Debord, Dep. II at 112)). Mr. Debord testified that he did not "recall this particular event." (CX 116 (Debord, Dep. II at 113)). The rate increase was allowed to go into effect. CX 17.

73. Mr. Debord was unable to recall any specific justifications provided in support of any general rate increases. (CX 116 (Debord, Dep. II at 115-116)).

74. In Supplement 71, Kentucky Association filed for a 5% increase on specific items contained in the tariff, such as the added cost of moving a car which increased from $128.30 to $134.70. Mr. Debord does not recall the justification for that increase. (CX 116 (Debord, Dep. II at 119-120)). The rate increase was allowed to go into effect. (CX 10).

F. The KTC Does Not Analyze Requests for Rate Increases or Rates

75. Even during the time Kentucky calculated operating ratios, there was no written policy which set forth an acceptable level. Nor did the state have a numerical goal for an acceptable operating ratio, "[A]s far as official policy stating that to allow ninety-five or ninety-three percent ratio - - operating ratio, we never had that." Nor did the state mandate rates as was done in many states. (CX 116 (Debord, Dep. II at 95-96); JX 1 ¶ 49).

76. The KTC does not have any standard or formula that it uses to determine whether a rate increase is appropriate. (CX 129 (Tolson, Dep. at 98-99)). Nor does the KTC have any "particular standard or formula" that it applies in determining whether to permit rate increases to go into effect. (CX 116 (Debord, Dep. II at 105-106)). Similarly, the KTC does not have any way of knowing whether a rate increase will increase movers' profits. (CX 116 (Debord, Dep. II at 105-106)).

77. KTC does not have any mathematical or numerical formula for determining whether movers' rates comply with the statutory standards. (CX 129 (Tolson, Dep. at 80)). Mr. Debord was asked whether there were any written standards for determining whether rates were "reasonable" under Kentucky statutes. He testified that "there's not a written rule within the Cabinet that requires specific standards to be followed." (CX 116 (Debord, Dep. II at 37)). Similarly, Mr. Debord testified that KTC did not have any way of analyzing whether rate increases would result in rates being "excessive." (CX 116 (Debord, Dep. II at 108-109)).

78. In one instance a non-member, Apartment Movers, filed for individual rates. Mr. Debord was asked about whether he had any standard for deciding whether to allow separate rates that had been submitted by a firm to go into effect if they were "X Percent higher" than other firms' rates and Mr. Debord testified that "we don't have any specific standards documented." (CX 116 (Debord, Dep. II at 123-124)).

79. The Planes moving company filed an exception whereby it charges 20% more than the highest intrastate rates in the tariff. Another firm, Weil-Thoman, filed an exception whereby it charges 38% more than the highest intrastate rates in the tariff. In neither instance could Mr. Debord identify a standard that the KTC used to determine whether these rates complied with the statutory requirement that the rates not be "excessive." (CX 116 (Debord, Dep. II at 141-145)). KTC permitted both of these firms to charge these elevated rates. (CX 2 at KHGCA 7038).

80. Similarly, the Kentucky Association does not have any formula it uses in determining what level of rate increase to seek. (CX 129 (Tolson, Dep. at 133, 142)). Nor does the Kentucky Association have any assumptions concerning what level of rate increase the KTC is likely to allow to go into effect. (CX 129 (Tolson, Dep. at 133)).

VII. KTC DOES NOT SUPERVISE RATES BASED ON INFORMAL DISCUSSIONS WITH MOVERS

81. Mr. Debord's testimony about informal discussions he has with movers is devoid of specific information concerning those discussions. For instance, at his deposition, Mr. Debord was shown a cover letter dated December 1, 2000 (RX 169) that accompanied an 8% general rate increase. He was asked about any oral statements made to justify this increase. He testified, " I can't remember specific statements or points of justification." (CX 116 (Debord, Dep. II at 101-102)). Mr. Debord was also asked about a cover letter dated December 1, 1999 (RX 164) for a 10% rate increase. Mr. Debord was asked what other factors went into his decision to let that rate increase take effect. He testified, "I don't remember this particular event." (CX 116 (Debord, Dep. II at 111-113)).

82. After being asked about these two general rate increases, Mr. Debord was given the opportunity to testify about <u>any</u> general rate increase where he did recall something specific. Mr. Debord, testified, "But, for me to recall that right now, I'm not able to do so." (CX 116 (Debord, Dep. II at 116)).

83. So Mr. Debord was asked about specific rate increases. In Supplement 71, which was issued March 1, 2002, Kentucky Association filed for a 5% increase on the intrastate rate and on additional items contained in the tariff, such as the added cost of moving a car which increased from $128.30 to $134.70. (CX 10; CX 12) Mr. Debord, when asked about the justification for that increase, replied, "[S]pecifically what the – that line item justification, I can't recall." (CX 116 (Debord, Dep. II at 120)). Mr. Debord was also

asked about the justification for allowing two firms to charge, respectively, 20% and 38% more than the highest intrastate rates in the tariff. Mr. Debord testified, "I don't specifically remember those" and "I just -- I don't remember either one." (CX 116 (Debord, Dep. II at 142)).

84. Mr. Tolson's testimony about informal discussions KTC may have had with movers is also vague. Mr. Tolson testified that at Board Meetings movers would verbally estimate their cost increases. (CX 129 (Tolson, Dep. at 150)). Mr. Tolson was unable to provide details on discussions that took place at Board Meetings where the Kentucky Association approved specific increases. When asked about an 8% rate increase in 1997 Mr. Tolson stated, "I wasn't involved in the decision." (CX 129 (Tolson, Dep. at 139)). When asked about a 10% increase in 1999 Mr. Tolson stated, "I don't recall the exact language that was used in the discussions." (CX 129 (Tolson, Dep. at 140-141)). When asked about whether he was involved in justifying to the KTC the 10% increase in 2000 Mr. Tolson testified, "I don't recall that I was specifically [involved]." (CX 129 (Tolson, Dep. at 143)). When given an opportunity, generally, to testify to any instances where he remembered a rate increase being justified to KTC officials, Mr. Tolson could not do so. (CX 129 (Tolson, Dep. at 155)).

85. Mr. Tolson's testimony about informal communications from Mr. Debord to movers at Board Meetings about permissible rate increases is also vague. Not only could Mr. Tolson not remember any specific instances where Mr. Debord made such a statement, he also could not recall the rate level in question or what year such discussion took place. (CX 129 (Tolson, Dep. at 239-240)).

86. Mr. Mirus's testimony about informal discussions between Mr. Debord and movers is totally lacking in specificity. When asked to describe how he justified why he thought the state should acquiesce in a rate increase, Mr. Mirus stated that "he could have a conversation with [Mr. Debord] advising him as to what the board wishes to do, what the board of directors wishes to do, and more or less just to get his feeling on it." CX 117 (Mirus, Dep. at 88)). In response to a request to describe discussions with Mr. Debord about possible rate increases, Mr. Mirus said: "Well, I would contact Mr. Debord and tell him as a result of a board meeting the board proposed a possible rate increase and that we would ask him what his feelings were on it before we got too deeply into it, because there was money involved, et cetera, and see what his feelings were on it. And if he felt it was, and nicely he would ask us what is your justification, and we would have something to back it up." (CX 117 (Mirus, Dep. at 151-152)).

87. Mr. Mirus did not provide Mr. Debord with detailed justifications or business documents to justify rate increases. (CX 117 (Mirus, Dep. at 153-154)). Instead, Mr. Mirus would "tell [Mr. Debord] what went on at the board meeting and that the membership, the general membership felt they needed an increase in their charges in order to offset the increase, whether it be in operation cost or whether it be in insurance,

whichever the case may be." (CX 117 (Mirus, Dep. at 153)). In response to Mr. Mirus's statement that costs had gone up, Mr. Mirus testified that "Many times [Mr. Debord] would say file the tariff and we will take it from there." (CX 117 (Mirus, Dep. at 153)).

88. Mr. Mirus' testimony fails to recall discussions or justifications for significant rate or item increases. Mr. Mirus could not recall having a discussion with anyone at the state about a five percent across-the-board increase in the tariff submitted on March 1, 2002. (CX 117 (Mirus, Dep. at 60)). When asked if he had discussions with anyone at the KTC about the appropriateness of having or the appropriate dates for charging peak season rates, Mr. Mirus did "not remember going into any more particulars with them, other than advising them it was going to happen." (CX 117 (Mirus, Dep. at 196-197)). Mr. Mirus could also not recall having any discussions with anyone at the KTC about adding a new schedule (G) to Section 2 of the tariff, which allowed mover to charge the rates in schedule F plus 15 percent. (CX 117 (Mirus, Dep. at 203-204.)). Mr. Mirus did not recall any discussions with anyone at the KTC about two increases in item 110 of the tariff, which increased the price of packing boxes 25 percent in 1995. (CX 117 (Mirus, Dep. at 209-211)).

89. Mr. Mirus could not recall the last time Mr. Debord recommended a lower percentage increase in the tariff. (CX 117 (Mirus, Dep. at 155)). Nor did Mr. Mirus know the basis for such a recommendation by Mr. Debord. (CX 117 (Mirus, Dep. at 155)).

90. The minutes of Kentucky Association Board meetings show that the Board has discussed, and in some cases decided to propose, a rate increase when no KTC employee was present at the meeting. (CX 14, CX 15, CX 19, CX 20, CX 25, CX 26, CX 47; CX 129 (Tolson, Dep. at 138-140); CX 117 (Mirus, Dep. at 170)). Mr. Tolson testified that it was "very possible" that rate increases were submitted to the KTC without prior input from Mr. Debord. (CX 129 (Tolson, Dep. at 241-242)).

91. Mr. Debord testified that he learns the bases for planned rate increases at Kentucky Association meetings. (CX 116 (Debord, Dep. I at 49-50)). However, movers do not disclose details about their costs, revenues or profit margins at Kentucky Association meetings. Mr. Tolson testified about the lack of specific information disclosed in the verbal discussions that take place at Kentucky Association's board meetings: "you have to understand that these are -- men and women are competitors with one another, too, so that a lot of, you know, exact detailed financial information is not made available to -- for public consideration at that point. So, again, it's in terms of generalities . . . ." (CX 129 (Tolson, Dep. at 133)). For instance, movers would not disclose at a meeting that KTC officials attend, the exact wages they pay their workers. (CX 129 (Tolson, Dep. at 123)). Nor would movers disclose their actual cost of obtaining supplies such as boxes. (CX 129 (Tolson, Dep. at 127)). They would also not disclose their margins on selling a box to a customer. (CX 129 (Tolson, Dep. at 127)). During Kentucky Association meetings,

Associate members of the Kentucky Association, who sell goods or services to movers, also do not divulge actual invoices showing what movers paid for their goods or services. (CX 129 (Tolson, Dep. at 238-239)).

92. Contemporary documents do not show discussions with Mr. Debord about proposed rates, only that he indicates his willing to allow the rates proposed by the Kentucky Association to go into effect. (RX 101; RX 106; RX 178; RX 189; RX 190; CX 129 (Tolson, Dep. at 97-98)).

93. When the intrastate rates are increased, the tariff has many rates which are adjusted upward. For instance, each rate table has 240 prices on it and there are seven rate tables. For a 5% rate increase such as was contained in Supplement 71, the Kentucky Association prepares the new tables with the upwardly adjusted rates. Mr. Debord only checks "three or four" numbers per page to see if the rate increase has been calculated accurately. (CX 116 (Debord, Dep. II at 137-140)). And he admitted in his testimony that, "I'm sure there might be some math errors that arrive based upon not checking and auditing." (CX 116 (Debord, Dep. II at 140)).

VIII. RESPONDENT CANNOT RELY ON KTC'S REVIEW OF INTERSTATE TARIFFS

94. While the Kentucky Association at times mentions increases in interstate rates when implementing increases in intrastate rates, interstate rates are not comparable. First, there is no evidence in the record indicating how the interstate rate levels are established. (CX 129 (Tolson, Dep. at 193-194)). As Mr. Debord testified, the rates are established by a private rate publishing agency and he did not know how that organization established the interstate rates, "What format they use, how they come up with that, I would not know." (CX 116 (Debord, Dep. II at 131-133)).

95. Moreover, interstate rates are not approved by the federal government. Indeed, as Mr. Debord testified, those private rates do not even "have to be filed" with the federal government. (CX 116 (Debord, Dep. II at 132)).

96. In addition, movers are permitted to discount from the interstate tariff. And they routinely do discount off those rates. (CX 116 (Debord, Dep. II at 127-128)). As Mr, Debord testified, "The mover can elect to discount whatever they want to." "It's again, whatever they want to charge. (CX 116 (Debord, Dep. II at 128)). Mr. Debord testified that he had seen a wide variety of discounts from the interstate rate including discounts as high as 70% and 75% from the interstate rate. (CX 116 (Debord, Dep. II at 128)). Mr. Debord characterized his estimate of the average level of discounting that occurs, as a "guess" of twenty percent, which is much lower than the level of discounts movers indicate are given off the interstate tariff. (*Compare,* CX 116 (Debord, Dep. II at 129); CX 111 - CX 113).

97. Mr. Debord testified that he is "not aware of any" industry or government publication that tracks the actual cost of interstate moves as compared to the rates published in the interstate tariff. He also has not discussed that issue with movers. Mr. Debord said that "It would be very difficult to compare" the rates in the Kentucky Association tariff with the rates in the interstate tariff. "I have not made a study in that regard." (CX 116 (Debord, Dep. II at 129-131); JX 1 ¶ 50).

98. Similarly, Mr. Debord cannot compare the actual rates charged for interstate moves with the rates contained in the Kentucky Association tariff. (CX 116 (Debord, Dep. II at 131)).

99. The interstate tariff also is not established using the standards set out in the Kentucky statutes. (CX 116 (Debord, Dep. II at 133-134)). As Mr. Debord testified, "my understanding, their goal is to let the industry charge as they wish, charge whoever they wish, whatever they wish and discriminate as they see fit. (CX 116 (Debord, Dep. II at 133-134)).

100. The exhibits show that there is no correlation between the increases in the interstate rate and the increases in the intrastate rate. For example, RX 164 is a December 1, 1999 cover letter for Supplement 61. The letter states that the interstate rate went up 5% but the Kentucky Association sought, and received, a 10% increase in the intrastate rates. Similarly, RX 169 is a December 1, 2000 cover letter for Supplement 66. That letter states that interstate rates went up 5% but the Kentucky Association filed for, and received, an increase of 8% in the intrastate rates.

101. KTC also cannot rely on the tariffs in use in other states to review the rates in the Kentucky Association tariff. First, KTC does not routinely get tariffs from other states. (116 CX (Debord, Dep. at 114-115)). In addition, there is no indication in the record establishing how the rate levels are set in the other states' tariffs. CX 129 (Tolson, Dep. at 114-115)).

IX. RESPONDENT CANNOT RELY ON TESTIMONY ABOUT THE ULTIMATE LEGAL ISSUE

102. Mr. Debord was asked to testify about the main legal issue in this matter. He gave the following testimony in response to improper leading questions:

> Q: Does the Kentucky Transportation Cabinet actively supervise the rate setting process as far as collectively set rates are concerned?
>
> Mr. Abrahamsen: Objection. Calls for a legal conclusion.
>
> Q: You can answer that question.
>
> A: I believe so, yes.

Q: Do you have any doubt?

A: No.

(CX 116 (Debord, Dep. I at 83-84)). The Court should accord no weight to this testimony about the ultimate legal issue in the case.

CONCLUSIONS OF LAW

1. The Federal Trade Commission has jurisdiction over the subject matter of this proceeding and over Respondent Kentucky Association herein.

2. The acts and practices charged in the Complaint in this matter took place in or affecting commerce within the meaning of the Federal Trade Commission Act, as amended.

3. Respondent Kentucky Association, its members, officers and directors, are engaged in a continuing combination and conspiracy to fix rates charged by motor common carriers for the intrastate transportation of property within the Commonwealth of Kentucky.

4. The acts and practices of Kentucky Association in the Commonwealth of Kentucky, as set forth in paragraph 3 above, are to the prejudice and injury of the public and constitute unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act, as amended.

5. The state action defense is an affirmative defense to an antitrust action. The Respondent bears the burden of establishing the defense.

6. Kentucky Association's activities in the Commonwealth of Kentucky, as set forth in paragraphs 3 and 4 above, are not exempt from Section 5 of the Federal Trade Commission Act by reason of the state action defense. Kentucky Association's activities were not "actively supervised" by the Commonwealth of Kentucky through the Kentucky Transportation Cabinet ("KTC").

7. Respondent has asserted that KTC officials and Kentucky Association members had informal discussions about rates and rate levels. The evidence concerning such discussions consists of general assertions that such discussions occurred but lacks specifics of when and where such discussions occurred, the content of the discussions, or details of what rates or rate increases were the subject of such discussions. This evidence falls far short of establishing active supervision.

8. Respondent has not established that the KTC took the regulatory steps necessary to make the collective rates in Respondent Kentucky Association's tariff the state's own. KTC did not receive reliable revenue and expense data from movers. KTC did not audit movers' financial data. KTC did not review studies of the moving industry. KTC did not require cost justification data supporting requests for rate increases. KTC did not provide public notice of proposed rate increases. KTC did not hold hearings to consider proposed rate increases. KTC received only movers' input on proposed rate increases. KTC did not issue a written opinion explaining its allowance of rate increases. KTC did not develop quantitative measures for determining whether rates satisfied the state's statutory standards for appropriate rate levels. For instance, KTC did not calculate movers' profits, nor did it determine movers' operating ratios.

9. The notice of contemplated relief issued with the Complaint in this matter sets forth provisions appropriate and warranted to remedy Respondent Kentucky Association's unlawful activities.

Respectfully submitted,

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Dated: April 2, 2004

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

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

PROPOSED ORDER

I.

IT IS ORDERED that, for the purposes of this Order, the following definitions shall apply:

A. "Respondent" or "KHGCA" means the Kentucky Household Goods Carriers Association, Inc., its officers, executive board, committees, parents, representatives, agents, employees, successors and assigns;

B. "Carrier" means a common carrier of property by motor vehicle;

C. "Intrastate transportation" means the pickup or receipt, transportation and delivery of property hauled between points within the Commonwealth of Kentucky for compensation by a carrier authorized by the Kentucky Transportation Cabinet's Division of Motor Carriers to engage therein;

D. "Member" means any carrier or other person that pays dues or belongs to KHGCA or to any successor corporation;

E. "Tariff" means the publication stating the rates of a carrier for the transportation of property between points within the Commonwealth of Kentucky, including updates, revisions, and/or amendments, including general rules and regulations;

F. "Rate" means a charge, payment or price fixed according to a ratio, scale or standard for direct or indirect transportation service;

G. "Collective rates" means any rate or charge established under any contract, agreement,

understanding, plan, program, combination or conspiracy between two or more competing carriers, or between any two or more carriers and Respondent; and

H. "Person" means both natural persons and artificial persons, including, but not limited to, corporations, unincorporated entities, and governments.

II.

IT IS FURTHER ORDERED that Respondent, its successors and assigns, and its officers, agents, representatives, directors and employees, directly or through any corporation, subsidiary, division or other device, shall forthwith cease and desist from entering into and within 120 days after service upon it of this Order cease and desist from adhering to or maintaining, directly or indirectly, any contract, agreement, understanding, plan, program, combination or conspiracy to fix, stabilize, raise, maintain or otherwise interfere or tamper with the rates charged by two or more carriers for the intrastate transportation of property or related services, goods or equipment, including, but not limited to:

1. Knowingly preparing, developing, disseminating or filing a proposed or existing tariff that contains collective rates for the intrastate transportation of property or other related services, goods or equipment;

2. Providing information to any carrier about rate changes considered or made by any other carrier employing the publishing services of Respondent prior to the time at which such rate change becomes a matter of public record;

3. Inviting, coordinating or providing a forum (including publication of an informational bulletin) for any discussion or agreement between or among competing carriers concerning rates charged or proposed to be charged by carriers for the intrastate transportation of property or related services, goods or equipment;

4. Suggesting, urging, encouraging, persuading or in any way influencing members to charge, file or adhere to any existing or proposed tariff provision which affects rates, or otherwise to charge or refrain from charging any particular price for any services rendered or goods or equipment provided;

5. Maintaining any rate or tariff committee or other entity to consider, pass upon or discuss intrastate rates or rate proposals; and

6. Preparing, developing, disseminating or filing a proposed or existing tariff containing automatic changes to rates charged by two or more carriers.

III.

IT IS FURTHER ORDERED that Respondent shall, within 120 days after service upon it of this Order:

1. Cancel all tariffs and any supplements thereto on file with the Kentucky Transportation Cabinet's Division of Motor Carriers that establish rates for transportation of property or related services, goods or equipment by common carriers in the Commonwealth of Kentucky and take such action as may be necessary to effectuate cancellation and withdrawal;

2. Terminate all previously executed powers of attorney and rate and tariff service agreements, between it and any carrier utilizing its services, authorizing the publication and/or filing of intrastate collective rates within the Commonwealth of Kentucky;

3. Cancel those provisions of its articles of incorporation, by-laws and procedures and every other rule, opinion, resolution, contract or statement of policy that has the purpose or effect of permitting, announcing, stating, explaining or agreeing to any business practice enjoined by the terms of this Order; and

4. Amend its by-laws to require members of KHGCA to observe the provisions of the Order as a condition of membership in KHGCA.

IV.

IT IS FURTHER ORDERED that, within fifteen (15) days after service upon it of this Order, Respondent shall mail or deliver a copy of this Order, under cover of the letter attached hereto as "Appendix," to each current member of Respondent engaged in the transportation of household goods, and for a period of three (3) years from the date of service of this Order, to each new member engaged in the transportation of household goods within ten (10) days of each such member's acceptance by Respondent.

V.

IT IS FURTHER ORDERED that Respondent notify the Commission at least thirty (30) days prior to any proposed change in Respondent, such as dissolution, assignment or sale resulting in the emergence of a successor corporation, or any other proposed change in the corporation which may affect compliance obligations arising out of the Order.

VI.

IT IS FURTHER ORDERED that Respondent shall file a written report within six (6) months

of the date of service of this Order, and annually on the anniversary date of the original report for each of the five (5) years thereafter, and at such other times as the Commission may require by written notice to Respondent, setting forth in detail the manner and form in which it has complied with this Order.

VII.

IT IS FURTHER ORDERED that this Order shall terminate twenty (20) years from the date on which it was issued by the Commission.

APPENDIX

(Letterhead of the Kentucky Household Goods Carriers Association, Inc.)

Dear Member:

The Federal Trade Commission has ordered the Kentucky Household Goods Carriers Association, Inc. ("KHGCA") to cease and desist its tariff and collective rate-making activities. A copy of the Commission Decision and Order is enclosed.

In order that you may readily understand the terms of the Order, we have set forth its essential provisions, although you must realize that the Order itself is controlling, rather than the following explanation of its provisions:

(1) The KHGCA is prohibited from engaging in any collective rate-making activities, including the proposal, development or filing of tariffs which contain any collectively formulated rates for intrastate transportation services. Each member carrier must independently set its own rates for transportation of property or related services, goods or equipment between points within the Commonwealth of Kentucky, but may use KHGCA as a tariff publishing agent.

(2) KHGCA is prohibited from providing a forum for its members for the purpose of discussing rates.

(3) KHGCA is prohibited from urging, suggesting, encouraging or in any way attempting to influence the rates members charge for their intrastate transportation services; KHGCA may not provide non-public information to any carrier about rate changes ordered by another carrier.

(4) KHGCA is prohibited from maintaining any rate or tariff committee which discusses or formulates intrastate rates or rate proposals.

(5) KHGCA is given 120 days to cancel all tariffs and tariff supplements currently in effect and on file with the Kentucky Transportation Cabinet's Division of Motor Carriers which were prepared, developed or filed by KHGCA.

(6) KHGCA is required to amend its by-laws to require its members to observe the provisions of the Order as a condition of membership in KHGCA.

Sincerely yours,

[appropriate KHGCA officer]

Appendix A

INDEX OF TRIAL EXHIBITS[1]

Joint Exhibit

JX NUMBER	DOCUMENT DESCRIPTION	Page Admitted (Pre-Trial Transcript) 03/16/04	Page Discussed (Trial Transcript) 03/16/04
JX 1	Stipulations of Law, Fact and Authenticity	7	

Complaint Counsel's Exhibits

CX NUMBER	DOCUMENT DESCRIPTION	Page Admitted (Pre-Trial Transcript) 03/16/04	Page Discussed (Trial Transcript) 03/16/04
CX 1	Kentucky Household Goods Carriers Association - Tariff No. 5 - Local and distance rates on household goods between from and within all points in Kentucky (KTC 1892 - KTC 2207)	7	31, 32
CX 2	Kentucky Household Goods Carriers Association - Tariff No. 5 - Local and distance rates on household goods between from and within all points in Kentucky (KHGCA 6931 - KHGCA 7054)	7	7, 8, 19, 32
CX 3	Call of Meeting of Incorporators (KHGCA 6934 - KHGCA 6962)	7	
CX 4	Example of a power of attorney (A & M Moving & Storage Services, Inc.) (KHGCA - 7825)	7	
CX 5	Letter from Bill Debord to Tom Shetler with handwritten notes attached (KTC 1267 - KTC 1272)	7	
CX 6	Letter from William Lally to Taylor enclosing March 30th letter from Bruce Narrod and a Shetler Moving & Storage's bill estimate KTC 1274 - KTC 1277)	7	
CX 7	Fax memo from Rudy Miller to Bill Lally attaching bid estimate (KTC 0476 - KTC 0477)	7	

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[1] No exhibits were admitted *in camera*. (Trial Volume 1 at 5 (March 16, 2004); *see* Rule 3.46(b)(7) of the Commission's Rules of Practice). No exhibits summarize the contents of any listed exhibit. (*See* Rule 3.46(b)(5) of the Commission's Rules of Practice).

CX NUMBER	DOCUMENT DESCRIPTION	Page Admitted (Pre-Trial Transcript) 03/16/04	Page Discussed (Trial Transcript) 03/16/04
CX 8	Letter from William Lally to W.C. Debord re. Illegal Movers (KTC 1254 - 1259)	7	
CX 9	General Membership Meeting Minutes (KHGCA 3681 - KHGCA 3682)	7	
CX 10	Tariff Committee Annual Report (KTC 0624 - KTC 0625)	7	11
CX 11	Tariff Advisory Bulletin # 02-1 (KTC 0584 - KTC 0585)	7	
CX 12	Tariff Bulletin - Advance Notice (KHGCA 0923 - KHGCA 0924)	7	
CX 13	Tariff Bulletin - Supplement #41 (KHGCA 4734 - KHGCA 4735)	7	
CX 14	Kentucky Household Goods Carriers Association Board of Directors Meeting Minutes (KHGCA 0342 - KHGCA 0343)	7	
CX 15	Kentucky Household Goods Carriers Association Board of Directors Meeting Minutes (KHGCA 0330 - KHGCA 0332)	7	
CX 16	Tariff Committee Annual Report (KHGCA 0306 - KHGCA 0307)	7	
CX 17	Instruction Sheet Supplement #61 (KTC 1137)	7	
CX 18	Tariff Bulletin Advance Notice of Special Supplement #61 (KTC 0727)	7	
CX 19	Kentucky Household Goods Carriers Association Board of Directors Meeting Minutes (KHGCA 0295 - KHGCA 0296)	7	11, 67
CX 20	Kentucky Household Goods Carriers Association Board of Directors Meeting Minutes (KHGCA 0268 - KHGCA 0269)	7	
CX 21	Tariff Bulletin Advance Notice Special Supplement #56 (KHGCA 6417 - KHGCA 6418)	7	
CX 22	Tariff Bulletin Advance Notice General Rate Increase (KHGCA 5996)	7	
CX 23	Supplement Worksheet # 51 (KHGCA 5860)	7	
CX 24	Kentucky Household Goods Carriers Association Newsletter (KHGCA 6005)	7	
CX 25	Kentucky Household Goods Carriers Association Board of Directors Meeting Minutes (KHGCA 0183 - KHGCA 0184)	7	
CX 26	Kentucky Household Goods Carriers Association Board of Directors Meeting Minutes (KHGCA 0176 - KHGCA 0177)	7	
CX 27	Kentucky Household Goods Carriers Association Newsletter (KHGCA 0132)	7	
CX 28	Kentucky Household Goods Carriers Association Board of Directors Meeting Minutes (KHGCA 0110 - KHGCA 0111)	7	
CX 29	Kentucky Household Goods Carriers Association Board of Directors Meeting Minutes (KHGCA 0127 - KHGCA 0129)	7	
CX 30	Tariff Advisory Bulletin # 96-3 - Docket for Supplement #46 (KHGCA 5410)	7	

CX NUMBER	DOCUMENT DESCRIPTION	Page Admitted (Pre-Trial Transcript) 03/16/04	Page Discussed (Trial Transcript) 03/16/04
CX 31	Instruction Sheet - Special Supplement # 45 (KHGCA 5190 - KHGCA 5199)	7	
CX 32	Tariff Committee Annual Report - Issued Supplements 1995 - 2002 (KHGCA 7164 - KHGCA 7173)	7	
CX 33	General Membership Meeting Minutes (KHGCA 0023 - KHGCA 0024)	7	
CX 34	Supplement Worksheet # 51 (KHGCA 9840)	7	
CX 35	Tariff Advisory Bulleting # 94-3 - Docket for Supplement # 34 (KHGCA 9918 - KHGCA 9919)	7	
CX 36	Tariff Bulletin Advisory Notice - Docket # 94-3 (KHGCA 9627)	7	
CX 37	Tariff Committee Annual Report (KHGCA 3528)	7	
CX 38	Supplement Worksheet # 21 (KHGCA 8907)	7	
CX 39	Kentucky Household Goods Carriers Association Board of Directors Meeting Minutes (KHGCA 3580 - KHGCA 3581)	7	
CX 40	Tariff Special Bulletin (KHGCA 8924)	7	11
CX 41	Special Supplement Worksheet # 10 (KHGCA 8281 - KHGCA 8289)	7	
CX 42	Kentucky Household Goods Carriers Association Board of Directors Meeting Minutes (KHGCA 3725 - KHGCA 3727)	7	
CX 43	Kentucky Household Goods Association Board Meeting Minutes (KHGCA 3780)	7	
CX 44	Kentucky Household Goods Membership Meeting Minutes (KHGCA 3881 - KHGCA 3882)	7	12
CX 45	Memo from Bud Mirus to Bob Wagner re. Proposed "Peak-Time" Intrastate Rates with attachments (KHGCA 4979 - KHGCA 4986)	7	
CX 46	Tariff Committee Annual Report (KHGCA 0107 - KHGCA 0108)	7	
CX 47	Kentucky Household Goods Carriers Association Board of Directors Meeting Minutes (KHGCA 0081 - KHGCA 0083)	7	
CX 48	Request for Tariff Change from Boyd Moving & Storage and D.L. Boyd Movers to the Chairman, Rate & Tariff Committee with handwritten notes (KHGCA 4969 - KHGCA 4970)	7	12, 16
CX 49	Request for Tariff Change from Tri-State Moving & Storage, Inc. to the Chairman, Rate & Tariff Committee (KHGCA 9031)	7	
CX 50	Request for Tariff Change from Hammond Moving Services, Inc. to the Chairman, Rate & Tariff Committee (KHGCA 9565)	7	
CX 51	Statute 281.590 Declaration of policy	7	
CX 52	Statute 281.695 Powers of Department of Vehicle Regulation to regulate rates and service	7	
CX 53	Various Statutes (KTC 0716 - KTC 0718)	7	

CX NUMBER	DOCUMENT DESCRIPTION	Page Admitted (Pre-Trial Transcript) 03/16/04	Page Discussed (Trial Transcript) 03/16/04
CX 54	State of Kentucky Regulation regarding rates and fares (KTC 0706)	7	
CX 55	Background on KTC officials (KTC 0613)	7	
CX 56	Memo from Bud Mirus to Eileen Clark re. Gypsy Mover Article (KHGCA 8790 - KHGCA 8791)	7	
CX 57	Request for Tariff Change from C & L Moving and Storage, Inc. (KHGCA 4107)	7	
CX 58	Request for Tariff Change from J & J Canter & Son, Inc. (KHGCA 4108)	7	
CX 59	Request for Tariff Change from Audubon Moving & Storage (KHGCA 4103)	7	
CX 60	Request for Tariff Change from J & J Canter & Son of Lexington (KHGCA 4109)	7	
CX 61	Request for Tariff Change from J.R. Nash Moving & Storage Company (KHGCA 4113)	7	
CX 62	Requests for Tariff Change from Pennyrile Moving & Storage, Inc. (KHGCA 4114 - KHGCA 4115)	7	
CX 63	Request for Tariff Change from Bunny's Moving & Storage (KHGCA 7559)	7	
CX 64	Request for Tariff Change from Quality Moving & Storage (KHGCA 8090)	7	
CX 65	Request for Tariff Change from Hammond Moving & Storage, Inc. (KHGCA 9386)	7	
CX 66	Request for Tariff Change from Kentucky Moving & Storage Services, Inc. (KHGCA 8165)	7	
CX 67	Request for Tariff Change from Kentucky Moving & Storage Services, Inc. (KHGCA 1155)	7	
CX 68	Request for Tariff Change from T. Peavlec Moving Systems, LLC (KHGCA 1161)	7	
CX 69	Request for Tariff Change from Odle Moving (KHGCA 1162)	7	
CX 70	Request for Tariff Change from Sadler (KHGCA 1163)	7	
CX 71	Request for Tariff Change from Sadler & Odle Moving (KHGCA 1165)	7	
CX 72	Request for Tariff Change from Lynn Moving & Storage, Inc. (KHGCA 8556)	7	
CX 73	Request for Tariff Change from T. Peavler Moving Systems, LLC (KHGCA 1284)	7	
CX 74	Handwritten request for increase from J.J. Carter & Son Moving & Storage, Inc. of Indiana (KHGCA 2552)	7	
CX 75	Letter from John Carter of J.J. Carter & Son, Inc. to O.B. Arnold re. rate increase request (KHGCA 2554)	7	

CX NUMBER	DOCUMENT DESCRIPTION	Page Admitted (Pre-Trial Transcript) 03/16/04	Page Discussed (Trial Transcript) 03/16/04
CX 76	Letter from John A. Jasper of Great Midwest Moving & Storage, Inc. to Bud Mirus (KHGCA 2559)	7	
CX 77	Letter from William Johnson to O.B. Arnold request rate change for William H.H. Johnson Moving & Storage (KHGCA 2561)	7	
CX 78	Handwritten request for rate change from Luther Transfer, Inc. (KHGCA 2563)	7	
CX 79	Letter from Dan Gorczyca of Boweil Storage and Transit Company request rate change (KHGCA 2654 - KHGCA 2655)	7	
CX 80	Request for Tariff Change from Fallon Moving & Warehousing, Inc. (KHGCA 3968)	7	
CX 81	Request for Tariff Change from Dana J. Curl (KHGCA 3971)	7	
CX 82	Request for Tariff Change from Belmont Moving & Storage (KHGCA 4471)	7	
CX 83	Request for Tariff Change from Shadowens Moving & Storage (KHGCA 4472)	7	
CX 84	Request for Tariff Change from Belmont Moving & Storage (KHGCA 4776)	7	
CX 85	Request for Tariff Change from Bunny's Moving & Storage, Inc. (KHGCA 5095)	7	
CX 86	Request for Tariff Change from Garbe Moving & Storage, Inc. (A Moore Moving Services) (KHGCA 5100)	7	
CX 87	Request for Tariff Change from Odle Movers (KHGCA 5719)	7	
CX 88	Request for Tariff Change from Don Peck's Moving & Storage (KHGCA 7862)	7	
CX 89	Request for Tariff Change from A. Arnold & Son Trf & Storage Co., Inc. (KHGCA 8310)	7	
CX 90	Request for Tariff Change from A. Arnold & Son Trf & Storage Co., Inc. (KHGCA 8337)	7	
CX 91	Request for Tariff Change from Ellis Moving & Storage (KHGCA 8343)	7	
CX 92	Request for Tariff Change from Vincent Fister Moving and Storage (KHGCA 8346)	7	
CX 93	Request for Tariff Change from Vincent Fister Moving and Storage (KHGCA 8347)	7	
CX 94	Requests for Tariff Change from Kentucky Moving and Storage (KHGCA 8552 - KHGCA 8553)	7	
CX 95	Request for Tariff Change from Don Peck's Moving & Storage (KHGCA 8560)	7	
CX 96	Request for Tariff Change from William H H Johnson Moving & Storage (KHGCA 9319)	7	

CX NUMBER	DOCUMENT DESCRIPTION	Page Admitted (Pre-Trial Transcript) 03/16/04	Page Discussed (Trial Transcript) 03/16/04
CX 97	Request for Tariff Change from Gillum Transfer & Storage, Inc. (KHGCA 9384)	7	
CX 98	Request for Tariff Change from Odhes Movers (KHGCA 9456)	7	
CX 99	Request for Tariff Change from Sadlers Movers (KHGCA 9457)	7	
CX 100	Request for Tariff Change from H. Johnson Moving Co., Inc. (KHGCA 9604)	7	
CX 101	Request for Tariff Change from Miller Moving and Storage, Inc. (KHGCA 9824)	7	
CX 102	Request for Tariff Change from Paducah Moving and Storage (KHGCA 9825)	7	
CX 103	Requests for Tariff Change from Wagner Moving and Storage, Inc. (KHGCA 9826 - KHGCA 9828)	7	
CX 104	Kentucky Household Goods Carriers Association Board Annual Membership Meeting Minutes (KHGCA 3833 - KHGCA 3835)	7	
CX 105	Kentucky Household Goods Carriers Association Board Meeting Minutes (KHGCA 10187)	7	
CX 106	Letter from George Catlett to C.L. Pangburn enclosing files re. Gilbert J. Parr Associates (KHGCA 7106 - KHGCA 7111)	7	
CX 107	Kentucky Household Goods Carriers Association Board of Directors Meeting (KHGCA 7114 - KHGCA 7115)	7	
CX 108	Instruction Sheet Supplement #51 (KHGCA 5861 - KHGCA 5905)	7	54
CX 109	Letter from Dana Abrahamsen to William Lally	7	
CX 110	Letter from Kyle Thompson to Dana Abrahamsen	7	53
CX 111	Kentucky Household Goods Carriers Association Board of Directors Meeting Minutes (KHGCA 3634 - KHGCA 3635)	7	
CX 112	Letter from Dennis Tolson to Bud Mirus (KHGCA 0487)	7	
CX 113	Memo from Joe Harrison to Household Goods Carriers' Bureau re. Prototype Tariff 2000 (KHGCA 0690 - KHGCA 0693)	7	
CX 114	ICC Termination Act (KTC 0495 - KTC 0498)	7	
CX 115	Deposition Transcript of Denise King	7	
CX 116	Deposition Transcript of William Debord	7	
CX 117	Deposition Transcript of A.F. "Bud" Mirus	7	
CX 118	See Below		
CX 119	See Below		
CX 120	See Below		
CX 121	See Below		
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CX 123	See Below		
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CX NUMBER	DOCUMENT DESCRIPTION	Page Admitted (Pre-Trial Transcript) 03/16/04	Page Discussed (Trial Transcript) 03/16/04
CX 125	See Below		
CX 126	See Below		
CX 127	See Below		
CX 128	See Below		
CX 129	Deposition Transcript of Dennis Tolson	7	

Respondent's Exhibits

RX NUMBER	DOCUMENT DESCRIPTION	Page Admitted (Pre-Trial Transcript) 03/16/04	Page Discussed (Trial Transcript) 03/16/04
RX 1	Supplement No. 2	10	
RX 2	Supplement No. 6	10	
RX 3	Supplement No. 7	10	
RX 4	Supplement No. 8	10	
RX 5	Supplement No. 9	10	
RX 6	Supplement No. 10	10	
RX 7	Supplement No. 11	10	
RX 8	Supplement No. 14	10	
RX 9	Supplement No. 18	10	
RX 10	Supplement No. 20	10	
RX 11	Supplement No. 21	10	
RX 12	Supplement No. 22	10	
RX 13	Supplement No. 23	10	
RX 14	Supplement No. 27 (cover page only)	10	
RX 15	Supplement No. 28 (cover page only)	10	
RX 16	Supplement No. 29	10	54
RX 17	Supplement No. 30	10	55
RX 18	Supplement No. 31-SP	10	55
RX 19	Supplement No. 32	10	55
RX 20	Supplement No. 33	10	55
RX 21	Supplement No. 34	10	55
RX 22	Supplement No. 35	10	55
RX 23	Supplement No. 36	10	55

RX NUMBER	DOCUMENT DESCRIPTION	Page Admitted (Pre-Trial Transcript) 03/16/04	Page Discussed (Trial Transcript) 03/16/04
RX 24	Supplement No. 37	10	55
RX 25	Supplement No. 38	10	55
RX 26	Supplement No. 39	10	55
RX 27	Supplement No. 40	10	55
RX 28	Supplement No. 41	10	55
RX 29	Supplement No. 42	10	55
RX 30	Supplement No. 43	10	55
RX 31	Supplement No. 44	10	55
RX 32	Supplement No. 45	10	55
RX 33	Supplement No. 46	10	55
RX 34	Supplement No. 47	10	55
RX 35	Supplement No. 48	10	55
RX 36	Supplement No. 49	10	55
RX 37	Supplement No. 50	10	55
RX 38	Supplement No. 51	10	55
RX 39	Supplement No. 52	10	55
RX 40	Supplement No. 53	10	55
RX 41	Supplement No. 54	10	55
RX 42	Supplement No. 55	10	55
RX 43	Supplement No. 56	10	55
RX 44	Supplement No. 57	10	55
RX 45	Supplement No. 58	10	55
RX 46	Supplement No. 59	10	55
RX 47	Supplement No. 60	10	55
RX 48	Supplement No. 61	10	54
RX 49	Supplement No. 62	10	
RX 50	Supplement No. 63	10	
RX 51	Supplement No. 65	10	
RX 52	Supplement No. 66	10	
RX 53	Supplement No. 67	10	
RX 54	Supplement No. 68	10	
RX 55	Supplement No. 69	10	
RX 56	Supplement No. 70	10	
RX 57	Supplement No. 71	10	
RX 58	Supplement No. 72	10	
RX 59	Supplement No. 73	10	
RX 60	Supplement No. 74	10	
RX 61	Supplement No. 75	10	
RX 62	Supplement No. 76	10	

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RX 63	Supplement No. 77	10	
RX 64	Supplement No. 78	10	
RX 65	Supplement No. 79	10	
RX 66	Supplement No. 80	10	
RX 67	Supplement No. 81	10	
RX 68	KRS 281.010	10	
RX 69	KRS 281.011	10	
RX 70	KRS 281.012	10	
RX 71	KRS 281.013	10	
RX 72	KRS 281.014	10	
RX 73	KRS 281.015	10	
RX 74	KRS 281.590	10	
RX 75	KRS 281.600	10	
RX 76	KRS 281.624	10	
RX 77	KRS 281.625	10	
RX 78	KRS 281.640	10	
RX 79	KRS 281.675	10	
RX 80	KRS 281.680	10	
RX 81	KRS 281.685	10	
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RX 84	KRS 281.700	10	
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RX 90	601 KAR 1:030	10	
RX 91	601 KAR 1:031	10	
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RX 93	601 KAR 1:045	10	
RX 94	601 KAR 1:050	10	
RX 95	601 KAR 1:060	10	
RX 96	601 KAR 1:070	10	
RX 97	601 KAR 1:075	10	
RX 98	601 KAR 1:080	10	
RX 99	601 KAR 1:095	10	
RX 100	601 KAR 1:101	10	
RX 101	KHGCA Worksheet for Supplement No. 13	10	74

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RX 102	KHGCA Worksheet for Supplement No. 29	10	75
RX 103	KHGCA Worksheet for Supplement No. 30	10	
RX 104	KHGCA Worksheet for Supplement No. 44	10	
RX 105	KHGCA Worksheet for Supplement No. 48	10	
RX 106	KHGCA Worksheet for Supplement No. 50	10	74
RX 107	KHGCA Worksheet for Supplement No. 52	10	
RX 108	KHGCA Worksheet for Supplement No. 53	10	
RX 109	KHGCA Worksheet for Supplement No. 55	10	
RX 110	KHGCA Worksheet for Supplement No. 56	10	
RX 111	KHGCA Worksheet for Supplement No. 62	10	
RX 112	Minutes of KGHCA Board Meeting	10	
RX 113	Minutes of KHGCA Board Meeting	10	
RX 114	Minutes of KHGCA Board Meeting	10	
RX 115	Minutes of KHGCA Board Meeting	10	
RX 116	Minutes of KHGCA Membership Meeting	10	
RX 117	Minutes of KHGCA Board Meeting	10	
RX 118	Minutes of KHGCA Board Meeting	10	
RX 119	Minutes of KHGCA Board Meeting	10	
RX 120	Minutes of KHGCA Membership Meeting	10	
RX 121	Minutes of KHGCA Board Meeting	10	
RX 122	Memorandum from KY Dep't of Motor Carriers to all Household Goods Carriers	10	
RX 123	Minutes of KHGCA Board Meeting	10	
RX 124	Minutes of KHGCA Membership Meeting	10	
RX 125	Minutes of KHGCA Membership Meeting	10	
RX 126	Minutes of KHGCA Board Meeting	10	
RX 127	Minutes of KHGCA Board Meeting	10	
RX 128	Minutes of KHGCA Membership Meeting	10	
RX 129	Minutes of KHGCA Board Meeting	10	
RX 130	Minutes of KHGCA Membership Meeting	10	
RX 131	Minutes of KHGCA Membership Meeting	10	
RX 132	Minutes of KHGCA Board Meeting	10	
RX 133	Minutes of KHGCA Board Meeting	10	
RX 134	Minutes of KHGCA Membership Meeting	10	
RX 135	Minutes of KHGCA Membership Meeting	10	
RX 136	Minutes of KHGCA Board Meeting	10	
RX 137	Minutes of KHGCA Membership Meeting	10	
RX 138	Minutes of KHGCA Board Meeting	10	
RX 139	Minutes of KHGCA Membership Meeting	10	

RX NUMBER	DOCUMENT DESCRIPTION	Page Admitted (Pre-Trial Transcript) 03/16/04	Page Discussed (Trial Transcript) 03/16/04
RX 140	Minutes of KHGCA Board Meeting	10	
RX 141	Minutes of KHGCA Board Meeting	10	
RX 142	Minutes of KHGCA Board & Membership	10	
RX 143	Minutes of KHGCA Board Meeting	10	
RX 144	Minutes of KHGCA Board Meeting	10	
RX 145	Minutes of KHGCA Board Meeting	10	
RX 146	Minutes of KHGCA Board Meeting	10	
RX 147	Minutes of KHGCA Board Meeting	10	
RX 148	Minutes of KHGCA Membership Meeting	10	
RX 149	Minutes of KHGCA Membership Meeting	10	
RX 150	Minutes of KHGCA Board Meeting	10	
RX 151	Minutes of KHGCA Board Meeting	10	
RX 152	Minutes of KHGCA Membership Meeting	10	
RX 153	Minutes of KHGCA Board Meeting	10	
RX 154	Minutes of KHGCA Membership Meeting	10	
RX 155	Minutes of KHGCA Board & Membership Meeting	10	
RX 156	Minutes of KHGCA Board & Membership Meeting	10	
RX 157	Minutes of KHGCA Board Meeting	10	
RX 158	Minutes of KHGCA Board Meeting	10	
RX 159	Minutes of KHGCA Board & Membership Meeting	10	
RX 160	Minutes of KHGCA Board Meeting	10	
RX 161	Minutes of KHGCA Board Meeting	10	
RX 162	Memorandum from Mirus to Debord	10	
RX 163	Letter from Mirus to Debord	10	
RX 164	Letter from Mirus to Taylor	10	
RX 165	Letter from Mirus to Taylor	10	
RX 166	Letter from Mirus to Taylor	10	
RX 167	Letter from Mirus to Taylor	10	
RX 168	Note from Mirus to Taylor	10	
RX 169	Letter from Mirus to Taylor	10	
RX 170	Letter from Mirus to Taylor	10	
RX 171	Letter from Mirus to Debord	10	
RX 172	Letter from Mirus to Debord	10	
RX 173	Letter from Mirus to Debord	10	
RX 174	Letter from Mirus to Debord	10	
RX 175	Letter from Mirus to Debord	10	
RX 176	Letter from Mirus to Debord	10	
RX 177	Letter from Mirus to Debord	10	
RX 178	Letter from Berger Moving to Debord	10	75

RX NUMBER	DOCUMENT DESCRIPTION	Page Admitted (Pre-Trial Transcript) 03/16/04	Page Discussed (Trial Transcript) 03/16/04
RX 179	KTC Letter to Lewis Hayden	10	
RX 180	KTC Letter to All States Relocation Service	10	
RX 181	KTC Letter to KHGCA	10	
RX 182	KTC Letter to KHGCA	10	
RX 183	KTC Letter to Webb Moving & Storage, Inc.	10	
RX 184	KTC Letter to Wagner Moving & Storage, Inc.	10	
RX 185	KTC Letter to Berger Louisville, Inc.	10	
RX 186	Handwritten notes re: Supp. #81	10	
RX 187	Handwritten notes re: Berger filing	10	
RX 188	Handwritten notes re: General rate increases	10	
RX 189	Handwritten notes re: Debord	10	75
RX 190	Handwritten note re: Rate schedules	10	75
RX 191	Handwritten note re: Supp. #35	10	
RX 192	Handwritten note re: Meeting with Debord	10	
RX 193	Notes from KHGCA Board Meeting	10	
RX 194	Work Papers	10	
RX 195	Questions for Bill Debord	10	
RX 196	Notes re: Committee Meeting	10	
RX 197	KTC Final Order Granting Authority to Schlegel	10	
RX 198	Note from Mirus to Debord	10	
RX 199	Note from Mirus to Debord	10	
RX 200	KHGCA Newsletter	10	
RX 201	KHGCA Newsletter	10	
RX 202	KHGCA Letter to Debord	10	
RX 203	Memorandum re: Information for Justification of 8% increase	10	
RX 204	Letter from KTC to KHGCA	10	
RX 205	Letter from KTC to Shepherd Moving & Storage Co., Inc. Re: Power of attorney	10	
RX 206	Letter from KTC to Cynthiana Used Furniture	10	
RX 207	GAO Report Re: Oversight of Household Goods Moving Industry	10	
RX 208	Appendix to Supp. #5 to NMF100	10	
RX 209	Letter from KTC to Edward Lucas	10	
RX 210	Letter from KTC to Harmon's Moving Co.	10	
RX 211	Important Notice to Shippers of Household Goods	10	
RX 212	Supplement No. 3 to Tariff STB HGB 400-N; pp. 6-9	10	
RX 213	KTC Booklet containing Statutes & Regulations	10	
RX 214	Letter from KTC to Carl's, Inc.	10	

RX NUMBER	DOCUMENT DESCRIPTION	Page Admitted (Pre-Trial Transcript) 03/16/04	Page Discussed (Trial Transcript) 03/16/04
RX215	HGCB letter transmitting Mileage Guide Tariff	10	
RX216	National Motor Freight Traffic Association, Inc. Letter enclosing Appendix to Supp. #3	10	
RX217	KTC Order of Suspension & Notice of Hearing	10	
RX218	KHGCA Letter to Debord re: Seminars	10	
RX219	KTC Letter to Brentwood Moving & Storage	10	
RX220	HGCB Transportation Question Box	10	
RX221	HGCB Transportation Question Box	10	
RX222	HGCB Transportation Question Box	10	
RX223	HGCB Transportation Question Box	10	
RX224	KTC Mandatory Renewal Requirements for Household Goods Carriers	10	
RX225	KTC Final Order; *In re Allstate*	10	

INDEX OF EXHIBITS OFFERED BUT NOT ADMITTED INTO EVIDENCE

CX NUMBER	DOCUMENT DESCRIPTION	Page Offered (Pre-Trial Transcript) 03/16/04	Page Denied (Pre-Trial Transcript) 03/16/04
CX 118	Final Order signed by Administrative Law Judge Susan E. Teppola re. Oregon Department of Transportation Tariff #1081 - Dockets 163836, 16838, 16839 (ORE-ST-0000002 - ORE-ST-0000010)	8	9
CX 119	Oregon Public Utility Commission Order #94-758 re. In the Matter of the Petition of Oregon Draymen & Warehousemen's Association to restructure and increase household goods rates and charges in its Tariff 8-C (ORE-ST-0000012 - ORE-ST-0000018)	8	9
CX 120	Notice of Hearing - Oregon Department of Transportation Tariff Docket #1081 (ORE-Assoc-0000818 - ORE-Assoc-0000823)	8	9
CX 121	Final Order - Oregon Department of Transportation Tariff Docket #1081 (ORE-Assoc-0000827 - ORE-Assoc-0000845)	8	9
CX 122	Letter from William Sheppard to William Stewart re. 1997 HHG Cost Study Results (ORE-Assoc-0000853 - ORE-Assoc0000855)	8	9
CX 123	Final Order signed by Administrative Law Judge Susan E. Teppola re. Oregon Department of Transportation Tariff #1081 - Dockets 163836, 16838, 16839 (ORE-Assoc-0000951 - ORE-Assoc-0000958)	8	9
CX 124	Fax from William Sheppard to Matthew Muldoon attaching Spreadsheet Index (ORE-Assoc-0000959 - ORE-Assoc-0000961	8	9
CX 125	1997 Annual Report of All Household Goods Carriers (ORE-Assoc-0000962 - ORE-Assoc-0000963)	8	9
CX 126	Notice of Hearing - Oregon Department of Transportation Tariff Docket No. 1081 (ORE-Assoc-00001047 - ORE-Assoc-0001060)	8	9
CX 127	Notice of Hearing - Oregon Department of Transportation Tariff Docket No. 1098 (ORE-Assoc-0001298 - ORE-Assoc-0001310)	8	9
CX 128	Kentucky Household Goods Carriers Association Newsletter (KTC 0319 - KTC 0325)	8	9
RX 226	Letter dated February 18 from James Liebman to Dana Abrahamsen re: Prior letter sent to Complaint Counsel	12	15
RX 227	Attachment to Motion dated February 18 re: KTC as Intervenor	11	12

INDEX OF CROSS-REFERENCES OF COMMON EXHIBITS

(*See* Rule 3.46(b)(6) of the Commission's Rules of Practice)

CX 9	RX 137
CX 20	RX 153
CX 26	RX 150
CX 44	RX 134
CX 47	RX 147
CX 51	RX 74
CX 52	RX 83
CX 53	RX 80, 81, 82
CX 54	RX 94
CX 104	RX 135
CX 105	RX 129
CX 108	RX 38

CERTIFICATE OF SERVICE

This is to certify that on April 20, 2004 I caused a copy of:

1) Complaint Counsel's Post Trial Brief;

2) Complaint Counsel's Proposed Findings of Fact and Conclusions of Law;

3) A Proposed Order; and

4) A stipulated index of exhibits;

to be served upon the following persons by facsimile, U.S. Mail or Hand-Carried:

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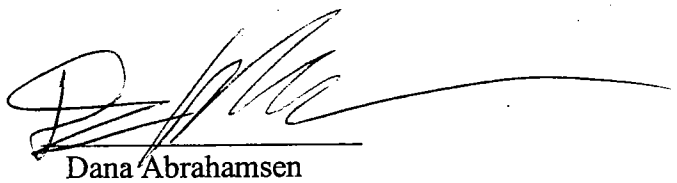

Dana Abrahamsen