

**COMPLAINT COUNSEL’S PROPOSED FINDINGS OF FACT
AND CONCLUSIONS OF LAW**

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**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**

FINDINGS OF FACTS

I. INTRODUCTION

1. This case involves a horizontal price-fixing agreement involving 93 intrastate movers in Kentucky. Respondent is the trade organization (*see* ¶¶ 4 and 5, *infra*) that facilitates this price-fixing. *See* ¶¶ 6 through 28, *infra*.
2. Respondent will attempt to prove that the state of Kentucky has actively supervised its price-fixing activity.
3. The evidence will demonstrate that Respondent cannot carry its burden of showing the presence of active supervision of its price-fixing activity. In particular, the state 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* ¶¶ 29 through 78, *infra*.

II. RESPONDENT KENTUCKY HOUSEHOLD GOODS CARRIERS ASSOCIATION, INC.

4. 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. 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”).

5. One of the primary functions of Kentucky Association is the initiation, preparation, development, dissemination, and filing with the Kentucky Transportation Cabinet's ("KTC") 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"). This function is conducted through Kentucky Association's Tariff Committee. Respondent's Answer to ¶ 5.

III. RESPONDENT HAS ENGAGED IN ILLEGAL PRICE-FIXING

6. 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 Respondent's KYDVR TARIFF NO. 5. CX 1; CX 2; Respondent's Admission ¶ 18. Respondent causes KYDVR Tariff No. 5 to be prepared and published. That tariff is currently in effect. CX 2; Respondent's Admission ¶¶ 10, 11, and 14.
7. The tariff contains the rates movers must charge for local moves, 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.
8. 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. 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. Packing a wardrobe carton cost \$3.60 regular time, and \$4.95 overtime. CX 1; CX 2; Respondent's Admission ¶ 16.
9. Respondent coordinates the rates charged by members by providing a copy of proposed supplements to Respondent'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 Respondent submits that supplement to the KTC. Participating Carriers that do want to file different rates do so by filing a Form 4286 with Respondent's Tariff Committee. Information about any such different rates is then sent to all Participating Carriers. 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 Tr.) 53:13-54:3; CX 116 (Debord Tr., II) 60:20-61:21.

10. The Participating Carriers cause Respondent to file with the KTC the rates contained in Respondent's KYDVR TARIFF NO.5 by granting Respondent 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 files for Increases in the Collective Rates

11. The Participating Carriers regularly engage in collective action with regard to price. *See* ¶¶ 12 through 20, *infra*.
12. Respondent 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 Tr.) 62:10-63:08; CX 15. For example, on October 13, 1999 Respondent, 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.
13. Similarly, on October 11, 2000, Respondent, 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.

14. Other examples of rate increases that have been proposed by Respondent and which have taken effect include the following:

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

15. The April 26, 1985 annual meeting minutes state: "Rates have increased 42% since 1980." CX 44.
16. 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 higher rates from May 15th through September 30th. CX 45 - CX 47; Respondent's Admission ¶¶ 25, 26.
17. Respondent 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.
18. 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; CX 2; Respondent's Admission ¶¶ 30, 31.
19. Similarly, all but two Participating Carriers agree to charge the rate of \$84.15 to move jet skis. CX 1; CX 2; Respondent's Admission ¶ 35.
20. 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.

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

21. Movers rely on the collective tariff to coordinate their rates. See ¶¶ 22 through 24, *infra*.
22. Where one Participating Carrier seeks to charge a different rate than what is prescribed in the tariff, the Respondent 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 told him that his proposed change "was in conflict with provisions of 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." The notes of the conversation make clear that even after agreeing to go along with the majority, Mr. Boyd continued to believe that his proposed change was in the best interests of the consumer. CX 48.
23. 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 Respondent), stating as his justification "Somewhat lower than our competition in this area." CX 49. Similarly, a mover filed a Form 4286 with Respondent 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.
24. Increases are implemented by majority vote. CX 117 (Mirus Tr.) 62:10-63:08; 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 Tr.) 163:7-21. 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

25. The collective rates in Respondent'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 ¶¶ 26 through 28, *infra*.
26. 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 state 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 Tr., II) 41:3-41:13.
27. 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 Tr.) 44:3-45:23.
28. 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 Tr., II) 46:18-47:22.

IV. STATE STANDARD

29. 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.
30. 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. CX 116 (Debord Tr., II) 31:11-32:3.
31. 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 Tr., II) 31:11-32:3; CX 115 (King Tr.) 17:2-18:12. 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.
32. 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."

33. 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." § 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 Tr., II) 33:2-33:20, 35:10-35:20.
34. 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.

V. LACK OF SUPERVISION

35. The evidence demonstrates that the state fails to 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 ¶¶ 36 through 78, *infra*.
36. 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; CX 128. 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 Tr.) at 242:5-243:17. 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 Tr.) 236:22-237:25; 242:5-245:4.

A. The KTC Commits Very Limited Resources to Tariff Issues

37. The person at the KTC responsible for intrastate movers matters is William Debord. Mr. Debord works part-time: 100 hours per month. CX 116 (Debord Tr., I) 11:10-11:23; 12:2-12:12. No KTC employees report to Mr. Debord. CX 116 (Debord Tr., II) 26:18-26:19.
38. Mr. Debord is responsible for more than household goods movers. He also has responsibility for passenger carrier issues and trucking matters in general. CX 116 (Debord Tr., II) 15:5-15:21; 19:22-20:7. A document likely written by Mr. Debord's boss stated that Mr. Debord spent 60% of his time on household goods matters. CX 55; CX 116 (Debord Tr., II) 25:10-26:13.
39. Mr. Debord spends the bulk of his time working on household goods matters other than reviewing tariff rates. Indeed, fully 20% of his 100 hours is spent driving to tariff compliance investigations. CX 116 (Debord Tr., II) 20:8-20:24. In addition, Mr. Debord spends time investigating illegal movers, conducting seminars, updating power of attorney forms, and handling inquiries from the public. CX 116 (Debord Tr., II) 19:12-19:19; 21:3-21:24; 22:1-23:14; 23:15-24:7.
40. 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 Tr., II) 26:20-27:10; CX 115 (King Tr.) 20:16-20:24; 21:1-21:5; 22:14-23:9; 30:12-31:6.

B. The KTC Does Not Receive Reliable Data

41. Household goods movers do not routinely submit balance sheets and income statements to the KTC. CX 116 (Debord Tr., II) 53:22-54:4; CX 115 (King Tr.) 32:8-32:24.
42. The KTC used to require household goods movers to file annual financial reports but stopped requiring such financial reports. In years past, the KTC would get detailed financial reports. 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 - CX 105; CX 116 (Debord Tr., II) 82:9-83:9; 86:12-88:20.
43. 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.

44. Today, there are no comparable filing or auditing requirements related to the tariff. 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 Tr., II) 78:10-81:14.
45. The KTC does not get any formal data on the percentage of movers' interstate moves versus their intrastate moves. CX 116 (Debord Tr., II) 84:14-85:2.
46. Nor does the Kentucky Association compile business data on movers' costs. CX 129 (Tolson Tr.) 85:10-17; CX 117 (Mirus Tr.) 78:22-79:20. 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 Tr., II) 62:17-63:16. 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 Tr., II) 63:16-65:18. Mr. Debord has never given the Kentucky Association any formal instructions about what information should be on the Form 4268. CX 116 (Debord Tr., II) 66:15-67:3.
47. 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.

C. The KTC Does Not Issue a Written Decision

48. 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. After 30 days, the change becomes effective. "No action is approval." CX 116 (Debord Tr., II) 58:5-60:19.
49. The state does not issue a written decision when it permits rate increases to go into effect. CX 116 (Debord Tr., II) 77:15-78:19; CX 115 (King Tr.) 34:14-34:24.

D. The KTC Does Not Hold Hearings

50. Aside from the original hearings in the 1950's or 1960's, the state has not held hearings to examine or analyze the collective rates contained in the Kentucky Association tariff. CX 116 (Debord Tr., II) 67:7-69:24; CX 115 (King Tr.) 33:1-33:9.
51. The only way the KTC could formally reject the Kentucky Association's collective tariff rate 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 Tr., II) 92:19-95:8.
52. The KTC does not receive any input from groups advocating on behalf of consumers. CX 116 (Debord Tr., II) 109:6-110:22. 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 Tr.) 98:3-99:7. 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 Tr.) 145:3-16.

E. The KTC Does Not Analyze Requests for Rate Increases

53. The state does not have any standard or formula that it uses to determine whether a rate increase is appropriate. Similarly, the state does not have any way of knowing whether a rate increase will increase movers' profits. CX 116 (Debord Tr., II) 105:20-106:23.
54. Virtually no justification is provided to the state in support of movers' requests for rate increases. Respondent does not submit, nor does the KTC require, any business records, economic study, or cost justification data. CX 116 (Debord Tr., II) 111:16-111:21; 119:21-120:10; 124:12-126:24. For instance, in December 2000, Respondent sought an 8% rate increase. The only written justification for that increase was a cover letter. 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 Tr., II) 97:11-101:16. Mr. Debord also could not recall any oral statements made to justify this rate increase. CX 116 (Debord Tr., II) 102:10-103:6. The rate increase was allowed to go into effect. CX 116 (Debord Tr., II) 105:20-105:22.
55. 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 increase. CX 116 (Debord Tr., II) 112:2-112:18. The rate increase was allowed to go into effect. CX 17.
56. 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 does not recall the justification for that increase. CX 116 (Debord Tr., II) 116:19-120:10. The rate increase was allowed to go into effect. CX 10. Mr. Debord could not recall any specific verbal justifications provided to him for any rate increases.

CX 116 (Debord Tr., II)115:8-116:17.

57. The state does not have any way of analyzing whether rate increases would result in rates being “excessive.” CX 116 (Debord Tr., II) 108:8-109:5.
58. In one instance a non-member, Apartment Movers, filed for individual rates. Mr. Debord testified that he had no “specific standards” for determining whether those rates would be acceptable. CX 116 (Debord Tr., II) 123:19-124:11.
59. 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. Both of these firms operate in the same geographic region. Mr. Debord does not remember the justification for these very substantial price surcharges. And in neither instance could Mr. Debord identify a standard that the state used to determine whether these rates complied with the statutory requirement that the rates not be “excessive.” CX 116 (Debord Tr., II) 141:1-145:8.
60. 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 Tr., II) 137:7-140:16.

F. The KTC Does Not Analyze Rates Under any State Standard

61. In 1972, the KTC had a staff of three auditors and others who did cost studies of for-hire carriers which involved “statistical formula.” There are no official cost studies done now for household goods movers. CX 116 (Debord Tr., II) 72:5-73:12.
62. Mr. Debord used to do monthly written reports to the Commissioner which would analyze rate applications. He would arrive at an operating ratio. Some time in the 1980's, the Commissioner told him “not to bother them with those things” (76:22-23) and “Don’t bother us with that.” (77:10). CX 116 (Debord Tr., II) 74:20-77:11.
63. 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 Tr., II) 88:21-89:19. One state, Oregon, has recently used operating ratios as the basis for its orders determining whether to grant movers’ requests for rate increases. CX 118 - 127. See ¶¶ 72 through 78, *infra*.
64. The operating ratios were done in the 1970's and 1980's in Kentucky but “most certainly .

. . one would not have been done” by the late 1990's. In the past, there were two auditors and five or six people in the Kentucky division. CX 116 (Debord Tr., II) 89:20-90:24.

65. 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 Tr., II) 95:9-96:4.
66. There is no Kentucky state standard for determining the rates that movers should establish in their tariffs. CX 116 (Debord Tr., II) 105:20-106:23; 123:19-124:11. And, as Mr. Debord stated, there is not a “written rule within the Cabinet that requires specific standards to be followed.” CX 116 (Debord Tr., II) 36:19-37:12; CX 115 (King Tr.) 16:12-16:15.

VI. THE STATE CANNOT RELY ON REVIEW OF INTERSTATE TARIFFS

67. While the Kentucky Association at times mentions increases in interstate rates when implementing increases in intrastate rates, interstate rates are not comparable. First, movers are permitted to discount from the interstate tariff. And they routinely do discount off those rates. CX 116 (Debord Tr., II) 127:16-128:7.
68. Mr. Debord has 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 Tr., II) 127:19-128:7. His estimate of the average level of discounting that occurs, twenty percent, is much lower than the level of discounts movers indicate are given off the interstate tariff. *Compare*, CX 116 (Debord Tr., II) 128:8-129:18; CX 111 - CX 113.
69. Mr. Debord is unaware 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 Tr., II) 129:19-130:18.
70. Similarly, Mr. Debord cannot compare the actual rates charged for interstate moves with the rates contained in the Kentucky Association tariff. CX 116 (Debord Tr., II) 131:8-131:13.
71. Mr. Debord did not know how the rate levels are established in the interstate tariff. CX 116 (Debord Tr., II) 131:14-133:5. The interstate tariff is not established using the standards set out in the Kentucky statutes. CX 116 (Debord Tr., II) 133:6-134:1.

VII. THE STATE OF OREGON PROVIDES AN ILLUSTRATION OF DETAILED ANALYSIS OF MOVERS' RATES

72. In 1994 and 1999, movers in Oregon sought to increase the rates contained in their tariff. Both rate increases were granted by the state. Oregon approved these requests for tariff rate increases after a detailed analysis of relevant factors. See ¶¶ 73 through 78, *infra*.
73. Oregon’s legislative standard for movers’ rates is similar to Kentucky’s legislative standard. Much like Kentucky, Oregon state law provides that household goods movers must file tariffs setting forth “just, reasonable and fair” rates. OR. REV. STAT. § 825.224 & KY. REV. STAT. ANN. § 281.590. The laws of both Kentucky and Oregon require that carriers’ rates not be discriminatory or preferential. KY. REV. STAT. ANN. § 281.590 & OR. REV. STAT. § 825.224. Both states affirmatively permit the filing of collective tariffs. KY. REV. STAT. ANN. § 281.680(4) & OR. REV. STAT. § 825.007; Oregon Administrative Rule 740-050-0010(3). Kentucky law requires that a notice be published prior to proposed rate increases. KY. REV. STAT. ANN. § 281.690. Kentucky law requires that a hearing be held when proposed tariffs are protested by an outside party, and permits such hearings when the proposed rates are unreasonable. *Id.* Oregon law also calls for the state to hold hearings on rates and also requires public notice of rate changes. OR. REV. STAT. § 825.202 & OR. REV. STAT. § 825.222. See also CX 118, CX 119, CX 123, CX 126, CX 127.
74. The Oregon Draymen and Warehousemen’s Association’s (“OD&W”) plays a similar role in Oregon to the role played by Respondent in Kentucky. OD&W is a not-for profit organization that files a tariff on behalf of its members who are engaged in household goods moving (CX 118, CX 119) and who must comply with Oregon law requiring the filing of tariffs for intrastate moves. OR. REV. STAT. § 825.224(1). Like in Kentucky, mover members comply with that law by having OD&W file a collective tariff on their behalf. Like Respondent’s tariff, OD&W’s tariff sets forth intrastate rates, hourly rates and specific rates for moving individual items. CX 1, CX 2, CX 121, CX 120, CX 127.
75. Oregon takes procedural steps when considering a rate increase. For instance, the state gives notice that there will be a public hearing on petitions filed to increase and restructure household goods rates. CX 120, CX 126, CX 127. Specifically, the Oregon Draymen and Warehousemen’s Association’s (“OD&W”) petitions were assigned docket numbers and that notice of hearings on the proposals provided a time and place for “carriers and interested persons” to “present evidence regarding the proposals.” CX 126, CX 127. The notice’s are also published in “a newspaper of general circulation in the Portland area at least ten (10) days prior to the hearing.” CX 118, CX 119, CX 123. The notices describe the role of the ALJ in the proceeding, how the proceeding will be conducted, the kinds of evidence that are admissible at the hearing, the rights of the parties attending, and the appeal process, among other things. CX 126, CX 127. The hearings are held and state officials and OD&W representatives appear. CX 118.
76. Oregon issues a written decision. The orders issued by the state embody the written decision rendered by the state when approving the rate increases. CX 118, CX 119, CX

121, CX 123. The Oregon orders further detail that required procedures were followed prior to the issuance of the written decision. *Id.*

77. Oregon collects business data from intrastate moving firms. The state requires movers to file annual reports. CX 121. State officials also perform a traffic study which analyzes carriers' "shipment data such as transportation revenue, extra labor revenue, packing material, valuation revenue, other revenue, tariff miles, round-trip miles, billed weight, drivers hours, packers and helper hours, and number of invoices." CX 121. The state makes an effort to assure the reliability of the data by subjecting it to an audit by state officials. CX 119.
78. Oregon performs a quantitative analysis of the proposed rates. The state uses data from a sample of movers to determine the operating ratio being achieved by movers in Oregon. CX 119. Then, using a computer program (CX 122), the state calculates the percentage rate increase needed to permit movers to achieve the state's target operating ratio of 96%. CX 119. This calculation is performed by a revenue-need study which considers factors such as "current and future operating expenses, debt service costs, effective income tax rate, and a fair return on the carrier's operating assets." CX 118, CX 119, CX 121, CX 123.

CONCLUSIONS OF LAW

1. The Federal Trade Commission has jurisdiction over the subject matter of this proceeding and over Respondent 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, 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 respondent 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. Respondent'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. Respondent's activities were not "actively supervised" by the Commonwealth of Kentucky through the Kentucky Transportation Cabinet

("KTC").

7. Respondent has not established that the KTC took the regulatory steps necessary to make the collective rates in Respondent's tariff the state's own. The KTC did not take regulatory steps that would make the rates 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.
8. The notice of contemplated relief issue with the Complaint in this matter sets forth provisions appropriate and warranted to remedy respondent's unlawful activities.

Respectfully submitted,

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Dated: February 20, 2004