

In the Matter of Kentucky Household Goods Carriers Association, Inc.
Docket No. 9309

OPINION OF THE COMMISSION

By MAJORAS, Chairman, For A Unanimous Commission:

INTRODUCTION

This case presents the question whether the activities of Respondent Kentucky Household Goods Carriers Association, Inc. in preparing and filing collective rates for its members under color of compliance with state law, are shielded from federal antitrust scrutiny by virtue of the “state action” doctrine. The Administrative Law Judge (ALJ) concluded that Respondent’s ratemaking activities constitute unlawful horizontal price fixing, and that Respondent is not entitled to the state action defense. We agree, and affirm the decision of the ALJ.

The state action doctrine and its jurisprudence are important because the doctrine enables the displacement of the federal antitrust laws. The doctrine, which is based on principles of state sovereignty, allows the states to implement legitimate policies. By enabling the displacement of the antitrust laws, however, the doctrine also can allow the implementation of programs that produce powerful anticompetitive effects, including higher prices and fewer choices for consumers.

The Supreme Court has made clear that the state action doctrine only applies when (1) “the challenged restraint [is] clearly articulated and affirmatively expressed as state policy,” and (2) the “policy [is] actively supervised by the State itself.” *California Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980) (internal quotation marks omitted). The principal issue here is whether the state agency responsible for supervising Respondent’s ratemaking engaged in the necessary “active supervision.” Active supervision is essential for the state action doctrine to apply because it ensures that the extent to which the antitrust laws are displaced and responsibility for this displacement is properly laid on the state itself, not merely the private actors. For the reasons set forth below, we find that the state has fallen far short of the conduct needed to satisfy the active

supervision requirement, and therefore that the state action doctrine does not apply.¹

I. Background

A. Respondent's Activities

The central facts are not in dispute. The Kentucky Household Goods Carriers Association, Inc. (“Respondent” or “Kentucky Association”) is an organization with a membership of approximately ninety-three household goods carriers that provide intrastate and local moving services within Kentucky. IDF 7.² One of the Kentucky Association’s primary functions is that of a “tariff publishing agent” or so-called “rate bureau” that prepares the initiation, preparation, development, dissemination, and filing of joint tariffs and tariff supplements with the Kentucky Transportation Cabinet (“KTC” or “Intervenor”) on behalf of the Kentucky Association’s members. This function is conducted through the Kentucky Association’s tariff committee. IDF 10. The participating

¹ This opinion uses the following abbreviations for citations:

ID - Initial Decision of the Administrative Law Judge

IDF - Initial Decision Finding of Fact

CX - Complaint Counsel’s Exhibit

RX - Respondent’s Exhibit

JX - Joint Exhibit

Dep. - Deposition (+ volume number, if multi-volume deposition)

Tr. - Trial Transcript

RAB - Respondent’s Appeal Brief

RRB - Respondent’s Reply Brief

CCAB - Complaint Counsel’s Answering Brief

We adopt the ALJ’s findings of fact to the extent those findings are not inconsistent with this opinion.

² The FTC has jurisdiction to regulate the intrastate moving services at issue here, because such activities affect interstate commerce. JX 1 at ¶ 51; *see Mass. Furniture & Piano Movers Ass’n v. FTC*, 773 F.2d 391, 394 (1st Cir. 1985).

carriers have authorized the Kentucky Association to file rates on their behalf by granting it power of attorney. IDF 24.

The Kentucky Association regularly files supplements to its tariff that contain proposed rate increases for its members. The decision to propose a rate increase can either be agreed to by a voice vote at a general membership meeting or by a vote of the Kentucky Association's Board of Directors. IDF 25. Before the Kentucky Association files a tariff supplement with the KTC, it notifies its members of the proposed rates. Participating carriers that want to file different rates can submit a request for a tariff change with the Kentucky Association's tariff committee. IDF 21. If participating carriers do not affirmatively exempt themselves from the terms of the proposed tariff rates, they are covered by the collective rates contained in the Kentucky Association's tariff. Once tariff rates are filed and approved, every carrier covered by them is obliged to charge the tariff rates. IDF 23. The majority of carriers agree to charge the same rate for many items in the tariff, and there is considerable uniformity among the participating carriers with respect to intrastate rates. IDF 30, 31.

B. State Regulation

Every household goods carrier operating in Kentucky must file a tariff containing its rates with the state. KY. REV. STAT. ANN. § 281.680(1) (Michie 2004). Under Kentucky law, these rates must be "just and reasonable." KY. REV. STAT. ANN. § 281.675(1) (Michie 2004). It is the policy of the state "to promote safe, adequate, economical and efficient service and foster sound economic conditions in transportation and among the several carriers," and "to encourage the establishment and maintenance of reasonable charges for such transportation service." KY. REV. STAT. ANN. § 281.590 (Michie 2004). Kentucky law authorizes household goods carriers to become participating parties to a joint tariff published by a tariff-issuing agency. KY. REV. STAT. ANN. § 281.680(1). Carriers must charge the rate set by their tariff – no discounting is permitted. KY. REV. STAT. ANN. § 281.685 (Michie 2004).

The KTC is the state agency authorized to fix or approve the rates charged by household goods carriers. KY. REV. STAT. ANN. § 281.695(1); 601 KY. ADMIN. REGS. 1:050. The KTC is responsible for ensuring that every rate charged by carriers is just and reasonable. 601 KY. ADMIN. REGS. 1:050; IDF 11. The

oversight function, however, is assigned to only one person. IDF 54, 55, 61, 62. The KTC is also charged with the responsibility of developing procedures for collective ratemaking, which procedures must “assure that respective revenues and costs of carriers . . . are ascertained.” KY. REV. STAT. ANN. § 281.680(4).

Common carriers must submit a proposed rate change to the KTC thirty days before the rate’s proposed effective date. KY. REV. STAT. ANN. § 281.690(1) (Michie 2004). If the KTC takes no action within thirty days, the proposed rate change becomes effective. IDF 94. Kentucky law provides that the KTC “may, upon its own initiative, and shall, upon protest” filed with the KTC, conduct hearings concerning a proposed rate change. KY. REV. STAT. ANN. § 281.690(2). The law also states that if, after a hearing, the KTC finds a proposed rate change to be “unjust, unreasonable, or unjustly discriminatory,” it must determine the “just and reasonable” rate. *Id.* Another statute provides that if, after a hearing, the KTC finds a proposed rate is “excessive,” it may “determine the just and reasonable rate.” KY. REV. STAT. ANN. § 281.695(1). In addition, the law states that carriers must give notice of a proposed rate change to “interested persons” in the manner directed by the KTC’s administrative regulations. KY. REV. STAT. ANN. § 281.690(1). The KTC’s administrative regulations provide that if a household goods carrier proposes an increase to its rates, it must publish a notice of the proposed increase in a newspaper of general circulation, which notice must state that any interested party may file a protest with the KTC. 601 KY. ADMIN. REGS. 1:070(2)(c). Notwithstanding this regulation, the record contains no evidence that the Kentucky Association has ever posted, or the KTC has required, notices of proposed rate increases. IDF 74. The KTC has not held any hearings to examine or analyze the collective rates contained in the Kentucky Association’s joint tariff since the late 1950s or early 1960s, when the tariff was first developed. IDF 96.

As noted above, the KTC employs only one person to review and process household goods carrier rates. IDF 54, 61-62. That individual (William Debord) obtains general information about the bases for the Kentucky Association’s planned rate increases from discussions with the head of the Kentucky Association’s tariff committee or by attending meetings of the Kentucky Association. IDF 70, 76-80. However, the Kentucky Association does not submit, and the KTC does not require submission of, any business records, economic studies or cost justification data. IDF 75. Moreover, the movers do not disclose details about their costs, revenues, or profit margins at Kentucky Association

meetings. IDF 70, 71. The KTC used to require household goods carriers to file annual financial reports in the 1970s and '80s, but it no longer requires the submission of this data. IDF 42, 63. The KTC also used to perform uniform cost studies and calculate operating ratios for all household goods carriers in the 1970s, but it no longer does so. IDF 44, 45. The KTC does not have any standard or formula for determining whether a rate increase is appropriate or complies with statutory standards. IDF 88, 89. The KTC does not issue a written decision when it permits a rate increase to go into effect. IDF 95. For years, the KTC has approved these rate increases in their entirety without modification. *See* CX 116 (Debord, Dep. II at 94).

C. Proceedings Before the Administrative Law Judge

The Commission's complaint in this matter, issued on July 8, 2003, alleged that the Kentucky Association and its members have engaged in a combination to fix prices in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, by taking actions to establish and maintain collective rates for the transportation of household goods within Kentucky. The complaint alleges that Respondent's conduct has had the effect of raising prices in the household goods moving industry and depriving consumers of the benefit of competition.

Respondent denied that its members' collective ratemaking activities constitute a horizontal agreement to fix prices, and asserted as an affirmative defense that the challenged conduct is exempt from the federal antitrust laws under the state action doctrine. Respondent relied on provisions of state law which permit carriers to adhere to joint tariffs. *See* Memorandum of Respondents in Support of Motion for Summary Decision at 24-42. Respondent filed a motion for summary decision on December 19, 2003, which ALJ D. Michael Chappell denied on February 26, 2004. On February 23, 2004, the KTC filed a motion seeking leave to intervene supporting Respondent. On March 10, 2004, the ALJ granted the motion in part and denied it in part, permitting the KTC to offer evidence and testimony at the hearing in this proceeding, subject to certain limitations, and to present an opening statement and closing argument. Trial commenced on March 16, 2004. No witnesses were called to testify. By agreement of Complaint Counsel and Respondent, the deposition transcripts and videotapes of depositions of four witnesses were offered into evidence in lieu of

live testimony. Intervenor KTC did not attend the March 16 proceedings, and did not offer any evidence or testimony at the trial.

Following the submission of post-trial briefs, the ALJ found that Respondent and its members engaged in horizontal price fixing that is *per se* unlawful. The ALJ also found that Respondent is not exempt from antitrust liability under the state action doctrine, because it failed to establish that the Commonwealth of Kentucky actively supervises its ratemaking activities. Accordingly, the ALJ found violations of Section 5, and recommended entry of an order requiring Respondent to cease and desist from collective ratemaking.

This matter now is before the Commission on Respondent's appeal from the Initial Decision. Respondent's principal contention in this appeal is that its ratemaking activities are exempt from antitrust liability under the state action doctrine. In this regard, Respondent also contends that the ALJ erroneously failed to take into account the KTC's views that it actively supervises Respondent's collectively-set rates and that holding this conduct in violation of the federal antitrust laws would reduce the KTC's ability to enforce the applicable state laws and regulations.

The Commonwealth of Kentucky, represented by its Attorney General, has submitted an *amicus curiae* brief in this appeal asserting that the ALJ's decision does not conflict with Kentucky law or public policy and, thus, does not implicate federalism concerns.

On the day of oral argument, Respondent filed a motion asking the Commission to stay this proceeding pursuant to Section 3.54(c) of the Commission's Rules of Practice, 16 C.F.R. § 3.54(c), pending the Commission's review of recent actions taken by the KTC, which Respondent asserts show that the KTC has instituted procedures consistent with the standards for active supervision set forth in the Initial Decision. As discussed below, we have deferred ruling on Respondent's Rule 3.54(c) motion until issuing our final decision on the merits, and address the issues raised in that motion herein.

II. State Action Doctrine

A. Overview

The principal issue on appeal is whether the Kentucky Association’s ratemaking activities are beyond the purview of the federal antitrust laws by virtue of the state action doctrine. The Supreme Court first articulated this doctrine in *Parker v. Brown*, 317 U.S. 341 (1943), where the Court upheld California’s Agricultural Prorate Act against a Sherman Act challenge. The Court determined that federal statutes do not limit the sovereign states’ autonomous authority over their own officers, agents, and policies in the absence of clear congressional intent to do so, and it found no such intent in the language or legislative history of the Sherman Act. *Id.* at 350-51. Accordingly, the Court held that when a “state in adopting and enforcing [a] program . . . , as sovereign, imposed the restraint as an act of government,” the Sherman Act does not prohibit the restraint. *Id.* at 352.³ The state action doctrine is thus grounded in principles of federalism and state sovereignty.

Although *Parker* involved acts of the state itself, the Supreme Court subsequently confirmed that the state action doctrine also protects certain private conduct from the federal antitrust laws. The Court has articulated a two-part test for determining whether anticompetitive conduct of private entities qualifies as “state action”: (1) the challenged conduct must be undertaken pursuant to a “clearly articulated and affirmatively expressed” state policy to displace competition with regulation; and (2) the conduct must be “actively supervised” by the state itself. *Midcal*, 445 U.S. at 105 (internal quotation marks omitted).⁴

³ The state action defense is available in Section 5 cases applying Sherman Act standards. *Ticor Title Ins. Co.*, 112 F.T.C. 344, 424 n.5 (1989).

⁴ Because the state action exception is an affirmative defense, the burden of proof is on Respondent to show that this standard has been met. *See Federal Trade Comm’n v. Ticor Title Ins. Co.*, 504 U.S. 621, 638 (1992) (“[T]he party claiming the immunity must show that state officials have undertaken the necessary steps to determine the specifics of the price-fixing or rate-setting scheme.”). Respondent does not dispute this point. *See* Memorandum of Respondent in Support of Motion for Summary Decision at 7-8.

Compliance with both parts of the *Midcal* test ensures not only that the federal antitrust laws are displaced only where there is a “deliberate and intended state policy,” but that the state remains politically accountable for the anticompetitive conduct it has sanctioned and overseen. *Ticor Title*, 504 U.S. at 636.

The first part of the *Midcal* test seeks to determine whether the state has intended to depart from the Sherman Act’s competitive model as an act of government to which federalism principles demand deference.⁵ In *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48 (1985), the Supreme Court applied the “clear articulation” requirement to collective ratemaking by intrastate common carrier rate bureaus operating under a regulatory scheme that was in some ways comparable to the state regulations at issue here. The Court held that collective ratemaking undertaken pursuant to state statutes that explicitly permitted collective rate-making or otherwise “made clear [the state’s] intent that intrastate rates would be determined by a regulatory agency, rather than by the market” established sufficiently clear articulation of the state’s intent to displace competition to satisfy the first part of the *Midcal* test. *Id.* at 63-64.⁶ In this case, nobody disputes that Respondent’s challenged conduct – undertaken pursuant to Kentucky law that explicitly permits collective ratemaking – meets the first part of the *Midcal* test.

The issue in contention here is the application of the second part of the *Midcal* test. While a state may substitute its own regulatory program in place of the competitive market, principles of federalism and state sovereignty do not empower a state simply to displace the federal antitrust laws and then abandon the

⁵ “Even strong regard for state policy would require antitrust immunity *only* if that were the state’s wish – that is, if the state intended in some sense to displace the antitrust laws from a certain area of activity.” I Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* § 221d, at 363 (2d ed. 2000) (emphasis in original).

⁶ The Court did not examine whether the state’s involvement satisfied the second part of the *Midcal* test, because the government had conceded that the relevant state agencies actively supervised the rate bureaus’ collective ratemaking activities. *Southern Motor Carriers Rate Conference*, 471 U.S. at 62.

market at issue to the discretion of non-governmental actors.⁷ Accordingly, to qualify for the state action exemption from the antitrust laws, a challenged restraint effectuated by such actors not only must accord with a clearly articulated state policy to displace competition, but also must be actively supervised by the state. *Midcal*, 445 U.S. at 105. This requirement “stems from the recognition that ‘[w]here a private party is engaging in the anticompetitive activity, there is a real danger that he is acting to further his own interests, rather than the governmental interests of the State.’” *Patrick v. Burget*, 486 U.S. 94, 100 (1988) (quoting *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 47 (1985)). As the Supreme Court explained in *Federal Trade Comm’n v. Ticor Title Ins. Co.*:

[W]hile a State may not confer antitrust immunity on private persons by fiat, it may displace competition with active state supervision if the displacement is both intended by the State and *implemented in its specific details*. Actual state involvement, not deference to private price-fixing arrangements under the general auspices of state law, is the precondition for immunity from federal law.

504 U.S. 621, 633 (1992) (emphasis added). The purpose of the active supervision requirement is not to impose normative standards on state regulatory practices, but rather to ensure that a state, in displacing federal law, takes appropriate steps to ensure that its own stated standards are met. *Id.* at 634-35.

The Supreme Court has made clear that the standard for active state supervision is a rigorous one. It is not enough that the state approves private pricing agreements with little review. As the Court held in *Midcal*, “[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.” *Midcal*, 445 U.S. at 106. Active supervision “requires that state officials have *and exercise* power to review particular anticompetitive acts of private parties and *disapprove those that fail to accord with state policy*.” *Patrick*, 486 U.S. at 101 (emphasis added). State officials must engage in a “pointed reexamination” of the private conduct. *Midcal*, 445 U.S. at 106 (internal quotation marks omitted).

⁷ See I Areeda & Hovenkamp, § 226a, at 464.

They must exercise “sufficient independent judgment and control so that the details of the rates or prices have been established as a product of deliberate state intervention.” *Ticor*, 504 U.S. at 634.

In *Ticor*, the Supreme Court confirmed the Commission’s application of the active state supervision requirement to collective ratemaking activities. The Court disagreed with lower court decisions holding that the active supervision requirement is met merely where the state regulatory program is “staffed and funded,” grants state officials “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.” *Id.* at 637 (quotation omitted). The Court stated that these criteria might be a “beginning point,” but were “insufficient to establish the requisite level of active supervision.” *Id.* at 637-38. The Court held:

Where prices or rates are set as an initial matter by private parties, subject only to a veto if the State chooses to exercise it, the party claiming the immunity must show that state officials have undertaken the necessary steps to determine the specifics of the price-fixing or ratesetting scheme. The mere potential for state supervision is not an adequate substitute for a decision by the State.

Id., at 638. Applying this standard, the Court found supervision inadequate in states where private rate filings routinely went into effect without further activity by the state regulatory agency – sometimes checked only for mathematical accuracy, and sometimes not even checked to that extent.⁸

The Supreme Court’s decisions in *Ticor*, *Patrick*, and *Midcal* thus make clear that a state official or agency must have ascertained the relevant facts,

⁸ Although *Ticor* involved a “negative option” regulatory scheme (*i.e.*, where proposed rates go into effect automatically within a specified time period, unless the regulatory agency raises an objection), the Court’s holding that active supervision requires the state actually to exercise “independent judgment and control” over the “details” of the ratesetting scheme is not limited to a negative option system. *Ticor*, 504 U.S. at 634-35.

examined the substantive merits of the private action, and assessed whether the private action comports with the underlying statutory criteria established by the state legislature in a way sufficient to establish the challenged conduct as a product of deliberate state intervention rather than private choice. Although the Supreme Court has not prescribed specific state supervisory activities that must exist to meet the active supervision standard, *Ticor* does suggest some steps that may be indicative of active supervision. The Court noted that the government's concession of active supervision in *Southern Motor Carriers* was against a background that "the State had ordered and held ratemaking hearings on a consistent basis." *Ticor*, 504 U.S. at 639. The *Ticor* Court also indicated that a state regulatory agency might properly use "sampling techniques" to investigate filed supporting data, or use a "specified rate of return" formula to determine whether a rate increase was justified. *Id.* at 640.

The courts that have addressed the active supervision requirement, and the Commission's previous decisions involving collective ratemaking, have identified a number of state supervisory activities that support a determination of active state supervision. These factors include where the state: collects business data (including revenues and expenses); conducts economic studies; reviews profit levels and develops standards or measures such as operating ratios; disapproves rates that fail to meet the state's standards; conducts hearings; and issues a written decision. For example, in *Yeager's Fuel, Inc. v. Pennsylvania Power & Light Co.*, 22 F.3d 1260, 1270-72 (3rd Cir. 1994), the court found active state supervision of a utility's special electric rates and other incentives for use of high-efficiency electric heating systems, where state officials: approved the rate after a hearing in a contested tariff proceeding; required the utility to submit an annual report regarding its rebate and rate program; promulgated regulations detailing the methodology to be used in assessing whether such programs and their associated costs were just and reasonable; conducted an investigation of the programs in response to inquiries from the legislature and complaints by non-participants; and issued a written report concluding that the programs were cost effective and did not adversely affect non-participants.⁹

⁹ The state's supervisory activities are described in further detail in the district court's opinion. *Yeager's Fuel, Inc. v. Pennsylvania Power & Light Co.*, 804 F. Supp. 700, 712-13 (E.D. Pa. 1992), *aff'd in relevant part and rev'd in part*, 22 F.3d 1260 (3rd Cir. 1994).

Other circuit court decisions have pointed to similar indicia of state supervision. In *Lease Lights, Inc. v. Public Service Co. of Oklahoma*, 849 F.2d 1330, 1334 (10th Cir. 1988), the court found active state supervision of a utility's rates where, in response to the utility's request for a rate adjustment, the regulatory agency conducted public hearings involving extensive testimony and documentary evidence, and subsequently authorized a different rate adjustment than the utility had proposed. In *DFW Metro Line Services v. Southwestern Bell Tel. Corp.*, 988 F.2d 601, 606-07 (5th Cir. 1993), the court found active supervision of telephone rates where the state agency's numerous published decisions ruling on petitions for a rate change showed that the agency examined the reasonableness of the rates and provided a forum for complaints regarding application of the tariffs. And, in *TEC Cogeneration, Inc. v. Florida Power & Light Co.*, 76 F.3d 1560 (11th Cir.), *modified on reh'g*, 86 F.3d 1028, 1029 (11th Cir. 1998), the court held that the state "exercised sufficient independent judgment and control" to satisfy the active supervision requirement where state regulators approved a utility's rates and its other challenged conduct after conducting extensive, contested administrative proceedings.¹⁰

¹⁰ See also *Green v. Peoples Energy Corp.*, No. 02 C 4117, 2003 WL 1712566, at *6-7 (N.D. Ill. Mar. 28, 2003) (finding active supervision where the state agency conducted "elaborate hearings" and issued "lengthy orders" approving the tariffs at issue); *Destec Energy, Inc. v. Southern California Gas Co.*, 5 F. Supp. 2d 433, 455-58 (S.D. Tex. 1997) (finding active supervision where the state agency held contested public hearings regarding contracts at issue, circulated its proposed resolutions for public notice and comment, and issued a written decision that addressed the reasonableness of the challenged provisions); *County of Stanislaus v. Pacific Gas & Elec. Co.*, No. CV-F-93-5866-OWW, 1994 WL 706711, at *26-27 (E.D. Cal. Aug. 25, 1994) (finding active supervision where the state agency conducted a "searching and thorough" annual review of the reasonableness of utility's rates that included the agency's "application of criteria to consider competitive concerns"); *City of Vernon v. Southern California Gas Co.*, No. CV 92-3435-SVW(CTx), 1994 WL 896057, at *2 (C.D. Cal. Aug. 4, 1994) (finding active supervision where the state agency conducted extensive proceedings regarding utility's rates and issued written orders which contained detailed explanations of the agency's reasons for its decision and indicated that the agency considered the competitive effects of its decision); *Gulf Marine Repair Corp. v. Liberty Mutual Ins. Co.*, No. 92-1576-CIV-T-21A, 1994 WL 805208, at

The Commission's previous decisions finding active supervision of collective ratemaking are also instructive. In *Motor Transport Ass'n of Connecticut, Inc.*, 112 F.T.C. 309, 341-42 (1989), the Commission held that the active supervision requirement was satisfied where the regulatory agency required that a proposed rate increase of more than 5% be accompanied by financial information – including operating revenues and expenses – to justify the reasonableness of the increase; applied a specified operating ratio to evaluate the proposed rate's reasonableness; and held several public hearings and issued written decisions regarding proposed rates. In *New England Motor Rate Bureau, Inc.*, 112 F.T.C. 200, 282-83 (1989), *rev'd on other grounds sub nom New England Motor Rate Bureau, Inc. v. Federal Trade Comm'n*, 908 F.2d 1064 (1st Cir. 1990), the Commission concluded that the active supervision requirement was met where state regulators analyzed proposed collective rates to determine whether they fell within a “zone of reasonableness” based on the minimum and maximum industry averages of previously approved rates, had suspended tariffs determined to be unreasonable pending a formal public hearing, and issued written orders.

Finally, in 2003, the Commission issued a complaint against the Indiana Household Goods and Warehousemen, Inc., and an accompanying Agreement Containing Consent Order. The complaint alleged that the respondent, an association consisting of 70 household goods movers, took collective actions to establish and maintain moving rates, in violation of Section 5 of the FTC Act. Complaint, ¶¶ 7-9, *Indiana Household Movers and Warehousemen, Inc.*, Dkt. No. C-4077 (April 25, 2003). The Consent Order, among other things, required the respondent to cease and desist from the unlawful conduct, barred the respondent from filing collective rates, and required cancellation of all existing tariffs. Consent Order, *Indiana Household Movers and Warehousemen, Inc.*, Dkt. No. C-4077 (April 25, 2003). An accompanying Analysis of Proposed Order to Aid Public Comment, *Indiana Household Movers and Warehousemen, Inc.*, Dkt. No. C-4077 (April 25, 2003) (“Analysis”), discussed the Commission's views about the parameters and requirements of the state action doctrine. The Analysis stated

*10-11 (M.D. Fla. Jan. 13, 1994) (finding active supervision where state agency routinely held public hearings on rates and only once approved rates as initially filed).

that the Commission would consider the following elements in its analysis of the active supervision prong:

- (1) the development of an adequate factual record supporting the proposed rate increase, including notice and opportunity to be heard;
- (2) a written decision on the merits; and (3) a specific assessment – both quantitative and qualitative – of how the private action comports with the standards established by the state legislature.

Analysis at 5, *Indiana Household Movers and Warehousemen, Inc.*, Dkt. No. C-4077 (April 25, 2003).¹¹

The ALJ concluded, and we agree, that no single measure identified above by the courts or the Commission is necessarily a prerequisite for active supervision in this case. We recognize, for example, that the financial information required for a small number of utilities may differ markedly from the information required of a large number of small movers. However, the ALJ's finding that the state of Kentucky has taken none of the measures identified by the courts and the Commission plainly supports a conclusion that the level of state supervision of the challenged private activity does not meet the active supervision standard. ID 36.

We now turn to an examination of the KTC's supervision of the conduct at issue.

B. State Supervision in Kentucky

We find that the Commonwealth of Kentucky does not actively supervise the Kentucky Association's collective ratemaking. Although the KTC has the authority – indeed the responsibility – to ensure that household goods carrier rates are “just and reasonable” and not “excessive,” *see* KY. REV. STAT. ANN. §§ 281.675, 281.590, and 281.695(1), the record shows that, in practice, the

¹¹ *See also* Office of Policy Planning, *Report of the State Action Task Force 55* (September 2003), *available at* <http://www.ftc.gov/os/2003/09/stateactionreport.pdf> (identifying same factors as indicia of active supervision).

KTC's review of the appropriateness of the rates in the Kentucky Association's tariff has been exceedingly limited.

As discussed in the preceding section, the active supervision standard requires Respondent to demonstrate that the state, having chosen to substitute regulation for the economic constraints of the competitive market, actually undertakes a substantive review of Respondent's collective rates to ensure that the rates comport with the state's articulated policy objectives. While there are a range of ways a state may undertake this review, the normal starting point for such a program of regulatory oversight is for the state to establish some methodology for evaluating the appropriateness of proposed rates. Usually, such an evaluation involves some analysis of the relevant firms' costs and revenues, profit margins, operating ratios, or other such measures. *See, e.g., Motor Transport Ass'n of Connecticut*, 112 F.T.C. at 320-22, 341 (state regulators reviewed carriers' operating revenues and expenses); *Yeager's Fuel*, 804 F. Supp. at 713 (agency's regulations set forth in detail the methodology to be used in assessing the cost effectiveness of utility's programs); *United States v. Southern Motor Carriers Rate Conference, Inc.*, 467 F. Supp. 471, 477 (N.D. Ga. 1979) (regulators used carriers' cost data to arrive at an operating ratio).¹²

In this case, the statute that authorizes the KTC to establish procedures for collective ratemaking expressly provides that these procedures must "assure that respective revenues and costs of carriers . . . are ascertained." KY. REV. STAT. ANN. § 281.680(4). It is thus evident that the state legislature has contemplated that the agency should undertake some cost-based analysis of collective rates. The KTC, however, has no formula or methodology for determining whether the Kentucky Association's collective rates comply with the statutory standards. IDF 88, 89. Although, at one time, the KTC performed "uniform cost studies" and calculated operating ratios for household goods carriers, it has not done so for over two decades. IDF 44, 45. As the KTC employee responsible for reviewing household goods carrier tariffs explained, "I didn't see it necessary to make – spend the time and expense of going into that in depth study when I felt common sense provided me that judgment." CX 116 (Debord, Dep. II at 90).

¹² As we noted above, the government in *Southern Motor Carriers* conceded active state supervision.

Not only has the KTC failed to establish any methodology for analyzing rates, it does not even obtain data – including the cost and revenue data specified in the statute – that would enable it to assess the reasonableness of the Kentucky Association’s rates. Over the years, the Kentucky Association has proposed numerous rate increases to its tariff. In the ten-year period from 1992 to 2002 alone, the Kentucky Association proposed nine general rate increases. IDF 27 (increase of 4.5% in 1992, 8% in 1994, 5% in 1996, 8% in 1998, 5% in 1999, 10% in 2000, 8% in 2001, 5% in 2002). The Kentucky Association also has filed tariff supplements adding new categories of rates – including, for example, higher peak season rates (to which all but two of its members adhere). IDF 29, 35. Year after year, the KTC has nearly always approved these rate increases in their entirety without any modification. *See* CX 116 (Debord, Dep. II at 94-95) (KTC employee identified only one instance in which KTC rejected a proposed increase to the collective tariff rates). Yet the record shows that the KTC has obtained little, if any, business data from the Kentucky Association or its members to verify the reasonableness of these numerous rate increases. IDF 75.

The KTC employee generally learns about the bases for proposed rate increases by attending meetings of the Kentucky Association membership or through informal discussions with Kentucky Association representatives. IDF 70, 76. The type of information the KTC obtains in this way is only of a very general nature – for example, “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.” IDF 79. The KTC does not request or obtain information about the carriers’ actual costs, revenues, or profit margins to verify the Kentucky Association’s asserted justifications for its proposed rate increases. IDF 70, 79.¹³ Although the KTC formerly required household goods carriers to file annual financial reports in the 1970s and ‘80s, it no longer requires carriers to submit that information and does not examine such

¹³ The KTC employee reviews records that movers keep on individual moves while conducting household goods compliance audits to ensure that movers are adhering to the filed rates, but he does not routinely look at balance sheets, income statements, payroll documents, or business records that would allow him to analyze the movers’ profitability. IDF 72.

materials in its review of proposed rates. IDF 42.¹⁴ Instead, the KTC employee testified that he relies on his experience in the industry, conversations with truckers regarding their costs, and his review of publications such as the *Wall Street Journal*. IDF 67.

One justification that the Kentucky Association has given, and the KTC has accepted, for proposed increases to its *intrastate* tariff is that *interstate* tariff rates have increased. For example, in December 1999, the Kentucky Association informed the KTC that it was seeking a 10% increase to its tariff rates because interstate tariff rates had increased by 5%. The following December, the Kentucky Association proposed an 8% rate increase because the interstate tariff rates had increased by 5%. The KTC allowed these rate increases to go into effect. IDF 83, 84. The KTC employee explained that “[i]t was very common for [the Kentucky Association] to state to me that their costs for doing intrastate work was equal to that of interstate work. And, if interstate went up eight percent, then it should be logical to assume that intrastate should be increased by an equal amount.” CX 116 (Debord, Dep. II at 102). The KTC employee indicated, however, that he did not really know how the interstate rates – which are developed by a private rate publishing agency and published pursuant to federal law – are established. IDF 98. He also acknowledged that, because movers are permitted to discount from the interstate tariff rates, and routinely do discount from those rates, it would be difficult to compare the rates in the Kentucky Association’s tariff rates with the rates in the interstate tariff. IDF 99-101. Indeed, the KTC employee stated that, in his view, the federal standards for the interstate tariff differ significantly from Kentucky’s standards for intrastate rates, because in “my understanding, their goal [for interstate rates] is to let the industry charge as they wish, charge whoever they wish, whatever they wish and discriminate as they see fit.” IDF 102 (quotation omitted). Under these circumstances, we find that the KTC could not reasonably make an assessment of the appropriateness of the intrastate tariff rates based on an increase in the interstate tariff rates. In particular, it is difficult to see any reasonable basis for using an interstate increase as a justification for a *larger* percentage increase in intrastate rates, as has occurred at least twice.

¹⁴ A limited number of carriers still submit financial statements to the KTC on a voluntary basis, but they are not audited, and the KTC does not consider them reliable sources of information regarding the industry’s economic conditions. IDF 63.

In *Ticor*, the Commission found active supervision lacking where the state agency “suffered from a dearth of information that would have enabled it to assess the appropriateness of the filed rates.” *Ticor*, 112 F.T.C. at 432. On remand from the Supreme Court, the circuit court affirmed the Commission’s decision, finding that the state “could not meaningfully examine the rates proposed because it never obtained the information necessary for a proper evaluation.” *Ticor Title Ins. Co. v. Federal Trade Comm’n*, 998 F.2d 1129, 1140 (3rd Cir. 1993). The same is true here. We do not mean to suggest that there is a specific factual inquiry that a state necessarily must undertake as part of its regulatory program. The factual record that will suffice for a meaningful review of the private conduct at issue depends at least in part on the substantive norms that the state has provided. In this case, it is of significant consequence that the state legislature itself has provided that the KTC must “assure that respective revenues and costs of carriers . . . are ascertained,” KY. REV. STAT. ANN. § 281.680(4), and that the KTC does not obtain this data.

Furthermore, the state’s regulatory program lacks the procedural elements – such as public input, hearings, and written decisions – that courts have found to be important indicators of active state supervision. *See, e.g., Yeager’s Fuel*, 22 F.3d at 1270-72; *Lease Lights*, 849 F.2d at 1334; *Destec Energy, Inc. v. Southern California Gas Co.*, 5 F. Supp. 2d 433, 455-58 (S.D. Tex. 1997); *City of Vernon v. Southern California Gas Co.*, No. CV 92-3435-SVW(CTx), 1994 WL 896057, at *2 (C.D. Cal. Aug. 4, 1994) These procedural elements are powerful tools for ensuring that relevant facts – especially those that might contradict the proponent’s contentions – are brought to the state decision-maker’s attention. Although the state legislature has identified public hearings as procedures state regulators may – and, upon receipt of a protest, must – use in reviewing rates, the state has not conducted hearings regarding the Kentucky Association’s collective tariff since the late 1950s or early 1960s, when the tariff was first developed. IDF 96.¹⁵ Moreover, although a state statute and the KTC’s own administrative

¹⁵ Respondent argues that it has not been necessary for the KTC to hold hearings or suspend the Kentucky Association’s proposed rates because the Kentucky Association’s formal tariff filings already reflect input from KTC employee Debord regarding which proposals he would accept or reject. As we have already discussed, however, Debord did not obtain or review the type of information that would support a substantive assessment of the merits of the

regulations require that household goods carriers give public notice of proposed rate increases, the KTC does not appear to enforce this requirement. IDF 74. The KTC receives no input from groups advocating on behalf of consumers. IDF 73. The KTC does not issue written decisions when it permits rate increases to go into effect, nor does it set forth in writing any analysis of the collective rates contained in the Kentucky Association's tariff. IDF 95.

We agree with the ALJ that this minimal level of state activity falls far short of the active supervision required by *Ticor*, *Patrick*, *Midcal*, and other relevant cases. ID 46.¹⁶ This is not a difficult case in which we are called upon to decide whether a state's implementation of certain supervisory steps but not of others satisfies the active state supervision requirement. Where, as here, the relevant state agency has not taken any of the steps that courts have identified as indicia of active supervision, it is clear that the state has not 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." *Ticor*, 504 U.S. at 634-35. This conclusion is all the more compelling when the state agency has not taken the steps that the state legislature itself has identified as important for a determination of whether rates are reasonable.

Respondent argues that this case is different than *Ticor*, because *Ticor* involved a negative option system, whereas the record here demonstrates KTC "activity" with regard to the Kentucky Association's tariff filings. RAB at 29. The Supreme Court in *Ticor*, however, never said that the need for a state to exercise "independent judgment and control" over the "details" of proposed rates is satisfied simply because a state avoids use of a negative option system. *Ticor*, 504 U.S. at 634-35. Moreover, the record evidence in the present case demonstrates the spurious nature of the distinction Respondent would have us draw. The record shows that when the Kentucky Association wants to increase rates, it informs the KTC employee of the proposed change to the tariff, and the

Kentucky Association's proposed rates.

¹⁶ The ALJ also found that the minimal level of staffing for the KTC's regulatory program weighs against a finding of active supervision. ID at 37-38. We believe that the evidence in this regard is inconclusive; thus, this finding does not factor into our analysis.

employee often says merely “file the tariff and we’ll take it from there.” IDF 79 (citing CX 117 (Mirus, Dep. At 153)). Then, when the document requesting the change is filed, the KTC stamps the document, and, in the absence of further action by the KTC, this is deemed the KTC’s approval of the proposed change. IDF 94. When Respondent submitted a price increase in 1994, for example, the Association’s notes of the filing stated bluntly: “Take to Bill Debord [the KTC employee] for acceptance stamp.” *Id.* (quoting RX 102). Regardless of whether this is properly deemed a negative option system, based on these facts we cannot say that the regulatory scheme here is significantly different than the one at issue in *Ticor*.

Respondent also argues that a requirement for notice and a hearing would add nothing to the regulatory process here because, given the sporadic and occasional nature of household moving, individual consumers shipping goods would have no interest in any rate proceeding and would therefore be unlikely to participate. RAB at 34. Respondent further argues that such procedural requirements are inappropriate, because the state’s system of tariff “publication” (*i.e.*, making tariffs available for inspection by shippers) is consistent with the manner of tariff publication prescribed by the federal government for interstate tariffs, and identical to rules that have traditionally governed tariff rate filings. *Id.* at 35. These arguments are ill-founded. Even assuming, for the sake of argument, that individuals who only occasionally use moving services would not be inclined to complain about rates, there are other groups that may well have an interest in providing input to the ratemaking process. *See* CX 116 (Debord, Dep. II at 94) (KTC employee testified that businesses that paid for their employees’ moving expenses had complained about proposed rate increases). Furthermore, Respondent fails to explain how publication of tariffs by itself can meet the basic requirement for active supervision – *i.e.*, ensuring that “the details of the rates or prices have been established as a product of deliberate state intervention.” *Ticor*, 504 U.S. at 634.

More fundamentally, these arguments misapprehend the significance of the ALJ’s observations about the lack of hearing procedures. As we already have made clear, neither we nor the ALJ have held that notice and a hearing are

absolute requirements for a state's program of active supervision.¹⁷ Nonetheless, while there are many ways a state may structure its supervision of private anticompetitive conduct, it is essential that the state's chosen procedures allow for meaningful review of the merits of the conduct at issue to ensure that it comports with the state's own normative standards.

Respondent also argues that it is improper to compare the KTC's current level of supervision with the KTC's supervisory activities in the past, because the state's regulatory needs have diminished as a result of federal deregulation of other non-household goods carrier rates in 1995. RAB at 40. We do not hold that the KTC must adhere to its supervisory activities of the past; rather, we merely look to these prior activities as an indicator of what supervisory activities are possible in this context.¹⁸ Changing circumstances may indeed cause the state to alter its regulatory activities, but that does not relieve the state of its obligation to exercise "independent judgment and control" over the regulated rates. *Ticor*, 504 U.S. at 634. At any time, the state has a choice: it can choose to return to a freely competitive system, or it can allocate the resources necessary to ensure that the regulated activity accords with state policy.

Last, Respondent argues that the Initial Decision does not give proper deference to the KTC's determination that its procedures for overseeing collective rates are appropriate and effective, or the fact that the KTC intervened in this matter, and that the ALJ erred in excluding a declaration by the KTC expressing its views that it actively supervises Respondent's collective rates. RAB at 15-18, 40-41. As the ALJ correctly found, the KTC declaration adds nothing to this

¹⁷ See *Motor Transport Ass'n of Connecticut*, 112 F.T.C. at 342 (rejecting argument that notice and a hearing are essential for active supervision).

¹⁸ Complaint Counsel also invites the Commission to consider documents (excluded by the ALJ) showing the extensive supervision of collective rates undertaken by the state of Oregon to assess how Kentucky's supervision fares by comparison. CCAB at 39-43. In a closer case, we might find the material helpful as an example of the level of supervision that is possible in this industry. However, because we find that this is not a close case, consideration of these materials is not necessary here.

case.¹⁹ Whether a state agency is satisfied with its level of regulatory oversight does not determine whether the state in fact actively supervises private anticompetitive conduct.²⁰ As the Supreme Court has made clear, states do not have unfettered discretion to determine the level of regulatory oversight that is adequate when competition has been displaced. *Midcal*, 445 U.S. at 106. Protection from the federal antitrust laws will be granted only when the state has substituted a program of active supervision for the economic constraints of the competitive market.

III. Price Fixing

We next address whether the Kentucky Association's rate-making conduct, if not shielded by the state action doctrine, violates the antitrust laws. The household goods carriers that participate in the Kentucky Association are competitors. IDF 8. On behalf of its members, the Kentucky Association prepares and files with the KTC joint tariffs and tariff supplements containing proposed rates, which, after nearly automatic approval by the KTC, establish the prices its members agree to charge, unless they file an exemption. IDF 10, 23.²¹ This

¹⁹ For this reason, we hold that the ALJ did not err in excluding the KTC's declaration. Even if we take this declaration into account, however, it does not change our analysis, for the reasons stated above.

²⁰ We note that the Commonwealth of Kentucky – represented by the Kentucky Attorney General – has submitted an *amicus* brief in this appeal expressing its view that the ALJ's decision does not conflict with state law or public policy. Although the objective facts – rather than the state's opinion – determine whether the active supervision standard is met, the submission further undercuts Respondent's argument.

²¹ The ALJ found that the Kentucky Association sometimes pressured its members to drop requests to charge rates lower than those in the tariff. IDF 36-40. Although there is some evidence in the record to support this finding, we do not believe that it is dispositive to the issues of whether the Kentucky Association's collective ratemaking violates the federal antitrust laws and whether its activities are exempt from these laws under the state action doctrine. Whether or not such pressure was imposed, the fact remains that the majority of Respondent's members voluntarily engaged in collective tariff filings, which

activity is collective ratemaking – concerted activity to fix or stabilize prices that historically has been condemned as *per se* illegal price-fixing.²² See *Ticor*, 504 U.S. at 639 (“This case involves horizontal price fixing No antitrust offense is more pernicious than price fixing.”); *Motor Transport Ass’n of Connecticut*, 112 F.T.C. 336 (collective ratemaking “easily fits the classic description of a ‘naked price restraint’”) (internal quotation marks omitted); *Massachusetts Furniture & Piano Movers Ass’n, Inc.*, 102 F.T.C. 1176, 1224 (1983) (“it is clear beyond cavil that agreements among competitors to set price levels or price ranges are *per se* illegal under the antitrust laws”) (citation omitted), *rev’d on other grounds sub nom Massachusetts Furniture & Piano Movers Ass’n, Inc. v. Federal Trade Comm’n*, 773 F.2d 391 (1st Cir. 1985).²³

Respondent does not seriously dispute that, unless the state action exemption applies, collective ratemaking violates the federal antitrust laws. See Tr. at 23-24. Although Respondent asserts that its members do not agree to prices but merely agree to submit tariff proposals for the KTC’s consideration (RAB 5), it does not contend that a “mere” agreement on *proposed* rates alters the illegal character of the challenged conduct.²⁴ Lest there be any doubt on the subject, we

amply demonstrates price-fixing.

²² “So called ‘rate bureaus’ are really cartels of common carriers, utilities, insurers, or other price-regulated firms that submit rates jointly. While joint submissions greatly simplify the rate approval process . . . , they pose obvious dangers of price fixing.” I Areeda & Hovenkamp, § 221a, at 356.

²³ In *PolyGram Holding Inc.*, Dkt. No. 9298, op. 49 n. 66 (FTC July 24, 2003), *review pending*, No. 03-1293 (D.C. Cir.), the Commission recognized that, although the Supreme Court has abandoned the view of a sharp *per se* rule of reason dichotomy for most types of collective activity, a traditional *per se* approach remains appropriate in cases with no possible arguments that restraints are needed to achieve procompetitive results. The collective ratemaking at issue clearly falls into the latter category.

²⁴ Respondent maintained during the oral argument before the Commission that its members sometimes charged old rates. Although the degree of uniformity could be potentially relevant in a damages action, we can find that Respondent’s conduct constitutes *per se* unlawful price fixing, even if

find that the need for formal KTC approval of proposed tariff filings (which can be effected simply by agency inaction, IDF 94) does not change the fact that the participating carriers agree on rates that they will charge. Furthermore, as the Commission has previously recognized, the Kentucky Association and its members “need not agree to a single price level in order to fix prices.” *Motor Transport Assoc. of Connecticut*, 112 F.T.C. at 336. Respondent effectively conceded this point as well. Tr. at 33. As noted earlier, the vast majority of carriers agree to charge the same rate for many items in the tariff.

Although we agree with the Initial Decision that Respondent’s challenged conduct constitutes horizontal price-fixing that is *per se* unlawful, we disagree that relevant markets must be defined in a *per se* case. ID 28-29. It is obviously necessary to identify the goods or services that are subject to the price-fixing or other anticompetitive restraint, and that has been done here. It is not necessary, however, to show that these goods or services constitute a relevant antitrust product market, as described, for example, in the *Horizontal Merger Guidelines*. See U.S. DEPARTMENT OF JUSTICE & FEDERAL TRADE COMMISSION, HORIZONTAL MERGER GUIDELINES § 1.1 (rev’d 1997). As the Supreme Court has long recognized, an analysis of market power – of which market definition is the typical starting point – is unnecessary in a *per se* price-fixing case:

Even [if] the members of the price fixing group were in no position to control the market, to the extent that they raised, lowered, or stabilized prices they would be directly interfering with the free play of market forces. The [Sherman] Act places all such schemes beyond the pale and protects that vital part of our economy against any degree of interference.

United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 221 (1940). See *PolyGram Holding Inc.*, Dkt. No. 9298, op. 29 (FTC July 24, 2003) (in a small “but significant category of cases, scrutiny of the restraint itself is sufficient to

Respondent’s rates were not adhered to uniformly. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 222 (1940) (“Nor is it important that the prices paid by the combination were not fixed in the sense that they were uniform and inflexible. Price fixing . . . has no such limited meaning.”).

find liability without consideration of market power”). Accordingly, we conclude that, the collective ratemaking at issue here is *per se* unlawful, without need for any inquiry into relevant market or market power.

We acknowledge that the Kentucky Association’s liability in this matter is due in part to the KTC’s sustained failure to provide proper supervision to Respondent’s rate-making activities. This fact, however, does not warrant a different result. Private interests can assess whether a state is in compliance with the requirements of the state action doctrine, and can urge the state to adopt the necessary practices. If a state, for whatever reason, declines to follow the requirements of the state action doctrine, then private interests can alter their behavior to comply with the antitrust laws.

IV. Remedy

The ALJ proposed an order that would require Respondent to cease and desist from collective ratemaking. The order would require Respondent to cancel and withdraw all existing tariffs and tariff supplements on file with the KTC and to cease and desist from developing future tariffs that contain collective rates. ID at 51-52. Pursuant to paragraph VII, the order would remain in effect until active supervision is demonstrated to the Commission. *Id.* at 54. We believe that these provisions are warranted with two exceptions discussed below.

The Commission has issued orders with similar provisions in prior cases involving motor carriers’ collective tariffs. *New England Motor Rate Bureau*, 112 F.T.C. at 300; *Massachusetts Furniture & Piano Movers*, 102 F.T.C. at 1228. The provisions in the order are also similar to terms contained in a recent series of consent orders accepted by the Commission. *Indiana Household Movers and Warehousemen, Inc.*, Dkt. No. C-4077 (April 25, 2003); *Iowa Movers and Warehousemen’s Ass’n*, Dkt. No. C-4096 (Sept. 10, 2003); *Minnesota Transportation Services Ass’n*, Dkt. No. C-4097 (Sept. 15, 2003); *Alabama Trucking Ass’n, Inc.* Dkt., Inc. No. D-9307 (Dec. 4, 2003); *Movers Conference of Mississippi, Inc.*, Dkt. No. D-9308 (Dec. 4, 2003). As Complaint Counsel points out, paragraph VII of the proposed order differs from the recent consent orders in two significant respects: it does not contain the 20-year “sunset” provision common to most of the Commission’s orders, and it explicitly provides that respondent may seek to modify the order if, in the future, the KTC engages in active supervision as determined by the Commission. Complaint Counsel argues

that Section 5(b) of the FTC Act, as implemented by Section 2.51 of the Commission's Rules of Practice, 16 C.F.R. § 2.51, sets forth the standards for modifying a Commission order, and that including this provision in the order might create an impression that some showing other than that established under Section 5(b) and Rule 2.51 will be either sufficient or necessary. Complaint Counsel also asserts that a 20-year sunset provision is appropriate in this case. We agree with Complaint Counsel on both counts and have modified our order accordingly.

Respondent argues that the better course of action would be for the Commission to stay entry of a remedial order altogether to allow the state to develop a program that will satisfy the active supervision requirement. Respondent argues, among other things, that a stay would allow the KTC to continue to protect the public interest by regulating household goods carriers, and would avoid exposing the KTC, Respondent and its members to unjustified private litigation. RAB at 45; RRB at 11-13. Respondent has separately moved the Commission to stay this proceeding pursuant to Commission Rule 3.54(c), 16 C.F.R. § 3.54(c), pending the Commission's review of actions taken by the KTC after the Initial Decision, which Respondent asserts show that the KTC has recently instituted procedures that satisfy the active supervision requirement.

Having found a violation of Section 5 of the FTC Act, the Commission has wide discretion in its choice of a remedy. *Federal Trade Comm'n v. Colgate-Palmolive Co.*, 380 U.S. 374, 392 (1965); *Jacob Siegel Co. v. Federal Trade Comm'n*, 327 U.S. 608, 611-13 (1946). The record in this case shows that, year after year, the KTC has allowed the Kentucky Association and its members to raise rates with virtually no examination of the merits of these rates. The brunt of these anticompetitive practices is being borne by consumers in Kentucky, and until the Kentucky Association can demonstrate that the state has in place a tested program of active supervision to ensure the reasonableness of collective rates, a cease and desist order is necessary to protect the interests of consumers, notwithstanding any hardship to Respondent and its members.

Contrary to Respondent's contention, entry of a cease and desist order would not expose the KTC to litigation or dismantle the state's entire system for regulating household goods carrier rates. By its terms, the order applies only to the Kentucky Association; it does not run against the KTC. Only joint tariff filings are prohibited. The KTC retains its power to review individual tariff filings

to ensure that household goods carrier rates in Kentucky are reasonable and not discriminatory. If the state prefers a system of joint tariffs and is willing to devote the appropriate resources to it, the state is free to modify this regulatory program to ensure a substantive review of joint tariff filings. In the intervening time, however, there is no reason to believe that either the state's entire system for regulating movers' rates or the interests of the moving public will be in jeopardy.

Moreover, we do not believe that a stay is warranted under Rule 3.54(c). That rule provides that the Commission may withhold final action in an appeal pending the receipt of additional information or views "as to the form and content of the rule or order to be issued." This rule is not a mechanism for avoiding a Commission decision on liability or entry of a cease and desist order prohibiting conduct found to be unlawful. Instead, the Commission has applied this rule to consider additional information that could affect the specific remedy provided in a final order.²⁵ Although the materials submitted by Respondent in support of its motion indicate that the KTC has taken some initial steps to augment the level of supervision it exercises over the Kentucky Association's collective rate-making (such as requiring some sort of financial reports and written findings), these materials fall significantly short of demonstrating that the KTC's new procedures satisfy the "active supervision" requirement articulated by the Supreme Court in *Ticor*, and other relevant decisions. Most important, Respondent has not shown with precision what information the KTC will require to support proposed rate adjustments and what criteria the KTC will apply to assess the reasonableness of proposed rate adjustments. These are not questions that are likely to be answered

²⁵ For example, in *Holiday Magic, Inc.*, 83 F.T.C. 1590 (Apr. 29, 1974), the Commission granted a 30-day extension of time for respondents to submit additional information regarding orders entered in a federal district court proceeding, which apparently provided some of the same relief – the refund of money – contemplated in the Commission's prospective order. In granting the motion, the Commission noted that this time extension would not delay final disposition of the case and directed respondents to assume that the ALJ's finding of liability would be affirmed. The Commission subsequently issued an opinion and final order upholding the ALJ's findings of liability, enjoining the respondents' unlawful practices, and ordering the refund of money, but staying the latter provision so long as respondents remained in compliance with the federal district court order. *Holiday Magic, Inc.*, 84 F.T.C. 748 (Oct. 15, 1974).

satisfactorily merely by awaiting the KTC's action with regard to the Kentucky Association's most recent tariff filing. Rather, as Respondent itself has acknowledged, development of a new program of supervision will take some time. RRB at 11.

Under these circumstances, there is no good reason to delay entry of a cease and desist order in this case. If and when the KTC implements a program to exercise greater supervision over household goods carrier rates, Respondent can apprise the Commission of these changed circumstances in a petition to reopen the proceeding and modify or set aside the Commission order, pursuant to Commission Rule 2.51, and the Commission will then consider whether the new evidence sufficiently demonstrates active state supervision.

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