



the rates were not actively supervised by the Commonwealth of Kentucky – specifically the state agency known as the Kentucky Transportation Cabinet (“KTC”).

On July 20, 2005, Respondent filed a Motion for Reconsideration or, in the Alternative for a Stay of the Commission’s Order pending review by a U.S. Court of Appeals. (“Resp. Motion for Stay”). Respondent’s motion for reconsideration should be denied both because it fails on the merits and because it was filed out of time. The motion for a stay should be denied so that a competitive market can be restored immediately. Complaint Counsel oppose any stay, but if the Commission wishes to consider a stay, Complaint Counsel recommend that the stay be limited so that it at most permits, during appellate review of the Commission’s decision, movers to continue to operate their businesses under the existing filed tariff , but does not permit any the filing of any other collective rates.

## **II. RESPONDENT’S MOTION FOR RECONSIDERATION SHOULD BE DENIED.**

Rule 3.55 states that a party’s petition for reconsideration “must be confined to new questions raised by the decision or final order and upon which the petitioner had no opportunity to argue before the Commission.” 16 C.F.R. § 3.55. Respondent’s motion should be denied for several reasons. First, it merely raises again arguments that have been fully considered by the Commission. Second, the supplemental information provided with the motion only further illustrates that active supervision is not occurring. And, finally, Respondent’s filing was made out of time.

Respondent’s motion for reconsideration must fail because it does not raise any argument not already raised in this matter. At the time of the oral argument, Respondent filed a motion for a stay and argued that the KTC had taken steps since the end of litigation to supervise

Respondent's rate filings. The Commission considered the motion and Respondent's argument, and decided against it. The Commission found that the KTC had "taken some initial steps to augment the level of supervision it exercises over the Kentucky Association's collective rate-making" but that the initial steps fell "significantly short of demonstrating that the KTC's new procedures satisfy the 'active supervision' requirement articulate by the Supreme Court." (Commission Opinion ("Comm. Op.") at 27). The Commission also noted that even Respondent had acknowledged that the "development of a new program of supervision will take some time." *Id.* at 28. Finally, the Commission ruled that at some point in the future, if the KTC does engage in active supervision, Respondent can seek to modify the order under Section 5(b) of the FTC Act. *Id.* at 26.

Respondent's motion for reconsideration does nothing more than renew the same arguments concerning the KTC's activities that the Commission rejected in its Decision. A desire to repeat essentially the same argument is not grounds for reconsideration. In evaluating a petition for reconsideration, the Commission has stated that:

Rule 3.55 requires that a petition for reconsideration "be confined to new questions raised by the decision or final order and upon which the petitioner had no opportunity to argue before the Commission" [citing 16 C.F.R. § 3.55]. This standard recognizes that litigation must end at some point, and that decision makers must render their judgment based on a finite body of evidence. We thus view reconsideration of a fully-litigated opinion and order as an "extraordinary remedy which should be used sparingly" [citing *Donald Riggs v. Anthony Auto Sales Inc.*, No. Civ. A 97-0507, 1998 U.S. Dist. LEXIS 21639, at \*6 (W.D.La. Aug. 28, 1998) (applying this standard to a motion for reconsideration under Fed. R. Civ. P. 59(e))].<sup>1</sup>

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<sup>1</sup> *In the Matter of Chicago Bridge & Iron Co.*, Dkt. No. 9300, 2005 WL 1274747 (FTC) (May 10, 2005). See also *In the Matter of Novartis Corp.*, 1999 WL 33913024 (FTC)

In the current motion, Respondent embellishes further on its rejected argument concerning the KTC's activities since the close of the record below. But its argument is not new, and is not grounds for reconsideration, especially since the information provided further confirms that the KTC has a long way to go before a demonstration can be made that rates are being actively supervised.

The information contained in Respondent's motion once again relates to the rate changes in the pending Supplement 86. (Resp. Motion for Stay at 2-4). This collective rate filing seeks to delete a 6 % fuel surcharge and a 4% insurance surcharge, while increasing the general moving rate by 11%, plus a 1% increase in movers' rates. (Resp. Motion for Stay, Exhibit 3). This is the same proposed overall collective rate increase that Respondent brought to the Commission's attention in its motion filed on the day of oral argument. Respondent's Motion for Stay of Proceedings Pending Action By Kentucky Transportation Cabinet, January 24, 2005 at 2; Exhibits L-N.

The current motion contains, as an attachment, the transcript of a hearing held by the KTC in April 2005. The "sole witness" in support of the rate increase was Mr. Tolson, President of the Kentucky Association, who testified about costs incurred by one "test carrier" – his own moving firm. (Resp. Motion for Stay, Exhibit 1 (herein after cited as "Transcript ") at 9, 15-16).<sup>2</sup>

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(Aug. 5, 1999), at \*3 (Commission denied reconsideration on the grounds, *inter alia*, that the Respondent's past conduct was "what is relevant in order to determine whether [the remedy was] required" and that a change in Respondent's business plans after the litigation was not directly relevant to that issue).

<sup>2</sup> Mr. Tolson provided some anecdotal information about costs such as: an announcement of a price increase in moving boxes (Transcript at 19-21); gas price increases such as fuel charges for pick-up trucks used for local moves (Transcript at 21, 27-29, 30, 39-40); insurance premiums (Transcript at 25-26); the cost of new tractors (Transcript at 26-27); and a

KTC called its long-time employee Mr. Debord as a witness at the hearing, and elicited little more than a page of testimony from him concerning his review of the proposed rate increase. (Transcript at 43-44). In response to further questions, Mr. Debord made generalized comparisons to rates in neighboring states (Transcript at 43-45) but gave no details of the basis for such comparisons. While Mr. Debord made reference to the KTC having received some sort of financial statements from movers (Transcript at 43), there is no indication that the KTC has established any procedures for undertaking a “cost-based analysis of collective rates.” (Comm. Op. at 15).<sup>3</sup>

The information submitted in support of Respondent’s current motion does not contain any ruling by the KTC on the rate increase request. There is no indication of what, if any, analysis KTC will do to consider the merits of the proposal. For instance, there is no indication how the KTC will determine that the experience of Mr. Tolson, the Association’s President, should be the basis for a rate increase for all Association members. There is no indication how the KTC will determine whether the deletion of the 6 % fuel surcharge and 4% insurance surcharge will, in fact, be offset or exceeded by an increase in the general moving rate of 11% percent. Nor is there any indication of any quantitative measure KTC will use to determine

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web-site concerning health insurance costs (Transcript at 29). Mr. Tolson also provided some rather confusing testimony about interstate tariffs (Transcript at 22-24) and he described some information he learned in telephone calls made in 2003 to movers in other states concerning moving rates. (Transcript at 30-36).

<sup>3</sup> The Commission opinion, citing KY. REV. STAT. ANN. § 281.680(4) which dictates that the KTC’s collective rate making procedures “shall assure that the respective revenues and costs of carriers . . . are ascertained,” stated that the KTC had not developed any “formula or methodology for determining whether the Kentucky Association’s collective rates compl[ied] with the statutory standard.” (Comm. Op. at 15).

whether the further 1% rate increase is reasonable. As the Commission stated in its opinion, "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." (Comm. Op. at 27). Such information and criteria for reasonableness remain absent for the pending rate increase proposal.

Finally, the Commission must reject the petition for reconsideration because it was filed out of time. Rule 3.55 states that a party may petition for reconsideration "[w]ithin fourteen (14) days after completion of service of a Commission decision." 16 C.F.R. § 3.55. Here, Respondents were served with the Commission's decision on June 27<sup>th</sup>, making the deadline for filing a petition for reconsideration 14 calendar days thereafter; or, Monday, July 11<sup>th</sup>. As noted above, Respondent did not file its motion until July 20, thus making its filing well out of time.

### **III. RESPONDENT'S BROAD MOTION FOR A STAY SHOULD BE DENIED.**

When Congress learned that the *average* delay in the effectiveness of affirmed Commission orders was well over 2 years, Congress amended the Federal Trade Commission Act to assure that the public would obtain the benefits of Commission action more quickly. S. Rep. 103-130 at p. 11 (August 24, 1993). As a result, the amended Section 5(g) of the Federal Trade Commission Act provides that Commission orders (except divestiture orders) are effective "upon the sixtieth day after" the date of service, unless "stayed, in whole or in part." 15 U.S.C. § 45(g)(2) (1994). Whether a stay should be granted depends upon: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will

substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *In the Matter of California Dental Ass'n ("CDA")*, Dkt. No. 9259, 1996 FTC LEXIS 277 at \*1 (May 22, 1996); 16 C.F.R. § 3.56(c). A stay should be granted only if the Commission "ruled on an admittedly difficult legal question" and determines that "the equities of the case suggest that the status quo should be maintained." *CDA*, 1996 FTC LEXIS 277 at \*9. Since the questions presented in this case are not difficult or novel, and since the broad stay sought by Respondent is not necessary or in the public interest, it should be denied.

**A. RESPONDENT IS NOT LIKELY TO SUCCEED ON APPEAL.**

Respondent is not likely to succeed on appeal. Both the Commission and the ALJ carefully analyzed the relevant Supreme Court and lower court precedents and found that the "minimal level of state activity" in this case "falls far short of the active supervision required." (Comm. Op. at 19). Respondent asserts that "the U.S. Supreme Court precedents relied on by the Commission can be interpreted differently," but it also fails to make any attempt at explaining how they can be distinguished. (Resp. Motion for Stay at 4-5).

Respondent's main assertion is that the Commission failed to give adequate weight to KTC's intervention in this matter. (Resp. Motion for Stay at 5). However, the Commission carefully considered this argument and rejected it. The Commission held that "[w]hether a state agency is satisfied with its level of regulatory oversight does not determine whether the state in fact actively supervises private anticompetitive conduct." (Comm. Op. at 22). It further noted that "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." *Id.* And the

Commission noted that the *amicus* brief filed in this matter by the Kentucky Attorney General, stating “that the ALJ opinion does not conflict with state law or public policy,” further undercuts Respondent’s arguments. (Comm. Op. at 22 n. 20).

**B. RESPONDENT AND ITS MEMBERS WILL NOT SUFFER IRREPARABLE HARM FROM A PROHIBITION OF COLLUSIVE RATE INCREASES.**

The second factor the Commission must consider in determining whether to grant a stay is whether Respondent will suffer irreparable harm if a stay is not granted. The Commission has held:

The Respondent bears the burden of demonstrating that denial of a stay will cause irreparable harm. Simple assertions of harm or conclusory statements based on unsupported assumptions will not suffice. A party seeking a stay must show, with particularity, that the alleged irreparable injury is substantial and likely to occur absent a stay. See *Michigan Coalition of Radioactive Material Users v. Griepentrog*, 945 F.2d 150, 154 (6th Cir. 1991).

*CDA*, 1996 FTC LEXIS 277 at \*5-6.

Respondent maintains that unless a stay is granted its members will suffer irreparable harm. (Resp. Motion for Stay at 6-8). Specifically, Respondent states that each mover will have to go to the expense of preparing and developing an individual tariff. (Resp. Motion for Stay at 7).<sup>4</sup> Respondent also asserts that the Kentucky Association will go out of business if it can no longer file a collective tariff. (Resp. Motion for Stay at 7-8). In support of this argument, Respondent’s motion makes the unsupported assertion that “the Kentucky Association is not in a

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<sup>4</sup> No evidence is presented on the cost movers would incur if they were required to file individual tariffs. There is some evidence in the record that movers in Kentucky in the past have been permitted to file “very simple tariffs.” CX 116 (Debord, Dep. II at 18).

position to file individual tariffs on behalf of its Members.” (Resp. Motion for Stay at 7). No explanation is given for why the Kentucky Association could not continue in business by providing precisely that function for movers in Kentucky. In short, in support of its position that the Kentucky Association and its members will suffer irreparable harm if a stay is granted, Respondent has provided only the “conclusory statements based on unsupported assumptions” held to be insufficient in *CDA*.

**C. A BROAD STAY IS NOT JUSTIFIED TO PREVENT ALLEGED HARM TO THIRD PARTIES.**

Respondent asserts that without a stay consumers and the KTC will suffer harm. Respondent asserts that some movers may fail to file any tariff at all, which will allow “less than scrupulous Movers” the ability to “engage in truly fraudulent activity.” (Resp. Motion for Stay at 8). Kentucky law requires movers to file tariffs,<sup>5</sup> and Respondent cites no support for the proposition that movers that currently file a tariff will fail to file one in the future in the absence of a collective tariff. More importantly, the stay sought by Respondent would cause significant, additional, harm to consumers because it would allow movers to continue to file for collective rate increases. In fact, the materials attached to Respondent’s motion establish that even now Respondent is seeking a collective rate increase.

Respondent also asserts that the KTC will suffer harm because it “will likely be unable to accommodate the tidal wave of individual rate filings mandated by the Final Order.” (Resp. Motion for Stay at 7). Respondent does not cite any support for this proposition, and it is unclear

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<sup>5</sup> KY. REV. STAT. ANN. § 281.680.

how disruptive receipt of new individual filings will be given the cursory review of collective rates KTC has historically performed.

The record does contain testimony, however, from Mr. Debord that individual filings would require additional state resources. CX 116 (Debord, Dep. II at 8-9). In light of the long history of less-than-substantial state resources devoted to regulatory supervision of movers in Kentucky, it is plausible that there could be regulatory disruption caused by the provisions of the Commission's Order requiring members to cancel their existing collective tariffs on file with the KTC, and in their place file individual rates. Such ultimate relief is entirely justified by the decades-long violation committed by the Kentucky Association, and will be necessary to effectuate the remedial purposes of the Commission's Order.

But if the Commission chooses to postpone such potential disruption while its decision is on review in an Appeals Court, it still need not and should not enter the broad stay sought by the Respondent. A narrow stay of the relevant provisions of the Commission's Order would prevent the possibility of any such regulatory disruption.<sup>6</sup> For example, a narrowly-limited stay could permit members of the Kentucky Association to postpone taking steps to withdraw their existing tariffs (which could require the Association's members to file 93 individual tariffs simultaneously), but would prevent the members of the Association from continuing their ongoing efforts to secure future rate increases through collective action. If, from time to time,

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<sup>6</sup> This could be accomplished by a Commission order stating: "To permit Respondent's members to comply with tariff provisions currently on file with the Kentucky Transportation Cabinet and in effect as of the date of this Order, Paragraphs III. A and III B. of the Commission's Final Order of June 21, 2005, shall be stayed upon the filing of a timely petition for review of Commission's order in an appropriate court of appeals, until the court issues a ruling disposing of the petition for review."

particular members of the Association want a rate increase (or decrease), no material disruption should occur if such members act independently to seek regulatory approval, as has been permitted all along under the Kentucky statutory provisions, and not through collusion with the other members of the Association.

**D. A BROAD STAY WILL HARM CONSUMERS AND THE PUBLIC INTEREST.**

The public interest ultimately will be served, and consumers protected, by implementing the Commission's Order. As the Commission found, Respondent's members have for many years adhered to tariffs that contain collectively determined prices and "the vast majority of carriers agree to charge the same rate for many items in the tariff." (Comm. Op. at 24). In addition to adhering to collectively determined existing rates, Respondent "regularly files supplements to its tariff that contain proposed rate increases for its members." (Comm. Op. at 3).

The Commission's Order addresses both of these issues. Paragraph II of the Order prohibits Respondent from continuing its practice of implementing future collective rate increases. Complaint Counsel maintain that a broad stay permitting unlimited future rate increases, even during the appeal process, will be harmful to consumers and not in the public interest. Thus, Complaint Counsel strongly oppose any stay that would permit Respondent to continue future collective rate activities during the appeal process (including the current ongoing efforts in connection with the pending Supplement No. 86) and urge the Commission to reject the broad stay sought by Respondent.

Paragraph III of the Order requires movers to withdraw their current collectively-set tariffs, and will force movers to file individual tariffs. Over time, market forces are likely to result

in movers filing individually-determined tariffs that reflect competitive rates rather than rates arrived at by collusion among competitors. Complaint Counsel believe this process should begin soon by full implementation of the Commission's Final Order. If, however, the Commission were to find that there could be temporary disruption of the regulatory process in Kentucky by reason of the withdrawal and individual rate filings (particularly in light of the meager state resources devoted in the past to regulation of movers' rates), it may wish to consider limiting such disruption during the time of any appellate review of the Commission's decision.<sup>7</sup>

#### IV. CONCLUSION

Respondent has proffered no reasonable basis for the Commission to reconsider its decision or stay its Order. Even if Respondent's motion for reconsideration had been timely, it would fail because it is simply a rehash of arguments previously considered and rejected by the Commission. Respondent's motion for a broad stay of the Commission's Final Order should be denied. Respondent has a very low likelihood of success on appeal and has not established with any credible evidence that significant harm will flow to it or its members if a stay is denied. Considerable additional harm to consumers could result from further collective rate increases during the appeal process. At most, the Commission should contemplate a narrow stay of the requirement for immediate individual rate filings, which will eliminate the possibility of potential

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<sup>7</sup> If the Commission chose to stay the immediate requirement of individual rate filings to postpone the "tidal wave" of new filings, the benefits of competition could begin to be achieved, at least in part, even during the appeal process. Movers would initially be bound by the current collectively-set tariffs. But over time, to the extent movers wished to lower or raise their rates, they would be free to do so by submitting an individual tariff to the KTC.

disruption of the Kentucky regulatory process during the time that the Commission's decision is on appellate review.

Respectfully submitted,



Dana Abrahamsen (202) 326-2906  
Ashley Masters (202) 326-3067

*Counsel Supporting the Complaint*

Susan A. Creighton  
*Director*

Jeffrey Schmidt  
*Deputy Director*

Richard B. Dagen  
*Special Counsel*

Geoffrey D. Oliver  
*Assistant Director*

Patrick J. Roach  
*Deputy Assistant Director*

Bureau of Competition  
Federal Trade Commission  
Washington, D.C. 20580  
Facsimile (202) 326-3496

Dated: August 1, 2005

**CERTIFICATE OF SERVICE**

This is to certify that on August 1, 2005, I caused a copy of Complaint Counsel's Opposition to Respondent's Motion for Reconsideration or, in the Alternative, for a Stay of Final Order Pending Review by U.S. Court of Appeals to be served upon the following persons by facsimile, U.S. Mail or Hand-Carried:

by hand delivery to:

The Commissioners  
U.S. Federal Trade Commission  
via Office of the Secretary, Room H-135  
Federal Trade Commission  
600 Pennsylvania Avenue, NW  
Washington, DC 20580

by mail delivery and fax to:

James C. McMahon  
McMahon & Kelly, LLP  
60 East 42<sup>nd</sup> Street, Suite 1540  
New York, NY 10165-1544  
(212) 986-6905 *facsimile*

James Dean Liebman, Esquire  
Liebman and Liebman  
403 West Main Street  
Frankfort, Kentucky 40601  
(502) 226-2001 *facsimile*

J. Todd Shipp, Assistant General Counsel  
Office of Legal Services  
Transportation Cabinet  
Transportation Cabinet Office Building  
200 Mero Street; 6<sup>th</sup> floor  
Frankfort, Kentucky 40622  
(502) 564-7650 *facsimile*

  
Dana Abrahamsen

