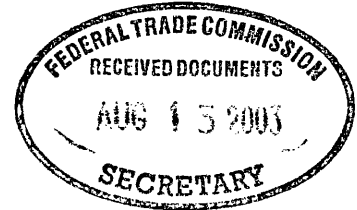


UNITED STATES OF AMERICA  
BEFORE FEDERAL TRADE COMMISSION



\_\_\_\_\_  
In the Matter of )  
)  
)

ALABAMA TRUCKING )  
ASSOCIATION, INC., )  
)

a corporation. )  
\_\_\_\_\_

Docket No. 9307

\_\_\_\_\_  
In the Matter of )  
)  
)

MOVERS CONFERENCE OF )  
MISSISSIPPI, INC., )  
)

a corporation. )  
\_\_\_\_\_

Docket No. 9308

\_\_\_\_\_  
In the Matter of )  
)  
)

KENTUCKY HOUSEHOLD )  
GOODS CARRIERS )  
ASSOCIATION, INC., )  
)

a corporation. )  
\_\_\_\_\_


Docket No. 9309 ✓

**COMPLAINT COUNSEL'S MOTION FOR LEAVE TO FILE A REPLY**

Pursuant to § 3.22(c) of the Commission's Rules of Practice, Complaint Counsel moves for leave to file a reply to Respondent Kentucky Household Goods Carriers Association, Inc.'s Opposition to Complaint Counsel's Motion to Consolidate ("Opposition"). As part of its

Opposition, Respondent cites *New England Motor Rate Bureau, Inc. v. F.T.C.*, 908 F2d. 1064 (1<sup>st</sup> Cir.1990), and asserts that its standard for the “active supervision” element of the state action defense is relevant to the case at hand (Opposition at 4-5), without noting that the First Circuit analysis has been explicitly overruled by the Supreme Court in *FTC v. Ticor Title Insurance Co.*, 504 U.S. 621, 637 (1992). In addition, Respondent fails to mention that in *New England Motor Rate Bureau* the Commission held a single trial despite the fact that the matter involved several different state regulatory bodies. As a result, Complaint Counsel seeks permission to file a short reply, which is attached hereto. The memorandum also provides notice that potential settlements may make the issue of consolidation moot. A proposed order is attached.

Respectfully submitted,



Dana Abrahamsen

Complaint Counsel  
Bureau of Competition  
Federal Trade Commission  
601 New Jersey Avenue, N.W.  
Washington, D.C. 20580  
(202) 326-2906

Dated: August 13, 2003

**UNITED STATES OF AMERICA  
BEFORE FEDERAL TRADE COMMISSION**

\_\_\_\_\_  
**In the Matter of** )  
)

**ALABAMA TRUCKING  
ASSOCIATION, INC.,** )  
)

**a corporation.** )  
\_\_\_\_\_ )

**Docket No. 9307**

\_\_\_\_\_  
**In the Matter of** )  
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**MOVERS CONFERENCE OF  
MISSISSIPPI, INC.,** )  
)

**a corporation.** )  
\_\_\_\_\_ )

**Docket No. 9308**

\_\_\_\_\_  
**In the Matter of** )  
)

**KENTUCKY HOUSEHOLD  
GOODS CARRIERS  
ASSOCIATION, INC.,** )  
)

**a corporation.** )  
\_\_\_\_\_ )

**Docket No. 9309**

**ORDER GRANTING COMPLAINT COUNSEL'S MOTION  
FOR LEAVE TO FILE A REPLY**

On July 25, 2003 Complaint Counsel filed a Motion to Consolidate pursuant to § 3.41(b)(2) of the Commission's Rules of Practice. On August 7, 2003 Respondent Kentucky

Household Goods Carriers Association, Inc. filed an opposition to Complaint Counsel's motion. On August 13, 2003 Complaint Counsel filed a motion for leave to reply to Respondent's opposition.

Complaint Counsel's motion is GRANTED. Complaint Counsel may file a reply brief to Respondent Kentucky Household Goods Carriers Association, Inc.'s Opposition to Complaint Counsel's Motion to Consolidate.

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Stephen J. McGuire  
Chief Administrative Law Judge

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D. Michael Chappell  
Administrative Law Judge

Dated: \_\_\_\_\_, 2003

**UNITED STATES OF AMERICA  
BEFORE FEDERAL TRADE COMMISSION**

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**In the Matter of**

**ALABAMA TRUCKING  
ASSOCIATION, INC.,**

**a corporation.**

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**Docket No. 9307**

---

**In the Matter of**

**MOVERS CONFERENCE OF  
MISSISSIPPI, INC.,**

**a corporation.**

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**Docket No. 9308**

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**In the Matter of**

**KENTUCKY HOUSEHOLD  
GOODS CARRIERS  
ASSOCIATION, INC.,**

**a corporation.**

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**Docket No. 9309**

**COMPLAINT COUNSEL'S REPLY IN SUPPORT OF ITS  
MOTION TO CONSOLIDATE**

On July 25, 2003 Complaint Counsel filed a Motion to Consolidate pursuant to § 3.41(b)(2) of the Commission's Rules of Practice which was opposed by Respondent Kentucky

Household Goods Carriers Association, Inc. (August 7, 2003) (“Opposition”). In this reply, Complaint Counsel will briefly respond to three issues raised in the Opposition. First, Respondent defends itself in this proceeding by relying on the state action defense which has two prongs: “the challenged restraint must be ‘one clearly articulated and affirmatively expressed as state policy’” and “the policy must be ‘actively supervised’ by the State itself.” *California Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*, 445 U.S. 97 at 105 (1980). However, respondent’s counsel cited a standard for the “active supervision” element of the state action defense (Opposition at 4-5) that has been explicitly overruled by the Supreme Court in *FTC v. Ticor Title Insurance Co.* (“*Ticor*”), 504 U.S. 621, 637 (1992). Second, Respondent argues that consolidation is not appropriate because these matters will require inquiry into the “supervision” activities of different states but then Respondent asserts that *New England Motor Rate Bureau, Inc. v. F.T.C.*, 908 F.2d 1064, 1077 (1<sup>st</sup> Cir.1990), is distinguishable because it involved one rate bureau operating in separate states. Opposition at 7. In fact, because that case involved inquiry into the supervision activities of three different states, it illustrates the appropriateness of consolidation as urged by Complaint Counsel. Third, Respondent’s Opposition requests this Tribunal to direct “Complaint Counsel to seek appropriate discovery from the Commonwealth of Kentucky before further proceedings are had in this case” (Opposition at 7). Such discovery was underway prior to Respondent’s pleading.

Finally, Complaint Counsel notes that a signed consent agreement and ongoing settlement discussions may moot the need for consolidation. These matters are each discussed briefly below.

I. Respondent's Reliance on Standard Rejected by the United States Supreme Court

A key issue in this case will be whether Respondent can sustain its burden of showing that its conduct is protected by the state action defense. To sustain the defense, Respondent will need to show that it satisfies the two-prong standard set out in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*: “the challenged restraint must be ‘one clearly articulated and affirmatively expressed as state policy’” and “the policy must be ‘actively supervised’ by the State itself.” 445 U.S. 97 at 105 (1980).

While this is not the appropriate time to air fully all issues that bear on whether Respondent can satisfy the state action defense, this Tribunal should be aware that Respondent has cited in its Opposition to a legal standard that has been explicitly overruled by the Supreme Court. Respondent asserts in its Opposition that “in *New England Motor Rate Bureau, Inc. v. F.T.C.*, 908 F.2d 1064, 1077 (1<sup>st</sup> Cir.1990), the First Circuit addressed the issue of “active supervision” in a manner which is applicable to the case at bar.” Opposition at 4. Respondent then proceeds to quote from that opinion. The quoted language indicates that active supervision can be established where, among other things, a state “regulatory agency has been established and funded to carry out [a] statutory mandate,” “State officials are positioned to carry out their statutory duties” and the “courts are available and are empowered to force the regulators to act at the suit of aggrieved parties.” Opposition at 4-5. That standard was, for a short period of time, the “active supervision” standard in the First and Third Circuits.

In 1992, however, the standard for active supervision relied on by Respondent was explicitly rejected by the United States Supreme Court. In fact, the Supreme Court specifically cited to the very decision Respondent now quotes from in rejecting the First Circuit's standard.

In *Ticor*, the Court stated that the Third Circuit:

[R]elied upon a formulation of the active supervision requirement articulated by the First Circuit:

“Where . . . the state’s program is in place, is staffed and funded, grants to the state officials ample power and the duty to regulate pursuant to declared standards of state policy, is enforceable in the state’s courts, and demonstrates some basic level of activity directed towards seeing that the private actors carry out the state’s policy and not simply their own policy, more not need be established.” 992 Fed. at 1136, quoting *New England Motor Rate Bureau, Inc. v. FTC*, 908 F.2d, at 1071.

*FTC v. Ticor Title Insurance Co.*, 504 U.S. 621, 637 (1992). The Court then held that the First Circuit standard is “insufficient to establish the requisite level of active supervision.” *Id.*<sup>1</sup>

## II. *New England Motor Rate Bureau Supports Complaint Counsel*

Respondent argues that separate trials are appropriate because these matters will involve inquiry into whether three different state regulatory agencies engaged in active supervision of rates. Opposition at 6. Respondent then states that *New England Motor Rate Bureau, Inc v. F.T.C.*, 908 F.2d 1064 (1<sup>st</sup> Cir.1990), involved “only *one* rate bureau operating in *multiple States*” and that the case is “readily distinguishable” from the three matters now in litigation. Opposition at 7, emphasizes in original. However, Respondent provides no insight into how the case is “readily distinguishable” from the matters at hand. In fact, the case supports the position urged by Complaint Counsel. In *New England Motor Rate Bureau* the Administrative Law Judge’s opinion and the Commission’s opinion examined whether *three different* state regulatory

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<sup>1</sup> The legal standard announced by the United States Supreme Court in *Ticor* is spelled out in the Analysis to Aid Public Comment in the Indiana Household Movers and Warehousemen’s matter (“Analysis”). The Analysis was issued by the Commission, not by the Bureau of Competition as Respondent suggests. Opposition at 6.

bodies engaged in active supervision. *New England Motor Rate Bureau, Inc v. F.T.C.*, 908 F.2d at 1065-66. That is precisely the course we urge here, that the matters be consolidated so that one opinion can examine whether these three states have actively supervised rates.

### III. Complaint Counsel's Discovery Efforts

Respondent correctly recognizes that an important aspect of its defense will involve facts pertaining to the state's activities in reviewing the tariffs submitted by Respondent. While Respondent can seek this information from the state, it requests in its Opposition that this Tribunal direct "Complaint Counsel to seek appropriate discovery from the Commonwealth of Kentucky before further proceedings are had in this case." Opposition at 7. Complaint Counsel has already sent a document request to Kentucky.<sup>2</sup> As set forth in the attached affidavit from Stephanie Langley, on July 30 Complaint Counsel sent a document request to an attorney in the Attorney General's office. On the same day, a copy of the letter forwarding the document request as well as the document request itself were also sent to Respondent's counsel James Dean Liebman. (Attached Affidavit from Stephanie Langley, August 13, 2003; Respondent Kentucky Household Goods Carriers Association, Inc. Notice of Appearance, July 30, 2003). As a result, there is no reason to delay these proceedings nor order Complaint Counsel to pursue discovery.

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<sup>2</sup> Complaint Counsel issued a voluntary request for documents. In the event the state does not voluntarily comply with the request, Complaint Counsel has the option of seeking a subpoena under § 3.36 of the Commission's Rules of Practice.

IV. Settlements

The issue of consolidation may become moot. On August 11, 2003 Complaint Counsel filed with the Secretary of the Commission a motion to have the Movers Conference of Mississippi, Inc. matter (Docket 9308) removed from litigation because that association has entered into a proposed consent agreement. Once that matter is removed from litigation (which is likely to happen in a matter of days), the Tribunal will lack jurisdiction to consolidate it with the other pending matters.<sup>3</sup>

V. Conclusion

In light of the settlement activities now pending, Complaint Counsel requests that the Tribunal defer a decision on Complaint Counsel's Motion to Consolidate. The alternative, withdrawal of the Motion to Consolidate, could result in unnecessary delay (e.g., refileing or rebriefing the motion) should the Commission return the Mississippi matter to litigation. In the

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<sup>3</sup> In addition, on August 5, 2003 counsel for Respondent Alabama Trucking Association (Docket 9307) filed a motion requesting more time to file an answer to the complaint noting that "Respondent and complaint counsel are in settlement discussions." (Refiled Motion to Extend Time for Answer at 1). Respondent Alabama Trucking Association has been given until September 2 to file an answer. (Order Extending Time to File Answer, Docket No. 9307, August 6, 2003). In light of the settlement activities in Docket Nos. 9307 and 9308, it is possible that the Kentucky Household Goods Carriers Association could become the only remaining Respondent.

event that the settlement activities render Complaint Counsel's Motion to Consolidate moot, Complaint Counsel will withdraw its motion at that time.

Respectfully submitted,



Dana Abrahamsen

Complaint Counsel  
Bureau of Competition  
Federal Trade Commission  
601 New Jersey Avenue, N.W.  
Washington, D.C. 20580  
(202) 326-2906

Dated August 13, 2003

UNITED STATES OF AMERICA  
BEFORE FEDERAL TRADE COMMISSION

\_\_\_\_\_)  
In the matter of \_\_\_\_\_)  
\_\_\_\_\_)  
KENTUCKY HOUSEHOLD \_\_\_\_\_)  
GOODS CARRIERS ASSOCIATION, \_\_\_\_\_)  
a corporation; \_\_\_\_\_)  
\_\_\_\_\_)

Docket No. D-9309

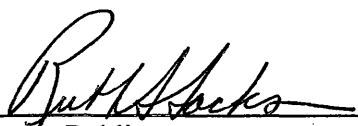
AFFIDAVIT OF STEPHANIE M. LANGLEY

Before me, the undersigned authority personally appeared Stephanie M. Langley who, after being duly sworn, says:

1. My name is Stephanie M. Langley. I am a Federal Trade Investigative Assistant for the Bureau of Competition, Anti-Competitive Practices Division.
2. I have sent by facsimile and First-Class U.S. Mail on July 30, 2003, a letter to David Vandeventer, Esq., Office of the Attorney General, State of Kentucky requesting documents in the Matter of Kentucky Household Goods Carriers Association, Inc.
3. I have also sent, by facsimile and First-Class U.S. Mail on July 30, 2003, a copy of the letter to David Vandeventer, Esq. to Mr. James Dean Liebman, Esq., Counsel for the Kentucky Household Goods Carriers Association.

  
Stephanie M. Langley

Subscribed and sworn to before me at the City of Washington, <sup>District</sup> State of Columbia,  
this 13<sup>th</sup> day of August, 2003.

  
\_\_\_\_\_  
Notary Public

**RUTH S. SACKS**  
Notary Public, District of Columbia  
My Commission Expires July 14, 2004

My commission expires: \_\_\_\_\_

