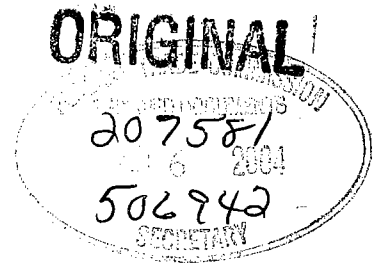


UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION



In the Matter of)
)
)
 KENTUCKY HOUSEHOLD)
 GOODS CARRIERS)
 ASSOCIATION, INC.,)
)
 a corporation.)

Docket No. 9309

**COMPLAINT COUNSEL'S SEPARATE AND CONCISE STATEMENT
OF MATERIAL FACTS AS TO WHICH THERE IS A GENUINE ISSUE FOR TRIAL**

Pursuant to Rule 3.24(a)(2) of the Commission's Rules of Practice, 16 C.F.R. §3.24(a)(2), Complaint Counsel hereby submit a separate and concise statement of those material facts as to which there exists a genuine issue for trial. Part I of this submission sets forth those material facts (with citations to the record) that demonstrate that there is a genuine issue for trial. Part II of this submission responds to each of the assertions as to which Respondent contends that there is no material dispute.

**PART I: STATEMENT OF MATERIAL FACTS
AS TO WHICH THERE EXISTS A GENUINE ISSUE FOR TRIAL**

1. This case involves a horizontal price fixing agreement involving 93 intrastate movers in Kentucky. See ¶¶ 6 through 28. Respondent is the trade organization that facilitates this price-fixing.
2. Respondent's defense is that the state of Kentucky has actively supervised the price fixing activity. Memorandum of Respondent Kentucky Household Goods Carriers Association, Inc. in Support of Motion for Summary Decision, December 19, 2003.
3. The admissible evidence demonstrates that there is at least an issue of fact as to whether or not the state has supervised the price-fixing activity. In particular, the state commits very limited resources to tariff issues, does not receive reliable data, does not employ

procedural safeguards such as issuing written decisions or holding hearings before agreeing to the tariffs, fails to analyze requests for rate increases, and does not analyze rates under any state standard. See ¶¶ 29 through 71 below.

I. Respondent Kentucky Household Goods Carriers Association, Inc.

4. Respondent is the Kentucky Household Goods Carriers Association, Inc. (Respondent or "Kentucky Association"). Kentucky Association is a non-profit Kentucky Corporation incorporated in 1957. CX 3. The membership of Kentucky Association consists of approximately 93 household goods moving companies that conduct business within Kentucky, receiving compensation for intrastate and local moves. Respondent Kentucky Household Goods Carrier Association, Inc.'s Answer to ¶ 5 of the Complaint, ("Respondent's Answer").
5. One of the primary functions of Kentucky Association is the initiation, preparation, development, dissemination, and filing with the Kentucky Transportation Cabinet's ("KTC") Division of Motor Carriers of tariffs and supplements thereto on behalf of and as agent for its members. Respondent's Answer to ¶ 2; Respondent's November 19, 2003 Response to ¶ 13 of Complaint Counsel's Request for Admission issued October 31, 2003, ("Respondent's Admission"). This function is conducted through Kentucky Association's Tariff Committee. Respondent's Answer to ¶ 5.

II. Respondent has engaged in illegal price fixing

6. KYDVR TARIFF NO.5 is the Kentucky Association's tariff which is applicable to Kentucky intrastate traffic. Respondent's Admission ¶ 9; CX 1; CX 2. The members of Kentucky Association ("Participating Carriers") are required to charge the rates contained in Respondent's KYDVR TARIFF NO. 5. CX 1; CX 2; Respondent's Admission ¶ 18. Respondent causes KYDVR Tariff No. 5 to be prepared and published. That tariff is currently in effect. CX 2; Respondent's Admission ¶¶ 10, 11, and 14.
7. The tariff contains the rates movers must charge for local moves, those within the carriers' situs and not greater than 25 miles. Local rates are either charged at a flat rate per room or determined by hourly fees for labor and equipment. The tariff also specifies the rates movers must charge for intrastate moves of more than 25 miles ("intrastate rate"). Intrastate rates are established as a function of the distance traveled and the total weight of the shipment. CX 1; CX 2; Respondent's Admission ¶ 16.
8. Another part of the tariff gives the rates for additional services, such as packing, moving particular bulky or heavy items, and moves involving flights of stairs. The tariff also establishes higher charges for work performed on "overtime:" any packing or unpacking performed on the weekends or after 5pm during weekdays. For example, packing a "Drum, Dish-Pack" costs \$14.60 regular time and \$20.40 on overtime. Packing a

wardrobe carton cost \$3.60 regular time, and \$4.95 overtime. CX 1; CX 2; Respondent's Admission ¶ 16.

9. Respondent coordinates the rates charged by members by providing a copy of proposed supplements to Respondent's KYDVR TARIFF NO.5 to all of the Participating Carriers. This provides the Participating Carriers the opportunity to request rates different than those contained in the supplement. This is done prior to the time Respondent submits that supplement to the KTC. Participating Carriers that do want to file an exemption do so by filing a Form 4286 with Respondent's Tariff Committee. Information about any such exemption is then sent to all Participating Carriers. Movers know that if they do not affirmatively exempt themselves from the terms of the proposed tariff rates, their firm will be obligated to charge the collective rates contained in the tariff. *See e.g.* CX 12; CX 13; CX 22; CX 57; Respondent's Admission ¶¶ 12, 20; CX 117 (Mirus Tr.) 53:13-54:3; CX 116 (Debord Tr., II) 60:20-61:21.
10. The Participating Carriers cause Respondent to file with the KTC the rates contained in Respondent's KYDVR TARIFF NO.5 by granting Respondent power of attorney to file their tariff with the KTC. CX 1; CX 2; Respondent's Admissions ¶¶ 17, 20; *See e.g.* CX 4.

A. Respondent files for Increases in the Collective Rates

11. The Participating Carriers regularly engage in collective action with regard to price. *See* ¶¶ 12 through 20, *infra*.
12. In particular, Respondent's members regularly file supplements to the tariff that contain price increases. The decision to increase rates can either be agreed to by a voice vote at a general membership meeting or by a vote of the Board of Directors. CX 117 (Mirus Tr.) 62:10-63:08; CX 15. For example, on October 13, 1999 Respondent, on behalf of its members (through its Board of Directors), agreed to seek a 10% increase in the transportation rates and charges then in effect in Sections II and VI of KYDVR TARIFF NO.5. CX 19; Respondent's Admission ¶ 23.
13. Similarly, on October 11, 2000, Respondent, on behalf of its members (through its Board of Directors), agreed to seek an 8% increase in the intrastate transportation rates and charges then in effect in Sections II and VI of KYDVR TARIFF NO.5. CX 15; Respondent's Admission ¶ 24.

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

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

15. The rate increases are substantial. The April 26, 1985 annual meeting minutes state: "Rates have increased 42% since 1980." CX 44.
16. The movers have also agreed to charge higher rates during the peak (summer) moving season. All of the Participating Carriers, except Hammond-Pennyrite Mov/Stg. Co., Inc., charge higher rates from May 15th through September 30th. CX 45 - CX 47; Respondent's Admission ¶¶ 25, 26.
17. Respondent also collectively amended the tariff to create a new set of intrastate rates. Those rates were placed in Schedule G of Section II of the tariff and were 15% higher than the rates then in effect in Schedule F of Section II of the tariff. CX 31; CX 41.
18. The movers have also agreed to specific charges in the tariff. For instance, all but two Participating Carriers charge \$134.70 to move an automobile. CX 1; CX 2; Respondent's Admission ¶ 30, 31.
19. Similarly, all but two Participating Carriers agree to charge the rate of \$84.15 to move jet skis. CX 1; CX 2; Respondent's Admission ¶ 35.

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

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

21. Plainly, movers rely on the collective tariff to coordinate their rates. See ¶¶ 22 through 24 *infra*.
22. Where one Participating Carrier seeks to charge a different rate than what is prescribed in the tariff, other competing Participating Carriers bring pressure on the outlier to conform his rates. In early 1996 Boyd Movers sought an exception to the tariff whereby the firm would compensate the consumer more for damage done in a move. The Head of the Tariff Committee called Mr. Buddy Boyd of Boyd Movers and urged him not to file his exemption. The head of the Tariff Committee wrote that he spoke to Mr. Boyd and told him that his proposed change "was in conflict with provisions of the tariff. Also requested that put-off (delay) filing this exception until a later date, this will allow time to see how the majority of parties to the tariff adjust to these new rules and items applicable to valuation charges. Buddy stated that he did not want to 'upset the program' or work against the majority of tariff participants. Therefore, he withdrew the requested exception as shown on this form." The notes of the conversation make clear that even after agreeing to go along with the majority Mr. Boyd continued to believe that his proposed change was in the best interests of the consumer. CX 48.
23. Likewise, Participating Carriers use the knowledge of the tariff rates to keep rates elevated. For instance, one mover changed increased his local rate (by submitting a Form 4286 to Respondent), stating as his justification "Somewhat lower than our competition in this area." CX 49.
24. Similarly, a mover filed a Form 4286 with Respondent for a higher local rate stating as his justification "Even with this rate increase we will still be the lowest priced hourly mover in the Owensboro area. We can raise our rates and still be in direct competition with the

other moving companies.” CX 50.

C. Movers Desire to Discount Rates

25. The collective rates in Respondent’s tariff exceed what many movers would otherwise charge; therefore, movers often seek to offer discounts from the collective rates. CX 9. However, when this happens, other Participating Carriers complain to the Kentucky Association Board to prevent these discounts from occurring. See ¶¶ 26 through 28, *infra*.
26. For example, one Participating Carrier, A. Arnold, complained that its competitor, Shelter Moving, was offering a 52% discount: “We at A. Arnold appreciate and respect fair and honest competition. However, in our regulated state we do not condone dishonest business practices.” Mr. Debord, the state employee responsible for intrastate movers matters, sent Shelter Moving a warning letter telling him not to offer discounts. CX 5; CX 6; CX 116 (Debord Tr., II) 41:3-41:13.
27. Another mover, Rudy Miller, complained that his competitor, Berger, had offered a 30% discount from the tariff. CX 7. Mr. Debord investigated this matter. CX 116 (Debord Tr.) 44:3-45:23.
28. Another mover alleged that Peters Movers was discounting 30% from the established tariff. CX 8. Mr. Debord conducted a rate compliance investigation of that firm but not in response to the letter. CX 116 (Debord Tr., II) 46:18-47:22.

III. State Standard

29. All household goods movers must file a tariff with the Kentucky Department of Vehicle Regulation. KY. REV. STAT. ANN. § 281.680. CX 53; Respondent’s Answer to ¶ 3.
30. A Kentucky statute regulates all motor carriers in order “to encourage the establishment and maintenance of reasonable charges for such transportation service, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices.” KY. REV. STAT. ANN. § 281.590. CX 51. A state official interprets this statute as protecting the interests of consumers, among others. CX 116 (Debord Tr., II) 31:11-32:3.
31. The statute declares that it is state policy to have rates that provide “economical and efficient service.” KY. REV. STAT. ANN. § 281.590. CX 51. State officials interpret this statute as protecting the interests of consumers, among others. CX 116 (Debord Tr., II) 31:11-32:3; CX 115 (King Tr.) 17:2-18:12. The procedures established by the Department for setting rates “shall assure that respective revenues and costs of carriers engaged in the transportation of the particular commodity or service, for which rates are prescribed, are ascertained.” KY. REV. STAT. ANN. § 281.680(4). CX 53.

32. If, after a hearing the Department determines that the rates are "excessive" it may "determine the just and reasonable rate." KY. REV. STAT. ANN. § 281.695(1). CX 52. A state official interprets this statute as protecting the interests of consumers, among others. CX 116 (Debord Tr., II) 35:10-35:20.
33. If the Department believes that a proposed tariff is unreasonable, it may hold a hearing. KY. REV. STAT. ANN. § 281.690(2). CX 53. A hearing must be held if the tariff is protested by an outside party. If, at the hearing, the Department finds that the tariff is "unjust, unreasonable, or unjustly discriminatory," it sets an alternative rate that is "just and reasonable." KY. REV. STAT. ANN. § 281.690(2). CX 53. A state official interprets this statute as protecting the interests of consumers, among others. CX 116 (Debord Tr., II) 33:2-33:20.
34. Discounting from the tariff is not permitted; movers must charge the exact rate set by the tariff. KY. REV. STAT. ANN. § 281.685. CX 53; Respondent's Answer to ¶ 3.

IV. Lack of Supervision

35. The evidence demonstrates that the state fails to supervise the Kentucky Association because it commits very limited resources to tariff issues, does not receive reliable data, does not employ procedural safeguards such as issuing written decisions or holding hearings before agreeing to the tariffs, fails to analyze requests for rate increases, and does not analyze rates under any state standard. See ¶¶ 36 through 71, *infra*.
36. The Kentucky Association has admitted that the state does not supervise it. In a letter to Complaint Counsel, Kentucky Association's counsel during the investigation of this matter wrote: "The state has never formally or informally commented, discussed, criticized, or audited any of the KHGCA filings under any Kentucky statute or regulation. And, the state does not grant official or unofficial conclusions regarding the tariff besides stamping each of the filings as approved." CX 110; CX 109; CX 128.

A. The KTC Commits Very Limited Resources to Tariff Issues.

37. The person at the KTC responsible for intrastate movers matters is William Debord. Mr. Debord works part-time: 100 hours per month. CX 116 (Debord Tr., I) 11:10-11:23; 12:2-12:12. No KTC employees report to Mr. Debord. CX 116 (Debord Tr., II) 26:18-26:19.
38. Mr. Debord is responsible for more than household goods movers. He also has responsibility for passenger carrier issues and trucking matters in general. CX 116 (Debord Tr., II) 15:5-15:21; 19:22-20:7. A document likely written by Mr. Debord's boss stated that Mr. Debord spent 60% of his time on household goods matters. CX 55; CX 116 (Debord Tr., II) 25:10-26:13.

39. Mr. Debord spends the bulk of his time working on household goods matters other than reviewing tariff rates. Indeed, fully 20% of his 100 hours is spent driving to tariff compliance investigations. CX 116 (Debord Tr., II) 20:8-20:24. In addition, Mr. Debord spends time investigating illegal movers, conducting seminars, updating powers of attorney forms, and handling inquiries from the public. CX 116 (Debord Tr., II) 19:12-19:19; 21:3-21:24; 22:1-23:14; 23:15-24:7.
40. Mr. Debord does not get any guidance from his supervisor about tariff issues. He has authority over such matters and has not reported to anyone in that regard since 1979. CX 116 (Debord Tr., II) 26:20-27:10; CX 115 (King Tr.) 20:16-20:24; 21:1-21:5; 22:14-23:9; 30:12-31:6.

B. The KTC Does not Receive Reliable Data

41. Household goods movers do not routinely submit balance sheets and income statements to the KTC. CX 116 (Debord Tr., II) 53:22-54:4; CX 115 (King Tr.) 32:8-32:24.
42. The KTC used to require household goods movers to file annual financial reports but stopped requiring such financial reports. In years past, the KTC would get detailed financial reports. The reports were routinely audited in the 1970's and 1980's. The KTC would check their accuracy by comparing the data sent to the state with the firm's ICC filings, which could be 200 pages long. CX 104 - CX 105; CX 116 (Debord Tr., II) 82:9-83:9; 86:12-88:20.
43. In 1966 the Kentucky Association considered hiring a consultant to prepare information for the KTC. "It was decided that due to the amount of information which maybe required by D.M.T., it would be feasible and probably more economical to call in an outside rates firm" CX 107. The expert under consideration had many years experience at the Interstate Commerce Commission, where he supervised "between 30 and 40 employees whose duties were to develop cost formulae for the determination of rail, motor carrier . . . pay costs, to prepare cost studies . . . [and] to furnish cost data to the Suspension Board and other members of the Commission staff for use in determining the reasonableness of rates for rail carriers, motor carriers, and barge carriers and to introduce cost and other evidence in proceedings before the I.C.C." CX 106.
44. Today, there are no comparable filing or auditing requirements related to the tariff. When Mr. Debord does a tariff compliance investigation he looks at certain documents that movers keep on individual moves. He does not routinely look at balance sheets, income statements, payroll documents, documents that show information about cost of capital or documents that would allow him to analyze movers' profitability. CX 116 (Debord Tr., II) 78:10-81:14.

45. The KTC does not get any formal data on the percentage of movers' interstate moves versus their intrastate moves. CX 116 (Debord Tr., II) 84:14-85:2.
46. Nor does the Kentucky Association compile data on rates. If a Participating Carrier wants to file for an exception or make a change in its rate, the Kentucky Association requires the carrier to fill out a Form 4268 and send it to the Chairman of the Tariff Committee. CX 12 - CX 13; CX 116 (Debord Tr., II) 62:17-63:16. The Form 4268's that are sent by Participating Carriers to the Kentucky Association's Tariff Committee are not routinely filed with the KTC. CX 116 (Debord Tr., II) 63:16-65:18. Mr. Debord has never given the Kentucky Association any formal instructions about what information should be on the Form 4268. CX 116 (Debord Tr., II) 66:15-67:3.
47. The information contained on the Form 4268's in the Kentucky Association's files are devoid of data. Many Participating Carriers have changed their rates without even filing out the Form 4268 or the information contained on the forms that are filled out is minimal. Many simply assert that costs have risen or that the Participating Carrier wishes to raise its rates. CX 57 - CX 103.

C. The KTC Does Not Issue a Written Decision

48. When the Kentucky Association wants to change the tariff - to raise rates, for example - it informs Mr. Debord of the change, and he stamps the document requesting the change. CX 108. After 30 days, the change becomes effective. "No action is approval." CX 116 (Debord Tr., II) 58:5-60:19.
49. The state does not issue a written decision when it permits rate increases to go into effect. CX 116 (Debord Tr., II) 77:15-78:19; CX 115 (King Tr.) 34:14-34:24.

D. The KTC Does not Hold Hearings

50. Aside from the original hearings in the 1950's or 1960's, the state has never held a hearing to examine or analyze the rates contained in the Kentucky Association tariff. CX 116 (Debord Tr., II) 67:7-69:24; CX 115 (King Tr.) 33:1-33:9.
51. The only way the KTC could formally reject the Kentucky Association's collective tariff rate would be by setting them for a hearing, which the KTC has never done. KY. REV. STAT. ANN. § 281.690(2). CX 53; CX 116 (Debord Tr., II) 92:19-95:8.
52. The KTC does not receive any input from groups advocating on behalf of consumers. CX 116 (Debord Tr., II) 109:6-110:22. In fact, in the limited hearings that are held on issues involving individual moving firms, the state does not allow people in the hearing room unless they represent a mover. CX 117 (Mirus Tr.) 98:3-99:7. The Kentucky Association

Board meetings are not publicly announced, and no group or individual representing consumers have ever attended a Board meeting. CX 129 (Tolson Tr.) 145:3-16.

E. The KTC Does not Analyze Requests for Rate Increases

53. The state does not have any standard or formula that it uses to determine whether a rate increase is appropriate. Similarly, the state does not have any way of knowing whether a rate increase will increase movers' profits. CX 116 (Debord Tr., II) 105:20-106:23.
54. Virtually no justification is provided to the state in support of movers' requests for rate increases. Respondent does not submit, nor does the KTC require, any business records, economic study, or cost justification data. CX 116 (Debord Tr., II) 111:16-111:21; 119:21-120:10; 124:12-126:24. For instance, in December 2000, Respondent sought an 8% rate increase. The only written justification for that increase was a cover letter. Mr. Debord characterized that letter as an "extra courtesy" and said that normally tariff filings were not usually accompanied by such a justification letter. CX 116 (Debord Tr., II) 97:11-101:16. Mr. Debord also could not recall any oral statements made to justify this rate increase. CX 116 (Debord Tr., II) 102:10-103:6. The rate increase was allowed to go into effect. CX 116 (Debord Tr., II) 105:20-105:22.
55. As another example, in 1999 Respondent filed Supplement 61, seeking a 10% increase in intrastate rates. There was no written justification provided to the state other than the cover letter which discussed a 5% interstate increase. CX 116 (Debord Tr., II) 112:2-112:18. The rate increase was allowed to go into effect. CX 17.
56. In Supplement 71, Respondent filed for a 5% increase on additional items contained in the tariff, such as the added cost of moving a car which increased from \$128.30 to \$134.70. Mr. Debord does not recall the justification for that increase. CX 116 (Debord Tr., II) 116:19-120:10. The rate increase was allowed to go into effect. CX 10. Mr. Debord could not recall any specific verbal justifications provided to him for any rate increases. CX 116 (Debord Tr., II) 115:8-116:17.
57. The state does not have any way of analyzing whether rate increases would result in rates being "excessive." CX 116 (Debord Tr., II) 108:8-109:5.
58. In one instance a non-member, Apartment Movers, filed for individual rates. Mr. Debord testified that he had no "specific standards" for determining whether those rates would be acceptable. CX 116 (Debord Tr., II) 123:19-124:11.
59. The Planes moving company filed an exception whereby it charges 20% more than the highest intrastate rates in the tariff. Another firm, Weil-Thoman filed an exception whereby it charges 38% more than the highest intrastate rates in the tariff. Both of these firms operate in the same geographic region. Mr. Debord does not remember the

justification for these very substantial price surcharges. And in neither instance could Mr. Debord identify a standard that the state used to determine whether these rates complied with the statutory requirement that the rates not be "excessive." CX 116 (Debord Tr., II) 141:1-145:8.

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

60. In 1972, the KTC had a staff of three auditors and others who did cost studies of for-hire carriers which involved "statistical formula." There are no official costs studies done now for household goods movers. CX 116 (Debord Tr., II) 72:5-73:12.
61. Mr. Debord used to do monthly written reports to the Commissioner which would analyze rate applications. He would arrive at an operating ratio. Some time in the 1980's, the Commissioner told him "not to bother them with those things"(76:22-23) and "Don't bother us with that."(77:10). CX 116 (Debord Tr., II) 74:20-77:11.
62. In the 1970's, the KTC routinely filled out a spreadsheet which contained the calculated operating ratio for all household goods movers. Those operating ratios varied from 92% for bigger carriers to over 100% for marginal carriers. CX 116 (Debord Tr., II) 88:21-89:19. At least one state, Oregon, has recently used operating ratios as the basis for its Orders determining whether to grant movers' requests for rate increases. CX 118 - 127.
63. The operating ratios were done in the 1970's and 1980's but "most certainly . . . one would not have been done" by the late 1990's. In the past there were two auditors and five or six people in the division. CX 116 (Debord Tr., II) 89:20-90:24.
64. Even during the time the state calculated operating ratios, there was no written policy which set forth an acceptable level. Nor did the state have a numerical goal for an acceptable operating ratio, "[A]s far as official policy stating that to allow ninety-five or ninety-three percent ratio - - operating ratio, we never had that." Nor did the state mandate rates as was done in many states. CX 116 (Debord Tr., II) 95:9-96:4.
65. There is no state standard for determining the rates movers should establish in their tariffs. CX 116 (Debord Tr., II) 105:20-106:23; 123:19-124:11. And as Mr. Debord stated, there is not a "written rule within the Cabinet that requires specific standards to be followed." CX 116 (Debord Tr., II) 36:19-37:12; CX 115 (King Tr.) 16:12-16:15.

V. The State Cannot Rely on Review of Interstate Tariffs

66. While the Kentucky Association at times tries to justify its requests for rate increases on increases in the Interstate rates, the interstate rates are not comparable. First, movers are permitted to discount from the interstate tariff. And they routinely do discount off those rates. CX 116 (Debord Tr., II) 127:16-128:7.

67. Mr. Debord has seen a wide variety of discounts from the interstate rate including discounts as high as 70% and 75% from the interstate rate. CX 116 (Debord Tr., II) 127:19-128:7. His estimate of the average level of discounting that occurs, twenty percent, is much lower than the level of discounts movers indicate are given off the interstate tariff. CX 116 (Debord Tr., II) 128:8-129:18; CX 111 - CX 113.
68. Mr. Debord is unaware of any industry or government publication that tracks the actual cost of interstate moves as compared to the rates published in the interstate tariff. He also has not discussed that issue with movers. Mr. Debord said that "It would be very difficult to compare" the rates in the Kentucky Association tariff with the rates in the interstate tariff. "I have not made a study in that regard." CX 116 (Debord Tr., II) 129:19-130:18.
69. Similarly, Mr. Debord cannot compare the actual rates charged for interstate moves with the rates contained in the Kentucky Association tariff. CX 116 (Debord Tr., II) 131:8-131:13.
70. Mr. Debord did not know how the rate levels are established in the interstate tariff. CX 116 (Debord Tr., II) 131:14-133:5. The interstate tariff is not established using the standards set out in the Kentucky Statutes. CX 116 (Debord Tr., II) 133:6-134:1.
71. When the intrastate rates are increased, the tariff has many rates which are adjusted upward. For instance, each rate table has 240 prices on it and there are seven rate tables. For a 5% rate increase such as was contained in Supplement 71 the Kentucky Association prepares the new tables with the upwardly adjusted rates. Mr. Debord only checks "three or four" numbers per page to see if the rate increase has been calculated accurately. CX 116 (Debord Tr., II) 137:7-140:16.

**PART II: RESPONSE TO RESPONDENTS' STATEMENT OF MATERIAL FACTS
AS TO WHICH RESPONDENTS CLAIM THERE IS NO GENUINE DISPUTE**

Complaint Counsel hereby respond to each of the statements in Respondent's Rule 3.24 Separate Statement of Material Facts as to Which There is No Genuine Issue. Respondent's statements are re-printed herein in italics. Complaint Counsel's responses follow.

A. *Kentucky Household Goods Carriers Association, Inc.*

1. *The Kentucky Association is a non-profit corporation organized and existing under the laws of the Commonwealth of Kentucky and functions as a trade association of the Household Goods Moving & Storage Industry for household goods carriers located in the*

Commonwealth of Kentucky. [Declaration of James C. McMahon dated December 19, 2003, identifying Exhibits submitted in support of Respondent's Motion for Summary Decision (hereinafter "McM Decl."); Para. 4; Exhibit 1; 11/18/03 Deposition of A.F. "Bud" Mirus (hereinafter "Mirus Dep."); pp. 16-19.]

Response to No. 1: Not disputed.

2. *The Kentucky Association is also in the business of acting as a motor carrier rate bureau for the purpose of publishing and filing tariffs naming rates for the intrastate transportation of household goods on behalf of its household goods carrier members. [McM. Decl. Para. 4; Ex. 1; 11/18/03 Mirus Dep.; pp. 19-20.]*

Response to No. 2: Not Disputed. The Kentucky Association not only names rates, but it also sets them. The Kentucky Association files tariffs containing collectively set rates for intrastate moving in Kentucky. *See* Complaint Counsel's Statement of Material Facts as to Which There is a Genuine Dispute for Trial ("CCS") ¶¶ 6-28. The state always permits the collectively set rates to take effect. Indeed, the contemporaneous business documents and the deposition testimony demonstrate that, among other things, the state commits very limited resources to tariff issues, does not receive reliable data, does not employ procedural safeguards such as issuing written decisions or holding hearings before allowing the rates to take effect, fails to analyze requests for rate increases, and does not analyze rates under any state standard. When it allows rates to take effect, the KTC takes no formal action aside from rubber stamping the tariff containing the collectively set rates. *See* CCS ¶¶ 35-71.

3. *The Kentucky Association has one (1) paid employee, who functions as an Executive Director, and one (1) compensated independent contractor, who functions as an Administrative Consultant and serves as Chairman of the Kentucky Association's Tariff Committee. No other person who is connected with the Kentucky Association is compensated, and it is managed by a voluntary Board of Directors comprised of representatives of member firms elected by the membership. [McM. Decl.; Para. 4; Ex. 1; 11/18/03 Mirus Dep.; p. 19.]*

Response to No. 3: Not disputed.

4. *Every household goods carrier operating in the Commonwealth of Kentucky is required by law to file a tariff containing its rates, charges, and rules with the Kentucky Transportation Cabinet ("KTC"). [McM. Decl.; Para. 4; Ex. 1; 11/18/03 Mirus Dep.; pp.19-20.]*

Response to No. 4: Not disputed.

5. *Under Kentucky law and regulations, a "tariff publishing agent" may file a tariff on behalf of one or more household goods carriers. [McM. Decl.; Para. 4; Ex. 1; 11/18/03 Mirus Dep.; p. 20.]*

Response to No. 5: Not disputed.

6. *Any member of the Kentucky Association is free to file its own individual tariff. [McM. Decl.; Para. 4; Ex. 1; 11/18/03 Mirus Dep.; p 20.]*

Response to No. 6: Disputed as incomplete and therefore misleading. Mr. Mirus testified that, in fact, all members of the Kentucky Association adhere to the tariff filed by the Kentucky Association. CX 117 (Mirus Tr.) 20:13-21:2.

7. *Any member of the Kentucky Association is free to participate in the Kentucky Association's tariff, and direct the Kentucky Association to file a tariff rate which is the same, higher, or lower than a rate contained in the collectively filed tariff approved by KTC. [McM. Decl.; Para. 4; Ex. 1; 11/18/03 Mirus Dep.; p.17.]*

Response to No. 7: Disputed. In fact, the movers act collectively, and pressure is applied to movers in some instances to ensure that the rates are coordinated. See CCS ¶¶ 6-28. For example, when one mover sought an exception to the tariff whereby he would compensate the consumer more for damage done in a move, the head of the Tariff Committee called this mover and urged him not to file his exemption. The mover withdrew his exception because, "he did not want to 'upset the program' or work against the majority of the participants." CCS ¶ 22.

B. Kentucky Transportation Cabinet

8. *The only witnesses designated in this proceeding are witnesses who have provided testimony in support of Respondent's State Action Defense. These witnesses include: (a) Hon. Denise King, Director of the Division of Motor Carriers of KTC; (b) Mr. William C. Debord, Administrative Specialist, Division of Motor Carriers, KTC; (c) Mr. A.F. Mirus, Chairman of the Kentucky Association's Tariff Committee; and (d) Mr. Dennis Tolson, President of the Kentucky Association. Since Complaint Counsel has failed to cause deposition testimony to be placed in the pre-trial record which would in any way contradict the deposition testimony of Respondent's witnesses, Respondent believes that there is no dispute concerning the statements contained herein - - almost all of which are drawn from deposition testimony.*

Response to No. 8: Disputed. The record evidence, including the deposition testimony identified in this paragraph, demonstrates that there is, in fact, no active supervision by the state. Indeed, the contemporaneous business documents and the deposition testimony demonstrates, among other things, that the state commits very limited resources to tariff issues, does not receive reliable data, does not employ procedural safeguards such as issuing written decisions or holding hearings before allowing the rates in Respondent's tariff to take effect, does not analyze requests for rate increases, and does not analyze rates under any state standard. CCS ¶¶ 35-71. Complaint Counsel have also designated these witnesses as rebuttal witnesses and have placed their deposition transcripts on the Exhibit List filed on December 19, 2003.

9. *Ms. Denise King has been Director of the Division of Motor Carriers of KTC since May, 2003. She reports to Mr. William M. Bushart, Commissioner of the Department of Vehicle Regulations. Commissioner Bushart reports to Deputy Secretary of Transportation Clifford Linkes, who in turn reports directly to Secretary of Transportation James Codell, III. [McM. Decl.; Para. 5; Ex. 2; 11/12/03 King Dep.; pp. 7-11.]*

Response to No. 9: Not disputed.

C. Active Supervision

10. *The laws of Kentucky and regulations of KTC require that household goods carriers file tariffs with KTC and KTC has a program in place for taking certain actions with regard to tariff filings. Mr. William Debord is responsible for that program of activity and he acts with the authority of KTC. [McM. Decl.; Para. 5; Ex. 2; 11/12/03 King Dep.; pp. 8-11.]*

Response to No. 10: Disputed in part. The laws of Kentucky and regulations of the KTC do require that household goods carriers file tariffs with the KTC. However, there is no “program in place” to supervise the Kentucky Association in its setting of tariff rates. CCS ¶¶ 35-71. It is not disputed that Mr. Debord is the employee responsible for intrastate mover matters at the KTC.

11. *Mr. William Debord is an “Administrative Specialist 3” employed by the Division of Motor Carriers, KTC, and has held this position since March, 2003. His responsibilities include oversight of intrastate regulation of carriers for hire, including passenger type carriers and household goods carriers; oversight of tariff filings, auditing carriers, responding to complaints and telephone inquiries from the public, and administering the statutes contained in Chapter 281. From 1972 to 1979 he was employed with the “Division of Rates & Services” of the “Department of Motor Transportation” which was the name by which the Division of Motor Carriers was known at that time. From December, 1979 to October, 1999, he served as either (a) Director; (b) Acting Director; or (c) Assistant Director, of the Division of Motor Carriers, KTC. For fifteen (15) of the years between 1979 and 1999, he was either Acting Director or Director. From 1972 until the present, Debord has been responsible for administering the Commonwealth of Kentucky’s program for the regulation of household goods carriers. Debord has been a member of the National Association of State Transportation Specialists since 1972 and served as its President in 2000-2001. He has been involved with other trucking industry groups including the Specialized Riggers Conference and tax associations and groups. [McM. Decl. Para. 6; Ex. 3; 11/13/03 Debord Dep.; pp. 11-15; 66.]*

Response to No. 11: Disputed in part. There is no “program for the regulation of” the Kentucky Association in its setting of rates contained in its tariff. The state has failed to actively supervise the rates-setting process. CCS ¶¶ 35-71. It is not disputed that Mr. Debord is

an "Administrative Specialist 3" and the employee responsible for intrastate mover matters at the KTC.

12. *It has been a part of Debord's employment responsibilities since 1972 to be familiar with the Kentucky laws regulating household goods carriers. [McM. Decl. Para. 6; Ex 3; 11/13/03 Debord Dep. p. 15.]*

Response to No. 12: Disputed as incomplete and therefore misleading. While Mr. Debord may be familiar with various Kentucky laws that give the state authority to regulate household goods carriers, he has not actively supervised the rate-setting process. CCS ¶¶ 35-71.

13. *During his Deposition, Mr. Debord identified various statutes and regulations as being laws and regulatory provisions which constitute a part of the Kentucky household goods regulatory program with which he was familiar, and as to which he had administrative responsibility. As to each provision, he provided an explanation and, in many cases, concrete examples of KTC's active involvement in administering the particular requirements of the subject provision. The statutes and regulations which formed the basis for this part of his testimony were marked as Exhibits during his deposition and are as follows: Kentucky Constitution, Section 196; Section 281.010, Kentucky Revised Statutes ("KRS"); KRS 281.011; KRS 281.012; KRS 281.590; KRS 281.600; KRS 281.624; KRS 281.625; KRS 281.640; KRS 281.675; KRS 281.680; KRS 281.685; KRS 281.690; KRS 281.695; KRS 281.705; KRS 691.900; 601 Kentucky Administrative Regulations ("KAR"), Section 1:029; 601 KAR 1:030; 601 KAR 1:031; 601 KAR 1:040; 601 KAR 1:045; 601 KAR 1:050; 601 KAR 1:060; 601 KAR 1:070; 601 KAR 1:075; 601 KAR 1:080; 601 KAR 1:095; and 601 KAR 1:101. [McM. Decl. Para. 6; Ex. 3; 11/13/03 Debord Dep.; pp. 16-79.] [McM. Decl. Para. 7; Ex. 4-A to 4-Z-1 contain copies of these statutes and regulations.]*

Response to No. 13: Disputed. While the above-listed statutes and regulations are in effect, the KTC is not "actively involved" in the administration of many of the provisions contained in these statutes. The KTC does require movers to file tariffs as required by KRS 281.680 and the KTC takes actions to prevent movers from offering consumers discounts which are prohibited by KRS 281.685. CCS ¶¶ 29, 34. However, the state is not "actively involved" in supervising the collective rates in the tariff to determine whether they meet the statutory standards

set out in, for example, KRS 281.590 (rates should be at a level where movers provide “economical and efficient” service) and KRS 281.695 (rates should not be “excessive”). CCS ¶¶ 31, 32. KRS 281.680(4) provides that the KTC’s collective rate making procedures “shall assure that the respective revenues and costs of carriers . . . are ascertained.” (*See* Memorandum of Respondent Kentucky Household Goods Carriers Association, Inc. in Support of Motion for Summary Decision, December 19, 2003 (“Respondent’s Memo”) at 31. Plainly, the KTC does not carry out this function as it no longer requires carriers to submit financial data to the state. CCS ¶¶ 41-44. Similarly, 601 KAR 1:070(c) contains the requirements for changes in tariff rates and charges by household goods carriers. The requirements include the following: “if the change in the rates and charges involves an increase, then he shall also, and at the same time, cause a notice to be printed in a newspaper of general circulation in the area of his situs which shall give notice of the proposed increase, the old rates and charges, the proposed rates and charges, and which shall state that any interested party may protest said increase by filing a protest with the Transportation Cabinet in accordance with its rules and administrative regulations.” *See* Respondent’s Memo at 37. Mr. Debord testified in response to a leading question by Respondent’s counsel that the KTC enforced 601 KAR 1:070. CX 116 (Debord Tr., I) 71:13-72:6. However, there is no evidence that any such notices have been published in newspapers, and Respondent has cited to no documents in support of its contention that this provision is enforced. In addition, none of Respondent’s exhibits support the contention that notices of this type are published in newspapers.

14. *Mr. Debord has attended Meetings of the Kentucky Association to “obtain information relative to the industry” and to “be made aware of tariff change proposals.” He has*

attended such meetings as part of his responsibilities with KTC. [McM. Decl. Para. 6; Ex. 3; 11/13/03 Debord Dep. pp. 86-87.]

Response to No. 14: Disputed as incomplete and misleading. While Mr. Debord does attend some meetings, he does not obtain reliable information. Rather, the information he gathers is anecdotal and nonspecific. Moreover, the information is provided solely by movers; Kentucky Association meetings are not attended by persons or groups representing the consumers. See CCS ¶¶41-47, 50-52. There are many Kentucky Association meeting minutes where rates or rate increases were discussed that indicate that Mr. Debord is not in attendance. See e.g. CX 14, CX 15, CX 19, CX 20, CX 25, CX 26, and CX 47.

15. *Debord has been present at Kentucky Association Meetings for discussions about revenues and costs including labor costs and insurance costs; he has had private discussions with household goods carriers regarding costs; “any time that [he] would do a field audit or what [he refers] to as a tariff compliance investigation, you know, they would share with me, or even at the board meetings, the various people that might attend, you know, they would share with me their costs, their—the issues that were affecting their rates—the rate making process.” [McM. Decl. Para. 6; Ex. 3; 11/13/03 Debord Dep.; pp.88-89.]*

Response to No. 15: Disputed as incomplete and misleading. While Mr. Debord does attend some meetings, he does not obtain reliable information. Rather, the information he gathers is anecdotal and nonspecific. Moreover, the information is provided solely by movers; Kentucky Association meetings are not attended by persons or groups representing consumers. See CCS ¶¶ 41-47, 50-52. There are many Kentucky Association meeting minutes where rates or rate increases were discussed, but also indicate that Mr. Debord was not in attendance. See e.g. CX 14, CX 15, CX 19, CX 20, CX 25, CX 26, and CX 47. While Mr. Debord does carry out “tariff compliance investigations” to make sure movers are not offering discounts to consumers, the only documents he reviews are transactional documents for individual moves – not documents

that would show a firm's costs, revenues or profitability. See CCS ¶¶ 41-47.

16. *Information that Debord learned at Kentucky Association Meetings was considered by KTC in the collective ratemaking process. [McM. Decl. Para. 6; Ex. 3; 11/13/03 Debord Dep.; p. 89.]*

Response to No. 16: Disputed as incomplete and misleading. First, as noted above, while Mr. Debord does attend some meetings, he does not obtain reliable information. Rather, the information he gathers is anecdotal and nonspecific. Moreover, the information is provided solely by movers; Kentucky Association meetings are not attended by persons or groups representing the consumers. See CCS ¶¶ 41-47, 50-52. Complaint Counsel again note that the record contains many Kentucky Association meeting minutes where rates or rate increases were discussed, but also indicate that Mr. Debord was not in attendance. See e.g. CX 14, CX 15, CX 19, CX 20, CX 25, CX 26, and CX 47. Further, the Kentucky Association itself does not compile reliable data on members costs, expenses, or profitability, nor does the Kentucky Association require movers to provide justifications for their rates. If a member participating in Respondent's tariff wants to file for an exception or make a change in its rate, the Kentucky Association requires the carrier to fill out a Form 4268 and send it to the Chairman of the Tariff Committee. CX 12 - CX 13; CX 116 (Debord Tr., II) 62:17-63:16. The information provided on the Form 4268's in the Kentucky Association's files are devoid of data. Many members have changed their rates either without even filling out the "Justification" section of the Form 4268 or writing more than minimal information in that section. Many simply assert that costs have risen or that the member wishes to raise its rates. CX 57 - CX 103. The Form 4268's that are filed with the Tariff Committee are not routinely filed with the KTC. CX 116 (Debord Tr., II) 63:17-65:18. Mr.

Debord has never given the Kentucky Association any formal instructions about what information should be on the Form 4268. CX 116 (Debord Tr., II) 66:15-67:3. See CCS ¶¶ 53-65.

17. *Debord is on the Kentucky Association mailing list; he receives Tariff Bulletins whenever they are sent to the Kentucky Association Membership. [McM. Decl. Para. 6; Ex. 3; 11/13/03 Debord Dep.; 93-94.]*

Response to No. 17: Disputed. While Mr. Debord testified that he is on the mailing list, he has failed to recognize many documents from the Kentucky Association. CX 116 (Debord Tr., I) 93:3-95:2.

18. *Other than his Mother's emergency surgery, Debord has attended all of the Kentucky Association's Board of Directors Meetings "the last couple of years." He has attended at least eighty five percent of the Kentucky Association's Annual Membership Meetings since 1972. [McM. Dec. Para. 6; Ex. 3; 11/13/03 Debord Dep.; pp. 111; 114.]*

Response to No. 18: Disputed. Mr. Debord's testimony relates to his attendance at the Kentucky Association's Annual Membership Meetings. The extent to which Mr. Debord attends Kentucky Association Board of Directors meetings is in dispute. The meeting minutes of many Board of Directors Meetings where rates or rate increases have been discussed indicate that Mr. Debord was not in attendance. See e.g. CX 14, CX 15, CX 19, CX 20, CX 25, CX 26, and CX 47.

19. *Debord remembers being a guest speaker at the Kentucky Association's 1995 Annual Membership Meeting and discussing household goods carriers who were charging rates contrary to the rates contained in their tariffs. [McM. Decl. Para. 6; Ex. 3; 11/13/03 Debord Dep.; pp. 96-97.]*

Response to No. 19: Not Disputed.

20. *Debord recalls discussion at a Kentucky Association Board Meeting held on July 16, 2003 regarding Proposed Supplement No. 81 to Tariff KDVR No. 5 which would address excess valuation charges. He also recalls discussing the issue of household goods carriers discounting their rates at this Meeting. [McM. Decl. Para. 6; Ex. 3; 11/13/03 Debord*

Dep. pp. 102-103.]

Response to No. 20: Disputed as incomplete and therefore misleading. Mr.

Debord testified that he attended this meeting and provided an update on complaints he had received about carriers discounting their rates because “that was putting them in an unfair position of offering to the public a discounted rate.” CX 116 (Debord Tr., I) 104:1-3.

21. *KTC enforces the provision of the Kentucky Constitution which regulates transportation of freight by common carrier, prohibits unjust discrimination in rates and services, and prohibits liability disclaimers. [McM. Decl. Para. 6; Ex. 3; 11/13/03 Debord Dep. P. 17.]*

Response to No. 21: Disputed as incomplete and therefore misleading. While

the KTC may be charged with enforcing this provision, the KTC does not actively supervise the collective rates contained in the Kentucky Association’s tariff. *See CCS ¶¶ 35-71.*

22. *There is a Kentucky State policy to promote economical and efficient transportation service which Debord interprets “to be service provided by a transportation provider that was profitable.” [McM. Decl. Para. 6; Ex. 3; 11/13/03 Debord Dep.; p. 24.]*

Response to No. 22: Disputed as incomplete and therefore misleading. Mr.

Debord interprets the Commonwealth of Kentucky’s state policy as also protecting the consumer. *See CCS ¶¶ 29-33; CX 116 (Debord Tr., II) 31:11-32:3, 33:2-33:20, 35:10-35:20.*

23. *It was Debord’s testimony that it is State policy that “the regulations would foster companies that were healthy and financially - - financial condition.” [McM. Decl. Para. 6; Ex. 3; 11/13/03 Debord Dep.; p. 25.]*

Response to No. 23: Disputed as incomplete and therefore misleading. Mr.

Debord interprets the Kentucky State policy as protecting the consumer. *See CCS ¶¶ 29-33. CX 116 (Debord Tr.) 31:11-32:3, 33:2-33:20, 35:10-35:20.* Furthermore, Mr. Debord identified no standard for evaluating the financial health of intrastate moving companies, and there is no

evidence that this is taken into consideration when the state permits the rates contained in Respondent's tariff to go into affect. CX 116 (Debord Tr., II) 36:19-37:12, 105:20-106:23; CX 115 (King Tr.) 16:12-16:15.

24. *KTC has "the ability to establish rates or to approve, to maintain a system where rates of various transportation services can be established." [McM. Decl. Para. 6; Ex. 3; 11/13/03 Debord Dep. p. 25.]*

Response to No. 24: Disputed as incomplete and therefore misleading. While the KTC has the authority to approve rates, the KTC does not exercise its authority in supervising the Kentucky Association's establishment of collective rates. See CCS ¶¶35-71.

25. *Reference to "unfair or destructive competitive practices" in the Kentucky State transportation policy "refer[s] to situations where a provider might charge one person one rate or some other person a different rate or provide a service for one that would not be provided to someone else. Perform a service or a function that would not be in the best interest of the public." [McM. Decl. Para. 6; Ex. 3; 11/13/03 Debord Dep. p. 26.]*

Response to No. 25: Disputed as incomplete and therefore misleading. The KTC has identified no standard for evaluating what rates are "unfair or destructive" and what rates are in the public interest. CX 116 (Debord Tr., II) 36:19-37:12, 105:20-106:23; CX 115 (King Tr.) 16:12-16:15. See CCS ¶¶ 60-65.

26. *KTC has the responsibility to ensure that every rate charged by household good carriers is just and reasonable; this is the statutory standard which is required to be observed by household goods transportation rates in Kentucky. [McM. Decl. Para. 6; Ex. 3; 11/13/03 Debord Dep. p. 33.]*

Response to No. 26: Disputed as incomplete and therefore misleading. The KTC has the authority to determine what rates are "just and reasonable," but has not exercised this authority or developed any guidance or standards for implementing this state policy. See CCS ¶¶ 60-65.

27. *Kentucky intrastate household goods transportation rates are required to be open to the public and maintained in a public place in the offices of household goods carriers. [McM. Decl. Para. 6; Ex. 3; 11/13/03 Debord Dep. p. 35.]*

Response to No. 27: Not disputed.

28. *KTC ultimately determines household goods transportation rates. [McM. Decl. Para. 6; Ex. 3; 11/13/03 Debord Dep. p. 36.]*

Response to No. 28: Disputed. The Kentucky Association sets the rates contained in the tariff. The KTC has ceded responsibility for establishing the level of those rates to Respondent. The evidence shows, among other things, that the state commits very limited resources to tariff issues, does not receive reliable data, does not employ procedural safeguards such as issuing written decisions or holding hearings before allowing the rates to take effect, does not analyze requests for rate increases, and does not analyze rates under any state standard. When it allows rates to take effect, the KTC takes no formal action aside from rubber stamping the tariff containing the collectively set rates. *See CCS ¶¶ 35-71.*

29. *KTC has collective ratemaking procedures for household goods transportation rates. [McM. Decl. Para. 6; Ex. 3; 11/13/03 Debord Dep. p. 37.]*

Response to No. 29: Not disputed.

30. *Collective ratemaking means that "rates are collectively filed through a joint tariff publishing agency representing rates of more than one carrier or a group of carriers." [McM. Decl. Para. 6; Ex. 3; 11/13/03 Debord Dep. p. 38.]*

Response to No. 30: Not disputed. Absent a valid defense, such collective rate filings constitute a *per se* violation of the antitrust laws.

31. *The Kentucky Association files collective rates. [McM. Decl. Para. 6; Ex. 3; 11/13/03 Debord Dep. p. 38.]*

Response to No. 31: Not disputed. The Kentucky Association's collective rate

filings form the basis for the Commission's complaint charging Respondent with violating Section 5 of the Federal Trade Commission Act.

32. *KTC makes efforts to determine the costs of household goods carriers as part of the ratemaking process. This includes Debord's knowledge of the trucking industry, the various costs involved with transportation services, general guidelines relative to economic situations that are across the board as far as trucking is concerned, insurance costs, labor costs, equipment costs, workers compensation insurance costs, fixed overhead. [McM. Decl. Para. 6; Ex. 3; 11/13/03 Debord Dep. p. 39.]*

Response to No. 32: Disputed. The KTC makes no effort to obtain reliable information. At best, the knowledge that Mr. Debord obtains is anecdotal and sporadic. *See* CCS ¶¶ 41-47.

33. *Debord keeps up to date with regard to costs by contact with trucking companies, conversations, the audit process, information from other states, national associations, Wall Street Journal. [McM. Decl. Para. 6; Ex. 3; 11/13/03 Debord Dep. pp. 38-39.]*

Response to No. 33: Disputed. The KTC makes no effort to obtain reliable information. At best, the information Mr. Debord obtains about the moving industry is anecdotal and sporadic. While Mr. Debord does carry out rate compliance investigations to make sure movers are not offering discounts off the collective rates to consumers, the only documents he reviews are transactional documents for individual moves – not documents that would show a firm's costs, revenues or profitability. *See* CCS ¶¶ 41-47.

34. *A carrier cannot charge any more or less than what its tariff says. [McM. Decl. Para. 6; Ex. 3; 11/13/03 Debord Dep. p. 44.]*

Response to No. 34: Not disputed. Indeed, the evidence shows that some intrastate moving companies in Kentucky would prefer to provide customers with discounts. *See* CCS ¶¶ 25-28.

35. *A "tariff" contains a schedule of rates, fares, and charges, and the rules that carriers impose on their transportation processes. [McM. Decl. Para. 6; Ex. 3; 11/13/03 Debord Dep. pp. 42-43.]*

Response to No. 35: Not disputed. See CCS ¶¶ 6-10.

36. *A household goods carrier cannot change its tariff rates except on thirty (30) days' notice to KTC and any interested party; the proposed changes are shown by filing new tariffs; short notice is sometimes permitted when its in the best interest of the public; the same rules apply to a tariff publishing agency such as the Kentucky Association, and to collectively set rates. [McM. Decl. Para. 6; Ex. 3; 11/13/03 Debord Dep. pp. 43-44.]*

Response to No. 36: Disputed in part. Whether tariff changes are in the best interest of the public is a matter of dispute as illustrated by the fact that movers attempt to offer discounts off the rates in the collective tariff. See CCS ¶¶ 25-28. It is not disputed that a household goods carrier cannot change its tariff rates except on thirty (30) days' notice to the KTC and that the proposed changes are shown by filing new tariffs. Nor is it disputed that short notice is sometimes permitted. Nor is it disputed that these rules apply to the Kentucky Association's collective tariff.

37. *Information about a proposed tariff change is available for inspection at KTC. [McM. Decl. Para. 6; Ex. 3; 11/13/03 Debord Dep. p. 48.]*

Response to No. 37: Not disputed.

38. *KTC has suspended proposed rates submitted by the Kentucky Association; there are situations where individual carriers were proposing rates that were placing a particular carrier in a more positive competitive environment than the other carriers; two rates are presently under suspension pending receipt of supplemental information; one situation involved "a flat rate." [McM. Decl. Para. 6; Ex. 3; 11/13/03 Debord Dep. pp. 45-47.]*

Response to No. 38: Disputed as incomplete and misleading. While the state has objected to individual movers' applications for an exception to the tariff, the KTC has never rejected the collective rates contained in the Kentucky Association's tariff. CX 116 (Debord Tr.,

II) 92:19-95:8. See CCS ¶¶ 36, 53-65.

39. During his deposition, Debord stated that he could not recall a situation in “recent history” where KTC held a hearing and found a rate to be unreasonable. He stated that situations have been “administratively” resolved, and proposed rates were “voluntarily changed.” [McM. Decl. Para. 6; Ex. 3; 11/13/03 Debord Dep. pp. 47-48.]

Response to No. 39: Disputed as incomplete and misleading. The KTC has not held a hearing on the collective rates contained in the Kentucky Association’s tariff since at least the mid-1960s. Mr. Debord’s testimony about administrative changes and voluntary changes is extremely vague. CX 116 (Debord Tr., II) 67:6-68:7. Respondent has provided no contemporaneous documents to substantiate its assertion that any such voluntary changes in rates have in fact taken place.

40. KTC issued an initial “minimum rate order” in the 1950s or 1960s; these rates were set by order of KTC. [McM. Decl. Para. 6; Ex. 3; 11/13/03 Debord Dep. p. 49.]

Response to No. 40: Disputed. Mr. Debord’s testimony about events that took place in the 1950s or 1960s is vague and not based on first hand knowledge. Mr. Debord testified that “other than the initial minimum rate an order was issued back in– before my time in the ‘50s or early ‘60s, I don’t know of any household goods rate that was established and set by order of the Cabinet or the Department.” CX 116 (Debord Tr., I) 49:9-13. Mr. Debord’s testimony is that, if this did occur, it was before his time. There also is no evidence concerning the standard the state may have used to set these rates. Mr. Debord himself testified that he did not know what standard was used. CX 116 (Debord Tr., II) 71:16-72:10. In addition, there are no documents reflecting such an order, and there have been no such orders ever since.

41. Debord discusses proposed collective rates before they are filed with KTC

by the Kentucky Association; he attends Kentucky Association meetings when there are discussions about proposed tariff changes. [McM. Decl. Para. 6; Ex. 3; 11/13/03 Debord Dep. p. 50.]

Response to No. 41: Disputed as incomplete and misleading. Mr. Debord's testimony concerning discussions about rates is vague at best. During this litigation, Respondent produced files containing many notes of conversations its officials had about the tariff with various individuals, including Mr. Debord. But, Respondent has not cited to any documents which memorialize any discussions with Mr. Debord concerning his analysis of collective rate levels. The extent to which Mr. Debord attends Kentucky Association Board of Directors meetings is also in dispute. The meeting minutes of many Board of Directors meetings where rates or rate increases have been discussed indicate that Mr. Debord is not in attendance. *See e.g.* CX 14, CX 15, CX 19, CX 20, CX 25, CX 26, and CX 47. Moreover, the testimony is clear that the state has developed no standard in reviewing rates. *See* CCS ¶¶ 53-65; CX 116 (Debord Tr., II) 36:19-37:12, 105:20-106:23; CX 115 (King Tr.) 16:12-16:15.

42. *One reason why collectively set rates have not been suspended by KTC is that "they [the Kentucky Association] know that through our discussions what I would probably recommend as a just and reasonable adjustment of some sort. They have some idea what, through my recommendations, the Cabinet would allow. And, they have stayed within those parameters that are voiced at those types of meetings." [McM. Decl. Para. 6; Ex. 3; 11/13/03 Debord Dep. p. 51.]*

Response to No. 42: Disputed as incomplete and misleading. Mr. Debord's testimony about discussions of rates is vague at best. Respondent produced, during this litigation, files containing many notes of conversations its officials had about the tariff with various individuals, including Mr. Debord. But, Respondent has not cited to any documents which memorialize any discussions with Mr. Debord concerning his analysis of the reasonableness of

collective rates. Respondent has not cited to any document that corroborates Mr. Debord's testimony that he has ever given any guidance on how the state would determine what constitutes a just and reasonable rate level. (Respondent's exhibits include a limited number of documents which indicate that Mr. Debord told the Kentucky Association that its proposed rate increase would be allowed to take effect. *See e.g.* RX101; RX 106; RX 178; RX 189; RX 190.) Moreover, there is no testimony about the standard that is applied in setting these rates. *See* CCS ¶¶ 53-65; CX 116 (Debord Tr., II) 36:19-37:12, 105:20-106:23; CX 115 (King Tr.) 16:12-16:15. The extent to which Mr. Debord attends Kentucky Association Board of Directors meetings is also in dispute. The meeting minutes of many Board of Directors Meetings where rates or rate increases have been discussed indicate that Mr. Debord is not in attendance. *See e.g.* CX 14, CX 15, CX 19, CX 20, CX 25, CX 26, and CX 47.

43. *During his deposition, Debord described the initial minimum rate order where rates were fixed by hearing and the manner in which those rates have been increased since that time.*

Q. Are you aware of any situation in which the Cabinet has fixed the rate under this section?

A. In years past, I have, but not recently.

Q. And why is that, so you think?

A. One of the reasons I think is back – I referred to earlier, when the regulatory scheme first was developed and household goods was removed from the exempt list, and what I mean by that is when they were – become regulated as to the rates they charge, there was a very elaborate process that – in the Department of Motor Transportation went through where they established these minimum rates. [McM. Decl. Para. 6; Ex. 3; 11/13/03 Debord Dep. pp. 67-68.]

Response to No. 43: Disputed as incomplete and misleading. The testimony about the formulation of minimum rates is vague, and Mr. Debord has testified that it was before his time. Also, if there was an order establishing minimum rates, it is not in evidence. Moreover, Respondent files a collective tariff containing actual rates that are substantially higher than any minimum rates Kentucky might have established in the 1950's or 1960's. Whatever transpired at that time was in the distant past, and the state has, at this point, ceased undertaking any active participation in establishing or even analyzing rate levels. *See CCS ¶¶ 36-71.*

44. *KTC requires financial data from household goods carriers from time to time, as it sees fit. [McM. Decl. Para. 6; Ex. 3; 11/13/03 Debord Dep. p. 56.]*

Response to No. 44: Disputed. The testimony cited is vague at best, particularly as to what financial data is required. Indeed, Respondent has not cited to any documents the KTC requires that contain financial data. Respondent's exhibits also do not contain any documents containing financial data that the KTC has required from movers. Household goods movers do not routinely submit balance sheets and income statements to the KTC. CX 116 (Debord Tr., II) 53:22-54:4; CX 115 (King Tr.) 32:8-32:24. While the KTC used to require household goods movers to file annual financial reports, it stopped requiring such financial reports. In years past, the KTC would get detailed financial reports. The reports were routinely audited in the 70's and 80's. The KTC would check their accuracy by comparing the data sent to the state with the firm's ICC filings which could be 200 pages long. CX 104 - CX 105; CX 116 (Debord Tr., II) 82:9-83:9; 86:12-88:20. Mr. Debord would use this information to prepare monthly written reports to the Commissioner which would analyze rate applications. He would arrive at an operating ratio. Some time in the 1980's the Commissioner told him "not to bother them with those things" CX

116 (Debord Tr., II) 76:22-23; and, “Don’t bother us with that.” CX 116 (Debord Tr., II) 74:20-77:11. See CCS ¶¶ 41-47.

45. *KTC conducts audits of household goods carriers from time to time. [McM. Decl. Para. 6; Ex. 3; 11/13/03 Debord Dep. p. 57.]*

Response to No. 45: Not disputed. Mr. Debord conducts rate compliance investigations to ensure that movers are not offering discounts off the collective rates to consumers. CX 116 (Debord Tr., I) 104:18-105:19. When Mr. Debord does an investigation, the only documents he reviews are transactional documents for individual moves – not documents that would show a firm’s costs, revenues or profitability. See CCS ¶¶ 41-47.

46. **Not used.**

47. **Not used.**

48. *After a tariff is published, the public can file a protest on a new rate and existing rates. [McM. Decl. Para. 6; Ex. 3; 11/13/03 Debord Dep. p. 62.]*

Response to No. 48: Disputed as incomplete and misleading. The record contains no documentary evidence of any protest being filed concerning the collective rates contained in Respondent’s tariff. There is vague testimony about one big shipper protesting rates at some point in the distant past. CX 116 (Debord Tr., I) 62:8-15. No hearing was held on this matter, and Mr. Debord does not recall the disposition of this matter. CX 116 (Debord Tr., I) 62:16-17. The consuming public has no input into the rates contained in Respondent’s tariff. See CCS ¶ 52.

49. *Debord recalls a situation where a big shipper filed a protest regarding a tariff rate increase. [McM. Decl. Para. 6; Ex. 3; 11/13/03 Debord Dep. p. 62.]*

Response to No. 49: Disputed as incomplete and misleading. The record contains no documentary evidence of this protest being filed. There is vague testimony about one big

shipper protesting rates at some point in the distant past. KRS 281.690 states that if a protest is properly filed, then the state “shall” hold a hearing. Yet, no hearing was held in this matter, calling into question whether the protest was, in fact, filed. And, Mr. Debord does not recall the disposition of this matter. CX 116 (Debord Tr., I) 62:8-17. The KTC does not hold hearings on the collective rates contained in Respondent’s tariff. CX 116 (Debord Tr., II) 67:6-68:7.

50. *The tariff of a households goods carrier must be available for public inspection; the purposes for this are public inquiries regarding the cost of moving or rules of the company and for enforcement purposes so far as review of tariffs is concerned. [McM. Decl. Para. 6; Ex. 3; 11/13/03 Debord Dep. pp. 69-70.]*

Response to No. 50: Not disputed. As noted, the consuming public has no input into the rates contained in Respondent’s collective rates since the KTC does not receive any input from groups advocating on behalf of consumers. CX 116 (Debord Tr., II) 109:6-110:22; *See CCS ¶ 52.*

51. *KTC enforces all of the provisions of its regulations regarding tariffs. [McM. Decl. Para. 6; Ex. 3; 11/13/03 Debord Dep. p. 71.]*

Response to No. 51: Disputed. The regulations Respondent listed in paragraph 13 are in effect. Many of the regulations are ministerial in nature. For instance, 601 KAR 1:050(2) requires tariffs to be “typewritten or legibly printed.” However, the KTC does not enforce all of the provisions in its regulations. For instance, 601 KAR 1:070(c) contains the requirements for changes in tariff rates and charges by household goods carriers. The requirements include the following: “if the change in the rates and charges involves an increase, then he shall also, and at the same time, cause a notice to be printed in a newspaper of general circulation in the area of his situs which shall give notice of the proposed increase, the old rates and charges, the proposed rates and charges, and which shall state that any interested party may protest said increase by

filing a protest with the Transportation Cabinet in accordance with its rules and administrative regulations.” See Respondent’s Memo at 37. Mr. Debord testified in response to a leading question by Respondent’s counsel that the KTC enforced 601 KAR 1:070. CX 116 (Debord Tr., I) 71:13-72:6. However, there is no evidence that any such notices have been published in newspapers, and Respondent has cited to no documents (nor filed any exhibits) in support of its contention that this provision is enforced. Moreover, the KTC does not “enforce” those provisions that relate to substantive review of the collective rates contained in the Respondent’s tariff. For instance, 601 KAR 1:050 states that “KRS 281.695 authorizes the Transportation Cabinet to fix or approve the rates . . . of each carrier. This administrative regulation requires the filing and maintaining of just and reasonable rates.” As stated throughout, the state has never established any standards regarding the reasonableness of the collective rates contained in Respondent’s tariffs. See CCS ¶¶ 53-65; CX 116 (Debord Tr., II) 36:19-37-12, 105:20-106:23; CX 115 (King Tr.) 16:12-16:15.

52. *Kentucky does not permit discounting of household goods rates. [McM. Decl. Para.6; Ex. 3; 11/13/03 Debord Dep. p. 74.]*

Response to No. 52: Not disputed. Indeed, a large number of intrastate moving companies would prefer to provide customers with discounts. See CCS ¶¶ 25-28.

53. *KTC does not permit “binding estimates” for household goods moves. [McM. Decl. Para. 6; Ex. 3; 11/13/03 Debord Dep. p. 75.]*

Response to No. 53: Not disputed.

54. *During his deposition, Mr. Debord provided the following testimony which is appropriate to consideration of the Respondent’s State Action defense and the requirements of the Ticor and Midcal decisions:*

Q: I'd like to ask you some questions about the program of regulation the Kentucky Transportation Cabinet has regarding household goods carriers and household goods carriers intrastate transportation rates. Can you tell me – does KTC have control over the rates which are charged by household goods carriers for intrastate transportation services in Kentucky?

A: Yes.

Q: Is there a public purpose to the Commonwealth's regulation of household goods transportation rates in Kentucky?

A: Yes.

Q: Is KTC involved in the establishment of household goods intrastate transportation rates in Kentucky?

A: Yes, The procedures of the rules and regulations of the statutes, yes.

Q: Does KTC in any way participate in the formulation of household goods rates in Kentucky?

A: Yes, we do.

Q: Does KTC exercise any oversight over household goods rates in Kentucky?

A: Yes. We review the filings of them. We investigate the just and reasonableness of them. We follow up to make sure the public is not discriminated against by some people charging different rates.

Q: Is KTC's role in the regulation of household goods rates restricted to enforcing the rates that are privately agreed on by movers?

A: I don't understand your question.

Q: Is KTC's role in the regulation of household goods rates restricted simply to enforcing the rates that are

privately agreed on by movers?

A: You say restricted to only those that are privately submitted or –

Q: I'm going to withdraw the question. Does KTC do more than just act as a policing agent for a bunch of private agreements that are made by movers?

A: Most certainly, yes.

Q: Are tariff rate filings that are made by the Kentucky Association checked for mathematical accuracy?

A: Yes.

Q: By whom?

A: By myself. Me.

Q: Are there any filings made by the Kentucky Association, which are never checked?

A: Not to my knowledge.

Q: Would you know?

A: Yes.

Q: Has KTC ever requested information from the Kentucky Association with regard to proposed tariff rates?

A: Have we ever requested information? Yes.

Q: Has the Association furnished information when it has been requested?

A: Yes.

Q: Has the Association ever failed to comply to a KTC request for information?

A: I don't think the Association has ever failed to comply.

Individual carriers may have had to have some follow-up activity. And, as I described earlier in my testimony, some additional requests in suspension – some types of disciplinary action on our part to get the statutes and regulations fulfilled.

Q: But, has there ever – withdrawn. Has there ever been an information request with regard to collectively set rates that the Association has failed to comply with?

A: No.

Q: Does KTC – withdrawn. Is it the intention of the Kentucky Transportation Cabinet to allow collective rate making activity –

A: Yes

Q: - by the Kentucky Association?

A: Yes. We have a statute that allows carriers either to file their own tariff or become a member of the joint tariff publishing agency.

Q: Does the Kentucky Transportation Cabinet exercise independent judgment with regard to household goods rate proposals that are made by the Kentucky Association?

A: Yes.

OFF THE RECORD

Q: Are the rates contained in the Kentucky Association household goods tariffs established as a direct result of the Kentucky Transportation Cabinet's intervention in the collective rate setting process?

MR. ABRAHAMSEN: Object to the form of the question.

Q. Withdrawn. To your knowledge, are there proposed rates contained in tariffs that are filed with the KTC by the Kentucky Association?

A: You're asking, are there rates that have been filed?

Q: Yes.

A: Yes.

Q: And, is there a process known as collective rate making that has brought about the creation of the proposals that are contained in those tariffs?

A: Yes.

Q: And would you say that the Kentucky Transportation Cabinet were permitting the rates contained in the tariffs to become effective has intervened in the collective rate making process?

A: Yes.

Q: Is the Kentucky Transportation Cabinet aware of the specific details of the rate filings that have been made by the Kentucky Association?

A: Yeah. We're aware of what's contained in the tariff of those, you know. We really - I do scrutinize changes that they propose, whether it's rates or change of ownership. You know, our statutes set up these authorities be granted at a - with a situs. So, even a change of address could be an important matter. So -

Q: Do you examine the details of all of the filings they make?

A: Yes. Most certainly.

Q: They meaning the Kentucky Association?

A: Anybody that files a tariff, as far as they're concerned.

Q: Does the Kentucky Transportation Cabinet actively supervise the rate setting process as far as collectively set rates are concerned?

MR. ABRAHAMSEN: Objection. Calls for a legal conclusion.

Q: You can answer that question.

A: I believe so, yes.

Q: Do you have any doubt?

A: No. [McM. Decl. Para. 6; Ex. 3; 11/13/03 Debord Dep. pp. 79-84.]

Response to No. 54: Disputed. Complaint Counsel object to this contention on the grounds that it states a legal conclusion. While Complaint Counsel do not contest the transcription of Mr. Debord's words, Complaint Counsel dispute that the testimony, which involves cryptic responses to highly leading questions incorporating legally operative words that are undefined for the witness, establishes anything. The bulk of Mr. Debord's testimony shows that the KTC does not actively supervise the collective rates contained in the Kentucky Association's tariff. See CCS ¶¶ 35-71.

55. *Debord remembers the Kentucky Association rate request for peak and off-peak times; he discussed this filing with the Kentucky Association before it became effective; KTC looked at the matter closely; the matter was almost set down for a public hearing. [McM. Decl. Para. 6; Ex. 3; 11/13/03 Debord Dep. pp.100-101.]*

Response to No. 55: Disputed as vague and therefore misleading. While Mr. Debord testified that he looked at the matter closely, there is no explanation about what this means. Mr. Debord's review of all rate matters is conducted without standards established for determining whether the rates meet Kentucky's statutory requirements. See CCS ¶¶ 53-65

56. *Debord recalls the process involved in the Kentucky Association's 4% insurance surcharge proposal in 1996. [McM. Decl. Para. 6; Ex. 3; 11/13/03 Debord Dep. p. 101.]*

Response to No. 56: Disputed as vague and therefore misleading. While Mr. Debord

