

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

**In the Matter of**

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

**a corporation.**

**Docket No. 9309**

**POST TRIAL BRIEF OF RESPONDENT KENTUCKY  
HOUSEHOLD GOODS CARRIERS ASSOCIATION, INC.**

TABLE OF CONTENTS

I. INTRODUCTORY STATEMENT.....7

II. THE POSITION OF THE COMMONWEALTH OF KENTUCKY.....8

III. SUMMARY OF ARGUMENT.....9

IV. FACTUAL BACKGROUND.....10

V. RESPONDENT HAS ESTABLISHED THE ELEMENTS OF THE STATE ACTION DEFENSE UNDER PARKER v. BROWN.....16

    A. The Commonwealth of Kentucky’s household goods transportation regulatory Program is consistent with the “Active Supervision” requirement described in *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.* ....18

    B. The conduct challenged in the Complaint is immune under the most recent explanation of the “State Action Doctrine” found in *F.T.C. v. Ticor Title Guarantee.* .....23

    C. The Position of the Commission described in the Analysis of Proposed Consent Order to Aid Public Comment in Indiana Household Goods and Warehousemen, Inc. sets forth a Completely Erroneous Standard for the State Action Defense. ....27

V. THE KENTUCKY LEGISLATURE HAS ADOPTED A CLEARLY ARTICULATED AND AFFIRMATIVELY EXPRESSED STATE POLICY IN FAVOR OF ESTABLISHING INTRASTATE HOUSEHOLD GOODS TRANSPORTATION RATES THROUGH TARIFF FILINGS AND COLLECTIVE RATEMAKING.....33

A. Kentucky State Transportation Policy and Statutory Provisions and Regulations relating to household goods transportation rates set forth a clearly articulated and affirmatively expressed State policy sufficient to satisfy the first prong of the *Midcal* Test.....33

B. Evidence provided by the Kentucky Transportation Cabinet conclusively demonstrates that the private Conduct challenged in the Complaint is “Actively Supervised” and satisfies the second prong of the *Midcal* Test.....50

VII. CONCLUSION.....51

## TABLE OF AUTHORITIES

### CASES

<u>California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc., et al.</u> , 445 U.S. 97 (1980).....	16, 17, 18, 19, 20, 21, 24, 26, 27, 29, 30
<u>Federal Trade Commission v. Ticor Title Insurance Company, et al.</u> , 504 U.S. 621 (1992).....	17,23, 24, 25, 27, 28, 29, 30
<u>Hannah v. Larche</u> , 363 U.S. 420 (1960).....	29, 30, 31, 32
<u>Massachusetts Furniture &amp; Piano Movers Association, Inc. v. F.T.C.</u> , 773 F.2d 391 (1 <sup>st</sup> Cir. 1985).....	17
<u>Parker v. Brown</u> , 317 U.S. 341 (1943).....	16, 18, 21
<u>U.S. v. Southern Motor Carriers Rate Conference</u> , 467 F. Supp. 471 (N.D. Ga. 1979).....	16

### FEDERAL STATUTES

Administrative Procedure Act, 5 U.S.C., sections 1001-1011.....	28, 29
Interstate Commerce Act, Title 49 U.S.C.....	29
I.C.C. Termination Act of 1995, P.L. 104-88 (104 <sup>th</sup> Cong., 1995).....	29

### STATE STATUTES

Kentucky Constitution, Section 196.....	33
Kentucky Revised Statutes (“KRS”), Section 281.010.....	34
KRS 281.011.....	34
KRS 281.012.....	34
KRS 281.590.....	34, 35
KRS 281.600.....	36
KRS 281.624.....	36
KRS 281.625.....	37

601 KAR 1:070.....	44, 45
601 KAR 1:075.....	45
601 KAR 1:080.....	46, 47, 48
601 KAR 1:095.....	49
601 KAR 1:101.....	49

### OTHER AUTHORITIES

“Analysis of Proposed Consent Order to Aid Public Comment;” Iowa Movers and Warehousemen’s Association; File No. 021-0115; <a href="http://www.ftc.gov/os/2003/08/imwaanalysis.htm">www.ftc.gov/os/2003/08/imwaanalysis.htm</a> .....	37
--	----

## I. INTRODUCTORY STATEMENT

In this proceeding, Complaint Counsel uses the rules of evidence to achieve, by indirection, what it could not and should not be able to achieve lawfully, namely, the destruction of a highly effective State program for the regulation of household goods movers and intrastate household goods transportation rates which has successfully protected the consumers of Kentucky for more than half a century.

The antitrust laws would not permit a challenge to the real party in interest in this proceeding, namely, the Commonwealth of Kentucky. Accordingly, Respondent is compelled to provide a defense to both Kentucky and itself, while the small businesses which constitute Respondent's Membership and the Kentucky moving public are both placed at risk by this proceeding.

However, in a situation which is virtually unprecedented in antitrust jurisprudence, the State regulatory body whose conduct has been both challenged and insulted in this proceeding has sought to intervene *as a Respondent*. It is respectfully submitted that this fact should weigh heavily in the Initial Decision to be made herein. The fact is that there could be no more dramatic indication of the existence of "active supervision" than the conduct of KTC with respect to this proceeding.

In an action which demonstrates Complaint Counsel's utter lack of interest in the merits of this proceeding, except for the furtherance of a political agenda which bears no relationship to the applicable law, Complaint Counsel has previously refused to consent to KTC's intervention in this case - - and has been completely silent with respect to it.

Dismissal of the Complaint is warranted since the active supervision of the Kentucky Association's household goods tariff collective ratemaking activities by the

## I. INTRODUCTORY STATEMENT

In this proceeding, Complaint Counsel uses the rules of evidence to achieve, by indirection, what it could not and should not be able to achieve lawfully, namely, the destruction of a highly effective State program for the regulation of household goods movers and intrastate household goods transportation rates which has successfully protected the consumers of Kentucky for more than half a century.

The antitrust laws would not permit a challenge to the real party in interest in this proceeding, namely, the Commonwealth of Kentucky. Accordingly, Respondent is compelled to provide a defense to both Kentucky and itself, while the small businesses which constitute Respondent's Membership and the Kentucky moving public are both placed at risk by this proceeding.

However, in a situation which is virtually unprecedented in antitrust jurisprudence, the State regulatory body whose conduct has been both challenged and insulted in this proceeding has sought to intervene *as a Respondent*. It is respectfully submitted that this fact should weigh heavily in the Initial Decision to be made herein. The fact is that there could be no more dramatic indication of the existence of "active supervision" than the conduct of KTC with respect to this proceeding.

In an action which demonstrates Complaint Counsel's utter lack of interest in the merits of this proceeding, except for the furtherance of a political agenda which bears no relationship to the applicable law, Complaint Counsel has previously refused to consent to KTC's intervention in this case - - and has been completely silent with respect to it.

Dismissal of the Complaint is warranted since the active supervision of the Kentucky Association's household goods tariff collective ratemaking activities by the

The State's involvement in the rate approval process is not under any circumstances a "rubber stamp" type of approval. The State is actively involved in the process from start to finish. RFF 112.

Rates do not become effective by the filing of a Tariff - - they become effective by reason of the approval of KTC. RFF 88.

The Tariff which is the subject of this proceeding consists of the original tariff filing, and some 82 Supplements (collectively, the "Tariff") - - each of which has been approved by KTC. RFF 6.

There is a standard established by State Law and KTC Regulations which provides that rates must be fair and reasonable. RFF 9-61, 30, 49-50, 62-67, 82-83.

KTC takes substantial efforts to insure that rates in the Tariff meet this standard. RFF 112.

The State collects business data from Members of the Kentucky Association, and a State Official with 30 years of transportation regulatory experience involving household goods rates is responsible for administering the Kentucky regulatory program. RFF 75-76, 92-93,, 101, 104-105, 112, 115-116, 120.

Mr. William Debord is principally responsible for administering the State's program. RFF 70-72.

Debord acts as a "consumer advocate."

Debord conducts a substantive review of the rates in the Tariff. RFF 112.

The Kentucky Association files the Tariff on behalf of its Members. RFF 5.

The Tariff contains many rate levels, and Movers are free to select the rates which they wish to be published for their account, so long as the rate is contained in the KTC-approved Tariff.

Respondent does *not* institute increases in the Tariff; Respondent institutes *rate proposals* for submission to KTC for KTC approval. RFF 26, 43.

The Kentucky Association does not “orchestrate” Tariff changes.

There is no evidence that the Kentucky Association has ever put “pressure” on any Member or interfered with any Mover’s right of independent action to charge whatever Tariff rate it deemed appropriate.

There are a number of statutes and regulations which govern the filing of tariffs and the standard which must be met for household goods transportation rates. Tariff charges must be reasonable and charges must be made without unjust discrimination, unjust preference or advantage, or unfair or destructive competitive practices. RFF 86.

There is a State Transportation Policy which forms part of the standard for household goods transportation rates. RFF 14.

If KTC finds a rate unreasonable, it has the authority to establish a reasonable rate. RFF 30, 66..

Offering discounts from regulated rates is unlawful, as this would constitute rate discrimination. RFF 50, 67, 81, 85, 94, 110.

KTC reviews the Tariff rates to insure that they comply with the legal standard. RFF 112.

KTC has not recently held hearings regarding rates, as Debord discusses the rates with Kentucky Association representatives prior to the time that proposed Supplements containing the rates are formally filed with KTC. RFF 101, 117, 120, 122, 123.

KTC issues no written decision with regard to rates, as this is not required by law and the approval process is deemed by the State to be sufficient for the purposes of its regulatory program.

Debord is constantly receiving information regarding “business data” of Movers. He attends the Kentucky Association’s Board of Directors and Membership Meetings and has done so for decades. RFF 74-80; 92-93; 101-102; 120, 122.

KTC conducts audits of household goods carriers. These audits are sufficient for KTC’s regulatory purposes and provide KTC with information which it uses in the ratemaking process, including information regarding Movers’ costs and revenues. RFF 73, 104-105, 115-116.

No law or case requires KTC to hold hearings to satisfy the Supreme Court’s active supervision requirement.

No law or case requires KTC to issue written decisions to satisfy the Supreme Court’s active supervision requirement.

No law or case requires KTC or the Kentucky Association to satisfy the whims of Complaint Counsel by maintaining or conducting useless exercises, not required by law, in order to avail themselves of the State Action Defense.

The Commonwealth of Kentucky held extensive hearings when the Tariff was first approved in the 1950s. All Supplements filed since that time have their origin in that

original hearing process; it has been an amendment and “supplementing” process since that time.

KTC has elected to comply with its statutory responsibility to collect cost and revenue information (KRS § 281.680[4]) by the current methods it employs to determine such information.

It is not necessary for KTC to “formally reject” Kentucky Association or other Tariff filings because through its involvement in the rate-setting process from start to finish, KTC is able to advise the Kentucky Association regarding what proposals would be accepted or rejected by KTC. RFF 99, 102.

KTC has suspended proposed rates. RFF 98.

This method of operation has been determined by KTC to be more appropriate than conducting hearings.

Complaint Counsel has offered no evidence which would tend to show that KTC’s method of operation - - in this or any other regard - - in any way fails to comply with the law governing the availability of the State Action Defense.

The record contains numerous examples of “justification” being submitted to KTC or discussed with KTC in connection with Kentucky Association Tariff proposals. In many cases, appropriate justification is described in a cover letter.

Complaint Counsel has identified no law or case which states that this form of justification is in any way insufficient.

There is no case or law which states that rate justification of this type in any way deprives Respondent of the availability of the State Action Defense.

In many cases, justification for rate changes is based on the most commonly used tariff which governs the *inter*state transportation of household goods. While the basis for Complaint Counsel's objection to this fact is not entirely clear, Complaint Counsel seems to be saying that this approach is not legally sufficient because KTC Tariffs do not exactly "mirror" the provisions of the interstate tariff. Provisions in the interstate tariff are among the items of information employed by KTC to establish Kentucky intrastate transportation rates. There is no law or case which suggests that this approach in any way deprives the Kentucky Association of the State Action Defense.

Complaint Counsel's position would be more plausible if the Federal Trade Commission were either (a) a State Legislature; or (b) a State motor carrier regulatory agency. The FTC is neither of these.

The Commonwealth of Kentucky has "standards" in place for determining the reasonableness of rates. These standards are governed by, among other things, KTC Regulations and the methods chosen by KTC to comply with them. RFF 73.

Complaint Counsel's apparent preoccupation with the way things were in the 1950s, 1960s, 1970s, and 1980s may be of historical interest, but the law which governs the availability of the State Action Defense - - in the form of Ticor and Midcal - - is of more contemporary origin.

**V. RESPONDENT HAS ESTABLISHED THE ELEMENTS OF  
THE STATE ACTION DEFENSE UNDER *PARKER V. BROWN*.**

Respondent Kentucky Association and the Kentucky Transportation Cabinet have established that the Kentucky Association's actions in preparing and submitting collective rate proposals to KTC satisfy the criteria first announced by the Supreme Court in Parker v. Brown, 317 U.S. 341 (1943).

In Parker v. Brown, the Supreme Court held that the Sherman Act did not apply to the actions of local agricultural cooperatives in developing marketing policies for the California raisin crop. 317 U.S. at 351. The Supreme Court found that the actions of an "Advisory Commission" comprised of private actors was exempt from application of the federal antitrust laws because of the involvement of the State in the statutory program.

"In Parker v. Brown, this Court found in the Sherman Act no purpose to nullify state powers. Because the Act is directed against 'individual and not state action,' the Court concluded that the State's regulatory programs could not violate it. California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc., 445 U.S. 97, 104 (1980).

The cases which Complaint Counsel have relied upon at trial - - other than Ticor and Midcal - - are almost uniformly unsuited to an analysis of the issues in this proceeding.

The District Court Decision in U.S. v. Southern Motor Carriers Rate Conference, 467 F. Supp. 471 (N.D. Ga. 1979) was, as Complaint Counsel has previously acknowledged, ultimately reversed by the Supreme Court. More significantly, in the Supreme Court, the issue of "active supervision" was *conceded* by the Government.

Active supervision was not even *considered* by the Administrative Law Judge or the U.S. Court of Appeals which subsequently reversed his and the Commission's

position in Matter of Massachusetts Furniture & Piano Movers Ass'n, 773 F. 2d 391 (1<sup>st</sup> Cir. 1985).

The other cases previously cited by Complaint Counsel in Footnotes 14 and 15 of their Pre-Trial Brief do not involve household goods transportation rates. Moreover, they are easily further distinguished by a complete lack of identity of issue with this case.

And, *most* significantly, these cases have discussed written decisions, hearings, and the like because the regulatory bodies subject to review in these cases have determined that written decisions, hearings, and the like have been appropriate to their respective methods of operation. This has not been so in Kentucky - - where KTC has operated in a manner which *it* believes is sufficient for its purposes and which also complies with the standards laid down in Midcal and Ticor.

Neither Ticor nor Midcal require hearings, written decisions, or newspaper notices to household goods transportation consumers who would have no reason to comment on them. Inquiry into the specifics of the Kentucky regulatory program at issue in this case will disclose the availability of the State Action Defense as shown by Respondent.

**A. The Commonwealth of Kentucky’s Household Goods Transportation Regulatory Program is consistent with the “Active Supervision” Requirement described in *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.***

In California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc., 445 U.S. 97 (1980), the State of California Supreme Court had previously ruled that the subject wine pricing scheme violated the Sherman Act and “. . . held that because the State played only a passive part in liquor pricing, there was no Parker v. Brown immunity for the program.” 445 U.S. at 101.

A review of each item of the program before the Court in Midcal, compared to the corresponding factor of the Kentucky regulatory program at issue in this proceeding, confirms the availability of the State Action Defense to Respondent so far as the activity challenged in the Complaint is concerned.

The pricing scheme before the U.S. Supreme Court in Midcal involved, among other things, division of the State of California into “three trading areas for administration of the wine pricing program.” 445 U.S. at 99. This factor is not of particular significance as far as the KTC program of collective ratemaking in *this* case is concerned.

“The State [had] no direct control over wine prices. . .” 445 U.S. at 100. In *this* case, KTC has control over the rates charged by household goods carriers.

The State “[did] not review the reasonableness of the prices set by wine dealers.” 445 U.S. at 100. Undisputed deposition testimony in *this* case confirms that the reasonableness of household goods transportation rates is reviewed by KTC.

