BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of Determining the Proper Carrier Classification of, and Complaint for Penalties Against: TRANSIT SYSTEMS, INC. , d/b/a MOVES FOR SENIOR	TV 170747 PETITION FOR ADMINISTRATIVE REVIEW

Pursuant to WAC 480-07-610(7), Transit Systems, Inc. d/b/a Moves for Seniors ("MFS") petitions the Washington Utilities and Transportation Commission to review the Initial Order in the above captioned case.

As a preliminary matter, MFS does not contest that it may not provide intrastate household goods services in Washington State without first obtaining a permit to do so. However, for the reasons stated, MFS disputes the commission staff's attempt to label its activities as carriage rather than brokerage.

I. SUMMARY OF PROCEEDINGS

On August 4, 2017, the Commission staff issued a complaint against Tara Chila d/b/a Moves for Seniors,[1] alleging that MFS was offering services of a household goods carrier

[1] The complaint erroneously identified MFS as a dba for Tara Chila, who is MFS' internet social networking manager. MFS is a trade name for Transit Systems, Inc., a federally licensed household goods transportation broker.

without a permit and was also advertising household goods moving services without have a permit to provide such services, in violation of RCW 81.80.075(1).[2]

The Commission staff sought to impose penalties pursuant to RCW 81.80.075(4)(a). That statute provides,

> Any person who engages in business as a household goods carrier in violation of subsection (1) of this section is subject to a penalty of up to five thousand dollars per violation.
>
> > (a) If the basis for the violation is advertising, each advertisement reproduced, broadcast, or displayed via a particular medium constitutes a separate violation.

The complaint has two factual bases – MFS offered moving services without having a permit to do so and it advertised those services. The first allegation, that MFS offered services, was based on a staff investigator's seeking an on-line estimate from MFS. The Staff contends that MFS' response proves that it offered services as a household goods carrier. The second allegation is that MFS advertises its services as a household goods carrier on the Internet. SP-1 contains pages from MFS' website.

MFS disputed both of these factual contentions. It demanded a hearing. The Commission convened a brief adjudicative proceeding on December 19, 2017 before ALJ Rayne Pearson. Due to the derailment of an Amtrak train the day before, MFS attended telephonically. A Commission employee, Susie Paul testified in person, in the place of the investigator who conducted the Commission investigation.[3] Susie Paul had no first-hand knowledge of the details of Rachel Jones investigation. What she knew, she learned from conversations she claims to have had with Ms. Jones.

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[2] The statute states, "No person shall engage in business as a household goods carrier without first obtaining a household goods carrier permit."

[3] At the time of hearing, that investigator, Rachel Jones, was no longer a Commission employee, though she remained a state employee with the Department of Social and Health Services. TR 46:14-16

On February 13, 2018, ALJ Pearson issued her initial order classifying MFS as a household goods carrier. She imposed a $10,000 fine, with $5,000 deferred. She also granted the Staff request for a cease and desist order which prohibited MFS from offering services as a household goods carrier without a permit to do so.

II. ARGUMENT IN SUPPORT

A. The Initial Order is Not Based on Competent Evidence - The ALJ Erred in Admitting SP 1.

WAC 480-07-495(a) permits the ALJ to consider, "all relevant evidence." Under the regulation, relevant evidence,

> ...is admissible if the presiding officer believes it is the best evidence *reasonably obtainable*, considering its *necessity, availability, and trustworthiness*. The presiding officer will consider, but is not required to follow, the rules of evidence governing general civil proceedings in non-jury trials before Washington superior courts when ruling on the admissibility of evidence.

SP 1 is Rachel Jones' Declaration and the exhibits on which her "testimony" was based. Because Ms. Jones did not testify at hearing, MFS had no opportunity to confront, and cross examine, her.

While WAC 480-07-495 is broad, it has limits. Being able to cross examine the Commission's only witness with personal knowledge is a fundamental right abridged in this case. *Shoemaker v. City of Bremerton*, 109 Wn.2d 504, 510, 745 P.2d 858, 862 (1987) [because Shoemaker had right and ability to cross examine City of Bremerton's witnesses during an administrative proceeding, administrative collateral estopped applied in subsequent civil action].

In administrative proceedings, a witness must be available for cross examination unless the evidence proferred by that witness is available through other means. See, *In re Disciplinary Proceeding against Kronenberg*, 155 Wn.2d 184, 194, 117 P.3d 1134, 1139 (2005) [Where

witnesses' were available for, and subject to, cross examination in a bar disciplinary proceeding, consideration of their extrajudicial testimony was not error].

In this case, not only did the Commission staff present its core evidence through Susie Paul's testimony summarizing the Jones' Declaration (SP 1), MFS had no prior notice that the Commission staff would pursue this tactic.[4] As such, MFS was unable to protect its right of cross examination Ms. Jones by issuing a hearing subpoena to her.

Instead, MFS was left to cross examine Susie Paul, a witness who confessed that she had no first-hand knowledge of the investigation processes Ms. Jones employed. Instead, Ms. Paul conceded that her "assumptions" were all based on investigation procedures that she "a*ssumed*" Jones had followed.

The ALJ would not permit MFS to *voir dire* Ms. Paul to determine the basis and depth of her knowledge underlying Ms. Jones declaration testimony. (TR 48:13-25). On later cross examination, Ms. Paul's lack of knowledge of the facts underlying the complaint became apparent.

As Ms. Paul admitted, SP-1, at page 31 is the basis for the complaint. Page 31 is a moving estimate. It identifies the origin as a Bellevue location in the 98006 zip code. It identifies the destination as a Bellevue location in the 98006 zip code. The estimate does not disclose either the origin or destination address. It is impossible, therefore, to tell whether the estimate shown on page 31 of SP-1 is even a regulated move. This issue is raised by the special instruction on page 31, which states, "This is inside pick-up and delivery." On cross examination the UTC witness did not know what this instruction meant. (TR 76:7-8). MFS' witness, Chris Pienkowski, explained the notation. He testified that it meant that the move was

[4] On December 12, 2017, one week before hearing, the UTC Staff timely filed and served its list of exhibits for hearing. However, it never disclosed that Ms. Jones would not be available to testify.

within a residential community – not on public roadways. (TR 95:4-11). Thus, the only evidence that the UTC staff presented was of a move occurring within a residential complex. Services that do not use public roads are not regulated, as Paul admitted. (TR 76:9-16).

Witness Paul admitted she had no first-hand knowledge of what Ms. Jones actually did. At 76:17 -77:6, she testified,

> Q. Where do I see that in the request? I don't see any addresses other than -- all I see is Bellevue to Bellevue. Tell me where I know I'm moving from one street to another.
>
> **A. Well, it doesn't show it on the document that --**
>
> Q. So then it's just your words against the document; is that right?
>
> **A. <u>It's not listed on the document</u>. I have had discussions with Ms. Jones and she requested two separate points, which is typical. We know that it needs to be within two points of Washington.**
>
> Q. But you don't know for a fact that that was the case because why isn't that reflected in the -- in your exhibit?
>
> **A. These exhibits were performed by Rachel Jones.**

The foregoing exchange demonstrates the fundamental flaw with the Initial Order. ALJ Pearson supported her decision by simply believing the staff witness and discounting MFS' evidence entirely, even though Mr. Pienkowski's testimony was not refuted by the staff witness and even though Mr. Pienkowski explained that the special instruction in the moving estimate was for an on-site relocation. To side step this evidence, which was fatal to the UTC case, the ALJ simply chose not to believe Chris Pienkowski even though the ALJ had no way to gage this witness' demeanor because he testified telephonically.[5]

[5] It should be noted here, Ms. Jones requested her quote on-line. SP-1 at ¶11. Clearly, if Jones had requested a quote for regulated service, she could have attached a copy of the quote request to her declaration. That she failed to do so raises material doubts about Ms. Jones' and Ms. Paul's veracity. Simply, nothing backs up Ms. Paul's testimony, other than her self-serving testimony that Jones told her she gave two addresses. .

B. The Evidence Does Not Show that MFS Transported, or Agreed to Transport, Household Goods on Public Roads.

RCW 80.80.010 governs the threshold question of whether the Washington Motor Carriers Act applies to MFS' activities. That statute is definitional. It provides,

> ((5) "Household goods carrier" means a person **who transports for compensation**, by motor vehicle within this state, or who advertises, solicits, offers, or enters into an agreement **to transport household goods** as defined by the commission.

Nothing in RCW 81.80.010's definition extends the definition of " household goods carrier" to a business that merely **arranges transportation** services performed by others. While RCW 81.80.075(1) requires a household goods carrier to obtain a license to provide transportation services, the law is silent about requiring a household goods broker to seek a license.[6]

A party provides household goods transportation services if it "**transports"** household goods for compensation, or advertises household goods transportation services. [7] The operative word in the statute is the transitive verb, "transports." Washington law does not define the word "transport." Therefore, it should be given its dictionary meaning. *State v. Smith*, 405 P.3d 997, 1001 (Wash. 2017) [A nontechnical statutory term may be given its dictionary meaning; statutes should be construed to affect their purpose, and unlikely, absurd, or strained consequences should be avoided]. The Merriam Webster dictionary defines "transport" as, "**to transfer or convey** from one place to another."[8]

[6] The statute provides, "No person shall engage in business as a **household goods carrier** without first obtaining a household goods carrier permit from the commission."

[7] For purposes of this action, MFS concedes that it is involved in **arranging** transportation of household goods.

[8] https://www.merriam-webster.com/dictionary/transport

The evidence presented at hearing plainly establishes that MFS does not transport household goods. Chris Pienkowski testified that MFS is a broker of household goods transportation services. (TR 81:19) It is in the business of facilitating the relocation of senior citizens by providing a host of relocation services, only one of which is arranging transportation by household goods carriers (Tr. 83:10-23) with whom MFS has broker-carrier agreements.[9] Nothing in the record contradicts Mr. Pienkowski's testimony. Simply, the record does not establish that MFS transports, or offers to transport, household goods.

Finally, the commission has presented no evidence that MFS actually provided the services contemplated by the quote. Since the violation is for **transporting** household goods without a permit, the record fails because the Commission has not proven the necessary element of the violation - transporting the goods.

Since the burden falls on the Commission to prove the violation, it has failed to make even a prima facie case that MFS has provided services, or has offered to provide services, as a household goods carrier. As such, the Commission must dismiss the first charge ("MFS has engaged, and is engaging, in business as a household goods carrier within the state of Washington without the authority required by RCW 81.80.")

C. Since MFS Does Not Offer Household Goods Moving Services, the Advertising Restriction in RCW 81.80.075(4)(b) Does Not Apply.

RCW 81.80.075 prohibits a party: (a) from engaging in the business of a household goods carrier without a permit or (b) from advertising those services if it does not have a permit. Section 4(b), is a subordinate clause. It merely defines how penalties for advertising are to be calculated. It provides,

[9] CP 4

> (4) Any person **who engages in business as a household goods carrier** in violation of subsection (1) of this section is subject to a penalty of up to five thousand dollars per violation.
>
> > (a) If the basis for the violation is advertising, *each advertisement* reproduced, broadcast, or displayed via a particular medium *constitutes a separate violation*.

The statute merely states that if an uncertificated household goods carrier advertises, then each separate advertisement is a separate violation. Thus, to assess a penalty for advertising, the Commission must first prove that MFS provided, or held itself out as providing, household goods carrier services without a license.

For the reasons stated above, the Commission has not met its threshold burden of proof. Accordingly, the Commission must dismiss the second charge ("advertised, solicited, offered, or entered into one or more agreements to transport household goods within the state of Washington without first having obtained a household goods carrier permit from the Commission").

The Commission may attempt to rely on its decision in *Ghosttruck, Inc*., Docket TV-161308 (May 31, 2017). However, that reliance would be misplaced for several reasons. Foremost, the doctrine of *stare decisis* has a limited role in administrative law. *Stericycle of Washington Inc. v. Washington Utilities & Transp. Comm'n,* 190 Wn. App. 74, 93 (2015). As such, *Ghostrruck* is not a binding precedent.

Second, it failed to recognize the essential difference in function between a brokerage business and motor carriage. According to *Ghosttruck's* analysis, every broker will be deemed a motor carrier even though it lacks the facilities *to transport* property. Plainly, this is outcome driven logic that ignores the functional differences between brokerage and carriage businesses.

Finally, *Ghosttruck* never addressed the issue of FAAAA's field pre-emption under 49 U.S.C. 14501(b)(1). For the foregoing reasons, MFS submits that *Ghosttruck* provides no guidance here.

D. 49 U.S.C. § 14501(b)(1) ("FAAAA") Pre-Empts Washington State from Enacting or Enforcing any Statute, Regulation or Order with Respect to MFS Rates, Routes and Services as a Broker.

49 U.S.C. § 14501(b)(1) pre-empts Washington State from regulating, or attempting to regulate, any aspect of MFS' household goods brokerage operation. The statute is an unequivocal exercise of Congress' right to pre-empt the field. The statute provides,

> b) Freight forwarders and brokers.--
>
> > (1) General rule.--Subject to paragraph (2) of this subsection [regarding the state of Hawaii's continuing right to regulate brokers and forwarders], no State or political subdivision thereof and no intrastate agency or other political agency of 2 or more States shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to intrastate rates, intrastate routes, or intrastate services of any freight forwarder or broker.

49 U.S.C. § 13102 provides the definitions relevant in this case. That statute defines broker, household goods and household goods carrier as follows:

> (2) Broker.--The term "broker" means a person, other than a motor carrier.... that as a principal or agent sells, offers for sale, negotiates for, or holds itself out by solicitation, advertisement, or otherwise as *selling, providing, or arranging for, transportation* by motor carrier for compensation.
>
> (10) Household goods.--The term "household goods", as used in connection with transportation, means personal effects and property used or to be used in a dwelling, when a part of the equipment or supply of such dwelling, and similar property if the transportation of such effects or property is--
>
> > (A) arranged and paid for by the householder, except such term does not include property moving from a factory or store, other than property that the householder has purchased with the intent to use in his or her dwelling and is transported at the request of, and the transportation charges are paid to the carrier by, the householder; or

(B) arranged and paid for by another party.

(12) Household goods motor carrier.--

(A) In general.--The term "household goods motor carrier" means a motor carrier that, in the ordinary course of its business of *providing transportation of household goods*, offers some or all of the following additional services:

***.

The federal definition of a household goods carrier is similar to the definition in RCW 81.80.010(5). In both statutes, "transporting" product is an indispensable element of household goods carriage. While 49 U.S.C. § 14501(c)(2)(B) does preserve the states' right to regulate household goods carrier services, it does not create a separate right for the states to regulate household goods brokerage. Since Congress addressed the preemption issue in 49 U.S.C. 14501(b)(1), and did not see fit to preserve the states' rights to regulate household goods brokerage, as it did with respect to household goods carriage under 49 U.S.C. 14501(c)(2)(B), any effort by Washington to regulate household goods brokerage will run afoul of FAAAA's field preemption of intrastate brokerage. Simply, FAAAA strips Washington of the power to create an exception to field preemption where Congress did not see fit to preserve the states' power to regulate household goods brokerage.

Because Congress has pre-empted the field of brokerage regulation, the Commission has no authority directly, or indirectly (as it is doing here) to impose any regulation, or apply any statute or regulation that has the effect of regulating MFS' brokerage rates, routes or services.

Based on field pre-emption, the Commission cannot impose any sanction on MFS for its brokerage activities, including its advertising of those activities.

E. The Commission's Efforts to Regulate Household Goods Brokerage is an Unlawful *Ultra Vires* Act. Its Actions are Void and Unenforceable.

Ultra vires acts are those done 'wholly without legal authorization or in direct violation of existing statutes....' " *Metropolitan Park Dist. v. Department of Natural Resources,* 85 Wash.2d 821, 825 (1975) [statute allowing state to enter into use deed supported agency actions, that, therefore, were not ultra vires].

The power and authority of an administrative agency is limited to that which is expressly granted by statute or necessarily implied. *McGuire v. State,* 58 Wash.App. 195, 198, 791 P.2d 929 (1990) [attempt by the Gambling Commission to confer upon an employee employment rights from which the employee is statutorily excluded is *ultra vires* and void].

Washington law does not regulate household goods brokerage. In fact, FAAAA prohibits the state from regulating any freight brokerage business beyond requiring a bond. Here, because the Commission is statutorily preempted from regulating MFS' household goods brokerage business, staff has concocted a theory that ignores the facts and bends the words in Title 81.80 RCW to justify its attempt to regulate brokerage services by disingenuously labeling them as carriage. By mislabeling MFS' operations as "carriage" instead of brokerage, the staff is attempting to do that which it is prohibited from doing – regulating a household goods broker. Plainly, this effort is well beyond the scope of the Commission's delegated authority.

F. MFS' Advertising is Protected Speech.

Both the United States and Washington State Constitutions protect commercial speech. For the state to limit commercial speech a court must determine: (1) whether the speech concerns a lawful activity and whether the speech is misleading; (2) whether the government's interest is substantial, (3) whether the restriction directly and materially serves the asserted

government interest, **and** (4) whether the restriction is broader than necessary to serve the government interest. The party seeking to uphold a restriction on commercial speech carries the burden of satisfying all four requirements. See, *Kitsap Cty. v. Mattress Outlet/Gould*, 153 Wn.2d 506 at 512 (2005).

Before the Commission may impose a fine for MFS' advertising, it bears the burden of satisfying **all four elements** in *Mattress Outlet.* It cannot.

As argued above, MFS' household goods brokerage business is lawful for three reasons: First, nothing in Washington law prohibits the brokerage of transportation of household goods. In fact, if the state had enacted such a statute, it would be void under 49 U.S.C. § 14501(b)(1)'s field preemption.

Second, the record fails to demonstrate that MFS acted as a household goods carrier without a license. All the record shows is that MFS provided a quote for an "inside move." Whether MFS did the work or hired a carrier to do it, is irrelevant. Simply, no evidence shows the contemplated service was regulated.

Third, nothing in the advertising is misleading. The advertising makes it clear that MFS is not the carrier. SP - 1 (page 14) makes this point on the home page of its website. MFS states, "Our nationwide ***partner network of movers***, specialty move coordinators and other service providers are committed to delivering the highest level of customer service." (Emphasis added). It makes the same statement on its LinkedIn home page (SP - 1, Page 17). Nowhere do these two advertisements state that MFS is a household goods carrier. While the phrasing of these websites may be less precise than the Commission desires, they are not false or misleading.

Certainly, by the time a consumer decides to book a move through MFS, the consumer is well aware of the carrier's identity.[10]

The Commission bears the burden of proving that the advertising was misleading. For the reasons stated above, it has failed to do so.

The Commission must also demonstrate that the speech it seeks to prohibit directly advances a substantial governmental interest. Since household goods transportation brokerage is not regulated, the Commission has failed to demonstrate any enforceable state interest. Given this failure of proof, the Commission cannot satisfy the second and third prongs of the *Mattress Outlet* test.

Finally, to prevail, the Commission must demonstrate that its prohibition in this context is narrowly tailored to satisfy its legitimate interest without overreaching. Here too, the evidence fails. Here, the Commission has two interests. First, regulation of household goods carriers enhances market stability by restricting the number of carriers and regulating their business operations. Equally important, continued economic regulation of household goods carriers protects a shipping public that is generally unsophisticated about the moving business. Regulation also protects the public against unlicensed, and unscrupulous, movers. As the Commission argued at hearing, its concern is heightened by the fact that it perceives (without evidence) that the senior citizen market is one that is particularly vulnerable to sharp business practices.

While that regulatory purpose is certainly within the state's police power, the record contains no evidence demonstrating that seniors are more susceptible to deceptive trade practices than any other segment of the moving market.

[10] As Mr. Pienkowski testified, before a consumer books a move, a moving company representative visits the pick-up location to provide an on-site moving estimate. As this witness testified, at that time of the on-site estimate, the consumer receives the consumer rights information required by both federal and state law. (TR. 87:2 through 89:20)

Since MFS is not acting as a mover, this proceeding does nothing to further the Commission's interests. Instead of evidence demonstrating a problem in need of a remedy, the Commission's opinion of vulnerability is just that...an opinion unsupported by any market studies, research or even anecdotal evidence to substantiate the opinion.

On this further basis, the Commission staff has failed to sustain its burden of proof. Since the Commission has failed to satisfy even one of *Mattress Outlet's* four elements, the Commission must dismiss the complaint with respect to the advertising claim.

III. CONCLUSION

By any fair and reasonable interpretation of the record in this case, the Commission staff has failed to establish that MFS has operated as a household goods carrier in intrastate commerce in Washington without first obtaining a permit to do so. The only "evidence" of allegedly wrongful conduct is tainted by the sponsoring witness' credibility. The document on which the staff relies, does not demonstrate an intrastate movement. It merely demonstrates a quote for moving services within the same zip code. However, the quotation states that it was an inside pickup and delivery, meaning the service did not use public roads.

The staff cannot regulate MFS' brokerage activities under FAAAA. To end run federal preemption, the staff has opted to redefine brokerage so that MFS' activities can be labeled carriage. In essence, what the staff is doing is calling an egg a chair. However, calling an egg a chair does not mean you can sit on it.

Since MFS is not a carrier, the commission staff has failed to prove that MFS has violated the advertising prohibition.

49 U.S.C. 14501(b)(1) prohibits the commission from regulating MFS' brokerage operation, including advertising its brokerage services (other than by requiring it to file a security bond).

Finally, since MFS' activities are beyond the state's regulatory power, any attempt to penalize MFS from advertising its brokerage services violates its First Amendment right of commercial free speech.

For all of the foregoing reasons, the Commission should reverse the Initial Order and dismiss this complaint.

Dated: March 2, 2018.

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CERTIFICATE OF SERVICE

The undersigned certifies that on March 2, 2018, he delivered a copy of the foregoing Petition for Administrative Review to counsel for the Utilities and Transportation Commission via e-mail, as follows:

To: Julian Beattie jbeattie@utc.wa.gov
To: Jeff Roberson jroberso@utc.wa.gov

Dated: March 2, 2018.

/s/ Andrew D. Shafer
Andrew D. Shafer, WSBA # 9405