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 SENIORS	DOCKET TV-170747 COMMISSION STAFF'S ANSWER TO PETITION FOR ADMINISTRATIVE REVIEW

I. INTRODUCTION

1 In Order 03 in this docket, ALJ Rayne Pearson classified Transit Systems Inc. d/b/a Moves for Seniors (MFS) as a household goods carrier, ordered the company to cease and desist regulated operations until it obtains a permit, and penalized the company $10,000 under RCW 81.80.075 for advertising, soliciting, or offering to transport household goods, for compensation, on at least two occasions, without a permit. The Commission suspended $5,000 of the penalty on the condition that the company cease and desist from regulated operations for two years.

2 On March 2, 2018, MFS petitioned for administrative review of Order 03. Staff answers the petition below and recommends that the Commission affirm Order 03 entirely.

II. BACKGROUND

3 The ALJ accurately summarized the relevant facts and procedural history in Order 03. The ALJ's key finding was:

> On at least two occasions, MFS has advertised, solicited, or offered to transport household goods for compensation within the state of Washington without first having obtained a household goods carrier permit from the Commission, in violation of RCW 81.80.075.[1]

Based on this finding, the ALJ correctly classified MFS as an HHG carrier, ordered the

[1] Order 03, p. 13 ¶ 49.

company to cease and desist regulated operations until it obtains a permit, and imposed a partially suspended monetary penalty.

III. ARGUMENT

A. The ALJ Properly Found that Moves for Seniors Solicited or Offered to Transport Household Goods

4 MFS first contests the ALJ's finding that the company "solicited, or offered to transport household goods."[2] This challenge fails because the ALJ's finding was supported by substantial evidence and also because MFS cannot show that it was denied any due process with respect to the ALJ's admission of documents and testimony establishing that a former Commission investigator, Rachel Jones, obtained a quote for a point-to-point move in Bellevue, Washington.

1. Substantial Evidence Showed that a Former Commission Investigator Obtained a Quote for a Point-to-Point Move in Bellevue, Washington

5 The ALJ's finding was based primarily on Exhibit SP-1 (Rachel Jones Declaration) and the testimony of Staff's witness, Susie Paul. At the BAP, Ms. Paul stated that she was the Commission's "lead investigator for compliance investigations in the consumer protection program."[3] Ms. Paul sponsored Exhibit SP-1 because Ms. Jones was no longer employed by the Commission at the time of the brief adjudicative proceeding (BAP).

6 At the BAP, Ms. Paul testified that Ms. Jones requested a quote for household goods transportation between two points in Bellevue, Washington.[4] When asked to recount the details, Ms. Paul said, "[I]t's right on their website 'Get a free quote,' and so [Ms. Jones] selected that, and then she asked for a move within two points of Washington, so it would be

[2] Order 03, p. 13 ¶ 49.
[3] Paul, Transcript (Tr.) at 43:20-21:19-65:1.
[4] Paul, Tr. at 64:19-65:1.

a local move."[5] When giving this testimony, Ms. Paul referred to Exhibit SP-1, Attachment I, which was a printout of the confirmation Ms. Jones received when she submitted her quote request at www.movesforseniors.com.

7 MFS responded to the quote request with what Ms. Paul described as an "offer for a move."[6] Ms. Paul referred to Exhibit SP-1, Attachment J, which was a printout of an email from an MFS employee named Sharon Osborne and a printout of a "Quote for Moving Services" that was attached to Ms. Osborne's email. The quote stated that the total estimated price was $638, which covered a four-hour move, two men, a truck, and a travel fee.[7] The quote also stated, "This is inside pickup and delivery. If the move goes beyond 4 hours[,] you are charged in 15 minute increments based on hourly rate of $132."[8]

8 MFS raised a dispute regarding the meaning of the phrase "inside pickup and delivery." MFS's witness, Chris Pienkowski, opined that the phrase referred to relocation of household goods from one unit to another on the same property (meaning the service fell outside the Commission's jurisdiction).[9] But Staff witness Ms. Paul testified that Ms. Jones requested "two separate addresses in Bellevue"[10] (meaning the move was, in fact, jurisdictional). Ms. Paul explained, "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."[11]

9 Ultimately, the ALJ resolved this dispute by finding Ms. Paul's testimony more

[5] Paul, Tr. at 65:4-7.
[6] Paul, Tr. at 65:17-66:2.
[7] Paul, Exh. SP-1, Attachment J.
[8] Paul, Exh. SP-1, Attachment J.
[9] Pienkowski, Tr. at 95:9-11 ("To my knowledge, that means that we are relocating furniture from one unit to another within a building.").
[10] Paul, Tr. at 76:15-16.
[11] Paul, Tr. at 76:24-77:2.

plausible than Mr. Pienkowski's. The ALJ explained in Order 03, "Unlike Mr. Pienkowski, who neither claimed to have seen the request for a quote nor to have prepared it, Ms. Paul has first-hand knowledge that Ms. Jones requested a move between two separate addresses."[12] The ALJ further explained that "inside pickup and delivery" is "most rationally understood as a clarification that the four hour estimate begins at the time of pick up and concludes at the time of delivery; hence, both pickup and delivery occur 'inside' the four hour window."[13]

10 The upshot is that Mr. Pienkowski's testimony was not "fatal" to Staff's case, as MFS now argues.[14] His testimony was merely a competing interpretation of Exhibit SP-1, Attachment J that was rejected by the ALJ. As the fact-finder, it was the ALJ's prerogative to credit Staff's evidence while discounting the probative value of MFS's.

2. Neither Staff nor the ALJ had a Duty to Make Rachel Jones, a Former Commission Employee, Available for Cross-Examination

11 MFS argues that the ALJ erred by denying it the "opportunity to confront, and cross examine" Ms. Jones about the moving quote she obtained from www.movesforseniors.com. This argument fails because neither Staff nor the ALJ had a duty to make Ms. Jones available for cross-examination. Instead, Staff had a right to present its case exclusively through Ms. Paul.

12 MFS is mistaken about its right to "confront" witnesses in administrative litigation. Criminal defendants have a qualified right to cross-examine adverse witnesses under Washington Constitution, Article 1, Section 22, and under the United States Constitution, Sixth Amendment. *State v. Darden*, 145 Wn.2d 612, 620, 41 P.3d 1189 (2002). But civil

[12] Order 03, p. 8, ¶ 30.
[13] Order 03, p. 8, ¶ 31.
[14] Pet. for Admin. Rev. at 5.

defendants enjoy no analogous right. *Chmela v. Dep't of Motor Vehicles*, 88 Wn.2d 385, 392, 561 P.2d 1085 (1977). And parties to APA brief adjudicative proceedings (BAP) enjoy an even narrower set of hearing rights.

13 Under the APA, an agency conducting a BAP must allow the respondent "an opportunity to be informed of the agency's view of the matter" and a chance "to explain the party's view of the matter."[15] On top of that, the Commission's procedural rules in WAC 480-07 specify that the presiding officer "may" allow the respondent to make an "oral statement."[16] Neither the APA nor WAC 480-07 guarantees a right to cross-examine witnesses in this context. Indeed, the APA appears to allow a decision based entirely on written submissions. Under RCW 34.05.494(1), the record in a BAP consists of "*documents* regarding the matter that were considered or prepared by the presiding officer for the brief adjudicative proceeding or by the reviewing officer for any review."[17]

14 Here, MFS indisputably had a meaningful opportunity to be informed of the agency's view of the matter (through the Commission's complaint and notice of BAP, through Staff's witness and exhibits at the BAP, and through Staff's post-hearing brief) and to make an oral statement explaining its view of the disputed issues (through its own witness and exhibits, through cross-examination of Staff's witness, and through its own post-hearing brief). It therefore received all the process it was due—and more.[18]

15 The cases cited by MFS do not compel a different result. The first case, *Shoemaker v. City of Bremerton*, 109 Wn.2d 504, 745 P.2d 858 (1987), held that a prior administrative

[15] RCW 34.05.485(2).
[16] WAC 480-07-610(5).
[17] Emphasis added. *See also* WAC 480-07-610(10) (same).
[18] MFS did not contest the Commission's decision to adjudicate this docket using a BAP. It likewise assigns no error to that decision in its Petition for Administrative Review.

proceeding was procedurally adequate "for collateral estoppel purposes" because the prior proceeding included an opportunity for cross-examination.[19] *Shoemaker* is inapplicable here because Staff proved its case through Ms. Paul, and neither Staff nor the ALJ relied on collateral estoppel. Furthermore, to the extent the opinion suggests that the opportunity to cross-examine witnesses is one component of a fair hearing, MFS cannot deny that the component was present here. At the BAP, MFS cross-examined Staff's witness.

16 The second case, *In re Disciplinary Proceeding Against Kronenberg*, 155 Wn.2d 184, 117 P.3d 1134 (2005), is an attorney discipline case. In the case, a disbarred attorney argued that the disciplinary proceeding was unfair because the hearing officer admitted hearsay evidence. The court held that any error was harmless because "all of the facts supported by the disputed evidence were also established by other evidence"—namely through witnesses who were available for cross-examination.[20] This holding does not assist MFS because it does not establish that either the ALJ or Staff had a *duty* to make Ms. Jones available for cross-examination at the BAP. It remains true that Staff had a right to prove its case through Ms. Paul, and that the ALJ had a right to find against MFS primarily on the basis of Ms. Paul's testimony and exhibits.

3. The ALJ Properly Admitted Exhibit SP-1, Attachments I and J

17 As discussed above, the ALJ relied primarily on Ms. Paul's testimony and on Exhibit SP-1 (Rachel Jones Declaration), Attachments I and J, to find that MFS solicited, or offered, to transport household goods. Under WAC 480-07-495(1), the Jones declaration and Attachments I and J were admissible if they were relevant and if they were the "best evidence reasonably obtainable, considering its necessity, availability, and trustworthiness."

[19] *Shoemaker*, 109 Wn.2d at 508.
[20] *Kronenberg*, 155 Wn.2d at 194.

It is undisputed that the declaration and attachments were relevant. Therefore, the legal issue is whether the ALJ abused her discretion in determining that the attachments[21] were the best evidence reasonably obtainable under the circumstances.

18 The ALJ did not abuse her discretion. Although Ms. Jones authored the declaration and created Attachments I and J, she could not reasonably sponsor this evidence because she was no longer employed by the Commission at the time of the BAP.[22] Instead, it was reasonable for a different witness, Ms. Paul, to sponsor the documents.

19 Ms. Paul was currently employed by the Commission at the time of the BAP. Further, Ms. Paul:

- Supervised Ms. Jones during her investigation of MFS and reviewed her work;[23]
- Reviewed Ms. Jones's declaration and was "very familiar" with its contents;[24]
- Discussed the investigation with Ms. Jones before she left the Commission;[25] and
- Believed she was prepared to discuss Ms. Jones's findings at the BAP.[26]

Given this record, it was reasonable—and not an abuse of discretion—for the ALJ to admit Ms. Jones's declaration and Attachments I and J through Ms. Paul. The ALJ was rightfully persuaded that the evidence was the best evidence reasonably obtainable.

[21] We say "attachments" because it does not appear that MFS has challenged the admissibility of Ms. Paul's oral testimony.
[22] Paul, Tr. at 46:14-16 (Ms. Paul testified that Ms. Jones was currently working for the Department of Social and Health Services).
[23] Paul, Tr. at 46:17-21.
[24] Paul, Tr. at 46:22-47:1.
[25] Paul, Tr. at 47:2-4.
[26] Paul, Tr. at 47:5-7.

B. Whether Moves for Seniors Actually Provided the Services Contemplated by the Quote is Irrelevant

20 MFS next contends that "the commission has presented no evidence that MFS actually provided the services contemplated by the quote."[27] It argues, "Since the violation is for **transporting** [emphasis in original] household goods without a permit, the record fails because the Commission has not proven the necessary element of the violation—transporting the goods."[28]

21 MFS is mistaken in a key respect: the basis for the ALJ's penalty was not the company's *transportation* of household goods. The basis was her finding that the company (a) "advertised" and (b) "solicited, or offered" to transport household goods without a permit.[29] Under RCW 81.80.010(5), an entity is a household goods carrier if it "advertises" or "solicits/offers" to transport household goods, regardless of whether the transportation of such goods actually occurs. Thus, whether MFS "actually provided the services contemplated by the quote" is irrelevant.

C. The Advertising Violation Requires no "Predicate Offense"

22 MFS next contends that "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." The company is mistaken because the advertising violation requires no "predicate offense." Stated differently, *advertising alone* is sufficient to classify the company as an HHG carrier and to impose a monetary penalty for operating without a permit.

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[27] Pet. for Admin. Rev. at 7.
[28] Pet. for Admin. Rev. at 7.
[29] Order 03, p. 13 ¶ 49.

23 This conclusion is supported by the legislative history of RCW 81.80.010. Before 2009, RCW 81.80.010 defined "household goods carrier" as a "person engaged in the business of transporting household goods as defined by the commission."[30] In 2009, the legislature eliminated the requirement that the carrier be "engaged in the business of transporting" household goods and made clear that "transportation" was merely one of several ways to come under regulation. The 2009 amendment read as follows:

> "'Household goods carrier' means a person ((~~engaged in the business of transporting~~)) <u>who transports for compensation, by motor vehicle within this state, or who advertises, solicits, offers, or enters into an agreement to transport household goods</u> as defined by the commission.[31]

The legislature's final bill report confirmed that the amendment created a distinct violation for advertising:

> A violation is created for engaging in *or attempting to engage* in the business of transporting household goods without a permit. *This violation includes advertising*, soliciting, offering, or entering into an agreement regarding the transportation of used household goods. The penalty for a violation is up to $5,000 for each occurrence of operating or advertising without a permit and up to $10,000 for each violation of a cease and desist order.[32]

The bill report leaves no doubt that advertising requires no "predicate offense."

24 The Commission will note that MFS does not contest the *fact* that it advertised to transport household goods (nor could it, since Staff presented ample evidence that the company advertised moving services to Washington consumers).[33] The company merely

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[30] Laws of 2007, ch. 234, § 68;
[31] Laws of 2009, ch. 94, § 1.
[32] Final Bill Report, HB 1536 (Wash. 2009), at 2, http://lawfilesext.leg.wa.gov/biennium/2009-10/Pdf/Bill%20Reports/House/1536%20HBR%20FBR%2009.pdf (emphasis added).
[33] *See, e.g.*, Order 03, p. 5, ¶ 20 (describing advertisements on www.movesforseniors.com).

advances the flawed legal argument that advertising requires a "predicate offense." Assuming the Commission rejects that argument,[34] the ALJ's finding should be affirmed.

D. Federal Law Does not Preempt the Commission from Regulating MFS

25 MFS next contends that Congress preempted the Commission's authority to regulate MFS's operations by enacting 49 U.S.C. § 14501(b)(1), which preempts state laws or regulations relating to the rates, routes, or services of brokers. MFS is both legally and factually incorrect. While 49 U.S.C. 14501 does preempt some state laws and regulations, the provision leaves intact state regulatory authority over intrastate household goods transportation, including brokerage thereof. Regardless, the ALJ properly determined as a matter of fact that, as relevant to the Commission's complaint, MFS was not acting as a broker, meaning that MFS did not carry its burden of proving its affirmative preemption defense.

1. 49 U.S.C. § 14501(b)(1) Does not Preempt State Regulatory Authority Over Entities Like MFS

26 49 U.S.C. § 14501 preempts certain provisions having the force and effect of law concerning the transport of property. Three of its provision are relevant to MFS's preemption defense.

27 The first is 49 U.S.C. § 14501(b)(1) ("subsection (b)(1)"). Before the Interstate Commerce Commission Termination Act of 1995 (ICCTA), subsection (b)(1) applied only to freight forwarders.[35] The ICCTA added brokers to the preemptive sweep of the subsection, and the provision now reads:

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[34] *See In re Determining the Proper Carrier Classification of, & Complaint for Penalties Against Ghostruck, Inc.*, Docket TV-161308, Order 05, at 4 ¶¶ 12-13 (May 31, 2017) (rejecting essentially the same argument made here by MFS).

[35] Surface Freight Forwarder Deregulation Act, Pub. L. No. 99-521, § 11, 100 Stat. 2993 (1986).

> 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.[36]

28 The second is 49 U.S.C. § 14501(c)(1) ("subsection (c)(1)"). Before the ICCTA, subsection (c)(1) applied only to motor carriers.[37] The ICCTA added brokers and other entities to the preemptive sweep of the subsection, and it now reads:

> Except as provided in paragraphs (2) and (3), a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier (other than a carrier affiliated with a direct air carrier covered by section 41713(b)(4)) or any motor private carrier, broker, or freight forwarder with respect to the transportation of property.[38]

29 The third is 49 U.S.C. § 14501(c)(2)(B) ("subsection (c)(2)(B)"). 49 U.S.C. § 14501(c)(2) provides that subsection (c)(1) does not "cover[]" certain "matters."[39] Subsection (c)(2)(B) specifies that subsection (c)(1) "does not apply to the intrastate transportation of household goods."[40]

a. 49 U.S.C. § 14501(b)(1) Does not Preempt State Regulation of the Brokerage of Intrastate Household Goods Transportation Because Those Regulations do not Relate to Rates or Price, Routes, or Services.

30 The Commission must begin its interpretation of 49 U.S.C. § 14501 with the text of the provision itself.[41] Its various subsections show that the terms "rates" or "price," "routes,"

[36] 49 U.S.C. § 14501(b)(1) (emphasis added).
[37] *Compare* former 49 U.S.C. § 11501(h)(1) (1994) (repealed 1995) *with* 49 U.S.C. § 14501(c)(1).
[38] 49 U.S.C. § 14501(c)(1) (emphasis added).
[39] 49 U.S.C. § 14501(c)(2).
[40] 49 U.S.C. § 14501(c)(2)(B).
[41] *Park 'N Fly, Inc. v. Dollar Park 'N Fly, Inc.*, 469 U.S. 189, 194, 105 S. Ct. 658, 83 L. Ed. 2d 582 (1985).

and "services," do not include any part of intrastate household goods transportation, including brokerage.

31 Subsections (b)(1) and (c)(1) both use the terms "rates" or "price,"[42] "routes," and "services." A basic rule of statutory interpretation requires the Commission to give those terms identical meanings in the two subsections,[43] and one federal court has done exactly that when interpreting subsection (b)(1).[44]

32 Subsections (c)(1) and (c)(2)(B) collectively provide that no aspect of intrastate household goods transportation is a rate or price, route, and service. Subsection (c)(1) does not preempt certain kinds of state regulations because either (1) those regulations either do not relate to rates or price, routes, or services,[45] or (2) Congress chose to preserve state regulatory authority otherwise preempted by subsection (c)(1).[46] Regulation of intrastate household goods transportation is one of the former types of regulations—subsection (c)(1)'s reference to rates or price, routes, or services does not "cover[]" state regulation of such transportation.[47]

33 Even if the Commission finds the term "covered" ambiguous in this context, it would generally turn to the provision's legislative history to discern its meaning.[48] There Congress provided that

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[42] Congress uses the terms rates and price interchangeably, H.R. REP. NO. 103-677, at 86 (1994) (Conf. Rep.), and courts have recognized this by holding that the terms are synonymous. *Air Transp. Ass'n v. City of San Francisco*, 266 F.3d 1064, 1071 (9th Cir. 2001).
[43] *Puerto Rico v. Franklin Cal. Tax-Free Tr.*, __ U.S. __, 136 S. Ct. 1938, 1946, 195 L. Ed. 2d 298 (2016).
[44] *Delivery Express, Inc. v. Sacks*, No. C15-5842 BHS, 2016 WL 3198321, at *3 (W.D. Wash. June 9, 2016).
[45] *See* 49 U.S.C. § 14501(c)(2) (providing for certain "[m]atters not covered" by subsection (c)(1)).
[46] See 49 U.S.C. § 14501(c)(3) (exempting from preemption state regulatory authority over certain matters if regulated carriers consented to the exercise of that authority), (c)(4) (exempting Hawaii's regulatory authority, which subsection (c)(1) would otherwise have preempted).
[47] 49 U.S.C. § 14501(c)(2)(B); s*ee* Webster's Third New International Dictionary at 524 (1968 ed.) (defining cover to mean "to put, lay, or spread something over, on, or before . . . overlay . . . to lie over : spread over : be placed on or often over the whole surface of . . . [to] occupy the whole surface of.")
[48] *Burlington N. R.R. Co. v. Okla. Tax Comm'n*, 481 U.S. 454, 457, 107 S. Ct. 1855, 95 L. Ed. 2d 404 (1987).

> [n]ew subsection (h)(2)[49] emphasizes that State authority to regulate safety, financial fitness and insurance, transportation of household goods, vehicle size and weight and hazardous materials routing of motor carriers is unchanged since State regulation in those areas is not a price, route or service and is thus unaffected.[50]

There is no ambiguity after recourse to this legislative history: intrastate household goods transportation is not a rate or price, route, or service.

34 Brokers, by definition, are entities that "sell[], provid[e], or arrang[e] for" transportation.[51] As used in subsection (c)(2)(B), the term "[t]ransportation . . . includes . . . services related to the movement" of property, "including arranging for" such movement.[52] Again, if the Commission somehow finds ambiguity as to whether the definition of transportation extends to brokerage, it would generally turn to the provision's legislative history.[53] Congress provided there that the term transportation "includes all pre- and post-move services directly related to that transportation . . . includ[ing] the entire process from arranging the movement through the final resolution of any claims disputes." Given these definitions and the provision's legislative history, brokerage is transportation as that term is used in subsections (c)(1) and (c)(2)(B).

35 Because "state regulation in th[e] area[]" of intrastate household goods transportation is not a price, route, or service in subsection (c)(1), it is not a rate, route, or service in subsection (b)(1).[54] Because the term transportation includes brokerage in both

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But the Commission would not need to turn to legislative history here because it should interpret any ambiguity against preemption. *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449, 125 S. Ct. 1788, 161 L. Ed. 2d 687 (2005) (federalism concerns require resolving ambiguity against the reading favoring preemption).

[49] *Codified at* 49 U.S.C. § 14501(c)(2).

[50] H.R. REP. NO. 103-677, at 88 (1994) (Conf. Rep.) (emphasis added).

[51] 49 U.S.C. § 13102(2).

[52] 49 U.S.C. § 13102(23)(B) (emphasis added).

[53] Again, the Commission would not need to do so here because it should interpret any ambiguity against preemption. *Bates*, 544 U.S. at 449.

[54] H.R. REP. NO. 103-677, at 88 (1994) (Conf. Rep.).

sections, the public service laws do not relate to brokers' intrastate rates or price, routes, or services when applied to the brokerage of intrastate household goods movement. Subsection (b)(1) does not preempt the public service laws as applied to MFS.

b. The Applicable Canons of Interpretation Confirm That Congress Did not Intend to Preempt State Regulation of the Brokerage of Intrastate Household Goods Transportation

36 The rules used to glean meaning from statutes generally, and preemption provisions specifically, confirm that federal law does not preempt the public service laws as concerns the regulation of entities like MFS, for four reasons.

37 First, the Commission must attempt to harmonize statutory provisions to avoid conflict wherever possible.[55] The reading implicitly advocated by MFS, which treats the terms "rates" or "price," "routes," and "services" as having different meanings in the various subsections of 49 U.S.C. § 14501, creates a statutory conflict. Under that reading, subsection (b)(1) preempts state authority over the brokerage of intrastate household goods transportation, but subsection (c)(2)(B) expressly saves that regulatory authority. The two subsections cannot both have effect. In contrast, reading the terms to mean the same thing in both subsections harmonizes them and avoids this conflict.[56]

38 Second, the Commission should interpret statutes in a manner that gives meaning to all of its language. It can do that here by reading the terms "rates" or "price," "routes," and "services" identically in subsections (b)(1) and (c)(1). By doing so, each of subsections (b)(1), (c)(1), and (c)(2)(B) have meaning: subsection (c)(1) sets out the general rule

[55] *Morton v. Mancari*, 417 U.S. 535, 551, 94 S. Ct. 2474, 41 L. Ed. 2d 290 (1974).
[56] If the Commission determines that the conflict is irreconcilable, subsection (c)(2)(B) would control given that it is the more specific of interrelated and closely positioned provisions. *HCSC-Laundry v. United States*, 450 U.S. 1, 6, 101 S. Ct. 836, 67 L. Ed. 1 (1981). Subsection (c)(2)(B) is more specific because, with regard to brokers, it applies only to intrastate household goods transportation, whereas subsection (b)(1) applies to all intrastate transportation.

preempting state regulation of broker rates or prices, routes, and services; subsection (b)(1) makes clear that this preemption extends to intrastate rates or prices, routes, and services; and subsection (c)(2)(B) makes clear that this preemption does not extend to state authority over intrastate household goods transportation. The reading advocated by MFS, in contrast, impermissibly renders the reference to brokers in subsection (c)(2)(B) superfluous.

39 Third, the Commission should avoid reading 49 U.S.C. § 14501 in a way that produces absurd or unreasonable results. Congress did not grant either the Secretary of Transportation or the Surface Transportation Board jurisdiction over purely intrastate household goods transportation.[57] The Federal Motor Carrier Safety Administration, which regulates the transportation of household goods pursuant to a delegation of power from the Secretary of Transportation,[58] implicitly signaled that it does not understand federal jurisdiction to reach intrastate household goods brokers by promulgating regulations that apply only to brokers of household goods shipments operating in interstate or foreign commerce.[59] MFS's reading thus produces an absurd result: a "regulatory vacuum."[60] If states cannot regulate intrastate household goods brokerage, no entity can, and that cannot be the law.[61]

40 Finally, the Commission must interpret 49 U.S.C. § 14501 in light of the presumption against preemption, and therefore it must read the provision narrowly.[62]

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[57] *See generally* 49 U.S.C. § 14104 (enacting regulatory requirements for carriers subject to federal jurisdiction as provided for by 49 U.S.C. §§ 13501-13508, none of which extend federal jurisdiction to purely intrastate activity).
[58] 49 U.S.C. § 113(f).
[59] 49 C.F.R. § 371.101.
[60] *See Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 207-08, 103 S. Ct. 1713, 75 L. Ed. 2d 752 (1983).
[61] *Cf. Medtronic v. Lohr*, 518 U.S. 470, 486, 116 S. Ct. 2240, 135 L. Ed. 2d 700 (1996) (courts must interpret preemption provisions in light of "a reasoned understanding of the way in which Congress intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law.").
[62] *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 518, 523, 112 S. Ct. 2608, 120 L. Ed. 2d 407 (1992).

Reading subsection (b)(1) as using the terms "rates" or "price," "routes," or "services" in the same way as subsections (c)(1) and (c)(2)(B) is the narrow reading of 49 U.S.C. § 14501. The reading results in the preemption of fewer state regulations and leaves intact more state regulatory authority.

2. MFS Did not Hold Itself Out as a Broker and 49 U.S.C. § 14501(b)(1) Therefore Does not Apply

41 Preemption "'is an affirmative defense upon which the defendants bear the burden of proof.'"[63] The elements MFS's preemption defense appear to be that (1) the Commission is enforcing (2) a law, rule, regulation, standard, or other provision having the force and effect of law (3) relating to intrastate rates, intrastate routes, or intrastate services (4) of a broker.[64] To succeed on the merits of that defense, MFS needed to "put forth enough evidence to enable" the Commission to find for it.[65] The ALJ below determined that MFS defense failed on the final element,[66] and the record supports her determination.

42 Federal courts interpreting the definitions in 49 U.S.C. § 13102 recognize that "'[t]he difference between a carrier and a broker is often blurry.'"[67] Nevertheless, those courts generally agree on a few principles. First, whether a person acts as a carrier or broker is one of fact, not law.[68] Second, whether a person is federally licensed as a carrier or broker

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[63] *Brown v. Earthboard Sports USA, Inc.*, 481 F.3d 901, 912 (6th Cir. 2007) (quoting *Fifth Third Bank v. CSX Corp.*, 415 F.3d 741, 745 (7th Cir. 2005)).
[6464] See 49 U.S.C. § 14501(b)(1).
[65] *See Int'l Longshoremen's Ass'n v. Davis*, 476 U.S. 380, 106 S. Ct. 1904, 90 L. Ed. 2d 389 (1986).
[66] Order 03, p. 9-10, ¶¶ 33-35.
[67] *AIG Europe (Netherlands), N.V. v. UPS Supply Chain Solutions, Inc.*, 765 F. Supp. 2d 472, 483 (S.D.N.Y. Feb. 14, 2011) (quoting *Nebraska Turkey Growers Coop. Ass'n v. ATS Logistics Servs., Inc.*, No. 4:05CV3060, 2005 WL 311808, at *4 (D.Neb. Nov. 22, 2005)).
[68] *Hewlett-Packard Co. v. Brother's Trucking Enter. Inc.*, 373 F. Supp. 2d 1349, 1352 (S.D. Fla. June 16, 2005); *Tokio Marine & Fire Ins. Co., Ltd. v. Amato Motors, Inc.*, 770 F. Supp. 426, 428 (N.D. Ill. July 29, 1991), *overruled on other grounds by* 996 F.2d 874 (7th Cir. 1993).

provides no dispositive answer to that factual question.[69] Instead, the factual question largely turns on how the person holds himself or herself, out to the world.[70]

43 The ALJ determined that MFS did not hold itself out as a broker. A significant weight of evidence supports that finding. As the ALJ noted, the record shows that MFS's customers deal with it, and only it.[71] MFS provides the quotes seen by its customers.[72] Those customers enter into one, and only one agreement for the transport of household goods: the one with MFS.[73] As also noted by the ALJ, a number of statements of MFS's website sell the company as offering moving services or provide that it will ship household goods.[74] And those statements are not limited to MFS's website: they are found throughout its electronic footprint, including the company's LinkedIn page[75] and blog,[76] as well as its physical advertisements.[77] Certainly MFS's customers believed that MFS was their mover, not their broker: a number of their comments left on various websites speak to that fact.[78] That strongly suggests MFS did not hold itself out as a broker to its customers.[79]

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[69] *Chubb Group of Ins. Cos. V. H.A. Transp. Sys., Inc.*, 243 F. Supp. 2d 1064, 1069 (quoting *Ensco, Inc. v. Weicker Transfer & Storage Co.*, 689 F.2d 921, 925 (10th Cir. 1982)).
[70] *Ensco, Inc. v. Weicker Transfer & Storage Co.*, 689 F.2d 921, 925 (10th Cir. 1982); *Hewlett-Packard Co. v. Brother's Trucking Enter. Inc.*, 373 F. Supp. 2d 1349, 1352 (S.D. Fla. June 16, 2005);
[71] Order 03, pp. 5-7 ¶¶ 21-23.
[72] Pienkowski, Exh. CP-13.
[73] *See* Pienkowski, Exh. CP-4.
[74] Paul, Exh. SP-1 at 14-15; Paul, SP-2 at 1-5 (noting that MFS "provide[s] both local and long-distance moving services" in certain states, one of which is Washington and describing MFS as employing expert move consultants and also as providing specialized long-distance moving services); Paul, SP-5 (the dedicated page for MFS on its corporate parent's website).
[75] Paul, Exh. SP-1 at 17 (for example, stating that MFS "safely ship[s] any of the following" with a list of household goods and later providing that MFS can help "move and unpack your belongings.")
[76] Paul, Exh. SP-3.
[77] Paul, Exh. SP-4.
[78] E.g., Paul, Exh. SP-1 at 16 (Yelp review by Tom S., which describes MFS as "hav[ing] made many moves in our retirement community); Paul, SP-2 at 4 (review of Beth L., which describes the consumer as using MFS to move her mother); Paul, Exh. SP-5 at 6 (review of Letha R., which indicates the customer understood the movers as MFS employees).
[79] *ASARCO LLC v. England Logistics, Inc.*, 71 F. Supp. 3d 990, 998 (D. Ariz. Dec. 23, 2014) (courts look to the understanding among the parties involved to determine whether a person or company acted as a carrier or broker) (collecting cases).

44 MFS, for its part, appears to contest the ALJ's determination based on testimony from Mr. Pienkowski that the company was a broker.[80] But the ALJ heard that testimony, saw MFS's exhibits, and nevertheless found Staff's evidence showing that MFS did not hold itself out as a broker more persuasive. The Commission should defer to the factfinder's weighting of the evidence and inferences to be drawn from that evidence.[81]

45 Given the ALJ's factual determination, which the Commission should defer to, MFS was not acting as a broker as it was operating and advertising. It therefore cannot meet the final element of its affirmative preemption defense.

E. Order 03 is not Ultra Vires

46 MFS recasts its statutory interpretation and preemption arguments as arguments that the Order 03 is ultra vires. The attempt to do so fails for the reasons discussed above: the public service laws apply to MFS's intrastate operations and federal law does not preempt them in this context. Order 03 is not ultra vires.

F. MFS's Advertisements Receive no Free-Speech Protection because they Concern an Unlawful Activity

47 Finally, MFS contends that Order 03 abridges its right to free speech. MFS is incorrect: it has no constitutional right to make the types of statements it did in its advertisements.

48 As MFS notes, commercial speech receives protection under both the state and federal constitutions.[82] Courts evaluate the permissibility of a restriction on commercial speech by looking to four factors: whether (1) the speech concerns a lawful activity and is

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[80] Pet. for Admin. Rev. at 7.
[81] *See* RCW 34.05.464(4).
[82] *Kitsap County v. Mattress Outlet/Gould*, 153 Wn.2d 506, 511-12, 104 P.3d 1280 (2005) (citing *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 563, 100 S. Ct. 2343, 65 L. Ed. 2d 341 (1980)).

not misleading, (2) the government has a substantial interest in the regulation, (3) the regulation directly and materially advances the governmental interest, and (4) the restriction is narrowly tailored.[83] The proponent of the restriction on speech bears the burden of justifying it.[84]

49 The first factor serves as a threshold inquiry.[85] Because "there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity,"[86] the state may "ban . . . commercial speech related to illegal activities."[87] Accordingly, if the speech concerns unlawful activity, the restriction is valid and receives no further scrutiny under the remaining factors.[88]

50 MFS's commercial speech claims fails at the threshold inquiry. No person may engage in business as a household goods carrier without first obtaining a household goods carrier permit from the Commission.[89] A person engages in business as a household goods carrier by advertising to provide household goods transportation.[90] The ALJ determined that MFS had advertised for household goods transportation, and that it lacked a permit from the Commission to do so.[91] Substantial evidence supports that finding, as discussed above.[92]

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[83] *Mattress Outlet/Gould*, 153 Wn.2d at 511-12 (citing *Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 563).
[84] *Mattress Outlet/Gould*, 153 Wn.2d at 511-12.
[85] *United States v. Bell*, 414 F.3d 474, 480 (3d Cir. 2005).
[86] *Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 563.
[87] *Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 563; *accord Bates v. State Bar Ass'n of Ariz.*, 433 U.S. 350, 384, 97 S. Ct. 2691, 53 L. Ed. 2d 810 (1977) ("Advertising concerning transaction that are themselves illegal obviously may be suppressed."); *Pittsburg Press Co. v. Pittsburg Comm'n on Human Rights*, 413 U.S. 376, 388, 93 S. Ct. 2553, 37 L. Ed. 2d 669 (1973) ("We have no doubt that a newspaper constitutionally could be forbidden to publish a want ad proposing a sale of narcotics or soliciting prostitutes."); *Erotic Serv. Provider Legal Ed. & Research Project v. Gascon*, 880 F.3d 450, 460 (9th Cir. 2018); *Bell*, 414 U.S. at 480-81; *Casbah, Inc. v. Thone*, 651 F.2d 551,563-64 (8th Cir. 1981).
[88] *Gascon*, 880 F.3d at 460; *Bell*, 414 F.2d at 480; *Casbah*, 651 F.2d at 564.
[89] RCW 81.80.075.
[90] RCW 81.80.010(5).
[91] Order 03, p. 5, ¶ 20, and p. 7, ¶ 25.
[92] *E.g.*, Paul, Tr. at 50:2-17, 56:21-57:10, 57:15-59:4, 59:23-60:6, 60:16-61:13.

MFS violated the public service laws, and its advertisements receive no constitutional protection.

DATED this 12th day of March 2018.

Respectfully submitted,

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