

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Temporary Permit)
of JOSEPH DEAN SMITH,) DOCKET NO. TV-001209
d/b/a JOE THE MOVER)
) COMMISSION DECISION AND
) ORDER DENYING MOTION
.....) TO MODIFY TEMPORARY PERMIT

1 **Synopsis.** This is an order resolving a brief adjudicative proceeding to address the motion of Joseph Dean Smith, d/b/a Joe the Mover (Petitioner or Joseph Smith), to modify his temporary permit to operate as a household goods carrier. Joseph Smith asks the Commission to remove a condition from his permit that restricts him from using or employing his brother, Jason Smith, d/b/a Jay the Mover (Jason Smith). The Commission denies the motion.

2 **Background.** On April 3, 1997, the Commission entered Order M.V. No. 149145, finding that Jason Smith must cease and desist from conducting activities requiring authority from the Commission without first obtaining such authority.

3 On July 15, 1997, the Commission entered Order M.V. No. 149214, assessing penalties against Jason Smith, in the amount of \$2500.

4 Commission Staff filed a complaint against Jason Smith in the King County Superior Court, alleging that Jason Smith failed to pay the \$2500 penalty and continued to operate as a household goods mover, despite the Commission's order to cease and desist. On February 23, 1998, the Court entered a judgement in favor of the Commission in the amount of \$2500 and issued a permanent injunction requiring that Jason Smith not provide, or hold himself out to provide, services as a household goods carrier, including the transportation of residential household goods for compensation.

5 On May 4, 2000, the Petitioner filed an application with the Commission for temporary authority to transport household goods. On July 18, 2000, the Commission granted him temporary authority to operate as a motor carrier in the transportation of household goods in the state of Washington. The Commission attached a condition to the temporary permit requiring that the Petitioner not "use or employ, or hire as independent contractor" Jason Smith.

- 6 On August 14, 2000, the Petitioner filed with the Commission an Amended Motion for Modification of his temporary permit so that he may use or employ Jason Smith. Commission Staff responded to the Petitioner's motion on September 5, 2000.
- 7 On November 1, 2000, upon due and proper notice, the Commission convened a hearing on the motion, over which William E. Hendricks presided as Administrative Law Judge. At the hearing, the parties agreed to waive their right to an initial order.
- 8 **Parties.** Stephen D. Cramer, attorney, Federal Way, represented Joseph Dean Smith, d/b/a Joe the Mover. Shannon E. Smith, Assistant Attorney General, Olympia, represented Commission Staff.

I. DISCUSSION

- 9 The Commission granted temporary authority to the Petitioner to operate as a motor carrier for household goods in Order M.V. No. 149821. The Order and permit contain the following restriction:

The applicant may not use or employ, or hire as independent contractor, Jason Smith, d/b/a Jay the Mover, until the permanent injunction issued by the King County Superior Court against Jason Smith, d/b/a Jay the Mover is rescinded, or until Jason Smith, d/b/a Jay the Mover obtains permit authority from the Commission.¹

- 10 Smith requests that the Commission remove the words "use or employ" from the Order and temporary permit.

- 11 We will begin by discussing the rationale underlying the restriction against the Petitioner using or employing Jason Smith. We will then address the motion to modify the permit as if it were a petition for rehearing and, in the alternative, as if it were a petition to alter or amend the Commission's Order and the Petitioner's temporary permit.

A. Why is the permit condition restricting the Petitioner from using or employing Jason Smith in the public interest?

- 12 Jason Smith has a documented history of operating illegally as a household goods mover in the state of Washington. The Commission has found that Jason Smith provided, or held himself out to provide, services as a household goods carrier without authority. *See In the Matter of Determining the Proper Classification of Jason Smith d/b/a Jay the Mover, Hearing No. H-5032, M.V. Order No. 149116, at*

¹ See Attachment (Order M.V. No. 149821 and Permit).

p. 3 (February 27, 1997), affirmed and adopted in Order M.V. No. 149145 (April 3, 1997). The Commission has found that Jason Smith violated RCW 81.80.355 by placing various advertisements for his moving business, even though the Commission had not granted him authority. See *In the Matter of Jason Smith d/b/a Jay the Mover*, Hearing No. H-5036, Order M.V. No. 149715, at p. 6 (May 28, 1997), affirmed and adopted in Order M.V. No. 149214 (July 16, 1997). The Commission has also found that Jason Smith violated RCW 81.80.070 by providing intrastate transportation of household goods without authority. See *Id.*, at p. 7, affirmed and adopted in Order M.V. No. 149214 (July 16, 1997).

- 13 Moreover, the record contains court documents provided by the Commission Staff, without any objection from the Petitioner, that post-date the Commission's cease and desist order and the King County Superior Court permanent injunction. Those documents demonstrate that the Petitioner and Jason Smith have been working together, either providing or holding themselves out to provide services as household goods carriers in violation of the cease and desist order and the permanent injunction.
- 14 One document demonstrating that Jason Smith and Joseph Smith partnered to provide services as household goods carriers is an invoice provided to Ann Martyn-Modarelli for moving services, which identifies the business as "Jay and Joe the Mover." See *Commission Staff's Response to Motion for Modification of Temporary Permit (WUTC v. Jason Smith, d/b/a Jay the Mover, No. 97-2-26815-0KNT, Declaration of Ann Martyn-Modarelli In Support of Motion to Show Cause)*. That trade name also appears on webpage printouts, dated April 6, 2000, from an internet site with the URL "http://www.jayandjoe.com." See *Id. (WUTC v. Jason Smith, d/b/a Jay the Mover, No. 97-2-26815-0KNT, Second Declaration of Ray Gardener In Support of Motion to Show Cause)*. Even more disconcerting is a bid provided by "Jay and Joe the Mover" to the King County Housing Authority, on November 11, 1999. See *Id. (WUTC v. Jason Smith, d/b/a Jay the Mover, No. 97-2-26815-0KNT, Declaration of Melinda Carruth)*. According to that bid, Jason Smith and Joseph Smith co-own the moving company.²
- 15 Jason Smith's disregard for the law, the Commission's orders, and the order of the King County Superior Court, combined with his close relationship with the Petitioner in furthering that disregard, make the condition in the Petitioner's temporary permit both reasonable and necessary to protect the public from further violations.

² This is troubling because Joseph Smith states in his Declaration, dated October 18, 2000, that "I am and have always been the sole and exclusive owner of the business," and "My brother, Jason Smith has never had a financial or ownership interest in the business."

B. What is the result if the Commission treats the Petitioner's motion as a petition for rehearing?

- 16 The statute grants the Commission discretion to permit the filing of a petition for rehearing at any time. *RCW 81.04.200*. According to *RCW 81.04.200*, the petitioner must show that circumstances or conditions have changed since the issuance of the order for which rehearing is sought, that the Commission or the petitioner did not anticipate the consequences of the order, or that any good and sufficient cause exists that the Commission did not consider.
- 17 The Petitioner has failed to show in his motion or at hearing that there are any changed circumstances, unanticipated consequences, or considerations that were not before the Commission when it granted the Petitioner his temporary authority.
- 18 The Petitioner asserts that the permit condition at issue is arbitrary and capricious, unreasonably and unnecessarily punitive, and not reasonably calculated to protect any legitimate public interest. *See Reply Memorandum of Petitioner, at p. 1*. The Petitioner, however, does not provide any specific factual or legal basis to support those assertions. In making its argument, the Petitioner wrongly presumes that the burden is the Commission Staff's to prove that the Commission should not grant the Petitioner's motion.
- 19 The Petitioner states that "the Commission Staff fails to articulate exactly what public interest is being protected by prohibiting Jason Smith from working as the Petitioner's employee." *Id., at p. 3*. Again, the Petitioner argues as if it is incumbent on the Commission Staff to prove that the proposed service is not in the public interest. Similarly, rather than addressing substantive factual and legal issues, the Petitioner asserts that the Commission was "pandering to news media" when it filed its complaint in the King County Superior Court. *Id., at p. 2*. It is the Petitioner's burden, not Commission Staff's, to show that the proposed authority is consistent with the public interest. *RCW 81.04.200*. Unsupported assertions and accusations do not satisfy that requirement.
- 20 Absent a showing by the Petitioner, as required by *RCW 81.04.200*, the Commission must deny the Petitioner's motion.

C. What is the result if the Commission treats the Petitioner's motion as a petition to amend or alter a prior Commission order?

- 21 Treating the Petitioner's motion as a petition to alter or amend the temporary permit and Order M.V. No. 149821, pursuant to RCW 81.04.210,³ the Commission determines that the Petitioner fails to demonstrate that it is in the public interest to do so.
- 22 RCW 81.04.210 is permissive, not mandatory. The Commission need not initiate the process to alter or amend unless it believes sufficient reason exists for doing so. *In the Matter of the Application of Application GA-868 of Sure-Way Incineration, Inc., Order M.V.G. No. 1533, at p. 6 (February 1992)*. The Commission will "review the issues raised in the petition to determine whether any good reason is shown for considering amendment of the order, or whether the process would be futile, fruitless or inconsistent with the public interest." *Id.*
- 23 The Petitioner does not offer any good reason why the Commission should amend Order M.V. No. 149821. The Petitioner relies mainly on unsupported assertions in his argument and resorts to innuendo regarding the motives of the Commission Staff, rather than providing reasons based more firmly in fact, policy, or law. *See supra* ¶¶ 18-20.
- 24 Moreover, granting the Petitioner's motion, and thus allowing him to use or employ Jason Smith, is not in the public interest because the record shows that Jason Smith has continued to disregard the law, the Commission's orders, and the King County Superior Court's permanent injunction.

D. What is the result if the Commission were to make a decision on the merits of the Petitioner's motion?

- 25 Even considering the Petitioner's motion on its merits, the Commission must reject the changes he proposes to his temporary permit.
- 26 The Commission considers whether the Petitioner is fit, willing and able to provide the proposed service and whether granting the request to amend the permit and order is in the public interest. *WAC 480-15-280*.
- 27 In determining whether a grant of temporary authority is consistent with the public interest, the Commission considers whether the authority will allow the Commission

³ The statute provides, in pertinent part, that the Commission "may at any time, upon notice to the public service company affected, and after opportunity to be heard as provided in the case of complaints rescind, alter or amend any order or rule made, issued or promulgated by it . . ."

to more efficiently regulate and "provide increased consumer protection through regulation." *WAC 480-15-280(4)(b)*.

28 Granting the Petitioner's motion would present a substantial and real threat to the Commission's ability to more efficiently regulate. Moreover, granting the motion would seriously hamper the Commission's ability to ensure increased consumer protection while regulating Joseph Smith's operations, because the pattern of Jason Smith's abuse of the law has been in conjunction with Joseph Smith and Joseph Smith's moving business. Thus, granting the motion would be inconsistent with the public interest; the Petitioner would no longer be fit, willing and able to provide the service he proposes if the Commission granted the motion.

E. Decision

29 The Commission denies the Petitioner's motion. Addressing the motion as a petition for rehearing, the Commission finds that the Petitioner has not shown that there are changed circumstances, unanticipated consequences, or considerations that were not before the Commission when it decided to grant the Petitioner temporary authority.

30 Addressing the motion as a petition to amend a Commission order, the Commission finds that the Petitioner has not provided any good reason why the Commission should amend Order M.V. No. 149821.

31 Even addressing the merits of the Petitioner's motion, the Commission finds that the Petitioner has not demonstrated that it would be in the public interest to modify the Petitioner's temporary authority to allow him to use or employ Jason Smith.⁴

32 Granting the Petitioner's motion, and thus allowing him to use or employ Jason Smith, is not in the public interest because Jason Smith has continued to disregard the law, the Commission's orders, and the King County Superior Court injunction. Granting the Petitioner's motion would create a substantial and real threat to the Commission's ability to more efficiently regulate. In addition, because the pattern of Jason Smith's abuse of the law has been closely connected with the Petitioner's operations, granting the Petitioner's motion would hamper the Commission's ability to ensure increased consumer protection.

⁴ Although the Commission denies the Petitioner's motion to modify the language of his temporary permit, he and Jason Smith are not without redress in this matter. Jason Smith can petition the Commission for authority to operate as a household goods carrier or he can petition the King County Superior Court to rescind the permanent injunction issued against him.

II. FINDINGS OF FACT

- 33 (1) On April 3, 1997, the Commission entered Order M.V. No. 149145, requiring that Jason Smith cease and desist from conducting activities requiring authority from the Commission without first obtaining such authority.
- 34 (2) On July 15, 1997, the Commission entered Order M.V. No. 149214, assessing penalties to Jason Smith, in the amount of \$2500.
- 35 (3) Commission Staff filed a complaint against Jason Smith in the King County Superior Court, alleging that Jason Smith failed to pay the \$2500 penalty and continued to operate as a household goods mover, despite the Commission's penalty assessment and cease and desist order. On February 23, 1998, the Court entered a judgement in favor of the Commission in the amount of \$2500 and issued a permanent injunction requiring that Jason Smith not hold himself out to provide, or provide transportation of property, including residential household goods, for compensation.
- 36 (4) On May 4, 2000, the Petitioner filed an application with the Commission for temporary authority to transport household goods. On July 18, 2000, the Commission granted him temporary authority to operate as a motor carrier in the transportation of household goods in the state of Washington on the condition that:
- The applicant may not use or employ, or hire as independent contractor, Jason Smith, d/b/a Jay the Mover, until the permanent injunction issued by the King County Superior Court against Jason Smith, d/b/a Jay the Mover is rescinded, or until Jason Smith, d/b/a Jay the Mover obtains permit authority from the Commission.
- 37 (5) On August 14, 2000, the Petitioner filed with the Commission an Amended Motion for Modification of his temporary permit. The Petitioner requests that the Commission remove the words "use or employ" from the Order and temporary permit. Commission Staff responded to the Petitioner's motion on September 5, 2000.
- 38 (6) On November 1, 2000, upon due and proper notice, the Commission convened a hearing, over which William E. Hendricks presided as Administrative Law Judge.
- 39 (7) Jason Smith has provided, or held himself out to provide, services as a household goods carrier without first having obtained a grant of authority and permit from the Commission.

- 40 (8) Petitioner and Jason Smith have been working together either providing or holding themselves out to provide services as household goods carriers.
- 41 (9) Granting the Petitioner's motion would create a threat to the Commission's ability to more efficiently regulate and would hamper the Commission's ability to provide for increased consumer protection.
- 42 (10) The Petitioner and Commission Staff agreed at the hearing to waive their right to an initial order.

III. CONCLUSIONS OF LAW

- 43 (1) The Commission has jurisdiction over the parties to and subject matter of this proceeding, under Title 81 RCW.
- 44 (2) Under chapter 81.80 RCW, a household goods carrier must obtain authority from the Commission before it may hold itself out to operate, or operate, as a household goods carrier in the state of Washington.
- 45 (3) The Petitioner has not shown that circumstances or conditions have changed since the issuance of the order for which rehearing of the issues is sought. The Petitioner has not shown that either it or the Commission did not anticipate the consequences of that order. The Petitioner has not shown that any good and sufficient cause exists that the Commission did not consider. Therefore, the Commission will not rehear the issues that it resolved in Order M.V. No. 149821.
- 46 (4) Sufficient reason does not exist, nor is it in the public interest, to treat the Petitioner's motion as a petition to alter or amend Order M.V. No. 149821.
- 47 (5) On the merits of the Petitioner's motion, it would be inconsistent with the public interest to modify the terms of his permit to allow him to use or employ Jason Smith. Specifically, granting the Petitioner's motion would present a threat to the Commission's ability to more efficiently regulate and would hamper the Commission's ability to provide for increased consumer protection.

IV. ORDER

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THE COMMISSION ORDERS That the Petitioner's Amended Motion for Modification is denied.

DATED at Olympia, Washington, and effective this 12th day of December, 2000.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION



MARILYN SHOWALTER, Chairwoman



RICHARD HEMSTAD, Commissioner



WILLIAM R. GILLIS, Commissioner

NOTICE TO ALL PARTIES:

This is a final order of the Commission. In addition to judicial review, administrative relief may be available through a petition for reconsideration, filed within 10 days of the service of this order pursuant to RCW 34.05.470 and WAC 480-09-810, or a petition for rehearing pursuant to RCW 80.04.200 or RCW 81.04.200 and WAC 480-09-820(1).

