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State Of WASH.
UTIL. AND TRANSP.
COMMISSION

Washington Utilities and Transportation Commission
621 Woodland Square Loop SE
Lacey, WA 98503

Re: Docket No. TV-200348

Dear Sir or Madam:

I am writing in response to the Washington Utilities and Transportation Commission's Notice of Opportunity to Respond to Petition filed under Docket No. TV-200348. In particular, the UTC is seeking comments in response to the April 9, 2020 Petition for a Declaratory Order filed by the Washington Movers Conference (the "WMC Petition"). The WMC Petition asks the UTC to prohibit regulated household goods ("HHG") motor carriers from contracting with independent contractors or third-party service providers to provide regulated HHG services in Washington. As more fully explained below, we believe federal law (specifically 49 U.S.C. 14501(b)) prevents the UTC from prohibiting intrastate HHG brokerage in Washington. Further, we believe requiring HHG motor carriers to use employees (as opposed to independent contractors) to perform intrastate HHG transportation services in Washington places an undue burden on HHG motor carriers engaged in intrastate transportation in the state and does not provide customers with any additional protections.

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I.

Federal Law Preempts Washington From Prohibiting HHG Brokerage

The Supremacy Clause of the United States Constitution provides that the laws of the United States “shall be the supreme Law of the Land ... any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” U.S. Const. art. VI, cl. 2. State laws that conflict with federal laws are therefore without effect. *Kozak v. Hillsborough Pub. Transp. Comm'n*, 695 F. Supp. 2d 1285, 1296 (M.D. Fla. 2010) (citing *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992)) *aff'd sub nom. Kozak v. Hillsborough Cnty., Fla.*, 644 F.3d 1347 (11th Cir. 2011).

In 1994, Congress enacted the Federal Aviation Administration Authorization Act (the “FAAAA”) to specifically address the regulation of motor carrier operations, finding that the regulation of intrastate transportation of property by the states unreasonably burdened free trade, interstate commerce, and American consumers. *See* Pub. L. 103-105, § 601(a)(1). Congress amended the FAAAA in 1995 with the Interstate Commerce Commission Termination Act (the “ICCTA”). As amended, the FAAAA and the ICCTA specifically “bar states from regulating freight forwarders/brokers.” *Alpine Fresh, Inc. v. Jala Trucking Corp.*, 181 F. Supp. 3d 250, 254 (D.N.J. 2016). Section 14501(b) of the ICCTA provides, in pertinent part:

No state or political subdivision thereof . . . 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.¹

49 U.S.C. § 14501(b)(1). In other words, federal law expressly preempts any attempt by a state or a political subdivision of a state to enact or enforce any law or regulation that would affect the rates, routes, or services of brokers (regardless of whether the broker is arranging property or HHG transportation). Accordingly, if Washington were to prohibit the use of third-party service providers or independent contractors

¹ Unlike the federal preemption applicable to motor carriers (e.g. 49 U.S.C. 14501(c)), which allows states to continue to regulate HHG motor carriers, Section 14501(b)(1) does not distinguish between brokers arranging for the transportation of general commodities or household goods. In other words, pursuant to § 14501(b)(1), Congress intended that all brokers, regardless of the commodity involved, would be free from state regulation of intrastate routes, rates, or services.

to provide intrastate HHG transportation services in Washington, this would effectively prohibit brokers from arranging intrastate HHG transportation in Washington. We believe such a prohibition would certainly be deemed an improper attempt to regulate a broker's intrastate rates, routes, and services and thus would be preempted by § 14501(b)(1).

II.

Requiring the Use of Employees Does not Further Washington's HHG Transportation Public Policy

We also believe that prohibiting HHG motor carriers from being able to use independent contractors or third-party service providers to perform HHG transportation services in Washington places an undue burden on HHG motor carriers engaged in such services. In particular, requiring intrastate HHG motor carriers to use employees (as opposed to independent contractors or third-party service providers) deprives these companies of the freedom to structure their companies in such a way that best meets the company's operational needs. By contrast, interstate HHG motor carriers and interstate/intrastate property carriers have long been allowed to contract work with independent contractors or third-party service providers to provide transportation services for the motor carrier. Thus, requiring intrastate HHG motor carriers to use employees (as opposed to independent contractors) would place intrastate HHG motor carriers at a profound disadvantage when compared to counterparts in the interstate HHG motor carrier and interstate/intrastate property motor carrier industry.²

Moreover, requiring intrastate HHG motor carriers to only use employees deprives drivers and loader/unloaders working in the Washington HHG transportation industry freedom to be able to determine for themselves whether they want to be an

² The WMC argues that the UTC should require intrastate HHG motor carriers to use employees because this will prevent HHG motor carriers "to absolve themselves from paying Unemployment Benefit Premiums and Workers Compensation Premiums to the Employment Security Department and the Department of Labor and Industries." While we are somewhat surprised that the WMC would take a position that would impose additional burdens on some (if not all) its members, the WMC's argument is not relevant to the current matter as the UTC is charged with setting HHG transportation policy to protect the public. Thus, the question before the UTC is how the use of independent contractors/third-party service providers impacts the public and the HHG motor carrier industry (and not whether the use of independent contractors or employees is good employment policy).

employee or an independent contractor. In this regard, a number of drivers and loaders/unloaders prefer to be treated as an independent contractor as this provides them with additional flexibility to be able to work for additional HHG motor carriers and to be in control of their work environment/schedule.

Further, we do not believe that requiring intrastate HHG motor carriers to use employees (as opposed to third-party service providers or independent contractors) would provide any greater protection to the public. In particular, Washington law ultimately makes the HHG motor carrier responsible to the public (i.e. its customers) for damage that the customers suffer in connection with the HHG motor carrier's services (e.g. property damage, freight charge disputes, etc.).³ This liability to the customer/public would be imposed on the HHG motor carrier regardless of whether it is using employees or independent contractors/third-party service providers. Moreover, we believe that allowing HHG motor carriers to use independent contractors/third-party service providers to provide HHG transportation services could actually be beneficial to the public. For instance, by strategically using independent contractors/third-party service providers to perform aspects of the HHG transportation services, the intrastate HHG motor carrier can reduce its costs/expenses and such cost savings could be passed on to the customer in the form of lower rates.

For the reasons set forth above, we respectfully request that the UTC reject the WMC's Petition.

Cordially,

/s/ Adam Smedstad

Adam C. Smedstad

/s/ Andrew Light

³ Further, Washington has adopted the federal leasing regulations to serve as Washington's state leasing regulations, which effectively make the HHG motor carrier liable to the public for any highway accidents arising out of the HHG motor carrier's use of an independent contractor driver. *See Wash. Admin. Code 446-65-010 (adopts 49 C.F.R. Part 376).*

Andrew K. Light

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