

**BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION**

In the Matter of the)	DOCKET TV-050537
)	
)	ORDER 04
PENALTY ASSESSMENT AGAINST)	
ALL MY SONS MOVING &)	DENYING RESPONDENT'S
STORAGE OF SEATTLE, INC.)	PETITION FOR
.....)	RECONSIDERATION

MEMORANDUM

- 1 **PROCEEDINGS.** In an Initial Order entered on July 10, 2006, Administrative Law Judge Karen Caillé recommended that the Washington Utilities and Transportation Commission (Commission) approve a proposed Settlement Agreement between All My Sons Moving & Storage of Seattle, Inc. (All My Sons), and Commission regulatory staff (Staff) in full resolution of the issues in this proceeding.¹ On informal review of the Settlement Agreement's terms, the Commission found one provision unexplained and unsupported by any information in the record. Specifically, paragraph 6 of the Settlement Agreement appeared to be a safe-harbor provision related to possible violations by All My Sons, outside the period for which penalties were assessed and, hence, beyond the scope of this proceeding.

- 2 The Commission gave notice that it would reopen the record to receive evidence related to this provision and issued several bench requests. These were directed principally to Staff, but the Commission gave All My Sons an opportunity to respond, if it wished. Staff responded on August 3, 2006, to Bench Request Nos. 1-3 and on August 10, 2006, to Bench Request No. 4. Staff filed supplemental and corrected responses on August 24, 2006. All My Sons elected not to respond.

¹ In formal proceedings before the Commission, the Commission's regulatory staff appears as an independent party with the same privileges, rights, and responsibilities as any other party in the proceeding. Staff operates independently from the three-member Commission, who collectively decide the merits of each case. *RCW 34.05.455, WAC 480-07-340.*

- 3 The Commission gave notice of its intent to receive Staff's responses as exhibits on August 14, 2006, subject to any objections received by August 18, 2006. No objections were heard.
- 4 Following consideration of the Initial Order and the record, we entered our Order on Review, Order 03, on September 14, 2006. We observed in Order 03 that the Commission's power to assess penalties when policing violations of statutes and rules is essential to its ability to carry out its fundamental responsibility to regulate in the public interest.
- 5 The Staff Audit and Penalty Assessment in this docket identified with considerable specificity the alleged violations that were admitted to by the company or withdrawn by Staff as part of the Settlement Agreement. The violations the company admitted for purposes of settlement are specifically identified again in the body of the Settlement Agreement. In stark contrast, the safe-harbor provision is expressed in the form of a "black box." That is, the Settlement Agreement describes the potential violations protected by the safe-harbor provision only in broad and general terms.
- 6 The parties did not offer any evidence concerning the number and nature of potential violations that would fall within the bounds of the safe-harbor provision.² Staff's responses to the Commission's bench requests identified forty-three violations that would be within the scope of the safe-harbor provision on the basis of Staff's review of seven informal customer complaints.³ A thorough audit of the company's records

² WAC 480-07-740(2) provides in part:

When filing a proposed settlement agreement, parties must also file supporting documentation sufficient to demonstrate to the commission that the proposal is consistent with law and the public interest and that it is appropriate for adoption.

* * *

Proponents of a proposed settlement must present sufficient evidence to support its adoption under the standards that apply to its acceptance.

³ See *infra* ¶19.

during the effective period of the safe-harbor provision potentially could result in the identification of additional violations of which the Commission is currently unaware.⁴

7 In light of this record, we concluded in Order 03 that the Commission should not approve a provision such as the safe-harbor provision in the Settlement Agreement that would preclude the Commission from assessing penalties for violations that have not yet been closely scrutinized or perhaps even discovered. Accordingly, we ordered that the proposed Settlement Agreement would be approved as a reasonable resolution of the issues presented, subject to the condition that paragraph 6 of the Settlement Agreement, the safe-harbor provision, was rejected and, therefore, null and void.

8 On September 21, 2006, All My Sons filed its Petition for Reconsideration. All My Sons requests the Commission to reconsider Order 03 and approve the Settlement Agreement without condition.

9 The Commission, for the reasons discussed below, denies All My Sons' Petition for Reconsideration.

10 **DISCUSSION.** All My Sons challenges two paragraphs in Order 03 that state our determination (§ 4) and our conclusion of law (§ 27) that the Commission should approve and adopt the proposed Settlement Agreement as a reasonable resolution of the issues presented subject to the condition that the safe-harbor provision is rejected; and a third paragraph that implements our determination and conclusion by order (§ 31). All My Sons' argument is grounded in the proposition that it is not in the public interest for the Commission to reject the safe-harbor provision because, by denying the company a part of what it bargained for in its negotiations with Staff, the Commission chills the settlement process. The company argues: "The benefit of any settlement is severely eroded when it is limited simply to the withdrawal of clearly

⁴ It is suggestive that in addition to numerous violations Staff identified in connection with several years of complaints examined as part of the audit that led to Penalty Assessment TV-050537, Staff's independent review of the company's records during the audit process for the two-week period between April 23 – May 8, 2004, led Staff to identify at least 131 additional violations.

improper and untimely claims, rather than a settlement of claims that are also in dispute.”⁵

- 11 This argument ignores one of the key reasons the Commission rejected the safe-harbor provision. The Commission found the safe-harbor provision unacceptable in the context of this proceeding because the subject matter it would protect from scrutiny was not in dispute in this proceeding and was not sufficiently identified. The Commission states in paragraph 4 of Order 03 its determination that “the Commission should not be precluded from taking action concerning violations that may have occurred in periods outside the periods examined in Penalty Assessment No. TV-050537.” The Commission discussed its rationale at length in paragraph 14 of Order 03 as follows:

The Commission’s fundamental responsibility is to regulate in the public interest. In the context of policing violations of statutes and rules the Commission’s power to assess penalties is essential to its ability to carry out this fundamental responsibility. Accordingly, we will not approve a provision, such as the safe-harbor provision in the Settlement Agreement here, which would preclude us from assessing penalties for violations that have not yet been closely scrutinized or perhaps even discovered. The situation here is distinguishable from that where known violations are not pursued as part of a settlement because the nature and number of violations do not warrant further prosecution. The record in this proceeding shows a pattern of continuing violations over many years and the number of customer complaints and apparent violations has increased significantly from year to year.⁶ Despite the pendency of these proceedings, it appears All My Sons continues to conduct its operations in a manner that suggests the Company is either unwilling or unable to comply with the household goods laws and rules. It is possible that there are violations which may have occurred during the safe-harbor period that when viewed in the totality of the circumstances would warrant additional sanctions, including potentially suspension or cancellation of its authority to conduct business in Washington state. We therefore reject

⁵ We note that the record of this proceeding does not support the company’s characterization here that the violations Staff agreed to withdraw for purposes of achieving settlement were in any way improper or untimely.

⁶ Staff Audit Report at 5, 18-19.

the safe-harbor provision included in the Settlement Agreement at paragraph 6.

12 More briefly, we will not approve a safe-harbor provision as part of a settlement when we do not know what violations will not be pursued and have no basis upon which to determine whether the nature and number of violations is such as to not warrant further prosecution.

13 All My Sons additionally objects to the statement in the above-quoted paragraph that “the number of customer complaints and apparent violations has increased significantly from year to year.” The company argues:

These allegations were not at issue in either the Penalty Assessment or during the settlement negotiations. All My Sons was not given an opportunity to dispute these allegations since they were not relevant to the settlement process and they should not be included as part of an Order where there has been no admission to them or opportunity given to refute them.

These statements are simply inaccurate.

14 The number of customer complaints lodged against All My Sons is a matter of public record and is stated in Staff’s Audit Report that is part of the record in this docket.⁷ Two tables at page 19 of Staff’s Audit Report show significantly higher numbers of complaints against All My Sons relative to other companies of similar size and a significant increase in the number of complaints from 2002 through 2004. In Order 03, the Commission makes no determination concerning the merits of individual complaints but observes correctly that there were a significant and increasing number of complaints during the three years for which there is data in the record.

15 Staff identified and alleged 696 violations by the company as a result of its examination of these customer complaints and through review of the company’s records for the two week period between April 23 and May 8, 2004.⁸ The violations identified are precisely the allegations at issue in the Penalty Assessment, are the principal subject matter to which the settlement pertains and, presumably, the focus of

⁷ Audit Report at 18 – 20.

⁸ See, *id.*, and Staff response to Bench Request No. 1.

the settlement negotiations. All My Sons was afforded the opportunity of a hearing in this proceeding to dispute these allegations. The company elected not to do so and agreed to admit to more than 400 of the alleged violations as part of a settlement that would allow the company to pay significantly less in penalties and avoid the costs and uncertainty of litigation.

- 16 As part of its argument concerning paragraph 14 of Order 03, All My Sons also challenges our Conclusion of Law No. 2, at paragraph 26 of Order 03, which states:

When a company's compliance history shows a pattern of significant numbers of violations over a long period of time, a safe-harbor provision in a Settlement Agreement that would preclude Commission sanctions for violations undiscovered at the time of the agreement is contrary to the public interest.

This conclusion of law relates back to our Finding of Fact No. 6, at paragraph 22 of Order 03, which states:

All My Sons' compliance history shows a pattern of significant numbers of customer complaints and possible violations occurring over a long period of time, including periods both before and after the periods investigated in connection with Penalty Assessment No. TV-050537.

As we have discussed, the record in this proceeding, including the Staff Audit Report and the Staff's responses to bench requests 1 – 4, provides substantial evidence supporting our sixth finding of fact and the related conclusion of law at paragraph 26 of Order 03.

- 17 All My Sons challenges paragraph 11 of Order 03, which simply relates the steps the Commission took to develop the record concerning the safe harbor provision. The company argues that if it had been given notice of the specific purpose to which the Commission might put parties' responses to bench requests, then the company would have put on evidence and argument.⁹ The Commission provided adequate notice of

⁹ All My Sons' argument on this point is not entirely clear because it begins with the sentence: "All My Sons challenges paragraph 11 of the Order because it wrongly infers [sic] that All My Sons had no [sic]

the subject of its review and provided All My Sons opportunities to submit evidence and to object to evidence submitted by Staff.

- 18 In a single document served on the parties on July 28, 2006, the Commission gave notice that it was extending the time for administrative review of Order 03, reopening the record to provide an opportunity for parties to file responses to bench requests, and issuing bench requests. The bench requests, which were appended to and incorporated into the Commission's notice, clearly concern paragraph six of the Settlement Agreement, the safe-harbor provision. Indeed, this is the only paragraph of the parties' Settlement Agreement that is specifically identified in the notice and the safe-harbor provision is even quoted in full in Bench Request No. 3.
- 19 The Commission expressly invited All My Sons to respond to the Bench Requests if it wished to do so and, by separate notice, provided the company an opportunity to object to the admission of Staff's responses into the record. The company had adequate notice of the Commission's review, yet did not file any response or make any objection despite being given opportunities to do so. We see no reason to provide the company any additional opportunity to present evidence and argument at this time.
- 20 Finally, the company states in its Petition for Reconsideration that:

All My Sons challenges paragraph 13 of the Order because Staff's response to Bench Request No. 3, provided that paragraph 6 of the Settlement Agreement would preclude Staff from pursuing penalties for only 38 alleged violations identified in the chart following Response to Bench Request No. 3, not the 44 alleged violations identified in the chart following the response to Bench Request No. 2, as misquoted by the Commission in the Order.

Staff's original response to Bench Request No. 3, on August 3, 2006, did identify 38 alleged violations that might avoid scrutiny under the safe-harbor provision.

notice of what it should respond to." However, the balance of the paragraph seems directed to the proposition that the company did not have adequate notice from the Commission. Thus, we infer here that the company's complaint is that paragraph 11 in Order 03 "wrongly" implies "that All My Sons had notice of what it should respond to."

However, Staff filed a correction to its original response on August 24, 2006, and identified 43 such alleged violations. One of the two violations shown in the response to Bench Request No. 2 to have been issued on July 20, 2006, is omitted from the response to Bench Request No. 3 because the date of the alleged violation, May 18, 2006, falls after the end of the safe-harbor period, which is December 31, 2005. Thus, Order 03 is technically incorrect in this regard at paragraph 13. This, however, is not a basis upon which we should grant reconsideration.

- 21 In sum, All My Sons has provided no basis upon which we might reconsider our determination in Order 03 that the parties' Settlement Agreement is approved and adopted subject to the condition that the safe-harbor provision is rejected. We conclude that All My Sons' Petition for Reconsideration should be denied.
- 22 We underscore that the Commission does not reject as a matter of policy a settlement term that provides specific violations will not be pursued because, on examination, Staff has determined the nature and number of such violations does not warrant further prosecution.¹⁰ Indeed, the Commission in Order 03 accepts paragraph 4 of the Settlement Agreement, which provides that Staff will not pursue approximately 40 percent of the alleged violations initially at issue. These violations are known and have been examined. Supporting evidence in the form of Staff's audit informs the Commission concerning the nature and extent of the violations that Staff agreed not to pursue as part of the settlement.
- 23 We rejected paragraph 6 of the Settlement Agreement because it covered all violations that occurred during the safe-harbor period, including unexamined and perhaps even undiscovered violations. While some of these might have involved violations that occurred because of All My Sons' continued use of improper forms and procedures that were in place during the periods of Staff's audit and the contested proceeding, others appear to have been of a different nature and to have occurred under circumstances that might warrant additional scrutiny.¹¹

¹⁰ See *supra* ¶11 (quoting Order 03 at ¶14).

¹¹ We note, for example, complaint reference no. 97252, as to which Staff furnished documentation in response to Bench Request No. 04.

24 The Settlement Agreement here provides that either party may withdraw from the agreement if the Commission rejects any part of it. All My Sons has that option and may exercise it within 10 days after the date of this Order. In that event, the Commission will give notice of a prehearing conference and will determine a hearing schedule. Alternatively, the parties may reopen negotiations to discuss whether the safe-harbor provision might be replaced with a more narrowly drawn term that identifies specific violations outside the penalty assessment period that Staff will agree not to pursue. If the parties choose to negotiate, they should inform the Commission of their decision and may request a brief stay of Order 03 until a date certain if they require more than 10 days to complete their negotiations.

ORDER

25 THE COMMISSION ORDERS THAT:

26 (1) All My Sons' Petition for Reconsideration is denied.

27 (2) It retains jurisdiction to effectuate the terms of this Order.

DATED at Olympia, Washington, and effective October 10, 2006.

WASHINGTON STATE UTILITIES AND TRANSPORTATION COMMISSION

MARK H. SIDRAN, Chairman

PATRICK J. OSHIE, Commissioner

PHILIP B. JONES, Commissioner