

**BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION**

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| In the Matter of Determining the Proper Carrier Classification of, and Complaint for Penalties Against |) | DOCKET TG-120308 (<i>Consolidated</i>) |
| |) | ORDER 07 |
| MCAULIFFE AUTO SALES, INC. D/B/A MALTBY CONTAINER & RECYCLING |) | |
| |) | DOCKET TG-140512 |
| In the Matter of the Penalty Assessment Against |) | (<i>Consolidated</i>) |
| |) | ORDER 05 |
| MCAULIFFE AUTO SALES, INC. D/B/A MALTBY CONTAINER & RECYCLING |) | INITIAL ORDER APPROVING SETTLEMENT AGREEMENT |
| In the Amount of \$27,100 |) | |

BACKGROUND

1 On June 19, 2012, the Washington Utilities and Transportation Commission (Commission) entered an Initial Order Approving Settlement Agreement, Requiring Respondent to Cease and Desist Operations, and Imposing Penalties (Order 02). In Order 02, the Commission ordered McAuliffe Auto Sales, Inc. d/b/a Maltby Container (Maltby Container or Company) to cease and desist advertising and providing all forms of solid waste collection service; imposed a penalty of \$1,000, a \$700 portion of which was suspended for a one-year period on condition that Maltby Container commit no further violations of RCW 81.77.040; and ordered Commission Staff (Staff) to conduct a compliance review in one year and recommend whether or not the suspended penalty should be imposed. Order 02 became final on July 10, 2012.

2 On January 30, 2014, Staff filed a report detailing its compliance review and inspection of Maltby Container. Staff concluded that the Company had transported 271 loads of material from its facility to a landfill in Yakima for disposal during the compliance period, from July 10, 2012, to July 10, 2013, and that these deliveries

constituted transportation of solid waste to a disposal site on more than an occasional basis within the meaning of WAC 480-70-016(4).

- 3 On April 1, 2014, the Commission issued a \$27,100 penalty against Maltby Container in Docket TG-140512 for providing solid waste collection services requiring a Commission certificate in violation of Order 02 and applicable statutes and rules a total of 271 times. In addition, on April 2, 2014, the Commission issued a Notice of Intent to Impose Suspended Penalty in Docket TG-120308.
- 4 On May 14, 2014, the Commission consolidated Dockets TG-120308 and TG-140512 and set the matter for hearing. On June 13, 2014, Staff¹ and Maltby Container jointly moved to continue the hearing and hold a prehearing conference. The Commission granted the motion and conducted a prehearing conference on July 8, 2014. On July 10, 2014, the Commission served Order 03, Prehearing Conference Order, adopting a procedural schedule and granting intervention of three additional parties: Washington Refuse and Recycling Association (WRRRA), Waste Management of Washington, Inc. (Waste Management), and Lauts, Inc. d/b/a Lautenbach Industries, Inc. (Lauts).
- 5 On September 25, 2014, Staff filed written testimony. Maltby Container filed testimony on November 6, 2014.
- 6 On November 25, 2014, Staff filed a settlement agreement (Settlement Agreement) on behalf of Staff and Maltby Container (collectively the Settling Parties) and requested that the Commission cancel the scheduled evidentiary hearings.
- 7 The Settlement Agreement provides that Maltby Container admits it violated RCW 81.77.040 and Order 02 between July 10, 2012, and July 10, 2013, by transporting solid waste approximately 190 times to a landfill for disposal. Each of those times the Company hauled waste from its intermediate solid waste handling facility on more than an occasional basis, or from demolition job sites where the Company was not the

¹ In formal proceedings, such as this, the Commission's regulatory staff participates like any other party, while the Commissioners make the decision. To assure fairness, the Commissioners, the presiding administrative law judge, and the Commissioners' policy and accounting advisors do not discuss the merits of the proceeding with the regulatory staff, or any other party, without giving notice and opportunity for all parties to participate. *See* RCW 34.05.455.

demolition contractor. The Parties agree that Maltby Container will pay \$15,000 in penalties for violating RCW 81.77.040. The Company will also pay the \$700 suspended penalty for violating Order 02. The Parties agree that the Company will pay the penalty in three installments, as follows:

1. \$5,700 due by January 15, 2015.
2. \$5,000 due by April 15, 2015.
3. \$5,000 due by June 15, 2015.

Finally, the Company agrees to cease and desist from providing all forms of solid waste collection services that require a certificate from the Commission under chapter 81.77 RCW.

- 8 On November 26, 2014, the Commission issued a Notice Suspending Procedural Schedule and Notice of Opportunity to Respond to Settlement Agreement to allow the other parties to file comments opposing or supporting the Settlement Agreement. On December 4, 2014, WRRRA, Lauts, and Waste Management each filed comments on the Settlement Agreement.
- 9 WRRRA requests that the Commission reject the Settlement Agreement in its entirety or revise it to include the full \$27,100 penalty originally assessed and require Staff to conduct a follow-up compliance review. WRRRA expresses concern that the limited enforcement action reflected in the Settlement Agreement will not deter Maltby Container from unlawfully transporting solid waste and that the Company will consider the agreed penalty as merely a cost of doing business.
- 10 Lauts does not oppose the terms of the Settlement Agreement, but requests that any order approving it clearly indicate that transportation of solid waste to a landfill on more than an occasional basis does not, by itself, require a certificate. Lauts further requests the order specify that all factors outlined in WAC 480-70-016(4), as well as any legal exemptions, must be considered in determining what constitutes an “occasional basis.”
- 11 Waste Management does not oppose the Settlement Agreement and is satisfied with Staff’s enforcement efforts and Maltby Container’s admission of liability.

- 12 Staff and Maltby Container filed separate replies on December 12, 2014, but both Settling Parties make similar points. They each maintain that the penalties the Company has agreed to pay are substantial and reasonable, particularly in light of the size of the Company and Maltby Container's affirmative defenses that the Commission does not have jurisdiction over at least 81 of the 271 hauls at issue. The Settling Parties also share the belief that a future Staff compliance review of the Company's operations is not warranted because transportation of solid waste was only incidental to Maltby Container's clean up and demolition services, which do not appear to require a certificate under RCW 81.77, and Staff retains the ability to investigate the Company's compliance with applicable laws. In reply to Lauts, Staff and Maltby Container each assert that approval of the Settlement Agreement is specific to the facts of this case and that any further construction of WAC 480-70-016(4) as Lauts proposes is unnecessary.
- 13 Jennifer Cameron-Rulkowski, Assistant Attorney General, Olympia, represents Staff. Alan B. Bakalian, Zeno Bakalian PC, Kirkland, represents Maltby Container. James K. Sells, Attorney at Law, Gig Harbor, represents WRRRA. Donald L. Anderson, Eisenhower Carlson PLLC, Tacoma, represents Lauts. Sara A. Kelly and Polly L. McNeill, Summit Law Group PLLC, Seattle, represent Waste Management.

DISCUSSION AND DECISION

- 14 WAC 480-07-750(1) states in part: "The Commission will approve settlements when doing so is lawful, the settlement terms are supported by an appropriate record, and when the result is consistent with the public interest in light of all the information available to the commission." Thus, the Commission considers the individual components of the Settlement Agreement under a three-part inquiry, asking:
- Whether any aspect of the proposal is contrary to law.
 - Whether any aspect of the proposal offends public policy.
 - Whether the evidence supports the proposed elements of the Settlement Agreement as a reasonable resolution of the issue(s) at hand.

The Commission must determine one of three possible results:

- Approve the proposed settlement without condition.
- Approve the proposed settlement subject to conditions.
- Reject the proposed settlement.

- 15 The Commission approves the Settlement Agreement without condition. The Settling Parties made concessions relative to their respective litigation positions to arrive at end results that are supported by the evidence in the record. Maltby Container admits to 190 violations of RCW 81.77.040 and Order 02, agrees to pay a penalty of \$15,700 for those violations, and commits to refrain from providing all forms of solid waste collection services that require a permit from the Commission. The terms of the Settlement Agreement are not contrary to law or public policy and reasonably resolve all issues in this proceeding.
- 16 We appreciate the concerns WRRRA and Lauts raise, but those concerns do not provide a sufficient basis to reject or modify the Settlement Agreement. As both Staff and the Company note in their responses, the penalty represents a compromise of the Settling Parties' positions, and we find the amount reasonable in light of the circumstances. The Settlement Agreement reduces the number of violations to 190 to eliminate jurisdictional issues, correspondingly reducing the maximum penalty to \$19,000. The settled amount of \$15,000 – plus the \$700 suspended penalty – is substantial and does not represent the cost of doing business, particularly for a small company like Maltby Container. We also agree that a follow-up Staff compliance review is unnecessary because no portion of the penalty is suspended, and Staff can investigate and take additional enforcement action if it receives information that Maltby Container is engaging in regulated activities without Commission authority.
- 17 We also decline to make any findings with respect to the application of WAC 480-70-016(4) as Lauts proposes. We agree with Staff and the Company that each set of facts must be dealt with on a case-by-case basis. The rule, with its list of specific factors, inherently requires individualized application. Accordingly, we will not, in this order, define what constitutes the transportation of solid waste on more than an occasional basis.

18 The Settlement Agreement supports the Commission's goal of deterring illegal operations and assesses a significant penalty, which provides the Company with a reasonable incentive to comply with its legal obligations. Given these factors, we find the Settlement Agreement is consistent with the public interest and conclude it should be, and is, approved as filed.

ORDER

THE COMMISSION ORDERS:

- 19 (1) The Settlement Agreement is approved without condition and is attached as Exhibit A to, and incorporated into, this Order and adopted as the final resolution of the disputed issues in these dockets.
- 20 (2) McAuliffe Auto Sales, Inc. d/b/a Maltby Container must immediately cease and desist from providing all forms of solid waste collection services that require a permit from the Commission.
- 21 (3) McAuliffe Auto Sales, Inc. d/b/a Maltby Container is assessed a penalty of \$15,700, which is due and payable in three installments, as follows:
1. \$5,700 due by January 15, 2015.
 2. \$5,000 due by April 15, 2015.
 3. \$5,000 due by June 15, 2015.
- 22 (4) The Commission retains jurisdiction to effectuate the terms of this Order.

Dated at Olympia, Washington, and effective December 17, 2014.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

GREGORY J. KOPTA
Administrative Law Judge

NOTICE TO PARTIES

This is an Initial Order. The action proposed in this Initial Order is not yet effective. If you disagree with this Initial Order and want the Commission to consider your comments, you must take specific action within the time limits outlined below. If you agree with this Initial Order, and you would like the Order to become final before the time limits expire, you may send a letter to the Commission, waiving your right to petition for administrative review.

WAC 480-07-825(2) provides that any party to this proceeding has twenty (20) days after the entry of this Initial Order to file a *Petition for Administrative Review*. What must be included in any Petition and other requirements for a Petition are stated in WAC 480-07-825(3). WAC 480-07-825(4) states that any party may file an *Answer* to a Petition for review within ten (10) days after service of the Petition.

WAC 480-07-830 provides that before entry of a Final Order any party may file a Petition to Reopen a contested proceeding to permit receipt of evidence essential to a decision, but unavailable and not reasonably discoverable at the time of hearing, or for other good and sufficient cause. No Answer to a Petition to Reopen will be accepted for filing absent express notice by the Commission calling for such answer.

RCW 80.01.060(3) provides that an Initial Order will become final without further Commission action if no party seeks administrative review of the Initial Order and if the Commission fails to exercise administrative review on its own motion.

One copy of any Petition or Answer filed must be served on each party of record with proof of service as required by WAC 480-07-150(8) and (9). An original and **five (5)** copies of any Petition or Answer must be filed by mail delivery to:

Attn: Steven V. King, Executive Director and Secretary
Washington Utilities and Transportation Commission
P.O. Box 47250
Olympia, Washington 98504-7250

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Exhibit A
Settlement Agreement