

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Investigation of

MARSIK MOVERS, LLC

For Compliance with WAC 480-14-300,  
WAC 480-15-560, and WAC 480-15-590

DOCKET TV-231020

COMMISSION STAFF'S MOTION  
FOR CLARIFICATION OF  
INITIAL ORDER

1           On February 28, 2024, the presiding officer in this proceeding issued Order 01 cancelling the provisional permit authority of Marsik Movers, LLC (the Company). Staff subsequently filed a notice that it would submit a motion for clarification on Order 01 and a request for an extension of the deadline to file said motion, which was granted.

2           Pursuant to WAC 480-07-825, Staff submits this motion for clarification of initial Order 01. A motion for clarification “is to correct obvious or ministerial error without the need for parties to request administrative review.” This motion covers several topics that staff felt either required clarification or correction within the record set by Order 01. The motion is divided into two parts. First, Staff has noted what it believes to be a number of technical errors and humbly requests that either the errors be corrected or clarified. Second, staff has submitted a broader request for clarification on the role that the presiding officer expected Staff to take in this proceeding, how that role differs from longstanding guidance by the Commission, and how future cases should be handled.

3           At the outset, it should be emphasized that Staff is not requesting the presiding officer reconsider the cancellation of the Company’s permit for provisional authority. Staff does not dispute that decision, nor does it dispute that many of the Company’s actions during the course of multiple investigations have been concerning. The only purpose of this motion is Staff’s

humble request that the presiding officer clarify or correct certain portions of Order 01 that it feels are necessary for the record in this and future cases.

### **I. RELIEF REQUESTED**

4 Staff humbly requests that the presiding officer either issue a revised Order 01 correcting the identified factual issues in Part II of this memo and clarifying the conflicting Commission guidelines presented in Part III, or that the presiding officer issue a new order to that same effect.

### **II. FACTUAL ISSUES REQUIRING CLARIFICATION OR CORRECTION**

5 At several points, Order 01 asserts a failure by Staff to cite the company for violations of regulations where the regulations either do not apply to the company or the company did not violate the regulation. These sections can be classified into either violations that categorically do not apply to the company, or violations that the order claims should have been cited to the company but that Staff either supposedly did not document or declined to cite.

#### **A. Violations that Cannot Apply to the Company**

6 Staff has identified a number of violations within Order 01 that categorically cannot apply to the Company. First, the order states the company has violated 49 C.F.R. Part 387,<sup>1</sup> which has not been adopted by the Washington State Utilities and Transportation Commission (UTC).<sup>2</sup> The company did violate WAC 480-15-530 and -550, the analogous UTC rules, which was dealt with in case TV-230061.

7 Similarly, Order 01 also states a failure to maintain Federal Motor Carrier Safety Administration (FMCSA) insurance records or accident reports with federal regulators.<sup>3</sup> At the time of the inspection and hearing, the Company did not have federal authority for interstate

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<sup>1</sup> *In the Matter of the Investigation of Marsik Movers, LLC.*, TV-231020, Order 01, 6. [hereinafter Order 01].

<sup>2</sup> See WAC 480-15-560, adopting Code of Federal Regulations (C.F.R.) requirements for household goods carriers.

<sup>3</sup> Order 01, 6

moves,<sup>4</sup> meaning it was not subject to or required to comply with 49 C.F.R. Part 387's insurance reporting requirements. Similarly, accident reporting for FMCSA is done through the accident register; no separate reporting requirement to FMCSA exists to violate. Therefore, the Company could not have violated the regulations underlying Order 01's purported violations of federal law.

8           Finally, the order at several points finds violations for drivers not having commercial driver's licenses (CDLs) or regulations which only apply to drivers with a CDL.<sup>5</sup> A CDL is required for movers where a driver is operating or towing a vehicle with a gross weight rating of 26,001 pounds or more, or where the vehicle is being used to transport hazardous material.<sup>6</sup> The Company's moves fit none of these categories,<sup>7</sup> and therefore its drivers did not require a CDL.

**B.     Violations that were not Cited or Documented**

9           Turning next to lack of documentation and citation, Order 01 seems to be asking Staff to cite the Company for violations which Staff cannot issue under standard investigatory practices. Order 01 discusses, at length, a perceived lack of supporting documentation for accidents, inspection, and repairs that occurred during the investigation period and Staff's failure to issue violations on that basis.<sup>8</sup> However, Staff must have grounded, measurable evidence for issuing citations and could not have issued violations for which it had little to no evidence.

10           Of the three accidents Order 01 claims to be insufficiently cited in the investigation, only one, the Colorado 2023 incident, was not recorded in an accident register.<sup>9</sup> This lack of record

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<sup>4</sup> Sharp, Exh. JS-1, 10.

<sup>5</sup> Order 01, 6 (stating a violation of 49 C.F.R. 383, which only applies to CDLs, and stating a failure to maintain a CDL).

<sup>6</sup> WAC 308-100-010 (the WAC also lists vehicles capable of transporting more than 16 people and school buses, which is generally inapplicable to household goods movers).

<sup>7</sup> Sharp, Exh. JS-1, 11-12.

<sup>8</sup> Order 01, 10-12.

<sup>9</sup> Sharp, Exh. JS-1, 3.

keeping resulted in Staff issuing a 49 C.F.R. 390.15(b) violation for that incident.<sup>10</sup> The other accidents during the investigation time period were properly recorded after having a similar 390.15(b) violation issued for not being recorded on the accident register in the second investigation.<sup>11</sup>

11 Order 01 focuses on the lack of a police or insurance reports for accidents.<sup>12</sup> However, the Company did properly document and maintain insurance reports for the accidents<sup>13</sup>; police reports, meanwhile, are not required if they are not created.<sup>14</sup> The lack of documentation for which the carrier was cited was a deficient accident register, which a carrier must maintain for three years following an accident, not a deficient recording at the time of the accident.<sup>15</sup> Hence, the violation identified in the instant investigation is a general violation of 390.15(b) only.<sup>16</sup>

12 The order criticizes Staff for not issuing a critical violation of 49 C.F.R. 390.15(b)(2) in the instant case.<sup>17</sup> In order for Staff to determine that violation occurred, Staff would have had to determine that the Company had not maintained accident reports. Staff reviewed insurance paperwork that was produced as a result of the accident. Additionally, for the violation to adversely impact the company's safety rating by calculating as critical, the carrier would have

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<sup>10</sup> Sharp, Exh. JS-1, 3. Staff also issued a violation for 390.15(b)(2) in the second investigation of the Company, the only instance where Staff could have issued such a violation. Notice of Penalties, TV-230061, at 1. Staff cannot issue repeat violations for the same incident.

<sup>11</sup> See lack of other violations recorded in exhibit JS-1.

<sup>12</sup> Order 01, 11.

<sup>13</sup> Sharp, Exh. JS-1, 3.

<sup>14</sup> 49 C.F.R. 390.15(b)(2).

<sup>15</sup> WAC 480-15-560; 49 C.F.R. 390.15.

<sup>16</sup> Order 01 points to a 49 C.F.R. 390.15(b) violation as a critical violation. A 390.15(b)(2) violation is classified as critical; 390.15(b) is not considered acute or critical, and is therefore considered a general violation. 49 C.F.R. 385, Appendix B. Order 01 is also incorrect to the extent that it refers to 390.15(b) as an "umbrella" violation. As can be seen by the difference in classifications, 390.15(b) is different violations with different severity from 390.15(b)(2), not an umbrella that encompasses it.

<sup>17</sup> See fn. 9, *infra*, for where Staff previously cited the Company for such a violation.

had to demonstrate a pattern of not properly maintaining accident reports. Since the evidence did not support this conclusion, Staff did not cite the Company for this violation.<sup>18</sup>

13 Evidence also did not support issuing a violation for not maintaining driver vehicle inspection reports (DVIR) per 49 C.F.R. 396.11(a). This regulation presents two potential violations: 396.11(a), a critical violation for failure to have a driver prepare a DVIR, and 396.11(a)(3), an acute violation for failing to correct out-of-service defects listed in a DVIR. However, 396.11(a)(2) gives a wide exemption to preparing a DVIR, as it states “[d]rivers are not required to prepare a report if no defect or deficiency is discovered by or reported to the driver.” The investigator’s note that “no violations were recorded due to a lack of documentation” points to the fact that Staff could not present a lack of documentation in this case as proof of non-compliance with DVIR requirements, since 396.11(a)(2) specifically exempts a company from record-keeping where no defects or deficiencies are located. Order 01, therefore, also should not have found such a violation.

14 Given that Order 01 further elaborates on a failure to cite the Company for an acute violation of 396.11(a)(3),<sup>19</sup> it should be noted that, to prove the acute violation 396.11(a)(3) as classified in 49 C.F.R. 385 Appendix B. VII, Staff would have to be able to show that 1) an out of service defect existed, for which there was no documentation, and 2) that the defect was not corrected before a driver operated the vehicle, again for which there was no documentation.<sup>20</sup> Given the lack of documentation, Staff had no way to prove either of these elements at the time of the investigation.

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<sup>18</sup> Order 01 also lists “failure to cure” a violation previously cited as good cause for cancellation, referring to WAC 480-15-450. Order 01, 18. However, the referenced WAC is specifically concerned with failure to cure in the time period specified by a suspension order. The Company was operating within provisional authority at the time, and not under any form of suspension order from the prior investigation and NOIC process. Therefore, the WAC is inapplicable in this situation.

<sup>19</sup> Order 01, 13-14.

<sup>20</sup> 39 C.F.R. 385 Appendix B. VII.

15 Finally, the order repeatedly states that Staff should have placed the Company out of service due to operating interstate without authority.<sup>21</sup> Staff does not have such authority when conducting an investigation of a purely intrastate provisional permit.<sup>22</sup> Washington law delegates this authority to the Washington State Patrol through the administration of the Commercial Vehicle Safety Plan, funded by Motor Carrier Safety Assistance Program grants.<sup>23</sup> Therefore, Staff could not have placed the Company out of service following this type of result from an investigation.

### III. INVESTIGATORY PRACTICE

16 This order presents broader concerns for Staff’s investigatory practices. As has already been discussed, the order seems to instruct staff to go far beyond the realm of concrete evidence and into the territory of conjecture or unsubstantiated conclusory reasoning. For example, the entirety of the section titled “Inadequate inspection, repair, and maintenance of vehicles” contains conclusions about what supposedly missing records or documents might contain, concluding the section with accusing the company of potentially submitting false records or evasion of regulations, again without any evidence.<sup>24</sup> The “Findings and Conclusions” section then uses this and other chains of conclusory statements to find that Staff failed to cite the company on a barrage of violations, many of which had either already been cited to the company in this or prior cases, or had been considered and discounted due to lack of evidence.<sup>25</sup>

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<sup>21</sup> E.g., Order 01, 18.

<sup>22</sup> RCW 46.32.080(4)(c).

<sup>23</sup> *Washington Commercial Vehicle Safety Plan*, Federal Motor Carrier Safety Administration, 2023, at 5, <https://www.fmcsa.dot.gov/sites/fmcsa.dot.gov/files/2023-09/Washington%20FY23%20CVSP%20Final.pdf>.

<sup>24</sup> E.g. Order 01, 13, 18 (stating that staff should have cited the company for violations of 49 C.F.R. 390.15(b) and placed the company out of service). While the investigator’s report notes that the Company has not always been quick to take responsibility for compliance issues and has a history of “wanting to do it an easier way” that can interfere with regulatory compliance, investigators could find no evidence of purposeful evasion or falsifying records. Sharp, Exh. JS-1, 14.

<sup>25</sup> E.g., Order 01, 18.

17 Staff requests clarification as to the practices expected of it in conducting investigations into regulated companies. Staff relies on evidence-based, time-tested, and standardized investigatory practices during its inspections. Citations are only issued for those violations that Staff can prove with concrete documentation. When violations are found, longstanding guidance within the Commission has been to offer companies the ability to cure violations, with Staff working to provide technical assistance to companies. This guidance is held in accordance with the Commission's recognition of the essential function that these companies perform within the state, as well as the dual responsibilities of the Commission to both ensure proper functioning of industry and ensure the safety and reliability of industry. This opinion, and the statements made by the presiding officer during the course of the brief adjudicative proceeding, indicate that the Commission expects changes to this longstanding practice.<sup>26</sup> But if the Commission intends to change the manner in which Staff is to conduct its duties or is now instructing Staff to go beyond standard criteria for investigating violations, as this opinion seems to suggest, Staff must have clarification as to the new paradigm under which it is expected to operate.

#### IV. CONCLUSION

18 Staff humbly requests that the presiding officer grant Staff's motion by either issuing a revised Order 01 or issuing a new order providing the above requested corrections and clarifications.

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<sup>26</sup> See, e.g., Order 01, 18 ("It is not clear if the persistent lapses in record keeping practices have been excused as a matter of prosecutorial discretion.").

DATED at Tumwater, Washington, March 21, 2024.

Respectfully submitted,

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