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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF THURSTON

DOLLY, INC.

Petitioner,

vs.

WASHINGTON STATE UTILITIES AND
TRANSPORTATION COMMISSION, a
Washington state agency.

Respondent.

No. 18-2-03006-34

PETITION FOR JUDICIAL REVIEW OF
AGENCY ACTION

Petitioner Dolly, Inc. ("Dolly") pursuant to RCW 34.05.514 petitions this Court for judicial review of agency action by the Washington State Utilities and Transportation Commission's ("WUTC") Initial Order 02, Corrected Initial Order 02, and Order 04, Docket TV-171212. In support of its Petition, Petitioner shows as follows pursuant to RCW 34.05.546:

(1) Name and Mailing Address of Petitioner

Dolly, Inc
901 Fifth Avenue
Suite 600
Seattle, Washington 98164

(2) Name and Mailing Address of Petitioner's Attorney

Donna L. Barnett
Perkins Coie LLP
The PSE Building

PETITION FOR JUDICIAL REVIEW

PERKINS COIE LLP
The PSE Building
10885 N.E. Fourth Street, Suite 700
Bellevue, WA 98004-5579
Phone: 425.635.1400
Fax: 425.635.2400

1 10885 N.E. Fourth Street, Suite 700
2 Bellevue, WA 98004-5579

3 **(3) Name of Mailing Address of Agency Whose Action Is at Issue**

4 Washington Utilities and Transportation Commission
5 1300 S. Evergreen Park Drive SW
6 PO Box 47250
7 Olympia, Washington 98504-7250

8 **(4) Identification of Agency Action at Issue**

9 On March 29, 2018, the WUTC entered Order 02, *Initial Order Classifying Respondent*
10 *as a Household Goods Carrier; Ordering Respondent to Cease and Desist; Imposing and*
11 *Suspending Penalties on Condition of Future Compliance.* On April 9, 2018, the WUTC
12 entered Order 02 (Corrected) in Docket TV-171212, *Initial Order Classifying Respondent as a*
13 *Household Goods Carrier; Ordering Respondent to Cease and Desist; Imposing and*
14 *Suspending Penalties on Condition of Future Compliance.* On May 18, 2018, the WUTC
15 entered Order 04 in Docket TV-171212, *Final Order Denying Petition for Administrative*
16 *Review of Corrected Order 02.* Attached to this Petition are true and correct copies of WUTC
17 Order 02, Order 02 (Corrected), and Order 04 in WUTC Docket TV-171212, which are attached
18 as Exhibits 1, 2, and 3, respectively, and are collectively referred to as "Orders."

19 **(5) Identification of Parties Leading to Agency Action**

20 5.1 Dolly is a Delaware corporation with its principal of business in Seattle,
21 Washington. Dolly created a wholly owned proprietary software application that establishes a
22 marketplace that connects people who need an item moved between two locations or within the
same location with people who have the capacity to move the item.

5.2 Dolly is an Internet and app-based software company that provides a technology
platform that arranges "micro-moves." A micro-move is the on-demand transport of an item

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The PSE Building
10885 N.E. Fourth Street, Suite 700
Bellevue, WA 98004-5579
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1 that fits in a consumer-sized pick-up truck, that generally happens within 24 hours of the
2 customer's request, and cost less than \$100 (a micro-move also includes moving an item
3 between two points within a single location). Consumers use Dolly's Internet-based and smart
4 phone app-based technology to connect with individuals ("Helpers" and "Hands") who are
5 willing to perform the micro-move.

6 5.3 Dolly does not own any vehicles or employ any individuals to perform any
7 moving services. Instead, Dolly's software platform provides a marketplace for facilitating the
8 micro-move; no Dolly employees or agents perform the move.

9 5.4 WUTC is an agency of the State of Washington established pursuant to chapter
10 80.01 RCW and charged by the legislature with the authority to regulate in the public interest
11 the rates, services, facilities, and practices of businesses in the state offering the transportation
12 of goods to the public for compensation.

13 **(6) Jurisdiction and Venue**

14 6.1 The Court has jurisdiction over this petition pursuant to the state Administrative
15 Procedure Act ("APA"), RCW 34.05.510 *et seq.*

16 6.2 Venue is proper in Thurston County pursuant to RCW 34.05.514(1)(a).

17 **(7) Exhaustion of Administrative Remedies.**

18 On April 19, 2019 Petitioner submitted to the WUTC a Petition for Administrative
19 Review of Initial Order 02, and In the Alternative Corrected Initial Order 02 pursuant to
20 RCW 34.05.464 and WAC 480-07-610. The WUTC denied Dolly's petition on May 18, 2018,
21 in Order 04. Petitioner files this Petition for Judicial Review within the time limits of
22

1 RCW 34.05.542(2). As Required by RCW 34.05.534, Petitioner has exhausted its
2 administrative remedies.

3 **(8) Standing**

4 Petitioner is aggrieved and adversely affected by the WUTC's action. Petitioner is
5 substantially prejudiced by the Order's conclusions that Petitioner: (1) is classified as a
6 household goods carrier, common carrier, and solid waste collection company; (2) must
7 immediately cease operating as a household goods carrier, common carrier, and solid waste
8 collection company, (3) must affirmatively state specific language on its web-based application
9 and all of Petitioner's internet advertising, and (4) is assessed a penalty of \$69,000.00. A
10 judgement in Petitioner's favor would eliminate or redress the prejudice caused by the WUTC's
11 action.

12 **(9) Facts Demonstrating That Petitioner is Entitled to Obtain Judicial Review**

13 9.1 Dolly, a Washington-based company, created a new marketplace in the state by
14 becoming the first technology company to vet and instantly connect consumers who need help
15 transporting large, heavy, or bulky items within Washington with local pick-up truck owners.
16 Dolly is now an established technology company operating in seven states throughout the U.S.

17 9.2 Consumers use Dolly's proprietary software on their smart phone or internet-
18 enabled device to request help with a micro-move.

19 9.3 Customers submit requests through Dolly's smart phone app or website to have an
20 item transported between two locations or moved within a location.

21 9.4 Independent contractors known as "Helpers" or "Hands" use Dolly's platform to
22 review customer requests. Helpers or Hands who use Dolly's platform are under no obligation

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The PSE Building
10885 N.E. Fourth Street, Suite 700
Bellevue, WA 98004-5579
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1 to perform any transportation or labor services at all. They are free to accept or refuse any
2 micro-move they choose. Dolly does not assign micro-moves to Helpers or Hands. Any
3 services that are performed are completed at the Helpers' and Hands' and customers' discretion
4 and direction.

5 9.5 Dolly's Terms of Service ("Terms") explain the obligations created by agreeing to
6 the Terms. The Terms explain the financial transaction created when the consumer agrees to
7 exercise its license to use Dolly's platform. The Terms do not create an agreement between the
8 consumer and Dolly to transport household goods, nor is Dolly compensated for performing
9 micro-moving services.

10 9.6 The Terms do not govern the agreement between the consumer and the Helper
11 and/or Hands to perform micro-moving services. The Terms state that the Helper and/or Hands
12 and consumer create their own agreement to determine the terms of completing micro-moving
13 services; Dolly is not involved in that agreement other than hosting the platform that facilitated
14 the parties' meeting and its Terms do not govern that relationship.

15 9.7 Dolly uses multiple internet-based applications and websites to increase consumer
16 awareness of its platform and brand. Dolly limits its internet presence to creating awareness of
17 its service of connecting consumers who need items moved with individuals who can perform
18 the service. Dolly's internet presence is accessible anywhere in the world the internet is
19 available; this includes locations where it does not support micro-moving services.

20 9.8 On March 13, 2018 the Commission held a Brief Adjudicative Proceeding
21 pursuant to WAC 480-07-610 to determine whether Dolly engaged in business as a household
22 goods carrier, common carrier, or solid waste collection company.

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PERKINS COIE LLP
The PSE Building
10885 N.E. Fourth Street, Suite 700
Bellevue, WA 98004-5579
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1 9.9 On March 29, 2018 presiding Administrative Law Judge (“ALJ”) Dennis Moss
2 entered Order 02, Initial Order, which: 1) Classified Petitioner as a household goods carrier, a
3 common carrier, and a solid waste company; 2) Ordered Dolly to cease and desist operating
4 unless and until it obtained a permit from the Commission; 3) Imposed a \$69,000 penalty; and
5 4) Required that Dolly immediately remove its web-based application from the Internet and
6 remove all presence from Facebook, Twitter, Pinterest, and any other social media sites or other
7 platforms it uses or has ever used.

8 9.10 On April 2, 2018, Senior Assistant Attorney General Sally Brown, who filed no
9 Notice of Appearance pursuant to WAC 480-07-345, filed a Petition for Administrative Review
10 of Order 02 on behalf of WUTC Staff.

11 9.11 On April 9, 2018 ALJ Moss filed Initial Order 02 (Corrected) which interpreted
12 WUTC Staff’s Petition for Administrative Review as a Motion to Correct under WAC 480-07-
13 875 and made several significant and substantive modifications to Order 02. ALJ Moss referred
14 to these and other substantive edits as corrections of obvious errors, ministerial errors, and
15 scrivener’s errors.

16 9.12 On April 12, Dolly requested that ALJ Moss clarify the deadline to respond to
17 WUTC Staff’s petition because it was incorrectly filed under WAC 480-07-825, rather than
18 WAC 480-07-610, which governs the Brief Adjudicative Proceeding process and procedure.
19 Dolly also filed a response to WUTC Staff’s petition on this date.

20 9.13 On April 13, 2018, ALJ Rayne Pearson, who led WUTC Staff’s consumer
21 investigation department during Dolly’s investigation, responded via email to Dolly’s request to
22 ALJ Moss for clarification of the deadline to respond to WUTC Staff’s petition. ALJ Pearson

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The PSE Building
10885 N.E. Fourth Street, Suite 700
Bellevue, WA 98004-5579
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1 was not the presiding ALJ in the docket, gave no notice to the parties that she was substituted
2 for ALJ Moss, and was not present at the Brief Adjudicated Proceeding. ALJ Pearson cited
3 WAC 480-07-395(4) as the grounds for interpreting WUTC Staff's petition as a motion to
4 correct and granting the motion.

5 9.14 On April 19, 2018 Petitioner filed a Petition for Administrative Review of Order
6 02 and Order 02 (Corrected). On May 18, 2018, ALJ Pearson issued Order 04, *Final Order*
7 *Denying Petition for Administrative Review of Corrected 02*, which adopted in full the Findings
8 and Conclusions of Order 02 (Corrected).

9 9.15 Petitioner has filed this petition to challenge Orders 02, 02 (Corrected), and Order
10 04 as violating constitutional provisions, failing to follow prescribed procedures, erroneous
11 interpretations of law, unsupported by substantial evidence, and arbitrary and capricious.

12 **(10) Petitioner's Reasons for Believing That Relief Should Be Granted**

13 10.1 The Orders are in violation of constitutional provisions – RCW 34.05.570(3)(a).

14 The Orders violate the following constitutional provisions:

- 15 (a) Amendment I of the United States Constitution.
16 (b) Amendment XIV of the United States Constitution.
17 (c) Article I, Section 10 of the United States Constitution.
18 (d) Article I, Section 8 of the United States Constitution.
19 (e) Article I, Section 3 of the Washington State Constitution.
20 (f) Article I, Section 5 of the Washington State Constitution.
21 (g) Article I, Section 23 of the Washington State Constitution.

22 10.2 The Orders fail to follow prescribed procedures – RCW 34.05.570(3)(c):

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PERKINS COIE LLP
The PSE Building
10885 N.E. Fourth Street, Suite 700
Bellevue, WA 98004-5579
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1 (a) The WUTC failed to follow a prescribed procedure by substituting
2 administrative law judges without properly noticing the parties.

3 (b) The WUTC erred in significantly and substantively modifying Order 02
4 and characterizing such modifications as corrections of obvious errors, ministerial errors and
5 scrivener's errors.

6 10.3 The Orders contain errors of law – RCW 34.05.570(3)(d):

7 (a) The WUTC erred by adopting and incorporating Corrected Order 02,
8 which was issued in error.

9 (b) The WUTC erred by concluding Dolly is a household goods carrier,
10 common carrier, and solid waste collection company subject to penalties under RCW 81.80.075,
11 RCW 81.04.355, and RCW 81.77.040.

12 10.4 The Orders are not supported by substantial evidence – RCW 34.05.570(3)(e).
13 The Orders' conclusions on the following issues were not supported by substantial evidence:

14 (a) Whether Petitioner's Terms of Service create a contractual agreement to
15 transport household goods, common carrier goods, and solid waste.

16 (b) Whether Petitioner's internet marketing violates WUTC advertising
17 statutes and regulations.

18 10.5 The Orders are arbitrary and capricious – RCW 34.05.570(3)(i). The Orders'
19 conclusions on the following issue was arbitrary and capricious:

20 (a) Determining the applicability of a legislative budget proviso.
21

22 **(11) Petitioner's Request for Relief**

PETITION FOR JUDICIAL REVIEW

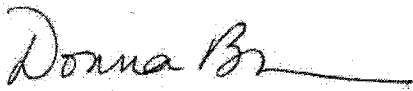
PERKINS COIE LLP
The PSE Building
10885 N.E. Fourth Street, Suite 700
Bellevue, WA 98004-5579
Phone: 425.635.1400
Fax: 425.635.2400

1 Pursuant to RCW 34.05.570 and RCW 34.05.574, Petitioner respectfully requests the
2 Court grant the following relief:

- 3 1) Enter an Order reversing the WUTC's decision to classify Petitioner as a
4 household goods carrier, common carrier, and solid waste collection company;
5 2) Enter an Order reversing the \$69,000 penalty the WUTC imposed on Petitioner;
6 3) Grant such other relief as this Court determines is just and reasonable.
7

8 Respectfully Submitted this 15th day of June, 2018.
9

10 **PERKINS COIE LLP**

11 
12 By: Donna L. Barnett
13 Donna L. Barnett, WSBA No. 36794
14 Ralph L. ("Buddy") Arnheim, CA Bar No.
15 170874
16 The PSE Building
17 10885 N.E. Fourth Street, Suite 700
18 Bellevue, WA 98004-5579
19 Telephone: 425.635.1400
20 Facsimile: 425.635.2400
21 DBarnett@perkinscoie.com
22 Arnhb@perkinscoie.com

Counsel for Petitioner Dolly, Inc.

PETITION FOR JUDICIAL REVIEW

PERKINS COIE LLP
The PSE Building
10885 N.E. Fourth Street, Suite 700
Bellevue, WA 98004-5579
Phone: 425.635.1400
Fax: 425.635.2400

Exhibit 1

Service Date: March 29, 2018

**BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION**

In the Matter of Determining the Proper
Carrier Classification of, and Complaint
for Penalties Against

DOCKET TV-171212

ORDER 02

DOLLY, INC.

INITIAL ORDER CLASSIFYING
RESPONDENT AS A HOUSEHOLD
GOODS CARRIER; ORDERING
RESPONDENT TO CEASE AND
DESIST; IMPOSING AND SUSPENDING
PENALTIES ON CONDITION OF
FUTURE COMPLIANCE

BACKGROUND

Synopsis. This is an Administrative Law Judge's Initial Order that is not effective unless approved or allowed to become effective as described in the notice at the end of this Order. This Initial Order is based upon a record developed during a Washington Utilities and Transportation Commission (Commission) investigation and during a Brief Adjudicative Proceeding held in accordance with RCW 34.05.482-94 and WAC 480-07-610. If this Initial Order becomes final, Dolly, Inc. (Dolly or Company) will be classified as a household goods carrier, as defined by RCW 81.80.010(5), and required to permanently cease and desist from operating as a household goods carrier unless and until the Company obtains a permit from the Commission. Dolly also will be found to have operated as a common carrier of general commodities (a/k/a motor freight common carrier) as defined in RCW 81.80.010(1) and WAC 480-14-040(4) having undertaken "to transport property for the general public by motor vehicle for compensation, whether over regular or irregular routes, or regular or irregular schedules." No common carrier of general commodities may operate for the transportation of property for compensation in Washington without first obtaining a permit from the Commission. RCW 81.80.070(1). If this Initial Order becomes final, Dolly will be required to permanently cease and desist from operating as a motor freight common carrier unless the Company first obtains a permit from the Commission. Dolly also will be found to have operated as a solid waste collection company as defined in RCW 81.77.010 and .040 without having obtained from the Commission a certificate of public convenience and necessity as required under RCW

81.77.090(2). If this Initial Order becomes final, Dolly will be required to permanently cease and desist from operating as a solid waste collection company unless and until the Company obtains from the Commission a certificate of public convenience and necessity as required under RCW 81.77.090(2).

Finally, Dolly will be assessed a financial penalty in the amount of \$69,000 for 25 violations of Title 81 RCW. A \$34,500 portion of the penalty will be suspended for a period of two years from the date of this order, then waived without further action by the Commission, subject to the condition that Dolly refrains from further household goods carrier operations, refrains from further motor freight common carrier operations, and refrains from hauling solid waste for compensation without first obtaining the required permit, or permits, from the Commission.

MEMORANDUM

- 1 **Nature of Proceeding.** The Commission initiated this special proceeding under RCW 81.04.510 to determine if Dolly has engaged, and continues to engage, in business as a common carrier for transportation of household goods, for transportation of property other than household goods, or for hauling solid waste for compensation within the state of Washington without possessing the permits or certificate of public convenience and necessity required for such operations. RCW 81.04.510 provides that: "whether or not any person or corporation is conducting business requiring operating authority, or has performed or is performing any act requiring approval of the commission without securing such approval, shall be a question of fact to be determined by the commission."
- 2 The Commission's related Complaint against Dolly, brought by Commission regulatory staff (Commission Staff or Staff) under RCW 81.04.110, is based in significant part on Dolly's advertising offering regulated transportation services without the necessary authority from the Commission.
- 3 **Procedural History.** On January 18, 2018, the Commission entered Order 01, Order Instituting Special Proceeding; Complaint Seeking to Impose Penalties; and Notice of Brief Adjudicative Proceeding, initiating this docket on its own motion. The Order Instituting Special Proceeding alleges that Dolly should be classified as a "household goods carrier" under RCW 81.80.010(5) because it has advertised, solicited, offered, or entered into one or more agreements to transport household goods, for compensation, by motor vehicle, within the state of Washington, despite its failure to seek and obtain a household goods carrier permit from the Commission. In addition, the Order alleges that Dolly has held itself out via advertising as a motor freight common carrier for the transportation of property other than household goods, offering to transport such goods for compensation, by motor vehicle, within the state of Washington, despite its failure to seek and obtain a common carrier permit from the Commission.¹ Finally, Order 01 alleges that Dolly has operated as a solid waste collection company by advertising for the hauling of solid waste for compensation without first obtaining a certificate of public convenience and necessity from the Commission.²

¹ See RCW 81.80.070.

² See RCW 81.77.040.

4 The Complaint alleges that Dolly:

- Violated RCW 81.80.010(5) at least 11 times since February 2015 by advertising, soliciting, offering, or entering into an agreement, to transport household goods in Washington for compensation without the necessary permit required for such operations;
- Violated RCW 81.80.355 a total of 11 times by advertising for the transportation of property within this state for compensation without first having obtained from the Commission a common carrier permit; and
- Violated RCW 81.77.040 by advertising for the hauling of solid waste without first having obtained from the Commission a certificate of public convenience and necessity.

The Commission issued a *Subpoena and Subpoena Duces Tecum For Production of Documents* (Subpoenas) to the Company on January 18, 2018, commanding Dolly to appear before the Commission at a special proceeding scheduled to convene at 9:30 a.m. on March 13, 2018, in the Commission's offices at 1300 S. Evergreen Park Drive S.W., Olympia, Washington, and to bring the documents specified in the *Subpoenas*.

5 On February 22, 2018, Dolly filed its Answer and Affirmative Defenses.

6 **Hearing.** On March 13, 2018, the Commission convened a Brief Adjudicative Proceeding hearing in Olympia, Washington, before Administrative Law Judge Dennis J. Moss.³ Responding to inquiry from the presiding officer, both parties declined the opportunity to file a brief or to argue orally.⁴

7 **Appearances.** Jeff Roberson, Assistant Attorney General, Olympia, Washington, represents Commission Staff.⁵ Armika R. Bryant, Attorney for Dolly, Inc., Seattle, Washington, represents the Company.

³ ALJ Moss substituted for ALJ Rayne Pearson by Notice of Substitution on March 27, 2017, following ALJ Pearson's recusal on Dolly's motion, also on March 27, 2017. The Notice of Substitution included a Notice Rescheduling Brief Adjudicative Proceeding to April 5, 2017.

⁴ TR. 98:5-21.

⁵ In adjudications the Commission's regulatory staff participates like any other party, while an administrative law judge or the Commissioners make the decision. To assure fairness, the Commissioners and the presiding administrative law judge do not discuss the merits of the proceeding with regulatory staff or any other party without giving notice and opportunity for all parties to participate. See RCW 34.05.455.

DISCUSSION

Applicable Law

8 RCW 81.80.010(5) defines "household goods carrier" as

[A] person who transports for compensation, by motor vehicle within this state, or who advertises, solicits, offers, or enters into an agreement to transport household goods.

RCW 81.80.075 prohibits household goods carriers from operating for compensation in Washington without first obtaining the required permit from the Commission. Upon proof of unauthorized operations, RCW 81.04.510 authorizes and requires the Commission to order the unpermitted company to cease and desist its activities.⁶ Additionally, RCW 81.04.110 authorizes the Commission to file a complaint on its own motion setting forth any act or omission by a company that violates any law, or any order or rule of the Commission.

9 RCW 81.80.075(4) subjects persons who engage in business as a household goods carrier in the state of Washington without the required permit to a penalty of up to \$5,000 for each violation. In deciding the penalty amount to be imposed per violation, RCW

⁶ RCW 81.04.510 provides:

Whether or not any person or corporation is conducting business requiring operating authority, or has performed or is performing any act requiring approval of the commission without securing such approval, shall be a question of fact to be determined by the commission. Whenever the commission believes that any person or corporation is engaged in operations without the necessary approval or authority required by any provision of this title, it may institute a special proceeding requiring such person or corporation to appear before the commission at a location convenient for witnesses and the production of evidence and bring with him or her or it books, records, accounts, and other memoranda, and give testimony under oath as to his or her or its operations or acts, and the burden shall rest upon such person or corporation of proving that his or her or its operations or acts are not subject to the provisions of this chapter. The commission may consider any and all facts that may indicate the true nature and extent of the operations or acts and may subpoena such witnesses and documents as it deems necessary.

After having made the investigation herein described, the commission is authorized and directed to issue the necessary order or orders declaring the operations or acts to be subject to, or not subject to, the provisions of this title. *In the event the operations or acts are found to be subject to the provisions of this title, the commission is authorized and directed to issue cease and desist orders to all parties involved in the operations or acts.* (Emphasis added).

81.80.075(4)(b) requires the Commission to consider two factors: (a) willingness to comply with the provisions of RCW 81.80.070 and the rules governing household goods carriers contained in WAC 480-15 and (b) compliance history.

- 10 RCW 81.80.355 makes it unlawful for persons to advertise to transport property other than household goods for compensation in Washington as a common carrier⁷ without a permit from the Commission authorizing such transportation. RCW 81.80.360 makes applicable to such activity the penalty provisions in RCW 81.04.380 - .405.
- 11 RCW 81.77.040 makes it unlawful to haul solid waste in Washington for compensation without first obtaining from the Commission a certificate of public convenience and necessity. The statute provides that “[o]perating for the hauling of solid waste for compensation includes advertising, soliciting, offering, or entering into an agreement to provide that service.” Violations of RCW Chapter 81.77 are gross misdemeanors and are subject to the penalty provisions in RCW 81.04.380 - .405.

Facts and Analysis

- 12 Staff became aware of Dolly’s operations in March 2015 after receiving information concerning the Company from one or more permitted household goods carriers operating in Washington and upon reviewing various publications that included articles describing the Company’s operations.⁸ On March 20, 2015, staff sent Dolly a letter notifying it that the Commission had received information about the Company’s operations and had reviewed the Company’s web site, getdolly.com.⁹ The letter informed Dolly that the Commission regulates the moving of household goods items and that only permitted household goods carriers may move these items for compensation. The letter also explained that any person found operating or advertising as a household goods carrier without the required commission-issued permit is subject to a penalty of \$5,000 per violation.
- 13 Dolly’s web pages include its “Terms of Service.”¹⁰ Customers who download Dolly’s mobile application or otherwise access or use the Dolly Internet-based platform “agree to

⁷ See RCW 81.80.010(1), (3), and (6).

⁸ Investigation Report, Dolly, Inc., December 2017, at 5. TR. 12:19-13:2.

⁹ Exh. SP-1.

¹⁰ Exh. SP-6.

be bound by all of the terms” set forth in the Dolly Terms of Service.¹¹ Customers are not required to enter, nor is there evidence that they do, in fact, enter, into a separate agreement with any household goods carrier Dolly may have engaged to conduct the physical move of the customer’s household goods. Dolly relies on a “network of Helpers” who perform “services” for Dolly’s customers including “loading, unloading, moving, hauling, packing, lifting, assembly or disassembly” of the customers specified “items.”¹² In other words, Dolly, using its Helpers, agrees with customers who use the Dolly platform to perform all the functions more typically carried out by traditional moving companies permitted by the Commission. Customers pay Dolly directly, using a credit card.¹³

- 14 Dolly does “not represent or warrant that any Helper will meet [the customer’s] expectations or instructions in performing any Services.” Dolly’s Terms of Service also provide that any disputes regarding performance “is between [the customer] and the applicable Helper.” Dolly states it is “not responsible for the replacement or repair of any ... personal property that may be damaged by a Helper while performing the Services” that Dolly offers.¹⁴ Dolly’s Terms of Service “to the extent not prohibited by law” disavow any liability to the customers for loss of their property or “other damages or losses.” The Terms also require customers to give up any right they may have to litigate, and instead require mediation and then arbitration of any disputes with Dolly, and limit the manner in which customers can seek relief from Dolly.
- 15 Dolly’s website identifies the Company’s “Most Common” services as “Mini and Small Moves,” “Apartment Moves,” and “Craigslist and Offerup Pick-up and Delivery.”¹⁵ According to the Company’s website, other services offered by Dolly include “Retail Store Delivery,” “Storage Moves,” and “Junk Removal.”¹⁶ The website states that “Dolly is your go-to source for finding local moving and delivery help” and “is a fast, easy, and affordable way to get help moving furniture between apartments, pick up that exercise

¹¹ *Id.*, page 1.

¹² *Id.*, page 2.

¹³ *Id.*

¹⁴ *Id.*, page 5.

¹⁵ Exh. SP-7 at 1. *See also* TR. 31:12-16.

¹⁶ Exh. SP-7 at 2. *See also* TR. 31:17-32:10.

gear on Craigslist or to get stuff home from stores like Lowe's, Crate & Barrel, and IKEA."¹⁷

- 16 Exhibits SP-8 through SP-17 show additional advertisements of moving services on a billboard near Seattle, and on Facebook, Twitter, LinkedIn, iTunes, Craigslist, YouTube, Pinterest, and Instagram, and a Yelp review in the categories of "Movers, Couriers & Delivery Services, Junk Removal & Hauling." The Yelp page is "claimed" by Dolly meaning Dolly can interact with its customers, or anyone else, who posts a review.¹⁸
- 17 Dolly's witness, Kevin Shawver, sponsored additional exhibits showing relatively current versions of the Company's website and its advertising on LinkedIn, iTunes, Facebook, Twitter, YouTube, Pinterest, Instagram, and Yelp.¹⁹ These confirm Staff's evidence that Dolly holds itself out as a household goods mover, a motor freight common carrier, and a hauler of solid waste. For example, Exhibit KS-3 includes in its description of Dolly "Moving Services We Provide" as including "Small Apartment Moves," "Retail Store Delivery," "Junk Removal" including "trash removal and responsible disposal." In other words, Dolly advertises household goods moves, transportation of property other than household goods, and solid waste pick-up, hauling, and disposal. Additional language in the same exhibit states that Dolly has "over 2,000 Helpers who are ready to help you with your apartment move, IKEA delivery, furniture delivery, furniture donation, dump run, junk removal, storage unit move, mattress removal, office move, and everything in between."
- 18 Considering the evidence discussed above, none of which is disputed,²⁰ Dolly unquestionably meets the statutory definitions of "household goods carrier," "common carrier," and "solid waste hauler" because it:
- Advertises, solicits, and offers on its website and social media to transport for compensation, by motor carrier, household goods in the state of Washington.
 - Enters into agreements to transport household goods for compensation in the state of Washington as indicated in its Terms of Service.

¹⁷ Exh. SP-7 at 5.

¹⁸ Exh. SP-17.

¹⁹ See Exhs. KS-1-9.

²⁰ Dolly denies the operative allegations in Staff's Complaint, but as discussed here offered no substantive evidence disputing the allegation. To the contrary, as discussed here, the evidence Dolly offered serves to support, not refute, the Complaint's allegations.

- Advertises, solicits, and offers on its website and social media, and enters into agreements to transport for compensation, by motor carrier, property other than household goods in the state of Washington.
- Advertises, solicits, and offers on its website and social media, and enters into agreements to transport solid waste for compensation.

19 Dolly does not have, nor has it applied for, authority to conduct itself as a household goods carrier in Washington. Dolly's activities accordingly violate RCW 81.80.010(5) and 81.80.075. Dolly does not have nor has it applied for, authority to conduct itself as a common carrier of property other than household goods in Washington. Its advertisements for such services accordingly violate RCW 81.80.355. Dolly does not have nor has it applied for, authority to conduct itself as a hauler of solid waste for compensation in Washington. Its advertisements for such services accordingly violate RCW 81.77.040.

Affirmative Defenses

- 20 Dolly alleged in its Answer that "staff's investigation report contains extensive factual errors,"²¹ but the Company made no specific allegations of error and offered no evidence showing any factual errors in the report. Nor did the Company present or develop through testimony at hearing any evidence that refutes the factual allegations included in Staff's Investigation Report, the testimony of its witnesses, or the documentary evidence the Commission received during the hearing. Indeed, the record evidence, including the evidence Dolly presented, supports fully the facts stated in Staff's Investigation Report.
- 21 Dolly's additional affirmative defenses likewise are unsupported by any evidence or argument in the record. Indeed, the Company's first four affirmative defenses—failure to state a claim upon which relief can be granted; full compliance with Washington Law; no violation of any Commission statute or rule; overbreadth in the application of Commission statutes and rules—are belied by the evidence, as discussed in this Order.
- 22 Dolly's final "affirmative defense" was that "Commission Staff, after a thorough review of Dolly operations, informed Dolly that it would not approve its application for a household goods carrier permit."²² Even if this was true, it is simply irrelevant to any issue in this proceeding. Moreover, Ms. Paul testified that Staff "didn't tell Dolly that we would deny their application" and gave technical assistance in a meeting with the

²¹ Dolly Answer and Affirmative Defenses at 6.

²² *Id.*

Company including guidance on changes in the Company's business model that would help if it did apply.²³ In fact, Dolly never submitted an application to the Commission. Even if the Company had applied, and was refused, this would not relieve it from being classified as a company doing business that requires a permit or certificate, nor would it relieve the Company from liability for penalties imposed in connection with facts and events that occurred in the past.

Penalties

- 23 Staff recommends that the Commission assess Dolly a penalty of up to \$5,000 for each of the 11 advertisements by the company offering to transport household goods in violation of RCW 81.80.010(5) and RCW 81.80.075, as evidenced in the record of this proceeding. In addition, Staff recommends that the Commission assess Dolly a penalty of up to \$1,000 for each of the 11 separate violations of RCW 81.80.355. Finally, Staff recommends that the Commission assess Dolly a penalty of up to \$1,000 for each of the three separate violations of RCW 81.77.040. Staff thus recommends a total penalty of up to \$69,000 for all of the alleged violations.
- 24 The Commission recognizes 13 factors that inform its decisions on penalties in individual cases. Eleven of these factors are identified in a policy statement the Commission issued on January 7, 2013, in Docket A-120061. The remaining two factors are identified in statute.²⁴
- 25 The two statutory factors are stated in RCW 81.80.075, as follows:
- The carrier's willingness to comply with the requirements of RCW 81.80.070 and the Commission's administrative rules governing household goods carriers.
 - The carrier's history of compliance with chapter 81.80 RCW.
- 26 Dolly has not shown an ability or willingness to comply with applicable law and has a three-year long history of non-compliance with the provisions of Title 81 RCW.
- 27 The facts demonstrate that Dolly has been operating and apparently continues to operate in Washington in defiance of applicable law. There is no evidence showing any cessation in Dolly's operations since the Company initially was informed on March 20, 2015, that

²³ TR. 26:1-9.

²⁴ RCW 81.80.075

it was at risk of incurring penalties for conducting operations not in compliance with various statutes and rules.

28 It appears from the record that Dolly's business model was never designed to conform to existing laws and regulations governing household goods movers in Washington. Rather, Dolly sought changes to the Commission's rules governing the household goods moving business to conform to Dolly's conception of what it should be, rather than to conform to its operations to meet existing laws and regulations the legislature and the Commission have determined are appropriate to protect consumers.²⁵ Following Governor Inslee's affirmation of the Commission's denial of Dolly's rulemaking petition on January 12, 2018,²⁶ the Commission provided Dolly with technical assistance on writing legislation that could support changes in the household goods rules.²⁷

29 Our brief analysis of Dolly vis-a-vis the factors affecting penalties that the Commission identifies in its policy statement follows:

30 *How serious or harmful the violation is to the public.* There is no evidence in the record, to substantiate significant actual harm arising from Dolly's operations. However, Dolly's business operations deny consumers in Washington the protections afforded by RCW Chapter 81.80 and the Commission's rules in WAC Chapter 480-15. Dolly's customers are denied the protections provided by the Commission's rules concerning public liability and property damage insurance (WAC 480-15-530), cargo insurance (WAC 480-15-550), criminal background checks of drivers and helpers (WAC 480-15-555), equipment safety requirements (WAC 480-15-560), and driver safety requirements (WAC 480-15-570).

²⁵ See TR. 21:7-25:2.

²⁶ See Exh. SP-5.

²⁷ TR.25:3-13. We note in this connection that the Commission did not oppose, and provided testimony concerning, House Bill 2604 and Substitute Senate Bill 6234 during the 2018 session of the Washington legislature. Had this legislation passed into law the Commission's statutory authority over household goods carriers and other common carriers would have changed. These bills did not become law. However, in its Supplemental Operating Budget, ESSB 6032, the legislature directed "the Commission to convene a task force to make recommendations and report to the legislature regarding the most effective method of regulation of digital application-based micro-movers and the small goods movers that utilize their digital application. The report is due to the legislature by December 15, 2018." ESSB 6032, Sec. 141(6).

- 31 *Whether the violation is intentional.* Dolly was informed by Staff on a number of occasions that it was operating as a household goods carrier without the required permit. The violations thus were intentional.
- 32 *Whether the Company self-reported the violation.* Dolly did not report any violation under RCW Chapter 81.80, RCW Chapter 81.77, or the Commission's rules.
- 33 *Whether the Company was cooperative and responsive.* The evidence is mixed, but overall it supports a finding that the Company was reasonably cooperative in terms of interacting with the Commission.
- 34 *Whether the Company promptly corrected the violations and remedied the impacts.* The short answer is "no." Dolly continues to operate in violation of applicable statutes and rules.
- 35 *The number of violations.* In addition to the 25 violations shown by the evidence in this case, evidence of the growth in Dolly's revenues over the past three years suggests many more violations have occurred. The Company's revenues increased from \$1,058,465.00 in 2015 to \$4,186,559.99 for the months January – August, 2017.²⁸
- 36 *The number of customers affected.* Again, this is unclear but the number appears to be substantial considering evidence of the Company's revenues in Washington.
- 37 *The likelihood of recurrence.* Dolly's business is ongoing, and the violations will likely continue and recur.
- 38 *The Company's past performance regarding compliance, violations, and penalties.* The Company received effective notification that it should cease and desist operating as a household goods company and has had contacts with Staff informing the Company it is operating as a household goods mover. The Company has not changed its business practices or obtained a permit to legally operate as a household goods carrier, as a transporter of property other than household goods, or as a solid waste hauler in the state of Washington. The Company is charged with knowledge of the law and plainly has continuously operated as a household goods carrier by advertising, soliciting, offering, or entering into agreements, to transport household goods without the necessary permit required for such operations.

²⁸ Investigation Report, Dolly, Inc., December 2017, at 6.

- 39 *The company's existing compliance program.* There is no evidence of any compliance program.
- 40 *The size of the company.* Dolly is a relatively small company with few employees but it has significant and growing revenues.
- 41 The Commission does not wish to stifle innovation and positive change in any industry it regulates.²⁹ The avenues for affecting such change, however, do not include Commission acquiescence in continuing violations of Washington statutes and Commission rules. The evidence shows that Dolly's efforts to participate in the Washington household goods moving industry following the Company's vision of how the industry should operate and be regulated has resulted in numerous violations of the laws and rules governing how the industry currently is required by law to operate. It is appropriate that the Commission assess penalties for this unlawful behavior and that the Commission require the Company to cease and desist from such behavior, including advertising, soliciting, offering, or entering into agreements to transport household goods unless and until it secures from the Commission the necessary permit for such activities and brings its operations fully into compliance with all applicable laws.
- 42 All things considered, the Commission determines that it should impose a penalty of \$69,000 reflecting a penalty assessment of \$5,000 for each of 11 violations of the prohibition against entering into agreements to transport household goods in Washington without the required permit and \$14,000 reflecting a penalty assessment of \$1,000 for each of eleven violations of the prohibition against advertising, soliciting, or offering to transport freight other than household goods and three violations of the same prohibition in connection with hauling solid waste in Washington without the required permit or certificate. The Commission concludes that it should, and is required by statute, to order Dolly to cease and desist from these activities.³⁰
- 43 Viewing compliance as its paramount interest in proceedings such as this one, the Commission will suspend one half, or \$34,500, of the penalty amount conditioned on Dolly ceasing and desisting fully from activities that define it as a household goods carrier under RCW 81.80.010(5). This means, among other things, that Dolly will remove immediately its web-based application from the Internet and will remove immediately its presence from Facebook, Twitter, Pinterest, and any other social media sites or other

²⁹ See *supra* n.26.

³⁰ See *supra* n.6.

platforms it uses or has used to make its services known. The Commission will investigate whether the Company complies with this condition on, or shortly after, 10 days following the date this Initial Order becomes final by operation of law or following affirmation by the Commission on review. Any failure to comply with this condition at that time, or subsequently within a period of two years will be duly noticed by the Commission and the suspended penalty amount of \$34,500 will be due and payable within five days following the date of Commission notice without further action by the Commission.

- 44 The penalty amount of \$34,500 not suspended by this Order is due and payable to the Commission within 10 days following the date this Initial Order becomes final by operation of law or following affirmation by the Commission on review.

FINDINGS AND CONCLUSIONS

- 45 (1) The Commission is an agency of the State of Washington vested by statute with authority to regulate persons engaged in the business of transporting household goods, property other than household goods, and solid waste for compensation over public roads in Washington.
- 46 (2) The Commission has jurisdiction over the subject matter of this proceeding and over Dolly, Inc.
- 47 (3) It is unlawful, under RCW 81.80.075(1), to operate as a household goods carrier in Washington without first obtaining the required permit from the Commission. Any person who engages in business as a household goods carrier without the required permit is subject to a penalty of up to five thousand dollars per violation under RCW 81.80.75(4).
- 48 (4) Since March 2015, using at least 11 separate platforms, Dolly, Inc. continuously has advertised, solicited, or offered to transport household goods, for compensation, by motor vehicle, within the state of Washington, without first having obtained a household goods carrier permit from the Commission, thus violating RCW 81.80.075.
- 49 (5) Dolly, Inc. is a "household goods carrier" as that term is defined in RCW 81.80.010(5) because it has continuously since 2015 advertised, solicited, offered, or entered into agreements to transport household goods. RCW 81.80.075(1) provides that "No person shall engage in business as a household goods carrier without first obtaining a household goods carrier permit from the commission."

- 50 (6) Dolly, Inc. has neither applied for nor obtained a permit from the Commission authorizing it to conduct business as a household goods carrier.
- 51 (7) Dolly violated RCW 81.80.75(1) at least 11 times since 2015.
- 52 (8) RCW 81.04.510 authorizes and requires the Commission to order an unpermitted household goods carrier such as Dolly, Inc. to cease and desist immediately its activities. Any person who engages in business as a household goods carrier in violation of a cease and desist order issued by the Commission under RCW 81.04.510 is subject to a penalty of up to ten thousand dollars per violation under RCW 81.80.75(5).
- 53 (9) Since March 2015, using at least 11 separate platforms, Dolly, Inc. continuously has advertised, solicited, or offered to transport property other than household goods, for compensation, by motor vehicle, within the state of Washington, without first having obtained a household goods carrier permit from the Commission, thus violating RCW 81.80.355 at least 11 times. Dolly is subject to a penalty of up to one thousand dollars per violation. The Commission is authorized and required by RCW 81.04.510 to order Dolly, Inc. to cease and desist immediately from these activities.
- 54 (10) Since March 2015, using at least three separate platforms, Dolly, Inc. continuously has advertised, solicited, or offered to haul solid waste, for compensation, by motor vehicle, within the state of Washington, without first having obtained a certificate of public convenience and necessity from the Commission, thus violating RCW 81.77.040 at least three times. Dolly is subject to a penalty of up to one thousand dollars per violation. The Commission is authorized and required by RCW 81.04.510 to order Dolly, Inc. to cease and desist immediately from these activities.

ORDER

THE COMMISSION ORDERS:

- 1 (1) Dolly Inc. is classified as a household goods carrier within the state of Washington, a common carrier transporting property other than household goods in the state of Washington, and a solid waste company offering to pickup, transport, and dispose of solid waste in Washington.

- 2 (2) Dolly Inc. is required immediately to cease and desist operations as a household goods carrier within the state of Washington, a common carrier transporting property other than household goods in the state of Washington, and a solid waste company offering to pickup, transport, and dispose of solid waste in Washington, and the Company must refrain from all such operations unless and until it first obtains a permit from the Commission.
- 3 (3) Dolly Inc. is assessed a penalty of \$69,000, as discussed in the body of this Order. A \$34,500 portion of the penalty is suspended for a period of two years from the date of this Order, and waived thereafter without further action by the Commission, provided Dolly, Inc. timely pays the portion of the penalty that is not suspended and refrains permanently from further operations as a household goods carrier, a common carrier transporting property other than household goods, and a solid waste hauler in the state of Washington without first obtaining the required permits and certificate from the Commission. The remainder of the penalty, \$34,500, is due and payable within 10 days following the date on which this Initial Order becomes final by operation of law, or otherwise.
- 4 (4) Dolly Inc. is required to remove immediately its web-based application from the Internet and its presence from Facebook, Twitter, Pinterest, and any other social media sites or other platforms it uses or has used to make its services known. The Commission will investigate whether the Company complies with this condition on, or shortly after, 10 calendar days following the date this Initial Order becomes final by operation of law or following affirmation by the Commission on review. Any failure to comply with this condition will be duly noticed by the Commission and the suspended penalty amount of \$34,500 will be due and payable within five days following the date of Commission notice, without further action by the Commission being required.
- 5 (5) The Commission retains jurisdiction over the subject matter and the parties to this proceeding to effectuate the terms of this Order.

DATED at Olympia, Washington, and effective March 29, 2018.

DENNIS J. MOSS
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 480-07-610(7) provides that any party to this proceeding has twenty-one (21) days after the entry of this Initial Order to file a *Petition for Review*. What must be included in any Petition and other requirements for a Petition are stated in WAC 480-07-610(7)(b). WAC 480-07-610(7)(c) states that any party may file a *Response* to a Petition for review within seven (7) 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.

Any Petition or Response must be electronically filed through the Commission's web portal as required by WAC 480-07-140(5). Any Petition or Response filed must also be electronically served on each party of record as required by WAC 480-07-140(1)(b).

Exhibit 2

Service Date: April 9, 2018

**BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION**

In the Matter of Determining the Proper
Carrier Classification of, and Complaint
for Penalties Against

DOCKET TV-171212

ORDER 02 (CORRECTED)

DOLLY, INC.

INITIAL ORDER CLASSIFYING
RESPONDENT AS A HOUSEHOLD
GOODS CARRIER; ORDERING
RESPONDENT TO CEASE AND
DESIST; IMPOSING AND SUSPENDING
PENALTIES ON CONDITION OF
FUTURE COMPLIANCE

BACKGROUND

Synopsis. *This is an Administrative Law Judge's Initial Order that is not effective unless approved or allowed to become effective as described in the notice at the end of this Order. This Initial Order is based upon a record developed during a Washington Utilities and Transportation Commission (Commission) investigation and during a Brief Adjudicative Proceeding held in accordance with RCW 34.05.482-94 and WAC 480-07-610. If this Initial Order becomes final, Dolly, Inc. (Dolly or Company) will be classified as a household goods carrier, as defined by RCW 81.80.010(5), and required to permanently cease and desist from operating as a household goods carrier unless and until the Company obtains a permit from the Commission. Dolly also will be found to have operated as a common carrier of general commodities (a/k/a motor freight common carrier) as defined in RCW 81.80.010(1) and WAC 480-14-040(4) having undertaken "to transport property for the general public by motor vehicle for compensation, whether over regular or irregular routes, or regular or irregular schedules." No common carrier of general commodities may operate for the transportation of property for compensation in Washington without first obtaining a permit from the Commission. RCW 81.80.070(1). If this Initial Order becomes final, Dolly will be required to permanently cease and desist from operating as a motor freight common carrier unless the Company first obtains a permit from the Commission. Dolly also will be found to have operated as a solid waste collection company as defined in RCW 81.77.010 and .040 without having obtained from the Commission a certificate of public convenience and necessity as required under RCW*

81.77.090(2). If this Initial Order becomes final, Dolly will be required to permanently cease and desist from operating as a solid waste collection company unless and until the Company obtains from the Commission a certificate of public convenience and necessity as required under RCW 81.77.090(2).

Finally, Dolly will be assessed a financial penalty in the amount of \$69,000 for 25 violations of Title 81 RCW. A \$34,500 portion of the penalty will be suspended for a period of two years from the date of this order, then waived without further action by the Commission, subject to the condition that Dolly refrains from further household goods carrier operations, refrains from further motor freight common carrier operations, and refrains from hauling solid waste for compensation without first obtaining the required permit, or permits, from the Commission.

MEMORANDUM

- 1 **Nature of Proceeding.** The Commission initiated this special proceeding under RCW 81.04.510 to determine if Dolly has engaged, and continues to engage, in business as a common carrier for transportation of household goods, for transportation of property other than household goods, or for hauling solid waste for compensation within the state of Washington without possessing the permits or certificate of public convenience and necessity required for such operations. RCW 81.04.510 provides that: “whether or not any person or corporation is conducting business requiring operating authority, or has performed or is performing any act requiring approval of the commission without securing such approval, shall be a question of fact to be determined by the commission.”
- 2 The Commission’s related Complaint against Dolly, brought by Commission regulatory staff (Commission Staff or Staff) under RCW 81.04.110, is based in significant part on Dolly’s advertising offering regulated transportation services without the necessary authority from the Commission.
- 3 **Procedural History.** On January 18, 2018, the Commission entered Order 01, Order Instituting Special Proceeding; Complaint Seeking to Impose Penalties; and Notice of Brief Adjudicative Proceeding, initiating this docket on its own motion. The Order Instituting Special Proceeding alleges that Dolly should be classified as a “household goods carrier” under RCW 81.80.010(5) because it has advertised, solicited, offered, or entered into one or more agreements to transport household goods, for compensation, by motor vehicle, within the state of Washington, despite its failure to seek and obtain a household goods carrier permit from the Commission. In addition, the Order alleges that Dolly has held itself out via advertising as a motor freight common carrier for the transportation of property other than household goods, offering to transport such goods for compensation, by motor vehicle, within the state of Washington, despite its failure to seek and obtain a common carrier permit from the Commission.¹ Finally, Order 01 alleges that Dolly has operated as a solid waste collection company by advertising for the hauling of solid waste for compensation without first obtaining a certificate of public convenience and necessity from the Commission.²

¹ See RCW 81.80.070.

² See RCW 81.77.040.

4 The Complaint alleges that Dolly:

- Violated RCW 81.80.010(5) at least 11 times since February 2015 by advertising, soliciting, offering, or entering into an agreement, to transport household goods in Washington for compensation without the necessary permit required for such operations;
- Violated RCW 81.80.355 a total of 11 times by advertising for the transportation of property within this state for compensation without first having obtained from the Commission a common carrier permit; and
- Violated RCW 81.77.040 by advertising for the hauling of solid waste without first having obtained from the Commission a certificate of public convenience and necessity.

The Commission issued a *Subpoena and Subpoena Duces Tecum For Production of Documents* (Subpoenas) to the Company on January 18, 2018, commanding Dolly to appear before the Commission at a special proceeding scheduled to convene at 9:30 a.m. on March 13, 2018, in the Commission's offices at 1300 S. Evergreen Park Drive S.W., Olympia, Washington, and to bring the documents specified in the *Subpoenas*.

5 On February 22, 2018, Dolly filed its Answer and Affirmative Defenses.

6 **Hearing.** On March 13, 2018, the Commission convened a Brief Adjudicative Proceeding hearing in Olympia, Washington, before Administrative Law Judge Dennis J. Moss. Responding to inquiry from the presiding officer, both parties declined the opportunity to file a brief or to argue orally.³

7 **Appearances.** Jeff Roberson, Assistant Attorney General, Olympia, Washington, represents Commission Staff.⁴ Armika R. Bryant, Attorney for Dolly, Inc., Seattle, Washington, represents the Company.

³ TR. 98:5-21.

⁴ In adjudications the Commission's regulatory staff participates like any other party, while an administrative law judge or the Commissioners make the decision. To assure fairness, the Commissioners and the presiding administrative law judge do not discuss the merits of the proceeding with regulatory staff or any other party without giving notice and opportunity for all parties to participate. See RCW 34.05.455.

DISCUSSION

Applicable Law

8 RCW 81.80.010(5) defines "household goods carrier" as

[A] person who transports for compensation, by motor vehicle within this state, or who advertises, solicits, offers, or enters into an agreement to transport household goods.

RCW 81.80.075 prohibits household goods carriers from operating for compensation in Washington without first obtaining the required permit from the Commission. Upon proof of unauthorized operations, RCW 81.04.510 authorizes and requires the Commission to order the unpermitted company to cease and desist its activities.⁵ Additionally, RCW 81.04.110 authorizes the Commission to file a complaint on its own motion setting forth any act or omission by a company that violates any law, or any order or rule of the Commission.

⁵ RCW 81.04.510 provides:

Whether or not any person or corporation is conducting business requiring operating authority, or has performed or is performing any act requiring approval of the commission without securing such approval, shall be a question of fact to be determined by the commission. Whenever the commission believes that any person or corporation is engaged in operations without the necessary approval or authority required by any provision of this title, it may institute a special proceeding requiring such person or corporation to appear before the commission at a location convenient for witnesses and the production of evidence and bring with him or her or it books, records, accounts, and other memoranda, and give testimony under oath as to his or her or its operations or acts, and the burden shall rest upon such person or corporation of proving that his or her or its operations or acts are not subject to the provisions of this chapter. The commission may consider any and all facts that may indicate the true nature and extent of the operations or acts and may subpoena such witnesses and documents as it deems necessary.

After having made the investigation herein described, the commission is authorized and directed to issue the necessary order or orders declaring the operations or acts to be subject to, or not subject to, the provisions of this title. *In the event the operations or acts are found to be subject to the provisions of this title, the commission is authorized and directed to issue cease and desist orders to all parties involved in the operations or acts.* (Emphasis added).

- 9 RCW 81.80.075(4) subjects persons who engage in business as a household goods carrier in the state of Washington without the required permit to a penalty of up to \$5,000 for each violation. In deciding the penalty amount to be imposed per violation, RCW 81.80.075(4)(b) requires the Commission to consider two factors: (a) willingness to comply with the provisions of RCW 81.80.070 and the rules governing household goods carriers contained in WAC 480-15 and (b) compliance history.
- 10 RCW 81.80.355 makes it unlawful for persons to advertise to transport property other than household goods for compensation in Washington as a common carrier without a permit from the Commission authorizing such transportation.⁶ RCW 81.80.360 makes applicable to such activity the penalty provisions in RCW 81.04.380 - .405.
- 11 RCW 81.77.040 makes it unlawful to haul solid waste in Washington for compensation without first obtaining from the Commission a certificate of public convenience and necessity. The statute provides that “[o]perating for the hauling of solid waste for compensation includes advertising, soliciting, offering, or entering into an agreement to provide that service.” Violations of RCW Chapter 81.77 are gross misdemeanors and are subject to the penalty provisions in RCW 81.04.380 - .405.

Facts and Analysis

- 12 Staff became aware of Dolly’s operations in March 2015 after receiving information concerning the Company from one or more permitted household goods carriers operating in Washington and upon reviewing various publications that included articles describing the Company’s operations.⁷ On March 20, 2015, staff sent Dolly a letter notifying it that the Commission had received information about the Company’s operations and had reviewed the Company’s website, getdolly.com.⁸ The letter informed Dolly that the Commission regulates the moving of household goods items and that only permitted household goods carriers may move these items for compensation. The letter also explained that any person found operating or advertising as a household goods carrier without the required commission-issued permit is subject to a penalty of \$5,000 per violation.

⁶ See RCW 81.80.010(1), (3), and (6).

⁷ Investigation Report, Dolly, Inc., December 2017, at 5. TR. 12:19-13:2.

⁸ Exh. SP-1.

- 13 Dolly's web pages include its "Terms of Service."⁹ Customers who download Dolly's mobile application or otherwise access or use the Dolly Internet-based platform "agree to be bound by all of the terms" set forth in the Dolly Terms of Service.¹⁰ Customers are not required to enter, nor is there evidence that they do, in fact, enter, into a separate agreement with any household goods carrier Dolly may have engaged to conduct the physical move of the customer's household goods. Dolly relies on a "network of Helpers" who perform "services" for Dolly's customers including "loading, unloading, moving, hauling, packing, lifting, assembly or disassembly" of the customers' specified "items."¹¹ In other words, Dolly, using its Helpers, agrees with customers who use the Dolly platform to perform all the functions more typically carried out by traditional moving companies permitted by the Commission. Customers pay Dolly directly, using a credit card.¹²
- 14 Dolly does "not represent or warrant that any Helper will meet [the customer's] expectations or instructions in performing any Services." Dolly's Terms of Service also provide that any dispute regarding performance "is between [the customer] and the applicable Helper." Dolly states it is "not responsible for the replacement or repair of any ... personal property that may be damaged by a Helper while performing the Services" that Dolly offers.¹³ Dolly's Terms of Service "to the extent not prohibited by law" disavow any liability to the customers for loss of their property or "other damages or losses." The Terms also require customers to give up any right they may have to litigate, and instead require mediation and then arbitration of any disputes with Dolly, and limit the manner in which customers can seek relief from Dolly.
- 15 Dolly's website identifies the Company's "Most Common" services as "Mini and Small Moves," "Apartment Moves," and "Craigslist and Offerup Pick-up and Delivery."¹⁴ According to the Company's website, other services offered by Dolly include "Retail Store Delivery," "Storage Moves," and "Junk Removal."¹⁵ The website states that "Dolly

⁹ Exh. SP-6.

¹⁰ *Id.*, page 1.

¹¹ *Id.*, page 2.

¹² *Id.*

¹³ *Id.*, page 5.

¹⁴ Exh. SP-7 at 1. *See also* TR. 31:12-16.

¹⁵ Exh. SP-7 at 2. *See also* TR. 31:17-32:10.

is your go-to source for finding local moving and delivery help” and “is a fast, easy, and affordable way to get help moving furniture between apartments, pick up that exercise gear on Craigslist or to get stuff home from stores like Lowe’s, Crate & Barrel, and IKEA.”¹⁶

- 16 Exhibits SP-8 through SP-17 show additional advertisements of moving services on a billboard near Seattle, and on Facebook, Twitter, LinkedIn, iTunes, Craigslist, YouTube, Pinterest, and Instagram, and a Yelp review in the categories of “Movers, Couriers & Delivery Services, Junk Removal & Hauling.” The Yelp page is “claimed” by Dolly, meaning Dolly can interact with its customers, or anyone else, who posts a review.¹⁷
- 17 Dolly’s witness, Kevin Shawver, sponsored additional exhibits showing relatively current versions of the Company’s website and its advertising on LinkedIn, iTunes, Facebook, Twitter, YouTube, Pinterest, Instagram, and Yelp.¹⁸ These confirm Staff’s evidence that Dolly holds itself out as a household goods mover, a motor freight common carrier, and a hauler of solid waste. For example, Exhibit KS-3 includes in its description of Dolly’s “Moving Services We Provide” as including “Small Apartment Moves,” “Retail Store Delivery,” and “Junk Removal,” including “trash removal and responsible disposal.” In other words, Dolly advertises household goods moves, transportation of property other than household goods, and solid waste pick-up, hauling, and disposal. Additional language in the same exhibit states that Dolly has “over 2,000 Helpers who are ready to help you with your apartment move, IKEA delivery, furniture delivery, furniture donation, dump run, junk removal, storage unit move, mattress removal, office move, and everything in between.”
- 18 Considering the evidence discussed above, none of which is disputed,¹⁹ Dolly unquestionably meets the statutory definitions of “household goods carrier,” “common carrier,” and “solid waste hauler” because it:
- Advertises, solicits, and offers on its website and social media to transport for compensation, by motor carrier, household goods in the state of Washington.

¹⁶ Exh. SP-7 at 5.

¹⁷ Exh. SP-17.

¹⁸ See Exhs. KS-1-9.

¹⁹ Dolly denies the operative allegations in Staff’s Complaint, but as discussed here offered no substantive evidence disputing the allegation. To the contrary, as discussed here, the evidence Dolly offered serves to support, not refute, the Complaint’s allegations.

- Enters into agreements to transport household goods for compensation in the state of Washington as indicated in its Terms of Service.
- Advertises, solicits, and offers on its website and social media, and enters into agreements to transport for compensation, by motor carrier, property other than household goods in the state of Washington.
- Advertises, solicits, and offers on its website and social media, and enters into agreements to transport solid waste for compensation.

19 Dolly does not have, nor has it applied for, authority to conduct itself as a household goods carrier in Washington. Dolly's activities accordingly violate RCW 81.80.010(5) and 81.80.075. Dolly does not have, nor has it applied for, authority to conduct itself as a common carrier of property other than household goods in Washington. Its advertisements for such services accordingly violate RCW 81.80.355. Dolly does not have, nor has it applied for, authority to conduct itself as a hauler of solid waste for compensation in Washington. Its advertisements for such services accordingly violate RCW 81.77.040.

Affirmative Defenses

- 20 Dolly alleged in its Answer that "staff's investigation report contains extensive factual errors,"²⁰ but the Company made no specific allegations of error and offered no evidence showing any factual errors in the report. Nor did the Company present or develop through testimony at hearing any evidence that refutes the factual allegations included in Staff's Investigation Report, the testimony of its witnesses, or the documentary evidence the Commission received during the hearing. Indeed, the record evidence, including the evidence Dolly presented, supports fully the facts stated in Staff's Investigation Report.
- 21 Dolly's additional affirmative defenses likewise are unsupported by any evidence or argument in the record. Indeed, the Company's first four affirmative defenses—failure to state a claim upon which relief can be granted; full compliance with Washington Law; no violation of any Commission statute or rule; overbreadth in the application of Commission statutes and rules—are belied by the evidence, as discussed in this Order.
- 22 Dolly's final "affirmative defense" was that "Commission Staff, after a thorough review of Dolly operations, informed Dolly that it would not approve its application for a

²⁰ Dolly Answer and Affirmative Defenses at 6.

household goods carrier permit.²¹ Even if this was true, it is simply irrelevant to any issue in this proceeding. Moreover, Ms. Paul testified that Staff “didn’t tell Dolly that we would deny their application” and gave technical assistance in a meeting with the Company including guidance on changes in the Company’s business model that would help if it did apply.²² In fact, Dolly never submitted an application to the Commission. Even if the Company had applied, and was refused, this would not relieve it from being classified as a company doing business that requires a permit or certificate, nor would it relieve the Company from liability for penalties imposed in connection with facts and events that occurred in the past.

Penalties

- 23 Staff recommends that the Commission assess Dolly a penalty of up to \$5,000 for each of the 11 advertisements by the Company offering to transport household goods in violation of RCW 81.80.010(5) and RCW 81.80.075, as evidenced in the record of this proceeding. In addition, Staff recommends that the Commission assess Dolly a penalty of up to \$1,000 for each of the 11 separate violations of RCW 81.80.355. Finally, Staff recommends that the Commission assess Dolly a penalty of up to \$1,000 for each of the three separate violations of RCW 81.77.040. Staff thus recommends a total penalty of up to \$69,000 for all of the alleged violations.
- 24 The Commission recognizes 13 factors that inform its decisions on penalties in individual cases. Eleven of these factors are identified in a policy statement the Commission issued on January 7, 2013, in Docket A-120061. The remaining two factors are identified in statute.²³
- 25 The two statutory factors are stated in RCW 81.80.075, as follows:
- The carrier’s willingness to comply with the requirements of RCW 81.80.070 and the Commission’s administrative rules governing household goods carriers.
 - The carrier’s history of compliance with chapter 81.80 RCW.

²¹ *Id.*

²² TR. 26:1-9.

²³ RCW 81.80.075

- 26 Dolly has not shown an ability or willingness to comply with applicable law and has a three-year long history of non-compliance with the provisions of Title 81 RCW.
- 27 The facts demonstrate that Dolly has been operating and apparently continues to operate in Washington in defiance of applicable law. There is no evidence showing any cessation in Dolly's operations since the Company initially was informed on March 20, 2015, that it was at risk of incurring penalties for conducting operations not in compliance with various statutes and rules.
- 28 It appears from the record that Dolly's business model was never designed to conform to existing laws and regulations governing household goods movers in Washington. Rather, Dolly sought changes to the Commission's rules governing the household goods moving business to conform to Dolly's conception of what it should be, rather than to conform its operations to meet existing laws and regulations the legislature and the Commission have determined are appropriate to protect consumers.²⁴ Following Governor Inslee's affirmance of the Commission's denial of Dolly's rulemaking petition on January 12, 2018,²⁵ the Commission provided Dolly with technical assistance on writing legislation that could support changes in the household goods rules.²⁶
- 29 Our brief analysis of Dolly vis-a-vis the factors affecting penalties that the Commission identifies in its policy statement follows:
- 30 *How serious or harmful the violation is to the public.* There is no evidence in the record to substantiate significant actual harm arising from Dolly's operations. However, Dolly's business operations deny consumers in Washington the protections afforded by RCW Chapter 81.80 and the Commission's rules in WAC Chapter 480-15. Dolly's customers are denied the protections provided by the Commission's rules concerning public liability

²⁴ See TR. 21:7-25:2.

²⁵ See Exh. SP-5.

²⁶ TR.25:3-13. We note in this connection that the Commission did not oppose, and provided testimony concerning, House Bill 2604 and Substitute Senate Bill 6234 during the 2018 session of the Washington legislature. Had this legislation passed into law the Commission's statutory authority over household goods carriers and other common carriers would have changed. These bills did not become law. However, in its Supplemental Operating Budget, ESSB 6032, the legislature directed "the Commission to convene a task force to make recommendations and report to the legislature regarding the most effective method of regulation of digital application-based micro-movers and the small goods movers that utilize their digital application. The report is due to the legislature by December 15, 2018." ESSB 6032, Sec. 141(6).

and property damage insurance (WAC 480-15-530), cargo insurance (WAC 480-15-550), criminal background checks of drivers and helpers (WAC 480-15-555), equipment safety requirements (WAC 480-15-560), and driver safety requirements (WAC 480-15-570).

- 31 *Whether the violation is intentional.* Dolly was informed by Staff on a number of occasions that it was operating as a household goods carrier without the required permit. The violations thus were intentional.
- 32 *Whether the Company self-reported the violation.* Dolly did not report any violation under RCW Chapter 81.80, RCW Chapter 81.77, or the Commission's rules.
- 33 *Whether the Company was cooperative and responsive.* The evidence is mixed, but overall it supports a finding that the Company was reasonably cooperative in terms of interacting with the Commission.
- 34 *Whether the Company promptly corrected the violations and remedied the impacts.* The short answer is "no." Dolly continues to operate in violation of applicable statutes and rules.
- 35 *The number of violations.* In addition to the 25 violations shown by the evidence in this case, evidence of the growth in Dolly's revenues over the past three years suggests many more violations have occurred. The Company's revenues increased from \$1,058,465.00 in 2015 to \$4,186,559.99 for the months January – August, 2017.²⁷
- 36 *The number of customers affected.* Again, this is unclear but the number appears to be substantial considering evidence of the Company's revenues in Washington.
- 37 *The likelihood of recurrence.* Dolly's business is ongoing, and the violations will likely continue and recur.
- 38 *The Company's past performance regarding compliance, violations, and penalties.* The Company received effective notification that it should cease and desist operating as a household goods company and has had contacts with Staff informing the Company it is operating as a household goods mover. The Company has not changed its business practices or obtained a permit to legally operate as a household goods carrier, as a transporter of property other than household goods, or as a solid waste hauler in the state of Washington. The Company is charged with knowledge of the law and plainly has continuously operated as a household goods carrier by advertising, soliciting, offering, or

²⁷ Investigation Report, Dolly, Inc., December 2017, at 6.

entering into agreements to transport household goods without the necessary permit required for such operations.

- 39 *The company's existing compliance program.* There is no evidence of any compliance program.
- 40 *The size of the company.* Dolly is a relatively small company with few employees, but it has significant and growing revenues.
- 41 The Commission does not wish to stifle innovation and positive change in any industry it regulates.²⁸ The avenues for affecting such change, however, do not include Commission acquiescence in continuing violations of Washington statutes and Commission rules. The evidence shows that Dolly's efforts to participate in the Washington household goods moving industry following the Company's vision of how the industry should operate and be regulated has resulted in numerous violations of the laws and rules governing how the industry currently is required by law to operate. It is appropriate that the Commission assess penalties for this unlawful behavior and that the Commission require the Company to cease and desist from such behavior, including advertising, soliciting, offering, or entering into agreements to transport household goods unless and until it secures from the Commission the necessary permit for such activities and brings its operations fully into compliance with all applicable laws.
- 42 All things considered, the Commission determines that it should impose a penalty of \$69,000 reflecting a penalty assessment of \$5,000 for each of 11 violations of the prohibition against entering into agreements to transport household goods in Washington without the required permit, and a penalty assessment of \$1,000 for each of eleven violations of the prohibition against advertising, soliciting, or offering to transport freight other than household goods and three violations of the same prohibition in connection with hauling solid waste in Washington without the required permit or certificate. The Commission concludes that it should, and is required by statute, to order Dolly to cease and desist from these activities.²⁹
- 43 Viewing compliance as its paramount interest in proceedings such as this one, the Commission will suspend one half, or \$34,500, of the penalty amount conditioned on

²⁸ See *supra*. n.26.

²⁹ See *supra* n.5.

Dolly ceasing and desisting fully from activities such as described in this order that define it under the Commission's governing statutes as a household goods carrier, a common carrier transporting property other than household goods (*i.e.*, a motor freight carrier), and a solid waste hauler. This means, among other things, that Dolly must immediately state clearly in its web-based application on the Internet, and in its advertising on Facebook, Twitter, Pinterest, and any other social media sites or other platforms it uses or has used to make its services known, that it does not offer or perform services in the state of Washington as a household goods carrier, as a common carrier transporter of property other than household goods, or as a solid waste hauler. The Commission will investigate whether the Company complies with this condition on, or shortly after, 10 days following the date this Initial Order becomes final by operation of law or following affirmation by the Commission on review. Any failure to comply with this condition at that time, or subsequently within a period of two years, will be duly noticed by the Commission and the suspended penalty amount of \$34,500 will be due and payable within five days following the date of Commission notice without further action by the Commission.

- 44 The penalty amount of \$34,500 not suspended by this Order is due and payable to the Commission within 10 days following the date this Initial Order becomes final by operation of law or following affirmation by the Commission on review.

FINDINGS AND CONCLUSIONS

- 45 (1) The Commission is an agency of the State of Washington vested by statute with authority to regulate persons engaged in the business of transporting household goods, property other than household goods, and solid waste for compensation over public roads in Washington.
- 46 (2) The Commission has jurisdiction over the subject matter of this proceeding and over Dolly, Inc.
- 47 (3) It is unlawful, under RCW 81.80.075(1), to operate as a household goods carrier in Washington without first obtaining the required permit from the Commission. Any person who engages in business as a household goods carrier without the required permit is subject to a penalty of up to five thousand dollars per violation under RCW 81.80.75(4).

- 48 (4) Since March 2015, using at least 11 separate platforms, Dolly, Inc. continuously has advertised, solicited, or offered to transport household goods, for compensation, by motor vehicle, within the state of Washington, without first having obtained a household goods carrier permit from the Commission, thus violating RCW 81.80.075.
- 49 (5) Dolly, Inc. is a "household goods carrier" as that term is defined in RCW 81.80.010(5) because it has continuously since 2015 advertised, solicited, offered, or entered into agreements to transport household goods. RCW 81.80.075(1) provides that "No person shall engage in business as a household goods carrier without first obtaining a household goods carrier permit from the commission."
- 50 (6) Dolly, Inc. has neither applied for nor obtained a permit from the Commission authorizing it to conduct business as a household goods carrier.
- 51 (7) Dolly violated RCW 81.80.75(1) at least 11 times since 2015.
- 52 (8) RCW 81.04.510 authorizes and requires the Commission to order an unpermitted household goods carrier such as Dolly, Inc. to cease and desist immediately its activities. Any person who engages in business as a household goods carrier in violation of a cease and desist order issued by the Commission under RCW 81.04.510 is subject to a penalty of up to ten thousand dollars per violation under RCW 81.80.75(5).
- 53 (9) Since March 2015, using at least 11 separate platforms, Dolly, Inc. continuously has advertised, solicited, or offered to transport property other than household goods, for compensation, by motor vehicle, within the state of Washington, without first having obtained a household goods carrier permit from the Commission, thus violating RCW 81.80.355 at least 11 times. Dolly is subject to a penalty of up to one thousand dollars per violation. The Commission is authorized and required by RCW 81.04.510 to order Dolly, Inc. to cease and desist immediately from these activities.
- 54 (10) Since March 2015, using at least three separate platforms, Dolly, Inc. continuously has advertised, solicited, or offered to haul solid waste, for compensation, by motor vehicle, within the state of Washington, without first having obtained a certificate of public convenience and necessity from the Commission, thus violating RCW 81.77.040 at least three times. Dolly is subject to a penalty of up to one thousand dollars per violation. The Commission is

authorized and required by RCW 81.04.510 to order Dolly, Inc. to cease and desist immediately from these activities.

ORDER

THE COMMISSION ORDERS:

- 53 (1) Dolly, Inc. is classified as a household goods carrier within the state of Washington, a common carrier transporting property other than household goods in the state of Washington, and a solid waste company offering to pick up, transport, and dispose of solid waste in Washington.
- 54 (2) Dolly, Inc. is required immediately to cease and desist operations as a household goods carrier within the state of Washington, a common carrier transporting property other than household goods in the state of Washington, and a solid waste company offering to pick up, transport, and dispose of solid waste in Washington, and the Company must refrain from all such operations unless and until it first obtains a permit or certificate from the Commission.
- 55 (3) Dolly, Inc. is assessed a penalty of \$69,000, as discussed in the body of this Order. A \$34,500 portion of the penalty is suspended for a period of two years from the date of this Order, and waived thereafter without further action by the Commission, provided Dolly, Inc. timely pays the portion of the penalty that is not suspended and refrains permanently from further operations as a household goods carrier, a common carrier transporting property other than household goods, and a solid waste hauler in the state of Washington without first obtaining the required permits and certificate from the Commission. The remainder of the penalty, \$34,500, is due and payable within 10 days following the date on which this Initial Order becomes final by operation of law, or otherwise.
- 56 (4) Dolly Inc. is required to state clearly in its web-based application on the Internet and in its advertising on Facebook, Twitter, Pinterest, and any other social media sites or other platforms it uses or has used to make its services known that it does not offer or perform services in the state of Washington as a household goods carrier, as a common carrier transporting property other than household goods, or as a solid waste hauler. The Commission will investigate whether the Company complies with this condition on, or shortly after, 10 calendar days following the date this Initial Order becomes final by operation of law or following affirmation

by the Commission on review. Any failure to comply with this condition will be duly noticed by the Commission and the suspended penalty amount of \$34,500 will be due and payable within five days following the date of Commission notice, without further action by the Commission being required.

- 57 (5) The Commission retains jurisdiction over the subject matter and the parties to this proceeding to effectuate the terms of this Order.

DATED at Olympia, Washington, and effective ~~March 29, 2018~~ April 9, 2018.

Dennis J. Moss
Administrative Law Judge

NOTICE TO THE 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*. Section (3) of the rule identifies what you must include in any petition as well as other requirements for a petition. WAC 480-07-825(4) states that any party may file an *Answer* to a Petition for review within (10) days after service of the petition.

WAC 480-07-830 provides that before the Commission enters 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. The Commission will not accept answers to a petition to reopen unless the Commission requests answers by written notice.

RCW 80.01.060(3), as amended in the 2006 legislative session, 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.

Any Petition or Response must be electronically filed through the Commission's web portal as required by WAC 480-07-140(5). Any Petition or Response filed must also be electronically served on each party of record as required by WAC 480-07-140(1)(b).

Exhibit 3

Service Date: May 18, 2018

**BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION**

In the Matter of Determining the Proper
Carrier Classification of, and Complaint
for Penalties Against

DOCKET TV-171212

ORDER 04

FINAL ORDER DENYING PETITION
FOR ADMINISTRATIVE REVIEW OF
CORRECTED ORDER 02

DOLLY, INC.

BACKGROUND

- 1 On January 18, 2018, the Washington Utilities and Transportation Commission (Commission) entered Order 01, Order Instituting Special Proceeding; Complaint Seeking to Impose Penalties; and Notice of Mandatory Appearance at Hearing (Order 01) initiating this docket on its own motion. Order 01 alleged that Dolly, Inc. (Dolly) should be classified as a household goods carrier under RCW 81.80.010(5) because it has advertised, solicited, offered, or entered into one or more agreements to transport household goods, for compensation, by motor vehicle, within the state of Washington. Order 01 further alleges that Dolly has advertised as a motor freight carrier for the transportation of property other than household goods without first obtaining a common carrier permit in violation of RCW 81.80.070, and that Dolly has operated as a solid waste collection company by advertising for the hauling of solid waste for compensation without first obtaining a certificate of public convenience and necessity in violation of RCW 81.77.040.
- 2 On March 13, 2018, the Commission convened a brief adjudicative proceeding in Olympia, Washington before Administrative Law Judge (ALJ) Dennis J. Moss.
- 3 On March 29, 2018, the Commission entered Order 02 in this docket, its Initial Order Classifying Respondent as a Household Goods Carrier; Ordering Respondent to Cease and Desist; Imposing and Suspending Penalties on Condition of Future Compliance. Initial Order 02 found that Dolly: 1) engaged in business as a household goods carrier 11 times by advertising moving services on its Company website, billboards, Facebook, Instagram, Twitter, LinkedIn, iTunes, Craigslist, YouTube, Pinterest, Yelp, and in other newspaper articles; 2) advertised the transportation of property for compensation using those same mediums; and 3) operated as a solid waste collection company on three occasions by advertising solid waste hauling services on its website. Initial Order 02

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required Dolly to cease and desist operating as a household goods carrier, common carrier, and solid waste collection company; assessed a \$69,000 penalty for violations of state laws; and required Dolly to remove its Internet presence.

- 4 On April 2, 2018, Commission staff (Staff) filed a Petition for Review seeking to correct Order paragraph 4 in Order 02, which required Dolly “to remove immediately its web-based application from the Internet and its presence from Facebook, Twitter, Pinterest, and any other social media sites or other platforms it uses or has used to make its services known.” Staff contended this requirement was overbroad and could be construed as violating the extraterritoriality doctrine of the dormant commerce clause of the United States Constitution because it impacted Dolly’s ability to conduct business in other states.
- 5 The presiding ALJ treated the filing as a motion to correct an obvious error pursuant to WAC 480-07-875(2).¹ On April 9, 2018, the Commission issued a Notice of Correction of Initial Order (Notice) and served Corrected Order 02, which amends paragraph 43 and Order paragraph 4 of the original Order 02.² The Notice confirmed that the period during which parties could file petitions for, or the Commission could initiate, administrative review of the initial order would run from the date that Corrected Order 02 was served on April 9, 2018.
- 6 On April 12, 2018, Dolly filed an Answer to Staff’s Petition for Administrative Review. Dolly expressed support for Staff’s Petition, and raised additional arguments contesting Order 02.
- 7 On April 13, 2018, Staff filed a letter responding to Dolly’s Answer. Staff asserted that Dolly’s Answer, which requested the Commission to either rescind Order 02, stay its effectiveness, or modify the penalty, went well beyond the limits of a response to Staff’s Petition. In essence, Staff argued, Dolly filed its own petition for review. Staff requested

¹ WAC 480-07-395(4) provides that “[t]he Commission will liberally construe pleadings and motions with a view to effect justice among the parties.”

² In its Notice, the Commission explained that “Although Order 02 clearly is concerned with, and discusses exclusively, Dolly’s activities in the state of Washington, it is true that the quoted language from the order does not recognize that Dolly’s Internet presence is not limited to the state of Washington. Dolly, in fact, operates in states other than Washington and may rely on the same Internet presence and platforms in other states. Overlooking these facts is an obvious error in Order 02 that requires correction, as provided under WAC 480-07-875(2).”

the Commission notify the parties whether the Commission would accept a second petition for review from Dolly and how Staff should respond.

- 8 On April 13, 2018, by email to the parties, the Administrative Law Director provided the following clarification:

WAC 480-07-395(4) provides for liberal construction of pleadings and motions to effect justice among the parties. Corrected Order 02, entered on April 9, treated Staff's petition as a *motion* for correction of an obvious error under WAC 480-07-875 and not as a petition for review under WAC 480-07-825. Although unnecessary under the circumstances, the Commission considers Dolly's answer to be one supporting Staff's motion.

Staff's motion and Dolly's answer to that motion were fully resolved by the entry of Corrected Order 02 and require no further action in this proceeding. It is not necessary to rescind Order 02; it is effectively and completely replaced by Corrected Order 02. Please note that Corrected Order 02 differs substantively from the original order only to the extent corrected. Also note that Corrected Order 02 is the only effective initial order in this docket. Corrected Order 02 is subject to a petition for review within the time-frame allowed for such petitions following the service date of the order. Any petition for review filed with respect to Corrected Order 02 should address only the terms and requirements of Corrected Order 02.

- 9 On April 19, 2018, Dolly filed a Petition for Administrative Review (Petition).³ In its Petition, Dolly contends that Staff's Petition was improperly filed, that the Commission erred in construing Staff's Petition as motion to correct Initial Order 02, and that Corrected Order 02 improperly addressed and changed substantive legal rulings without identifying the clerical errors it corrected.⁴ Dolly further contends that Initial Order 02 is the only effective order in this docket. In the alternative, Dolly argues that Corrected

³ On April 20, 2018, Staff filed a Motion for a Continuance to Respond to Dolly's Petition for Review. On April 23, Dolly filed a Response Opposing Staff's Motion for Continuance. On April 24, the Commission entered Order 03, Granting Staff's Motion for Continuance.

⁴ The Commission's Notice explained that Corrected Order 02 includes several copy edits that correct scrivener's errors in the original order, but did not identify the errors individually. But for the need to correct the substantive error in Order 02, the Commission would not have elected to issue an errata to address the clerical errors, which were minor.

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Order 02 violates numerous provisions of the United States Constitution. Dolly requests the Commission rescind Corrected Order 02 in its entirety.

- 10 On May 8, 2018, Staff filed an Answer to Dolly's Petition (Answer). Staff urges the Commission to affirm Corrected Order 02 because: 1) the record evidence supports a finding that Dolly enters into agreements to transport household goods, property, or solid waste, and also holds itself out as a carrier through advertisements; 2) the ALJ properly imposed a penalty for each of Dolly's advertisements; 3) Corrected Order 02 does not infringe on Dolly's constitutional rights; 4) the entry of Corrected Order 02 comported with the Commission's rules, and, in any event, did not prejudice Dolly.

DISCUSSION

- 11 We deny Dolly's Petition for Administrative Review. Corrected Order 02 appropriately resolves the disputed matters in this proceeding and imposes a reasonable penalty relative to the violations at issue. We adopt Corrected Order 02 as our own, as expanded by the discussion below.
- 12 As Staff notes in its Answer, Dolly's Petition presents two alternative requests for relief, alleging a total of 25 legal errors, in the following general categories:
- Classification of Dolly as a household goods carrier, a common carrier, and a solid waste collection company;
 - Correction of Order 02;
 - Constitutional challenges;
 - Penalty calculation;
 - The relationship between the Commission's classification proceeding and a legislative budget proviso.
- 13 We address each of Dolly's claims, by topic, in turn.
- 1. Classification of Dolly as Commission-regulated Carrier**
- 14 We affirm the ALJ's finding that Dolly should be classified as a household goods carrier, a common carrier, and a solid waste collection company.
- 15 RCW 81.80.010(5) defines "household goods carrier" as "a person who transports for compensation, by motor vehicle within this state, or who advertises, solicits, offers, or enters into an agreement to transport household goods."

ORDER 04

- 16 Similarly, RCW 81.80.355 makes it unlawful for persons to advertise to transport property other than household goods for compensation in Washington as a common carrier without a permit from the Commission authorizing such transportation. In addition, RCW 81.77.040 makes it unlawful to operate for the hauling of solid waste in Washington for compensation — including advertising, soliciting, offering, or entering into an agreement to provide that service — without first obtaining from the Commission a certificate of public convenience and necessity.
- 17 Dolly operates a digital application and website used by consumers who wish to purchase the transportation of household goods, other property, or solid waste. Consumers arrange this transportation by providing Dolly with information such as the type of goods the consumer wants transported, the origin and destination addresses, and the date and time for transportation. Dolly provides a guaranteed price quote, and the consumer pays Dolly for the transportation services. Dolly uses independent contractors, or “Helpers,” to perform the physical transportation of goods.
- 18 Based on this business model, Corrected Order 02 found that Dolly unquestionably met the statutory definitions of “household goods carrier,” “common carrier,” and “solid waste hauler” because it: 1) advertises, solicits, and offers on its website and social media to transport for compensation, by motor carrier, household goods in the state of Washington; 2) enters into agreements to transport household goods for compensation in the state of Washington as indicated in its terms of service; 3) advertises, solicits, and offers on its website and social media, and enters into agreements, to transport for compensation, by motor carrier, property other than household goods in the state of Washington; and 4) advertises, solicits, and offers on its website and social media, and enters into agreements, to transport solid waste for compensation.
- 19 Dolly first argues that it does not provide regulated services because it does not own any moving trucks and does not employ the individuals who perform its moving services. We disagree. The Commission has addressed whether companies who engage third parties to perform regulated activities are subject to Commission jurisdiction several times in the context of both household goods and passenger transportation, and has consistently reached the same conclusion: such companies are subject to the Commission’s jurisdiction.⁵

⁵ In Docket TC-143691 *et al*, the Commission specifically addressed the use of independent contractors to provide regulated service. In that case, an auto transportation carrier, Shuttle Express, Inc. (Shuttle Express) entered into agreements with its customers to provide auto transportation service, then subcontracted that service to limousine operators. Shuttle Express

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- 20 Most recently, in Dockets TV-170747 and TV-161308, we have classified as household goods carriers “persons alleged to be household goods movers subject to the Commission’s jurisdiction by virtue of their activities that typically involve the use of third party independent contractors to physically move a customer’s household goods from one location to another.”⁶ Like Dolly, those persons focused their operations on soliciting, offering, advertising, or entering into agreements to transport household goods rather than physically moving household goods using company employees and vehicles. In both of those dockets, we recognized that companies “need not physically transport goods to be classified as a household goods carrier.”⁷
- 21 The same is true of Dolly’s operations. Consumers contact Dolly to arrange transportation. Dolly then provides the consumer with a guaranteed price quote, and the consumer pays Dolly for services rendered. Dolly’s “terms of service” establish the rates, terms, and conditions under which the customer’s goods or solid waste will be transported. As Staff correctly observes, “the fact that Dolly then enters into a second agreement or subcontract to delegate its performance does not nullify the first agreement.”⁸ Dolly – not its Helpers – is the party ultimately responsible for complying with its customer agreements. Accordingly, Dolly’s “attempt to distinguish its activities from ‘conducting’ the move is a distinction without a legally significant difference.”⁹ The existence of a contractual relationship, regardless of who actually performs the service that Dolly agrees to provide, subjects Dolly to Commission regulation under RCW 81.80.075, RCW 81.80.070, and RCW 81.77.040.

collected payment from its customers, then remitted a portion thereof to the contracted driver. Shuttle Express unsuccessfully argued that the service was not subject to Commission regulation because it was provided in vehicles the company did not own, which were driven by drivers the company did not employ. Similarly, in the Commission’s final order in Docket TE-151667, a proceeding that classified Blessed Limousine, Inc. (Blessed Limousine) as a charter and excursion service carrier, we found that Blessed Limousine practice of subcontracting party bus services violated the public service laws.

⁶ *In the Matter of Determining the Proper Carrier Classification of, and Complaint for Penalties Against Transit Systems, Inc. d/b/a Moves for Seniors*, Docket TV-170747, Final Order 04 ¶ 10 (March 21, 2018).

⁷ *In re Determining the Proper Carrier Classification of, and Complaint for Penalties Against Ghostruck, Inc.*, Docket TV-161308, Order 05 ¶ 13 (May 31, 2017).

⁸ Staff’s Answer ¶ 21.

⁹ *Ghostruck Inc.*, Order 05 ¶ 13.

- 22 Next, Dolly argues that its terms of service do not create a contractual agreement because those terms do not conform to RCW 19.36 or Washington's statutory framework governing contract formation. We disagree. RCW 19.36 and Title 62A RCW do not apply to contracts for services.¹⁰ More to the point, public service laws forbid an "agreement." We agree with Staff that Dolly and its customers unquestionably enter into agreements.
- 23 We also find unconvincing Dolly's argument that the Commission is precluded from finding that the Company enters into agreements with its customers because Staff failed to produce written copies of any agreement. Staff correctly observes that the record contains sufficient circumstantial evidence that Dolly enters into such agreements. For instance, Dolly advertises that its services are available in Seattle, allows users to book a move in Seattle, and discloses its terms of service on its website. Moreover, Staff presented evidence that Dolly reported revenue for its operations in Washington. Overall, we find that the record amply demonstrates that Dolly enters into agreements with its customers to transport goods or solid waste.¹¹
- 24 Next, Dolly argues that it does not advertise regulated services. According to Dolly, it ensures that it "does not advertise that it performs regulated services" in Washington.¹² The record evidence shows, however, that Dolly advertises its services in a number of

¹⁰ RCW 19.36.010 is Washington's Statute of Frauds, which requires certain contractual agreements be reduced to writing. The primary purpose of the Statute of Frauds is to provide reliable evidence of the existence and terms of a contract. (See Restat 2d of Contracts, § Scope (2nd 1981)). The remainder of Chapter 19.36 RCW deals exclusively with the scope and enforceability of credit agreements. To the extent that the Uniform Commercial Code (UCC) affects basic contract law, those provisions are contained in Article 2, which governs the sale of goods in Washington. "Goods generally include all things which are moveable at the time of identification to the contract for sale." 25 David K. DeWolf *et al.*, *Washington Practice: Contract Law and Practice* §1:13, at 21. (2d ed. 2007).

¹¹ On September 25, 2017, Dolly filed a Petition to Amend Motor Carrier Rules or in the Alternative to Initiate Rulemaking in Docket TV-170999 that stated "Dolly is engaged in the business of arranging small goods transportation and labor services for customers in the state of Washington and in five other states," and "while there are hundreds of providers of traditional moving services in the state of Washington, Dolly is currently the ONLY provider of on demand micro-moving." It is disingenuous for Dolly to argue that there is insufficient evidence to support a finding that it enters into agreements to provide service in Washington when it has admitted in other proceedings that it has and does.

¹² Dolly Petition ¶ 30.

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ways, including on its own website and on numerous social media platforms. Dolly's advertisements include the following language:

- "Request a truck and Helper with the tap of a button, then relax. We'll keep the large items off the roof of your car, save you a trip to the chiropractor, and help make moving things – big and small – easy and fast."¹³
- "Dolly – Truck and Muscle Any Time you Need it. Use our app to load, haul, and deliver just about anything, whenever you need it!"¹⁴
- "Dolly provides the truck in fact the labor to promptly and affordably move your stuff when you need it."¹⁵
- "Dolly Helpers will remove and haul away your junk. Includes trash removal and responsible disposal."¹⁶
- "Retail Store Delivery. Convenient, faster and often cheaper than traditional store delivery options."¹⁷

25 We find that these statements amount to advertising to transport household goods, other property, and solid waste despite the existence of other statements describing Dolly's Helpers as "independent contractors." In fact, none of Dolly's advertisements state directly that Dolly *does not* transport or haul items for its customers. Rather, the above-quoted language could lead a reasonable consumer to believe that Dolly owns trucks and employs its Helpers. As such, Corrected Order 02 properly concluded that Dolly holds itself out as a household goods carrier, common carrier, and solid waste collection company in its advertisements.

26 Dolly contends that its business model is unique, and that its operations fall outside the Commission's current statutory authority. We disagree. So long as the Commission is charged by the legislature with regulating companies that solicit, offer, advertise, and enter into agreements to transport goods or haul solid waste, companies who subcontract the services they agree to provide have two choices: obtain a permit from the

¹³ Paul, Exh. No. SP-9.

¹⁴ Paul, Exh. No. SP-10.

¹⁵ Paul, Exh. No. SP-13.

¹⁶ Paul, Exh. No. SP-7.

¹⁷ *Id.*

Commission, or cease and desist operations in Washington. As we noted in Docket TV-170999, this presents a unique problem for Dolly because both Dolly and its Helpers meet the statutory definition of a household good carrier. As such, Dolly and each of its Helpers must be permitted by the Commission.

- 27 Although we are cognizant of the challenges this presents, we are, first and foremost, obligated to regulate in the public interest. We reaffirm our position that, “although the digital marketplace may alter how customers obtain service, provisioning [household goods] moving service remains the same as it has been for centuries – using vehicles to move items from one household to another. We will not sacrifice safety and consumer protection for convenience, nor will we authorize entities purporting to be ‘brokers’ to do so.”¹⁸ Accordingly, we uphold the ALJ’s finding in Corrected Order 02 that Dolly must cease and desist its operations unless and until it obtains a permit from the Commission.

2. Correction of Order 02

- 28 Dolly asserts three claims related to the ALJ’s Notice of Correction: 1) Dolly lost its ability to appeal the corrected provision of the cease and desist order, 2) the correction prejudices Dolly, and 3) Dolly would not have supported Staff’s Petition for Review if it knew how the ALJ would treat Staff’s Petition.
- 29 Staff contends that the Commission should decline to adjudicate Dolly’s claims related to the ALJ’s correction of Order 02.¹⁹ We agree. Dolly cannot reasonably argue that it was deprived of its right to complain against a possible or arguable constitutional infirmity

¹⁸ *In the Matter of the Petition of Dolly, Inc. to Amend Motor Carrier Rules or in the Alternative to Initiate a Rulemaking*, Docket TV-170999, Order 01 ¶ 11 (October 31, 2017).

¹⁹ Dolly makes a number of claims related to Staff’s Petition for Administrative Review, which the Commission construed as a Motion to Correct an Obvious Error. Among them: 1) Staff’s April 2, 2018, Petition for Administrative Review was incorrectly filed under WAC 480-07-825, and should have been filed pursuant to WAC 480-07-610; 2) the presiding administrative law judge should have applied WAC 480-07-395(4) to correct Staff’s error and construe that Staff’s Petition was properly filed under 48-07-610, then apply the 10-day deadline to file answers rather than the 7-day deadline afforded under 480-07-610 or 480-07-375; and 3) its answer supporting Staff’s Petition was timely filed on April 12 pursuant to WAC 480-07-610. We find each of Dolly’s contentions meritless. First, any issue related to the way in which Staff styled its Petition was rendered moot by the ALJ’s decision to construe Staff’s Petition as a Motion to Correct. Moreover, Staff’s reference to WAC 480-07-825 was a clerical error that has no bearing on the substance of Staff’s request. Finally, Dolly provides no basis for its assertions that the Commission should have allowed the Company 10 days, rather than 7, to respond to Staff’s Motion, or that its response – filed 10 days after Staff filed its Motion – was timely.

that has since been cured, and thus rendered moot. Whether we affirm the ALJ's correction to the initial order or independently adopt that correction on review, the result is the same. Additionally, Dolly's answer to Staff's Petition contained the same arguments it later set forth in its own Petition; the Company is therefore unable to establish that it was somehow prejudiced or deprived of its right to be heard.

30 We find that the ALJ properly exercised his discretion to enter Corrected Order 02 for the reasons discussed below. As such, Corrected Order 02 replaced the original order in its entirety, and is the only effective order in this docket. WAC 480-07-875(2) provides that "the time available for any post-hearing review begins with the service of the correction, as to the matter corrected." Adjusting the timeframe for post-hearing review demonstrates that the rule contemplates the possibility that matters in need of correction may be substantive in nature. There would be no need for a party to challenge an error that had no potentially substantive affect, let alone be afforded an extension of time for doing so.

31 Dolly cites WAC 480-07-395(4) as a basis for its claim, which, it argues, expressly permits only correction of "errors or defects in pleadings, motions, or other documents that do not affect the substantial rights of the parties." Dolly removes this language from the context of the rule, which provides as follows:

The commission will liberally construe pleadings and motions with a view to effect justice among the parties. The commission will consider pleadings and motions based primarily on the relief they request and will not rely solely on the name of the document. The commission, at every stage of any proceeding, will disregard errors or defects in pleadings, motions, or other documents that do not affect the substantial rights of the parties.

32 Dolly's interpretation of WAC 480-07-395(4) is facially incorrect, and its argument thus fails. The relief Staff requested was to narrow language in Order 02 that was overbroad, unintentionally implicating as it did Dolly's advertising in other states. Dolly supported Staff on this issue. Corrected Order 02 provided the relief Staff requested.

3. Constitutional Challenges to Corrected Order 02

33 **Dormant Commerce Clause.** Dolly claims Corrected Order 02 violates the dormant commerce clause of the US Constitution because Congress has not authorized state regulation of its Internet activities. According to Dolly, Washington cannot regulate foreign and interstate commerce without Congress's express authority. Because Dolly uses its Internet presence to engage in commerce outside Washington, Dolly claims that any attempt to regulate its activities runs afoul of the commerce clause. Dolly's approach,

however, is inappropriate because it fails to undertake a complete commerce clause analysis. Although Dolly failed to meet its burden, we nevertheless address the Company's claim of error and dispose of it on the merits.

- 34 The commerce clause provides Congress with the power to regulate commerce "among the several states," which implicitly limits state power to burden interstate commerce.²⁰ This limitation is referred to as the "dormant commerce clause."²¹ Where Congress has not expressly granted regulatory authority to the states, courts review a dormant commerce clause challenge to state action using a two-part test. In other words, whether or not Congress has authorized state regulation is a threshold question that determines whether the dormant commerce clause applies, not an aspect of the dormant commerce clause analysis itself. Staff correctly observes that, "[e]ven where Congress did not authorize state regulation, the regulation may survive a dormant commerce clause challenge in multiple ways."²²
- 35 In *Rouso v. The State of Washington*, the Washington Supreme Court addressed whether a statutory prohibition on Internet gambling violated the dormant commerce clause. As a threshold matter, the Court examined whether Congress delegated its authority to regulate Internet gambling and found that it did not. Similarly, Congress has not delegated to the states its authority to regulate Internet advertising. Thus, we "must determine (a) whether the language of the statute openly discriminates against out-of-state entities in favor of in-state ones or (b) whether the direct effect of the statute evenhandedly applies to in-state and out-of-state entities."²³ If the statute does not openly discriminate and applies evenhandedly, it does not violate the dormant commerce clause if there is a legitimate state purpose and the burden imposed on interstate commerce is not "clearly excessive" in relation to the local benefit.²⁴ We address each inquiry in turn.
- 36 First, we find that the language in the Commission's public service laws that prohibits persons from operating as a household goods carrier, common carrier, or solid waste collection company without first obtaining a permit from the Commission is not

²⁰ *Bostain v. Food Express, Inc.*, 159 Wn.2d 700, 717, 153 P.3d 846 (2013).

²¹ *Id.* at 717-18.

²² Staff's Answer ¶ 45.

²³ *Rouso v. State*, 170 Wn.2d 70, 76, 239 P.3d 1084 (2010), citing *Ne. Bancorp, Inc. v. Bd. of Governors*, 472 U.S. 159, 174 (1985).

²⁴ *Id.*, citing *State v. Heckel*, 143 Wn.2d 824, 832, 24 P.3d 404 (2001).

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discriminatory.²⁵ The laws prohibit offering, soliciting, or advertising unauthorized services regardless of whether the individual or entity offering, soliciting, or advertising those services is located in Washington, in another state, or in another country. Second, the statute applies evenhandedly to in-state and out-of-state entities. As Staff notes, the Commission's public service laws are facially neutral with regard to the physical location of the persons to whom they apply. The public service laws thus pass muster under the first two prongs of the dormant commerce clause analysis.

- 37 Third, the public service laws, which require carriers to obtain permits so the Commission may carry out its legislatively-mandated duties to protect consumers and the public safety, serve a legitimate state purpose.
- 38 Finally, the burden imposed on interstate commerce is not "clearly excessive" in relation to the local benefit. Any burden to Dolly would arise only from requiring the Company to add a disclaimer to its advertisements informing consumers that its services are not available in Washington. As a point of clarification, Dolly may remove Seattle from its list of cities that it serves and remove its "Moving and Delivery Help in Seattle" page from its website to satisfy the cease and desist requirement.²⁶ The Company need not affirmatively state that it does not provide services in Washington; rather, it must ensure that consumers in Washington are not able to engage its services. The burden of undertaking such action is minimal, and cannot be characterized as "clearly excessive" in relation to the local benefit of ensuring the public safety is protected by Commission regulation.
- 39 **Ex Post Facto.** Dolly argues that Corrected Order 02 violates the Article I, Section 10 of the Constitution by imposing an *ex post facto* law. Dolly claims that Corrected Order 02 imposes a legal requirement that did not exist prior to the entry of that order. We disagree. As Staff notes in its Answer, Corrected Order 02 did not retroactively create liability; its cease and desist provisions simply create the possibility that Dolly will incur future liability should it choose to ignore the Commission's directive to stop advertising the availability of its unauthorized services to Washington consumers. In other words, Dolly was always required to obtain a permit before operating in Washington, and the public service laws make clear that "operating" includes advertising. While Dolly is

²⁵ RCW 81.80.75, RCW 81.77.040 and RCW 81.80.355.

²⁶ Presently, Dolly's website represents that it provides service in Seattle, Portland, San Diego, Denver, Chicago, Philadelphia, and Boston.

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correct that there is no explicit statutory requirement that it publish a disclaimer on its website, the law prohibits, and always has prohibited, Dolly from advertising services it is not authorized to provide. It logically follows that the Company must, in some way, alter its advertisements to ensure it no longer holds itself out as providing unauthorized services in Washington. As discussed above, this can be accomplished in more than one way. Even if Corrected Order 02 had been silent with respect to Dolly's advertisements, failure to discontinue its services in Washington (including its advertisements) would subject the Company to further enforcement action.

- 40 **Due Process.** Dolly argues that Corrected Initial Order 02 violates the procedural and substantive due process clauses of the Constitution. We disagree.
- 41 The procedural due process clause requires "notice and an opportunity to be heard."²⁷ Dolly claims that it was not given notice that it was required to publish a disclaimer on its website to make it known that its services are not available in Washington. However, the ALJ did not impose a cease and desist order and require Dolly to obtain permits because it failed to publish a disclaimer on its website. Dolly simply misunderstands Corrected Order 02. The corrections to Dolly's advertisements are required *prospectively* as just one aspect of Dolly's operations (including soliciting, offering, and providing regulated services) that the Company must cease and desist.
- 42 Dolly's procedural due process claim ultimately fails because the Company received notice in Order 01 that the special proceeding may result in a cease and desist order. The Complaint referenced statutory authority and requested relief in the form of a cease and desist order. The ALJ opened the hearing by noting the legislature's directive that the Commission order companies to cease and desist upon a finding that they provide regulated services without a permit. Dolly was also given an opportunity to be heard. Dolly presented witness testimony, evidence, and oral argument at hearing, and declined the ALJ's offer to brief its legal arguments.
- 43 Dolly's substantive due process claim is similarly without merit. Substantive due process protections forbid "arbitrary and capricious government action even when the decision to take action is pursuant to constitutionally adequate procedures."²⁸ Substantive due

²⁷ *State v. Rogers*, 127 Wn.2d 270, 275, 898 P.2d 294 (1995).

²⁸ *Amunrud v. Bd. of Appeals*, 158 Wn.2d 208, 218-19, 898 P.2d 294 (1995).

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process is reviewed under the rational basis standard.²⁹ A governmental action survives if it is rationally related to a legitimate state interest.³⁰ RCW 81.80.075 serves several legitimate state interests, as do RCW 81.77.040 and 81.80.070. Corrected Order 02 rationally serves the interests identified by the legislature in the manner it intended – protecting consumers and the public safety – and therefore does not deprive Dolly of substantive due process.

44 **First Amendment.** Dolly argues that Corrected Initial Order 02 violates the First Amendment of the Constitution, and that it must be rescinded in its entirety on that basis. We disagree.

45 Courts evaluate whether commercial speech may be restricted using a four-part test set out in *Central Hudson Gas & Elec. v. Public Serv. Comm'n.*³¹ The first prong of that test provides that for such speech to be protected, “it at least must concern lawful activity and not be misleading.”³² Dolly’s advertisements promote the unauthorized provision of regulated services. As such, Dolly’s advertisements are unlawful and receive no constitutional protection. Corrected Order 02 does not infringe on the Company’s commercial speech rights.³³

4. Penalty Calculation

46 RCW 81.80.075 provides that any person who engages in business as a household goods carrier is subject to a penalty of up to \$5,000 per violation. If the basis for the violation is advertising, each advertisement reproduced, broadcast, or displayed via a particular medium constitutes a separate violation. RCW 81.04.380 provides that any public service company that fails to comply with any provision of Title 81 RCW is subject to a penalty

²⁹ Staff’s Answer ¶ 53, citing *Amunrud v. Bd. of Appeals* at 220-222.

³⁰ *Id.* at 222.

³¹ *Central Hudson Gas & Elec. v. Public Serv. Comm'n* 447 U.S. 557 (1980).

³² *Id.* at 566. The remaining *Central Hudson* factors consider whether the government’s interest in restricting the speech is substantial, whether the restriction directly and materially serves the asserted interest, and whether the restriction is no more extensive than necessary. See *Kitsap County v. Mattress Outlet/Gould*, 153 Wn.2d 506 at 512 (2005).

³³ Dolly also argues that Corrected Order 02 imposes prior restraints on Dolly’s right to free speech by requiring Dolly to acquire a permit or license before speaking and by prohibiting certain speech. Dolly’s advertisements, however, receive no protection under the prior restraint doctrine because they are not protected speech. Dolly’s complaint related to the original order’s requirement that it remove its Internet presence is rendered moot by Corrected Order 02, which is the only effective order in this docket.

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of up to \$1,000 per violation. Every violation is a separate and distinct offense, as is every day's continuance. Corrected Order 02 imposed a \$69,000 penalty, calculated as follows:

- \$5,000 for each of the 11 violations RCW 81.80.075
- \$1,000 for each of the 11 violations of RCW 81.80.355
- \$1,000 for each of the 3 violations of RCW 81.77.040

47 Dolly argues that Order 02 incorrectly interprets and applies the Commission's penalty-imposing statutes, pointing specifically to the fact that the RCW 81.80.075 does not define the term "medium."³⁴ According to Dolly, both Staff and the presiding ALJ erred by treating "different internet websites as multiple mediums" and imposing "penalties based on each website, instead of on the singular medium."³⁵ We disagree.

48 In a colloquy with the ALJ, Dolly's counsel confirmed the Company's belief that different advertisements published in multiple newspapers – for example, in both the Olympian and the Seattle Times – constitute one advertisement because newsprint is the same medium. The statutory language, however, is not susceptible to Dolly's interpretation, and the Company failed to cite any authority to support its claim.³⁶ "Each" means "being one of two or more distinct individuals having a similar relation and often constituting an aggregate."³⁷ Moreover, a plain reading of the statute reveals that "each" modifies the word "advertisement," not the word "medium." Accordingly, we reject Dolly's argument as it relates to how penalties must be calculated.

49 We also affirm the penalty amount assessed by Corrected Order 02. The presiding ALJ undertook a thorough 13-factor analysis, which includes two factors identified in statute and 11 factors identified in a policy statement the Commission issued on January 7, 2013, in Docket A-120061.³⁸ Corrected Order 02 appropriately assessed a \$69,000 penalty, a \$34,500 portion of which is suspended for a period of two years, and then waived, conditioned on Dolly ceasing and desisting unauthorized operations as a household goods carrier, common carrier, and solid waste collection company. The penalty amount is

³⁴ Dolly's Petition ¶ 49.

³⁵ *Id.*

³⁶ At hearing, the presiding ALJ specifically requested that Dolly cite authority to substantiate its interpretation of the laws related to advertising penalties.

³⁷ See Merriam-Webster.com.

³⁸ The statutory factors are set out in RCW 81.80.075.

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supported by the evidence in the record and is proportionately punitive in light of the Company's past conduct. In addition, the suspended penalty significantly deters future violations.

5. Applicability of Budget Proviso

50 Dolly argues that the Washington state legislature passed a budget proviso that recognizes that current Commission statutes and regulations do not apply to Dolly's business model and thus Corrected Order 02 errs by concluding to the contrary. We disagree with Dolly's characterization. While the budget proviso is a clear indication of legislative interest in the regulation of companies like Dolly,³⁹ it does not effect a change in the law or affect our responsibility to enforce it. The legislature did not, by passing the proviso, order the Commission to cease enforcing the public service laws that do not allow for Dolly to operate as it does without a permit. The legislature also declined to amend the definition of household goods carrier, common carrier, and solid waste collection company to exclude companies like Dolly from those definitions.

51 Therefore, we find no merit in the legal arguments contained in the Company's Petition. Nonetheless, in light of the 2018 legislative deliberations on regulation of companies like Dolly, the enacted budget proviso with a report due by December 15, 2018, and likely consideration of legislation in the 2019 session, we will establish a due date for the penalty assessed in Corrected Order 02 that will allow for work on the study directed in the budget proviso to continue and to provide an opportunity for the 2019 legislature to amend current Commission statutes in this area if it so chooses. This postponement of the due date for the penalty assessed is contingent on the Company's full compliance with the terms of this Order, including those requiring it to cease and desist from operations described in and found unlawful in Corrected Order 02. Should the Commission find going forward that Dolly has failed to cease and desist from such operations, the full penalty assessed will become due immediately.

FINDINGS AND CONCLUSIONS

52 (1) The Commission is an agency of the State of Washington vested by statute with authority to regulate persons engaged in the business of transporting household

³⁹ The 2018 legislature also considered Senate Bill No. 6234 and House Bill No. 2604 which would have authorized the Commission to regulate carrier network companies and operators.

goods, property other than household goods, and solid waste for compensation over public roads in Washington.

- 53 (2) The Commission has jurisdiction over the subject matter of this proceeding and over Dolly, Inc.
- 54 (3) It is unlawful, under RCW 81.80.075(1), to operate as a household goods carrier in Washington without first obtaining the required permit from the Commission. Any person who engages in business as a household goods carrier without the required permit is subject to a penalty of up to five thousand dollars per violation under RCW 81.80.75(4).
- 55 (4) Since March 2015, using at least 11 separate platforms, Dolly, Inc. continuously has advertised, solicited, or offered to transport household goods, for compensation, by motor vehicle, within the state of Washington, without first having obtained a household goods carrier permit from the Commission, thus violating RCW 81.80.075.
- 56 (5) Dolly, Inc. is a "household goods carrier" as that term is defined in RCW 81.80.010(5) because it has continuously since 2015 advertised, solicited, offered, or entered into agreements to transport household goods. RCW 81.80.075(1) provides that "No person shall engage in business as a household goods carrier without first obtaining a household goods carrier permit from the commission."
- 57 (6) Dolly, Inc. has neither applied for nor obtained a permit from the Commission authorizing it to conduct business as a household goods carrier.
- 58 (7) Dolly, Inc. violated RCW 81.80.75(1) at least 11 times since 2015.
- 59 (8) RCW 81.04.510 authorizes and requires the Commission to order an unpermitted household goods carrier such as Dolly, Inc. to cease and desist immediately its activities. Any person who engages in business as a household goods carrier in violation of a cease and desist order issued by the Commission under RCW 81.04.510 is subject to a penalty of up to \$10,000 per violation under RCW 81.80.75(5).
- 60 (9) Since March 2015, using at least 11 separate platforms, Dolly, Inc. continuously has advertised, solicited, or offered to transport property other than household goods, for compensation, by motor vehicle, within the state of Washington, without first having obtained a household goods carrier permit from the Commission, thus violating RCW 81.80.355 at least 11 times. Dolly is subject to

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a penalty of up to \$1,000 per violation. The Commission is authorized and required by RCW 81.04.510 to order Dolly, Inc. to cease and desist immediately from these activities.

- 61 (10) Since March 2015, using at least three separate platforms, Dolly, Inc. continuously has advertised, solicited, or offered to haul solid waste, for compensation, by motor vehicle, within the state of Washington, without first having obtained a certificate of public convenience and necessity from the Commission, thus violating RCW 81.77.040 at least three times. Dolly is subject to a penalty of up to \$1,000 per violation. The Commission is authorized and required by RCW 81.04.510 to order Dolly, Inc. to cease and desist immediately from these activities.
- 62 (11) The Commission's public service laws are not discriminatory, and apply even-handedly to in-state and out-of-state entities.
- 63 (12) The Commission's public service laws serve a legitimate state purpose because they protect consumers and the public safety.
- 64 (13) The Commission's public service laws withstand a dormant clause challenge.
- 65 (14) The Commission's public service laws prohibit persons from advertising, offering, or soliciting services they are not authorized to provide.
- 66 (15) Corrected Order 02 does not impose an *ex post facto* law.
- 67 (16) Dolly, Inc. received adequate notice that the Commission may enter a cease and desist order, and Dolly, Inc. was given an opportunity to be heard.
- 68 (17) Corrected Order 02 does not violate Dolly, Inc.'s procedural due process rights.
- 69 (18) The Commission's public service laws serve the legitimate state interests of protecting consumers and the public safety.
- 70 (19) Corrected Order 02 does not violated Dolly, Inc.'s substantive due process rights.
- 71 (20) Dolly, Inc.'s advertisements promote the unauthorized provision of regulated services, and thus are not protected commercial speech.
- 72 (21) Corrected Order 02 does not violate Dolly, Inc.'s First Amendment rights.

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73 THE COMMISSION ORDERS:

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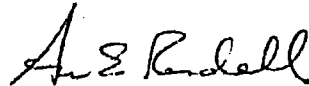
- 74 (1) The Commission denies Dolly, Inc.'s Petition for Administrative Review of Corrected Order 02 and affirms and adopts that order, which is attached as Appendix A.
- 75 (2) Dolly, Inc. must immediately cease operating as a household goods carrier, common carrier, and solid waste collection company unless it obtains authority from the Commission.
- 76 (3) Dolly, Inc. must clearly indicate in its web-based application on the Internet and in its advertising on Facebook, Twitter, Pinterest, and any other social media sites or other platforms it uses or has used to make its services known that it does not offer or perform services in the state of Washington as a household goods carrier, as a common carrier transporting property other than household goods, or as a solid waste hauler unless it obtains authority from the Commission.
- 77 (4) The Commission assesses a penalty of \$69,000 against Dolly, Inc., the entire amount of which is suspended until June 30, 2019, subject to the requirement that Dolly, Inc. immediately cease and desist from the operations described, and found unlawful, in Corrected Order 02. If Dolly, Inc. is found to have continued such operations in Washington after the date of this Order at any time before June 30, 2019, the full penalty will be due upon notice of that finding to Dolly, Inc.
- 78 (5) If Dolly, Inc. continues to comply with the terms of this Order until June 30, 2019, Dolly must pay a \$34,500 portion of the penalty by July 10, 2019. The remaining \$34,500 portion will be suspended until June 30, 2020, and waived thereafter, subject to Dolly, Inc.'s continued compliance with the terms of this Order. If Dolly, Inc. fails to comply after June 30, 2019, the \$34,500 suspended portion of the penalty will be due and payable immediately upon notice of that finding to Dolly, Inc.
- 79 (6) The Commission retains jurisdiction over this proceeding to effectuate the terms of this Order.

DATED at Olympia, Washington, and effective May 18, 2018.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

ORDER 04

DAVID W. DANNER, Chairman



ANN E. RENDAHL, Commissioner



JAY M. BALASBAS, Commissioner

NOTICE TO PARTIES: This is a Commission final order. 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 480-07-850, or a petition for rehearing pursuant to RCW 81.04.200 and WAC 480-07-870.

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Appendix A

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF THURSTON

DOLLY, INC.

No. 18-2-03006-34

Petitioner,

SUMMONS (20 days)

vs.

WASHINGTON STATE UTILITIES AND
TRANSPORTATION COMMISSION, a
Washington state agency.

Respondent.

TO THE RESPONDENT WASHINGTON UTILITIES AND TRANSPORTATION
COMMISSION:

A lawsuit has been started against you in the above-entitled court by Dolly, Inc.
Petitioner's claim is stated in the Petition for Judicial Review of Agency Action (the "Petition"),
a copy of which is served upon you with this Summons.

In order to defend against this lawsuit, you must respond to the Petition by stating your
defense in writing and serve a copy upon the undersigned attorney for the Petitioner within
twenty (20) days after service of this Summons, excluding the day of service, or a default
judgment may be entered against you without notice. A default judgment is one where
Petitioners are entitled to what they ask for because you have not responded. If you serve notice

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PERKINS COIE LLP
The PSE Building
10885 N.E. Fourth Street, Suite 700
Bellevue, WA 98004-5579
Phone: 425.635.1400
Fax: 425.635.2400

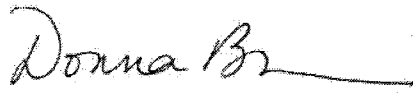
1 of appearance on the undersigned attorney, you are entitled to notice before a default judgment
2 may be entered.

3 If you wish to seek the advice of an attorney in this matter, you should do so promptly so
4 that your written response, if any, may be served on time.
5

6 **This Summons is issued pursuant to Rule 4 of Superior Court Civil Rules of the**
7 **State of Washington.**

8
9 DATED this 15th day of June, 2018.
10

11
12
13 **PERKINS COIE LLP**

14 
15 By: _____
16 Donna L. Barnett, WSBA No. 36794
17 Ralph L. ("Buddy") Arnheim, CA Bar No.
18 170874
19 The PSE Building
20 10885 N.E. Fourth Street, Suite 700
21 Bellevue, WA 98004-5579
22 Telephone: 425.635.1400
23 Facsimile: 425.635.2400
24 DBarnett@perkinscoie.com
25 Arnhb@perkinscoie.com

26
27
28 Counsel for Petitioner Dolly, Inc.