

**BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION**

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

DOLLY, INC.

DOCKET TV-171212

STAFF'S ANSWER TO DOLLY'S
PETITION FOR ADMINISTRATIVE
REVIEW OF ORDER 07

I. INTRODUCTION

1 The road to this petition was paved with bricks made from the provisions of Order 04 in this docket, specifically (1) the Commission's order that Dolly cease and desist its operations until it first obtained the necessary permits and certificate and (2) the Commission's order that Dolly pay a \$69,000 penalty, which it suspended and provided for a partial waiver subject to Dolly's compliance with Order 04. Dolly did not comply with the first of those provisions; Staff accordingly moved to lift the suspension of the penalty involved in the second. The Commission granted that motion, imposing the suspended penalty by order and then, also by order, denying Dolly's subsequent application for mitigation of the penalty. That last order is at issue here.

2 The Commission should deny Dolly's petition for review. Dolly's motion is essentially a collateral attack on the penalty imposed by the Commission in Order 04, and one not authorized by any of the Commission's procedural rules. Regardless, Dolly is not now, nor has it ever been since the entry of Order 04, in compliance with the Order 04. Granting Dolly's petition and mitigating the penalty imposed on it would reward its decision to flout the law and the Commission's authority, and the Commission should deny the petition.

II. BACKGROUND

3 The Commission complained against Dolly for violations of the public service laws in January 2018.¹ After a special proceeding, Administrative Law Judge (ALJ) Moss entered a corrected initial order classifying Dolly as a household goods carrier, a motor freight common carrier, and a solid waste collection company.² The ALJ ordered Dolly to cease and desist from violations of the public service laws and imposed a penalty, half of which the ALJ suspended for a period of two years, with the suspended portion waived thereafter, conditioned on Dolly complying with the terms of the corrected initial order.³

4 Dolly petitioned for administrative review, raising a number of arguments.⁴ The Commission rejected each of them.⁵ It affirmed the ALJ's classification findings,⁶ ordered Dolly to cease and desist,⁷ and affirmed the amount of the penalty imposed by the ALJ as correctly calculated.⁸ The Commission suspended the entire penalty for a period of one year and provided for the waiver of half of the penalty after that provided that Dolly complied with the terms of Order 04.⁹ The Commission explicitly notified Dolly that the suspension was "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

¹ See generally *In re Determining the Proper Carrier Classification of, and Complaint for Penalties Against Dolly, Inc.*, Docket TV-171212, Order 01 (Jan. 10, 2018).

² *In re Determining the Proper Carrier Classification of, and Complaint for Penalties Against Dolly, Inc.*, Docket TV-171212, Corrected Order 02, at 15-16 ¶¶ 48-54. (Apr. 9, 2018).

³ *Id.* at 16 ¶¶ 53-56.

⁴ See generally *In re Determining the Proper Carrier Classification of, and Complaint for Penalties Against Dolly, Inc.*, Docket TV-171212, Dolly, Inc. Petition for Administrative Review of Initial Order 02, and in the Alternative, Corrected Initial Order 02 (Apr. 19, 2018).

⁵ See generally *In re Determining the Proper Carrier Classification of, and Complaint for Penalties Against Dolly, Inc.*, Docket TV-171212, Order 04 (May 18, 2018).

⁶ *Id.* at 4-9 ¶¶ 14-27, 17-18 ¶¶ 55-61.

⁷ *Id.* at 19 ¶¶ 75-76.

⁸ *Id.* at 14-16 ¶¶ 46-49.

⁹ *Id.* at 19 ¶¶ 77-78.

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.”¹⁰

5 Dolly demonstrated that it had some understanding that the cease and desist provisions of Order 04 required it to cease operations. It timely moved to stay effectiveness of the order, stating that the provisions would “require[] Dolly to permanently refrain from making its services known to consumers and refrain from providing those services.”¹¹

6 The Commission denied Dolly’s request for a stay as inconsistent with RCW 81.04.510, which directs the Commission to order any unauthorized person providing jurisdictional services to cease and desist.¹² When it did so, the Commission clarified for the company that it “must simply comply with the provisions of Order 04 while it is engaging in the permit application or petition process,” and not necessarily required to permanently cease operations.¹³

7 While Dolly did apply for operating authority, it did not cease and desist from its unlawful operations. Staff moved to impose the penalty suspended in Order 04 on that basis.¹⁴

8 As the Commission noted in its order disposing of Staff’s motion, “Dolly did not dispute the operative allegations in [Staff investigator] Ms. Paul’s Declaration and admitted in its response that it had not ceased and desisted from its illegal operations.”¹⁵ Dolly instead

¹⁰ *Id.* at 19 ¶ 77.

¹¹ *In re Determining the Proper Carrier Classification of, and Complaint for Penalties Against Dolly, Inc.*, Docket TV-171212, Motion to Stay Effectiveness of Final Order 04, at 3 ¶ 5 (May 29, 2018).

¹² *In re Determining the Proper Carrier Classification of, and Complaint for Penalties Against Dolly, Inc.*, Order 05, at 3 ¶ 8 (June 8, 2018).

¹³ *Id.*

¹⁴ *See generally In re Determining the Proper Carrier Classification of, and Complaint for Penalties Against Dolly, Inc.*, Docket TV-171212, Commission Staff’s Motion for Imposition of Suspended Penalty for Violation of Commission Order (July 12, 2018).

¹⁵ *In re Determining the Proper Carrier Classification of, and Complaint for Penalties Against Dolly, Inc.*, Docket TV-171212, Order 06, at 5 ¶ 11 (Aug. 3, 2018).

had requested that the Commission decline to impose the suspended penalties because it had applied for operating authority.¹⁶ The Commission summarized this argument as effectively claiming that “because [Dolly] now has filed for operating authority and various exemptions from Commission rules, it should be excused from the consequences that follow logically, and necessarily, from its refusal to obey the Commission’s orders that plainly require it to cease and desist immediately from its illegal operations.”¹⁷ The Commission imposed the suspended penalties.¹⁸

9 Dolly did not appeal the order imposing the suspended penalty; it applied for mitigation of the penalty instead.¹⁹ In its application, Dolly repeated its argument that it had complied with Order 04 by applying for a permit and asked the Commission to reduce the penalty on that basis.²⁰

10 ALJ Pearson denied Dolly’s application for two reasons.²¹ First, the Commission’s rules provide an avenue for mitigation where a penalty is imposed without a hearing, but do not provide one where the penalty is imposed after a hearing.²² Given that the Commission imposed the penalty on Dolly after a hearing, the ALJ saw no mechanism for Dolly to seek mitigation.²³ Second, Dolly failed to present any new argument that justified mitigation given that it largely contended that it had complied with the Commission’s orders by

¹⁶ *Id.* at 5-6 ¶ 11.

¹⁷ *Id.* at 5-6 ¶ 11.

¹⁸ *Id.* at 6 ¶¶ 12-14.

¹⁹ *In re Determining the Proper Carrier Classification of, and Complaint for Penalties Against Dolly, Inc.*, Docket TV-171212, Application for Mitigation of Penalties – TV-171212, at 1-3 ¶¶2-9 (Aug. 20, 2018).

²⁰ *Id.*

²¹ *In re Determining the Proper Carrier Classification of, and Complaint for Penalties Against Dolly, Inc.*, Docket TV-171212, Order 07, at 2-4 ¶¶ 8-13 Aug. 31, 2018).

²² *Id.* at 2 ¶ 8 (citing RCW 81.04.380, WAC 480-07-300(2)(g), WAC 480-07-305(d), and WAC 480-07-610(2)(e) and distinguishing RCW 81.04.405).

²³ *Id.* at 2-3 ¶ 8.

applying for a permit.²⁴ The ALJ rejected this contention by noting that “Dolly fails to accept responsibility for its decision to continue operating in violation of the Commission’s cease and desist order, which requires the Company to shut down its operations until such time its application is approved.”²⁵

11 Dolly now appeals ALJ Pearson’s order denying its application for mitigation.

III. ARGUMENT

12 The Commission should deny Dolly’s petition for review for any or all of three reasons. First, the application amounts to a barred collateral attack on the Commission’s determination that the appropriate penalty for Dolly’s violations of the public service laws is \$69,000. Second, as ALJ Pearson determined, no procedural rule permits Dolly to apply for mitigation at this stage of the proceeding. Finally, the Commission should not exercise its discretion to Dolly’s benefit as doing so would ratify violations of the public service laws.

13 The Commission should deny Dolly’s petition for review because its application amounts to an impermissible collateral attack on Order 04. Dolly’s application, under the Commission’s rules, is a request to open a new adjudicative proceeding where it may address the propriety of the penalty amount.²⁶ But the Commission in Order 04 determined that \$69,000 was the appropriate penalty to impose on the company for its violations of the public service laws. That determination is final.²⁷ And, as discussed below, requiring Dolly to pay does not work an injustice on the company because Dolly continues to violate Order

²⁴ *Id.* at 3 ¶ 9.

²⁵ *Id.*

²⁶ WAC 480-07-305(3)(d).

²⁷ See *City of Des Moines v. Pers. Property Identified as \$81,231 in United States Currency*, 87 Wn. App. 689, 943 P.2d 669 (1997) (a judgment is final at the beginning of the appeals process, not the end, meaning that Dolly’s petition for review in superior court has no effect on the finality of Order 04).

04. Dolly is precluded from arguing that \$69,000 is not the appropriate penalty through its application for mitigation.²⁸

14 The Commission should also deny Dolly's petition because the company had no right to file its application for mitigation. No procedural rule authorizes a penalized person to file an application for mitigation in circumstances like the ones present here. Instead, where the penalty is imposed after a hearing, the penalized person may petition the Commission for administrative review of the penalty.²⁹ Allowing this kind of post-hearing application would give a penalized person two chances to get the penalty reduced: one on post-hearing review and another with a post-review application. That type of procedure is inconsistent with principles of administrative economy and the Commission should avoid it.

15 Finally, the Commission should deny Dolly's petition because the company fails to justify a favorable exercise of the Commission's discretion. As discussed more fully below, Dolly is in violation of Order 04. The Commission should not reward Dolly for refusing to comply with the Commission's orders by reducing the penalty assessed against the company.

16 Dolly, however, contends that it has complied with Order 04 by modifying its advertisements and applying for operating authority.³⁰ The Commission should disagree.

17 The overwhelming weight of evidence in this docket shows that Dolly has not changed its advertisements as required by the Commission, and therefore has not complied with Order 04. While Dolly offers generalized statements that it has made these changes,³¹

²⁸ See *Reninger v. Dep't of Corr.*, 134 Wn.2d 437, 449, 951 P.2d 782 (1998) (collateral estoppel).

²⁹ E.g., WAC 480-07-825, -610(7).

³⁰ *In re Determining the Proper Carrier Classification of, and Complaint for Penalties Against Dolly, Inc.*, Docket TV-171212, Dolly, Inc. Petition for Administrative Review of Order 07 Denying Application for Mitigation of Penalties, at 2:8-10, 2:15-17 (Sept. 20, 2018).

³¹ *Id.*

those statements are contradicted by the Declaration of Susie Paul, which Staff submitted with its motion to impose suspended penalties.³² Ms. Paul reviewed Dolly’s digital advertising several times in the months of June and July 2018. She determined that Dolly continued to advertise for the provision of jurisdictional services in Washington on its website and its Facebook, Twitter, and Instagram pages.³³ Ms. Paul also discussed non-digital advertising for the provision of those services that she found placed on commuter trains running between points in Washington.³⁴ Ms. Paul took screen-captures or pictures of those advertisements, which are attached as appendices to her declaration. Staff invites the Commission to examine them;³⁵ they leave no doubt that Dolly has not modified its advertising in any meaningful way in order to comply with the provisions of Order 04.

18 Dolly’s contention that it has complied with Order 04 by applying for permits verges on frivolous, a term that Staff does not lightly use in a legal pleading. As recounted in the lengthy statement of facts above, the Commission repeatedly informed Dolly that complying with Order 04 required the company to cease operating while it sought a permit. That requirement did not arise from an arbitrary whim or caprice of the Commission: the legislature requires jurisdictional carriers to obtain authority before operating.³⁶ Dolly did not do so. It failed to cease operations after the Commission served Order 04. It failed to

³² See generally *In re Determining the Proper Carrier Classification of, and Complaint for Penalties Against Dolly, Inc.*, Docket TV-171212, Declaration of Susie Paul (July 12, 2018).

³³ *Id.* at 2 ¶¶ 5-6, 3-4 ¶¶ 11-13.

³⁴ *Id.* at 3 ¶ 10.

³⁵ *Id.* at Attachments A, B, G, H, I, and J.

³⁶ RCW 81.80.075 (“[n]o person shall engage in business as a household goods carrier without first obtaining a household goods carrier permit from the commission”) (emphasis added); RCW 81.77.040 (“[a] solid waste collection company shall not operate for the hauling of solid waste for compensation without first having obtained from the commission a certificate declaring that public convenience and necessity require such operation.”) (emphasis added); RCW 81.80.070 (“[a] common carrier . . . shall not operate for the transportation of property for compensation in this state without first obtaining from the commission a permit for such operation.”), .355 (making it a gross misdemeanor for “[a]ny person not holding a permit authorizing him or her to operate as a common carrier . . . for the transportation of property for compensation in this state” to advertise for the “transportation of property for compensation.”).

cease operations after Staff moved to impose suspended penalties. It failed to cease operations after submitting its permit application. It failed to cease operations after the Commission imposed the suspended penalties. It currently operates. Dolly has not complied with the terms of Order 04. Dolly simply did not comply with Order 04.

19 Dolly has disregarded the law. Mitigating the penalty imposed by the Commission would ratify its misconduct. The Commission should decline to do so.

IV. CONCLUSION

20 Dolly's petition is without merit. It is an untimely attack of Order 04 made without any means to do so and whose arguments are contradicted by the record in this matter. The Commission should deny the petition.

21 DATED this 24th day of September 2018.

Respectfully submitted,

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