

Service Date: February 25, 2019

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

In re Application of

DOLLY, INC.

For a Permit to Operate as a Motor Carrier of  
Household Goods and a Permit to Operate as a  
Motor Freight Common

DOCKET NUMBER: TV-171212

DOLLY, INC. PETITION FOR  
RECONSIDERATION OF  
FINAL ORDER 01

**I. PRELIMINARY STATEMENT**

1. On February 14, 2019, the Washington Utilities and Transportation Commission (“Commission” or “WUTC”) entered Final Order 01 Denying Application (“Order 01” or “the Order”).<sup>1</sup> Dolly, Inc. (“Company” or “Petitioner”), 901 Fifth Avenue, Suite 600, Seattle, WA 98106, files the below Petition for Reconsideration of Final Order 01 (“Petition”). The Petition requests the Commission reconsider Order 01, and particularly the rulings finding that Petitioner: 1) enters into agreements to transport household goods by offering price quotes and accepting payment for household goods moves;<sup>2</sup> 2) advertises to perform household goods moves;<sup>3</sup> and 3) assists third-parties to perform household goods moves.<sup>4</sup>

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<sup>1</sup> *In re Application of Dolly, Inc. For a Permit to Operate as a Motor Carrier of Household Goods and a Permit to Operate as a Motor Freight Common*, Docket No. TV-180605, Order 01 (Feb. 14, 2019).

<sup>2</sup> *Id.* ¶ 31.

<sup>3</sup> *Id.* ¶ 32.

<sup>4</sup> *Id.* ¶ 33.

## II. APPLICABLE LAW

2. RCW 34.05.470, RCW 81.04 and 81.80 et seq., WAC 480-07-850, WAC 480-15, et seq., particularly WAC 480-15-305, and Washington appellate and Commission case law cited herein.

## III. REQUESTED RELIEF

3. Pursuant to RCW 34.05.470 and WAC 480-07-850, Petitioner files this Petition requesting the Commission reconsider the grounds for its denial of Petitioner's application for a permit to operate as a household goods carrier.

## IV. ARGUMENT AND ANALYSIS IN SUPPORT OF PETITION FOR RECONSIDERATION

### A. Reconsideration is Appropriate

4. Reconsideration is authorized by the Washington Administrative Procedure Act and Commission statutes, regulations, and administrative precedent, as stated in Order TV-140273 *In re Thomas C. Kolean and James B. Stewart d/b/a Olympic Transport*, Application P-72389, (Sept. 1989). Reconsideration is proper when there are errors of fact or law in the final order. Order TV-136858, *In re United Couriers Northwest, Inc.*, App. P-70574 (Oct 1987). Additionally, the Commission will grant a petition for reconsideration if the petitioner demonstrates that an order is erroneous or incomplete. *In the Matter of the Petition of: Qwest Corp. & Eschelon Telecom, Inc. Pursuant to 47 U.S.C. Section 252(b)*, No. 19, 2009 WL 289571 (Jan. 30, 2009).

**B. Order 01 errs in finding Petitioner enters agreements to transport household goods**

5. Final Order 01 states, “By offering price quotes and accepting payment for household goods moves, Dolly is entering into agreements for the transportation of household goods.”<sup>5</sup> The term “agreement” is undefined in Commission statutes and regulations. A reasonable interpretation of the term “agreement” is the analogous term “contract.” Washington contract jurisprudence is unambiguous in defining and interpreting the existence of contractual relationships. Washington courts have already considered and rejected the position that price quotes establish an underlying contract.<sup>6</sup> *U.S. Engine, Inc. v. Roberts*, 118 Wash. App. 1052 (2003). (citing *W.H. Barber Co. v. McNamara–Vivant Contracting Co., Inc.*, 293 N.W.2d 351 (1979), where the court rejected the contractor’s claim that individual invoices and price quotes established an underlying sales contract beyond those items specifically noted in the invoices). Final Order 01’s finding that Petitioner’s practice of offering price quotes creates a contractual relationship is contrary to Washington law.
6. Washington law recognizes, as a matter of classification, two kinds of contractual relationships—bilateral and unilateral. *Cook v. Johnson*, 37 Wash.2d 19, 23 (1950). A bilateral contract is an exchange of promises. *Govier v. N. Sound Bank*, 91 Wash.App. 493, 499 (1998). “The burden of proving a contract, whether express or implied, is on the party asserting it, and he must prove each essential fact, including the existence of a mutual intention.” *Bogle & Gates, P.L.L.C. v. Zapel*, 121 Wash.App. 444, 448 (2004) (quoting *Bogle & Gates, P.L.L.C. v. Holly*

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<sup>5</sup> *Id.* ¶ 25.

<sup>6</sup> Black’s Law Dictionary Sixth Ed. defines the term “agreement” to mean, “A concord of understanding and intention, between two or more parties, with respect to the effect upon their relative rights and duties, of certain past or future facts or performances. The act of two or more persons, who unite in expressing a mutual and common purpose, with the view of altering their rights and obligations. A coming together of parties in opinion or determination; the union of two or more minds in a thing done or to be done; a mutual assent to do a thing.”

*Mountain Res.*, 108 Wash.App. 557, 560 (2001)). For a contract to exist there must be mutual assent to its essential terms. *Yakima County (W.Valley) Fire Protection Dist. No. 12 v. City of Yakima*, 122 Wash.2d 371, 388 – 89, (1993). The existence of mutual assent may be deduced from the circumstances, *Kintz v. Read*, 28 Wash.App. 731, 735 (1981), including the ordinary course of dealing between the parties. *Ross v. Raymer*, 32 Wash.2d 128, 137 (1948).

**1. Petitioner does not enter or create a bilateral contract to transport household goods**

7. The essential elements of a bilateral contract are: A) subject matter, B) parties, C) a promise, D) terms and conditions, and E) price or consideration. *DePhillips v. Zolt Constr. Co.*, 136 Wash.2d 26, 31 (1998) (quoting *Family Med. Bldg., Inc. v. Dep't of Soc. & Health Servs.*, 104 Wash.2d 105, 108 (1985)). The record does not support a finding that Petitioner satisfies elements A, B, C, or D and even if does, the record is clear that Petitioner has not mutually assented to any term other than price (E), which alone does not create a contract. See *U.S. Engine, Inc.* Petitioner has not entered into or created bilateral contracts to transport household goods. The testimony of Petitioner's CEO, Michael Howell, actually explains that the customer and the Helper, with no influence or direction from Petitioner, determine contractual elements (A) through (D) necessary to create a bilateral contract.<sup>7</sup>

Q. Does Dolly enter into agreements with customers or Helpers to perform micro-moves?

A. No. "Dolly does not create the Helper's scope of work, the customer does. The agreement between the Helper and customer is dictated by the terms of the customer's scope of work and the Helper determines how to complete that scope of work."<sup>8</sup>

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<sup>7</sup> Howell, Exh. MH-1T at 7:12-23, 8:1-5.

<sup>8</sup> *Id.*

8. All services are completed under the terms and conditions and the discretion and direction established by the Helper and the customer. Dolly is not a party to that agreement nor does Dolly control the terms of that agreement.

**2. Petitioner does not enter or create a unilateral contract to transport household goods**

9. “A unilateral contract consists of: A) a promise on the part of the offeror; and B) performance of the requisite terms by the offeree.” *Multicare Med. Ctr. v. Dep’t of Soc. & Health Servs.*, 114 Wash.2d 572, 583 (1990). (citing *Higgins v. Egbert*, 28 Wash.2d 313, 317 (1947)). The party asserting the existence of a unilateral contract has the burden of proving each essential element. *Multicare Med. Ctr.*, 114 Wash.2d at 584 n. 19.

10. In the case of a unilateral contract, the record does not support a conclusion that the Petitioner satisfies the most essential element of a unilateral contract – performance of the requisite terms. *Id.* Petitioner owns no vehicles in which to transport household goods nor does it employ individuals to do so, thus rendering it impossible for Petitioner to perform the requisite terms. “The platform is a marketplace that connects independent contractors (“Helpers”) and customers who arrange to perform a ‘micro-move.’”<sup>9</sup> Emphasis added.

**3. The Commission has not met its burden of proving the existence of agreements to transport household goods**

11. The Commission has put forth no evidence showing the Petitioner creates or is a party to either bilateral or unilateral contracts to transport household goods. In fact, the record is clear that any payment the Petitioner receives is for *finding* a third-party to transport household

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<sup>9</sup> *Id.* Exh. M1-T at 5:21-22.

goods.<sup>10</sup> Additionally, there was no evidence asserted or submitted in this docket, or any other docket, showing or proving that Petitioner together with any other party mutually assented to create an agreement to transport household goods.

12. The Commission has not met its burden of proving the elements essential to Washington law establishing the *prima facie* existence of an agreement for Petitioner to have entered; nothing in the record supports the bare assertion that a price quote and payment creates a contract. See *Vacova Co. v. Farrell*, 62 Wa.App. 386 (1991) (court held that party's bare assertion of proof of payment was insufficient evidence to prove existence of contract). As a result, Final Order 01 errs in concluding that Petitioner enters into any agreements recognized by Washington law and reconsideration must be granted on this issue.

**C. Final Order 01 errs in ruling on previously appealed issues that are currently pending in Superior Court**

13. Judicial review of the Commission findings that Petitioner enters agreements and advertises to transport household goods are currently being reviewed in the Superior Court of Thurston County. Judicial review of the Commission's actions are reviewed under the standards enumerated in the Administrative Procedure Act (APA"). *United and Informed Citizen Advocates Network v. Washington Utilities and Transp. Com'n*, 106 Wash.App. 605 (2001). Reconsideration is appropriate here because the Superior Court will ultimately decide the issues of whether Petitioner enters into agreements and advertises to perform household goods moves at the March 8, 2019 Petition for Judicial Review hearing.

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<sup>10</sup> *Id.* Exh. M1-T at 7:23 "The price quote is for finding the Helper, it is not for the actual scope of work."

14. The Commission is not unwilling to delay determining matters at issue in the courts of this state. See, *In the Matter of Am. Civil Liberties Union of Washington Petition for Investigation*, Docket UT-060856, Order 03 (2008) (“We deferred further action until the federal courts resolved pending issues”). See also, *Washington Utilities & Transportation Commission v. Pacific Power & Light Company*, 320 P.U.R.4th 178 (2015) (“We do not wish to risk disrupting the Court’s well-ordered consideration of the matters before it” [ ... ] “[Company] put this matter before the Court of Appeals and we should not, for reasons of comity, take up again the same issues that are pending there”). The same well-reasoned approach the Commission applied in those instances similarly apply to Final Order 01.

15. Final Order 01, rather than allowing the Superior Court to review these issues under its statutory authority granted in RCW 34.05.570, improperly substitutes the Commission in the place of the Court thereby usurping the Court’s jurisdiction. *Serres v. Washington Dept. of Retirement Systems*, 163 Wash.App. 569 (2011) (holding, “When reviewing questions of law in reviewing an agency’s order, the Court of Appeals may substitute its determination for that of the agency”). *Green v. State, Dept. of Social and Health Services*, 163 Wash.App. 494 (2011) (holding, “Under the Administrative Procedure Act (APA)’s “error of law” standard, appellate court may substitute its interpretation of the law for the agency’s”).

16. The Commission must grant reconsideration on these issues and allow the Superior Court’s decision to be the final determination on these issues. Reconsideration is appropriate because the issues of whether Petitioner enters into agreements and advertises to transport household goods is not yet ripe for determination by the Commission while they are still pending appeal and remain undecided in Superior Court.

**D. Petitioner’s website does not advertise that it performs regulated activities in Washington State**

17. Final Order 01 also found the Petitioner advertises to perform household goods carrier services in Washington. However, the Petitioner changed its marketing before Order 01 was filed.<sup>11</sup> Based on the Assistant Attorney General’s (“AAG”) cross examination of Petitioner’s expert witness, Rachel Lazar,<sup>12</sup> and Petitioner’s Senior Director of Marketing, Kevin Shawver,<sup>13</sup> regarding Petitioner’s internet and transit marketing, the Company has inserted the following disclaimer on multiple pages of its website: “Dolly is not a licensed household goods carrier, common carrier, or solid waste collection company. The transport of all household goods is done by independent contractors, called Helpers.”<sup>14</sup>

18. The Petitioner altered the webpages due to the AAG’s repeated questioning of Mr. Shawver regarding the lack of such a disclaimer. Order 01 errs in concluding that Petitioner advertises to perform household goods carrier services because the disclaimers clearly indicates Petitioner is not a household goods carrier and does not transport household goods.

**E. Petitioner does not assist individuals to transport household goods in Washington without a permit from the Commission**

19. The Commission’s Assistant Attorney General also established the following line of questioning of Petitioner’s witness, CEO Michael Howell:

Q. Okay. So, it’s possible that ever since Dolly started operating in Washington, it’s been using unpermitted helpers to perform household goods moves?

A. It is possible.

Q. And that possibility extends to like right how?

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<sup>11</sup> The Company also significantly altered its Internet marketing prior to the hearing to remove any references to Washington State.

<sup>12</sup> TR 11:22 – 13:17 (Lazar).

<sup>13</sup> TR 71:5 – 93:1 (Shawver).

<sup>14</sup> See, <https://dolly.com/cities/>, last visited February 24, 2019.



A. It is possible.<sup>15</sup>

20. This is the only exchange regarding the “possibility” of individuals using Petitioner’s platform to transport household goods in Washington without a permit from the Commission; there is no other evidence supporting such an allegation in the record. In fact, Mr. Howell’s testimony states:

“As part of our agreement in terms of service with them [Helpers], they are required to have all permits and licensing needed to provide whatever services they volunteer to provide on the platform.” Emphasis added.

21. Yet, Order 01 concludes the Petitioner is liable for the “possibility” of independent contractors engaging in activities the Petitioner’s Terms of Service expressly prohibit. Moreover, Petitioner’s counsel’s closing remarks states Helpers who violate the Terms of Service, “are immediately suspended or even removed from the platform entirely.”<sup>16</sup>

22. Denying the Petitioner’s permit application based on the mere possibility of a third-party operating without a permit without any further evidence or proof that such acts occurred establishes a troubling precedent, especially when considering the Petitioner already has mechanisms in-place to enforce and resolve situations where an individual violates the Commission’s authority to have the required permits and licensing. While the Commission obviously has great latitude in authorizing jurisdictional activities, this ruling creates a disturbing irrebuttable presumption of unlawful activity based on a mere “possibility.”

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<sup>15</sup> TR 31:17-22 (Howell).

<sup>16</sup> TR 111:12-14 (Bryant).

## **F. Final Order 01 is discriminatory**

23. “Micro-moving” in Washington state is not unique to Petitioner’s business.<sup>17</sup> However, since 2015 Petitioner remains the lone micro-mover facing enforcement action from the Commission although several others currently continue operating with impunity.<sup>18</sup> Singling-out the Petitioner is simply unfair. The Commission claims to have “jurisdiction over the subject matter of this proceeding and personal jurisdiction over [Petitioner]”,<sup>19</sup> yet similar companies engaging in identical practices somehow continue to evade the Commission Staff’s investigatory capabilities.

24. Since the Commission began its classification proceeding against the Petitioner several copycat businesses have sprung into existence in the state and continue to flourish, defying the Commission’s authority.<sup>20</sup> One such company, Lugg, began operating in the state within the past two years and has captured a significant share of the micro-moving market. Lugg’s success is derived simply from basing its business model on Petitioner’s and copying the Petitioner’s website.<sup>21</sup> Lugg is not alone yet the Commission ignores their operations, and the several other copycat companies, without initiating any enforcement or classification proceedings; this begs the question, “why Dolly?”

25. In responding to this Petition, the Commission must clarify why Petitioner alone is required to “cease and desist any and all activities related to the transportation of household

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<sup>17</sup> “A micro-move is the on-demand transport of an item from one location to another location that fits in a consumer-sized pick-up truck that generally happens within 24 hours of the customer’s request, and cost less than \$100.” Howell, Exh. MH-1T at 5:22 – 6:2.

<sup>18</sup> The now defunct Ghostruck also faced enforcement action from the Commission in Docket No. TV-161308.

<sup>19</sup> Final Order 01 at ¶ 34.

<sup>20</sup> See <https://flex.amazon.com/faqs/>. The response to the FAQ “What do I do with packages I can’t deliver?” directs drivers to return undelivered packages to Amazon’s storage facility which they call a “returns area.”

<sup>21</sup> See, <https://lugg.com/cities/seattle>, last visited February 25, 2019.

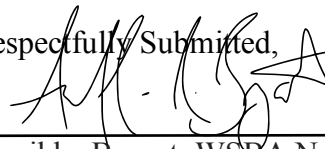
goods in Washington”<sup>22</sup> while similar companies are permitted to continue operating with what appears to be the Commission’s blessing.

V. CONCLUSION

26. Petitioner respectfully requests the Commission grant the relief requested in this Petition.

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Respectfully Submitted,



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<sup>22</sup> Final Order 01 at ¶ 25.