

**BEFORE THE WASHINGTON  
UTILITIES AND TRANSPORTATION COMMISSION**

In the MATTER of the

PETITION OF THE WASHINGTON  
MOVERS CONFERENCE FOR A  
DECLARATORY ORDER  
CLARIFYING WHETHER  
COMMISSION HOUSEHOLD  
GOODS AUTHORIZE PERMITTED  
CARRIERS TO USE THIRD-PARTY  
CONTRACTORS TO PERFORM  
REGULATED SERVICES

DOCKET TV-200348

RESPONSE OF DOLLY, INC., TO  
PETITION OF WASHINGTON  
MOVERS CONFERENCE FOR A  
DECLARATORY ORDER  
REGARDING USE OF THIRD-  
PARTY CONTRACTORS

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## I. INTRODUCTION

1 On April 9, 2020, the Washington Movers Conference (WMC) filed a letter with the  
Commission purporting to be a Petition for a Declaratory Ruling pursuant to RCW 34.05.240 and  
asking the Commission:

2 to determine if it is allowable within UTC [rules] that a UTC [p]ermitted intrastate  
[household goods] moving company can legally contract out their moving services to a  
third party such as –

a. Contracting with a third party for the services of a work crew(s) to  
pack/unpack their customers['] [household goods]

b. Contracting with a third party for the services of a work crew(s) to  
load/unload their customers['] [household goods] to the permitted moving  
company's commercial truck for pick-up/delivery?

c. Contracting with a third party for the services of a commercial truck  
driver with a commercial truck and work crew to pick-up/deliver the [household  
goods] for the permitted moving & storage company's customers?

3 In its April 14, 2020, Notice commencing this proceeding, the Commission stated that  
“WMC’s Petition fails to confirm to the requirements set forth in RCW 34.05.240, WAC 480-07-  
930 or WAC 480-07-395.” That is an understatement.

4 RCW 34.05.240 requires that the petition “set forth facts and reasons on which the petition  
relies to show” that uncertainty exists, there is an “actual controversy such that any declaratory  
order will not be an advisory opinion, that the uncertainty adversely affects WMC, and that such  
adverse effect outweighs the effects on others.

5 The Petition does none of these. Nor does the Petition conform to the format requirements  
contained in WAC 480-07-930.<sup>1</sup>

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<sup>1</sup> Indeed, the Petition appears to be more of an informal request that the Commission issue an interpretive statement on the independent contractor issue pursuant to RCW 34.05.230 and WAC 480-07-920.

6           These statutory and regulatory requirements have a purpose. They are designed to focus interested persons on the issues and facts that give rise to the issue, so those persons can respond in a meaningful way and the Commission can issue an opinion that is not simply advisory and that is helpful to the petitioner, to the Commission’s regulatory staff, and to others.

7           Having said that, Dolly, Inc. (Dolly), is not averse to the Commission considering this issue because as set forth below, in the past, Dolly has itself urged the Commission to consider the independent contractor issue. However, by responding to the Petition, Dolly—and perhaps others who wish to comment—must guess at the facts and argument underlying the Petition. Normally, a petition is in effect an opening brief, and others then have an opportunity to respond. Here, there is precious little to respond to. Therefore, we urge the Commission to permit responsive filings after Staff and others submit their comments on or before April 30, 2020, and to request oral argument on the issues if there is disagreement.

## **II. INTEREST OF DOLLY**

8           Dolly is a Seattle-based “transportation network company” (TNC) that provides a digital platform for transporting goods locally. It currently operates in 20 states and the District of Columbia, though it does not operate as a transportation company in Washington.

9           Around the country, Dolly performs two main types of services. First, it provides “small moves” of household goods, which is to say it enables customers to employ Dolly’s “Helpers” to move small loads of household goods using their personal vehicles from one place to another, almost always in the same community. It does not provide comprehensive moving services using large commercial trucks in the same way as many permitted household goods carriers, and it does not provide packing services as many movers do. Second, it provides a delivery service, in which

retailers use Dolly’s Helpers to deliver goods to their customers. Dolly has arrangements with big box retailers like Big Lots, The Container Store, Bob’s Discount Furniture, Lowe’s and many others by which Dolly offers to deliver goods for consumers purchasing from those stores. While Dolly currently does not offer either of these services in the State of Washington, it intends to seek a common carrier permit to offer “delivery service” in the future.<sup>2</sup>

10           In addition, Dolly provides its Helpers as a “muscle” service for moving furniture or other items within a house or other building. Some people want to move items to or from their basement or attic or from room to room, and this service is ideal for that. This is the only type of service Dolly currently offers in Washington.<sup>3</sup> It does not involve transportation of any goods.

### III. ARGUMENT

#### A. Statement of the Issue.

11           The WMC states the issue as whether use of independent contractors is “allowable” within Commission rules. That is not the issue, or at least not the threshold issue. The first question is whether Washington statutes governing regulated carriers prohibit the use of independent contractors. If the answer to that is no, then the question is whether Commission regulations prohibit them. It is not a question of finding some authorization in Commission rules; it is a question of whether the use of independent contractors is prohibited.

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<sup>2</sup> While Dolly had planned to file an application for a common carrier permit by now, because of the impact of the COVID-19 virus on operations in other states, Dolly has had to delay its plans.

<sup>3</sup> In the past, Dolly has had disputes with the Commission about offering household goods service. *See, e.g., In the Matter of Determining the Property Carrier Classification of, and Complaint for Penalties Against Dolly, Inc.*, Order 2 (Initial Order), ¶18 UTC Dkt. No. TV-171212 (April 9, 2018). We hope that those disputes can be put behind us as Dolly proceeds to seek a common carrier permit for future delivery service operations.

**B. The Plain Language of the Relevant Statutes Does Not Limit a Permittee to Using Only Employees to Fulfill Its Permitted Functions.**

12 As indicated above, it is difficult to respond to a petition that contains no facts or legal discussion. However, we will do the best we can and assume that the appropriate starting point is the underlying statute setting up the permit requirement for household goods movers.

13 In Dolly's past discussions with Commission staff, we were led to believe that any limitation on the use of independent contractors is based on the requirement for a common carrier permit in RCW 81.80.070(1) and the definition of "common carrier" in RCW 81.80.010. The household goods carrier permit requirements in RCW 81.80.075 are similar to those for common carriers. Neither of these statutes reveals a limitation on use of independent contractors.

14 RCW 81.80.075 states, in relevant part:

(1) No person shall engage in business as a household goods carrier without first obtaining a household goods carrier permit from the commission.

(2) Permits issued to any household goods carrier must be exercised by the carrier to the fullest extent to render reasonable service to the public. Applications for household goods carrier permits or permit extensions must be on file for a period of at least thirty days before issuance unless the commission finds that special conditions require earlier issuance.

(3) The commission must issue a permit or permit extension to any qualified applicant, authorizing the whole or any part of the operations covered by the application, if it is found that: The applicant is fit, willing, and able to perform the services proposed and conform to this chapter and the requirements, rules, and regulations of the commission; the operations are consistent with the public interest; and, in the case of common carriers, they are required by the present or future public convenience and necessity; otherwise, the application must be denied.<sup>4</sup>

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<sup>4</sup> Similarly, RCW 81.80.070 states:

15 RCW 81.80.010(1) defines “common carrier” to  
mean[] any person who undertakes to transport property for the general public by motor vehicle for compensation, whether over regular or irregular routes, or regular or irregular schedules, including motor vehicle operations of other carriers by rail or water and of express or forwarding companies.

16 Subsection (3) of that section elaborates that the term  
includes persons engaged in the business of providing, contracting for, or undertaking to provide transportation of property for compensation over the public highways of the state of Washington as brokers or forwarders.

17 Nothing in the language of these provisions requires, or even implies, that those seeking permits as household goods or common carriers are required either to use their own employees or subcontract the common carriage work out to other holders of such permits.

**C. In Administering Related Statutes, the Commission Has Allowed Carriers to Use Independent Contractors and Not Just Employees.**

18 The Commission’s past actions are consistent with the above statutory interpretation. In administering the analogous statutory permitting requirement for auto transportation companies, the Commission has determined that a carrier may use independent contractors and is not limited to using only equipment it owns or only its own employees to carry out its permitted functions.

19 As with common carriers, for auto transportation companies to operate they must have a permit, called a “certificate,” from the Commission.<sup>5</sup> Unlike the regulations for common carriers,

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(1) A common carrier, contract carrier, or temporary 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.  
(2) The commission shall issue a common carrier permit to any qualified applicant if it is found the applicant is fit, willing, and able to perform the service and conform to the provisions of this chapter and the rules and regulations of the commission.  
(3) Before a permit is issued, the commission shall require the applicant to establish safety fitness and proof of minimum financial responsibility as provided in this chapter.

<sup>5</sup> RCW 81.68.040.

which are silent on the use of contractors, the regulations for auto transportation companies prohibited the use of contractors as drivers. The previous rule required that “the driver of a vehicle operated by a transportation company . . . be the certificate holder or an employee of a certificate holder.”<sup>6</sup> But, as the subsequent regulatory history shows, the statute itself was not the source of that prohibition. Instead, the prohibition was a function only of the regulation and a policy choice by the Commission.

20           This was an issue in a 2013 proceeding. The Commission’s regulatory staff filed a complaint against an airporter service, Shuttle Express, Inc. The Company had been providing a “rescue service” when its own drivers and equipment were not readily available to transport customers to the airport. Staff alleged that, rather than using its own drivers to perform this service, the Company used independent contractors who drove their own limousines or town cars.<sup>7</sup> This ran afoul of then-effective WAC 480-30-213(2). The Initial Order stated, “[t]here are no exceptions to the rule” that drivers for auto transportation companies either be employees of a certificate holder or have their own certificates.<sup>8</sup>

21           The Commission, in upholding the Initial Order, rejected the argument that Shuttle Express did not “operate” the limousines or town cars. The Commission stated:

Commission oversight of a regulated company would be meaningless if that company could unilaterally delegate to another entity part or all of its obligations

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<sup>6</sup> Former WAC 480-30-213(2).

<sup>7</sup> *Washington Utilities & Transportation Comm’n v. Shuttle Express, Inc.*, UTC Dkt. No. TC-120323, Order 03 (Initial Order), ¶2 (Nov. 1, 2013).

<sup>8</sup> *Id.* ¶15.

to serve the public. The language in the Commission's rules must be interpreted in this context.<sup>9</sup>

22 In other words, the regulation prohibiting use of independent contractors in the auto transportation context was designed to ensure that the permittee, or certificate holder, had control over, and was responsible for, its obligations as a carrier. But the Commission's decision made clear that the certificate requirement for auto transportation companies was a regulatory interpretation, not a matter of statutory law.

23 A subsequent regulatory change shows that no statute prohibits carriers from using independent contractors. In 2017, the Commission repealed WAC 480-30-213(2), which had prohibited auto transportation companies from using independent contractors, and replaced it with a new rule. The new rule allows use of such contractors subject to certain conditions regarding enforcement.<sup>10</sup> If the statutory requirement for a certificate had prohibited the use of independent contractors, then the Commission could not legally have adopted this rule.

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<sup>9</sup> *Washington Utilities & Transportation Comm'n v. Shuttle Express, Inc.*, UTC Dkt. No. TC-120323, Order 04 (Final Order Denying, in Part, and Granting, in Part, Petition for Administrative Review and Assessing Penalty), ¶9 (March 19, 2014).

<sup>10</sup> **WAC 480-30-022 Contractors.**

A passenger transportation company may contract with a person or company to perform tasks that are subject to the rules under this chapter. If the passenger transportation company's contractor or any of its subcontractors engages in conduct that violates any federal, state, or local law or regulation, or any commission order, while performing tasks under the contract, the passenger transportation company is subject to commission enforcement actions as if the passenger transportation company itself engaged in that conduct. The passenger transportation company is responsible for maintaining measures designed to prevent and detect a violation of statutes or rules within the commission's authority to enforce by a contractor or any of its subcontractors. The passenger transportation company must make available records regarding its use of the contractor on request by the commission that fully enable the commission to audit, investigate, and determine the company's compliance with applicable law while using the contractor.

The impetus behind this rule amendment is also relevant. In its Order adopting this and other rule amendments, the Commission commented on the evolving transportation industry:

We initiated this rulemaking to examine the extent to which existing Commission rules unnecessarily inhibit auto transportation companies' ability to compete effectively. Our primary focus was on the requirement that these companies use their own vehicles and employees to provide service. TNCs [transportation network companies] use a different model, relying on a network of individuals the companies maintain are acting as independent contractors who use their own vehicles. TNCs' nascent, rapid success in the market has shed new light on a longstanding regulatory paradigm. At the same time, however, the Commission remains focused on safety and consumer protection as two of its primary obligations. Regardless of a regulated company's business model, the service it provides must be safe for its customers and the traveling public.

The proposed rules appropriately balance those concerns. *The rules would allow regulated companies to use independent contractor vehicles and drivers to provide auto transportation service. The regulated companies, however, would continue to be responsible for compliance with appropriate safety and consumer protection standards, regardless of whether the company or a contractor physically provisions the service.* The proposed rules also better tailor those standards to the smaller capacity vehicles some companies increasingly are using, as well as streamline company record-keeping obligations to reduce duplication and recognize consumers' increased access to information in a digital format.<sup>11</sup>

25 To summarize: At one time, the Commission prohibited by rule the use of independent contractors in the auto transportation industry, basing that prohibition on the need to ensure that the certificate holder maintained control of its permitted operations. However, as the auto transportation market evolved, so did the Commission's views. The Commission now recognizes

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<sup>11</sup> *In the Matter of Amending WAC 380-30 Relating to Passenger Transportation Companies*, UTC Dkt. No. TC-161262, General Order R-590, Order Repealing, Amending and Adopting Rules Permanently, ¶¶16-17 (July 31, 2017) (emphasis added).

that carriers use a network of independent contractors to efficiently provide auto transportation service. Accordingly, the Commission changed its rule to allow such a network, at the same time safeguarding the statute’s overall policy of ensuring safe service and protecting consumers.

26 As it did with auto transportation companies, the Commission, in the context of common carriers, including household goods movers (or other types of carriers), is free to adapt its regulation to the evolving nature of the industry, while ensuring adherence to the state statutory policy of protecting consumers. In other words, the Commission could adopt a rule, but it has not. And if the Commission should propose such a rule, it is safe to assume that Dolly, other companies using similar business models, and various interest groups would ensure that their perspective on this evolving industry was heard.

**D. In a Recent Study, the Commission Acknowledged that Independent Contractors May Be Used in Appropriate Conditions.**

27 More recently, the Commission reinforced its interpretation that the relevant statutes do not prohibit use of independent contractors. In 2018, at the Legislature’s direction, the Commission convened 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.”<sup>12</sup> The resulting “Report on the Digital Application Based Micro-Mover Task Force” (Task Force Report) states:

When a new business model involves the use of independent contractors who themselves may not be permitted, the UTC must be confident that the contractors who actually perform the moves have appropriate insurance and are carefully screened to provide service that is safe and reliable. This is

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<sup>12</sup> Chapter 299, Laws of 2018, §141(4).

reflected in the commission’s consideration of a number of recent cases before it, as discussed below.<sup>13</sup>

28 So, in the context of considering companies like Dolly, the Commission recognized that independent contractors may be used even when those contractors themselves do not have permits and indicated that this is supported by “a number of recent cases.”<sup>14</sup>

**E. In Other Contexts, the Terms “Employee” and “Independent Contractor” Are Not Legally Distinguishable.**

29 In addition to lacking a basis in the statute, WMC’s assertion that household goods carriers may not operate using independent contractors is in tension with authority indicating that, in many contexts, there is little or no legal distinction between “employees” and “independent contractors.” For example, as the Commission recognized in its December 2018 Task Force Report, the Washington Department of Labor and Industries considers digital-app-based businesses to be employers and individuals they hire to be covered workers for purposes of workers’ compensation insurance.<sup>15</sup> This is true whether the individuals are independent contractors or employees.

30 In its Petition, the WMC suggests that if use of independent contractors is permitted, it “would be a way for properly regulated intrastate moving & storage companies to absolve themselves from paying Unemployment Benefit Premiums and Workers Compensation Premiums

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<sup>13</sup> Washington Utilities & Transportation Comm’n, *Report on the Digital Application Based Micro-Mover Task Force* 8 (Dec. 15, 2018).

<sup>14</sup> In those cases, the companies had argued that their use of independent contractors removed them from Commission jurisdiction. The Commission rejected such arguments holding that use of such contractors did not immunize the companies from Commission regulation. The Commission did not hold that the use of contractors by a permitted carrier was unlawful.

<sup>15</sup> Task Force Report at 42-44; *see* WAC 296-17-31004(1), -31005; RCW 51.08.180, 51.08.195. Indeed, it has been Dolly’s experience and that of other gig-economy companies that the Department of Labor and Industries and the Employment Security Department consider independent contractors to be employees for the purposes of workers compensation and unemployment benefits.

to the Employment Security Department (ESD) and the Department of Labor and Industries (L&I) because they would have no employees.” The WMC added “Not a good plan!”<sup>16</sup>

31 This is a misplaced concern. Carriers, whether common carriers or household goods carriers, must comply with all ESD and L&I requirements. As the 2018 Task Force Report indicated, the distinction between employees and independent contractors is not a meaningful one when it comes to workers’ compensation. The same is true with matters of unemployment insurance. The Commission can and should rely on ESD and L&I to take care of the matters within their respective jurisdictions.

**F. The Commission Has Acquiesced in Other Companies’ Use of Independent Contractors.**

32 Public Counsel has noted in a proceeding involving Dolly that “other TNCs are currently operating or seeking permission to operate in Washington” and “there is a need to adapt traditional regulatory frameworks to meet the realities of a 21<sup>st</sup> Century economy.”<sup>17</sup> Indeed, the Commission has recognized this in the rulemaking regarding auto transportation companies and in the Task Force Report, both cited above.

33 The Commission has further recognized that new market reality by allowing, and in some cases issuing common carrier broker permits to, other companies to operate using the same

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<sup>16</sup> In their April 29 Comments on their own petition, the WMC cites to various contractor registration regulations of the Department of Labor and Industries. Those regulations are simply irrelevant to the types of contractors at issue in this proceeding.

<sup>17</sup> Initial Comments of Public Counsel, *In re Application of Dolly, Inc. for Authority to Operate as a Household Goods Moving Company and Motor Freight Common Carrier*, UTC Dkt. No. TV-190594. ¶3 (Sept. 9, 2019).

business model Dolly proposes: with independent contractors making deliveries on behalf of retailers or providing other transportation services.<sup>18</sup>

**G. No Regulations Limit the Use of Independent Contractors.**

34 With no statutory limitations on the use of independent contractors, the question becomes whether the Commission has prohibited their use under its rulemaking authority. Though, again, it is hard to respond to a Petition that has not made any legal argument, we think it clear that the Commission's regulations do not limit the use of independent contractors. This is unlike the situation with auto transportation companies, where there was a rule specifically disallowing use of independent contractors. As described above, that rule was later replaced.<sup>19</sup>

35 The only regulation that arguably addresses the independent contractor issue is WAC 480-14-110, which states:

**Improper use of permit or registration receipt.**

No person or firm may use a permit or registration receipt except the carrier to whom it was issued.

36 This rule states the obvious: a permit is not transferable from one carrier to another person. But this is irrelevant to the independent contractor issue. When a carrier uses an independent contractor in its operations, the carrier itself is still performing its permitted functions using its own permit. The independent contractors are part and parcel of the permitted operation.

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<sup>18</sup> Companies like Amazon Flex (<https://flex.amazon.com>) and PickupNow (<https://pickupnow.com>) are just two of a number of companies providing transportation services in Washington with business models that use independent contractors.

<sup>19</sup> See Part III.B., above.

#### IV. CONCLUSION AND REQUEST FOR DECLARATORY ORDER

37 Use of independent contractors is not unusual in the business world. And if the business using such contractors has a permit to conduct certain operations, such as a regulated utility or transportation company, use of independent contractors cannot relieve the permittee of its legal obligations. There is nothing in the relevant statutory language regarding permits that limits carriers from using independent contractors. This reading is confirmed by past and recent Commission practice and consistent with the Commission’s recognition of the evolution of transportation markets.

38 The fact that there is no regulation prohibiting the use of independent contractors by various classes of carriers does not mean that the Commission is without authority to protect the public interest when businesses opt to choose that business model. As is has done in the context with auto transportation companies, the Commission can adopt rules clarifying that the permit or certificate holder is responsible for the actions of the contractor. Alternatively, absent a rule, the Commission in a given permit application may require such oversight as a condition of the permit.<sup>20</sup>

39 Accordingly, we urge the Commission to do as follows:

1. Given the absence of any legal or factual argument by the WMC in its petition, permit interested persons to file responsive memoranda and to participate in oral argument to

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<sup>20</sup> Courts have made clear that the Commission is free to establish policy either through rulemaking or on a case-by-case basis. *See, e.g., SEC v. Chenery Corp.*, 332 U.S. 194, 202-03, 67 S.Ct. 1575, 91 L.Ed. 1995 (1947) (agency may set policy by either general rule or on a case-by-case basis); *Budget Rent-a-Car v. Department of Licensing*, 144 Wn.2d 889, 898, 31 P.3d 1174 (2001) (provisions on rulemaking in administrative procedure act “were not designed to serve as a straitjacket of administrative action” requiring rulemaking to the exclusion of case-by-case decision-making).

ensure that the Commission has a full record upon which to consider the independent contractor issue; and

2. Following any additional process, issue an order declaring that under Commission laws and regulations use of independent contractors by a permitted carrier in the performance of its permitted operations is not prohibited.

DATED this 30th day of April, 2020, at Olympia, Washington.

*/s/ Jeffrey D. Goltz*

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CERTIFICATE OF SERVICE

I hereby certify that I have served the attached Response of Dolly, Inc. to Petition of Washington Movers Conference for a Declaratory Order Regarding Use of Third-Party Contractors, upon the person and entities listed on the service list below via electronic, addressed as show below.

DATED at Olympia, Washington, this 30<sup>th</sup> day of April, 2020.

*/s/ Katie Dillon*

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