

**Exh. SP-11
Docket TV-180605
Witness: Susie Paul**

**BEFORE THE WASHINGTON
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
carrier**

DOCKET TV-180605

**EXHIBIT TO
TESTIMONY OF**

Susie Paul

**STAFF OF
WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION**

*Dolly, Inc. Motion for Stay
Thurston County Superior Court*

November 30, 2018

Attachment F

1 EXPEDITE
2 No hearing is set.
3 X Hearing is set:
4 Date: June 29, 2018
5 Time: 9:00 am
6 Judge/Calendar: Honorable Christopher Lanese
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11 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
12 IN AND FOR THE COUNTY OF THURSTON
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15 DOLLY, INC.

No. 18-2-03006-34

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17 Petitioner,

PETITIONER'S MOTION TO STAY
ENFORCEMENT OF ORDERS PENDING
JUDICIAL REVIEW

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19 vs.

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

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25 Respondent.
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29 **INTRODUCTION AND RELIEF REQUESTED**

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31 Petitioner Dolly, Inc. ("Dolly") has petitioned this court for judicial review of Initial Order 02,
32 Initial Order 02 (Corrected), and Order 04 issued by the Washington Utilities and Transportation
33 Commission ("WUTC" or "Commission") in WUTC Docket TV-171212. The orders, among other
34 things, found that Dolly is operating as a household goods carrier without a household goods permit,
35 imposed a \$69,000 penalty, and ordered Dolly to cease and desist operations in Washington. Now,
36 Dolly seeks to stay enforcement of these orders pending judicial review. A copy of each order is
37 attached to Dolly's Petition for Judicial Review. The Court should grant this motion because:
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44 First, there are serious legal questions warranting judicial review, including whether: (1) an
45 app-based software company that owns no vehicles and performs no moving services engages in
46 business as a household goods carrier, and (2) major procedural errors violated Dolly's due process.
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PETITIONER'S MOTION TO STAY ENFORCEMENT OF
ORDERS PENDING JUDICIAL REVIEW – 1

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1 These issues have significance beyond the contours of this case because they provide critical guidance
2 to e-commerce vendors operating in Washington.
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4 Second, Dolly will suffer irreparable injury absent a stay because it will be forced to effectively
5 shut down all operations in Washington while the judicial review is pending.
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7 Third, the balance of hardships sharply tips in favor of a stay because the order is not based on
8 public safety, health or welfare and there is no risk of harm if the status quo is maintained during
9 judicial review. In addition, Dolly is currently in the process of obtaining a supersedeas bond, so the
10 Commission will not be financially harmed if the Court grants a stay.
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12 Finally, although it is Dolly's position that the Commission erred when it ordered Dolly to
13 either cease and desist operations or obtain certain permits to conduct business in Washington, Dolly is
14 nonetheless in the process of obtaining such permits from the Commission. Accordingly, the public
15 interest favors a stay because a stay will save both the parties and the Court substantial time and money
16 on litigation that might be mooted on judicial review.
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18 **FACTUAL BACKGROUND**

19 Over 80 years ago the Washington State Legislature passed RCW 81.80 for the purpose of
20 regulating the business of operating a motor carrier of freight for compensation along the highways of
21 this state. The legislature was concerned with "motor carrier freight traffic," the hazards of "motor
22 trucks" to the public, and the physical impact of such trucks on the highways. RCW 81.80.020. Fast-
23 forward to 2018: Dolly is an emerging technology company operating in seven states throughout the
24 U.S. Dolly uses a digital platform to connect individuals needing on-demand micro-moving services
25 with small-scale movers. Dolly owns no vehicles, employs no drivers, and is solely a mobile app-
26 based company. Order 04 at ¶ 19.
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28 WUTC Staff became aware of Dolly's business in March 2015 and began considering Dolly's
29 operations in light of the Commission's household goods carrier regulations. Initial Order 02 at ¶ 12.
30 Several meetings occurred between WUTC Staff and Dolly over the several years, and last year the
31 Commission considered initiating a rulemaking to amend the household goods carrier regulations to
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1 expressly allow for digital, app-based household goods “brokers” such as Dolly. *Id.* at ¶ 22.

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3 Ultimately, the Commission declined to open the rulemaking.

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5 Although we are denying Dolly’s petition today, we nevertheless believe
6 the changing market warrants further Commission exploration of the
7 business model and operations of companies like Dolly that wish to
8 engage only in household goods brokerage services or arrangement of so
9 called “micro moves.” The Commission intends to schedule at a future
10 date a forum where all interested parties can better understand the impact
11 existing statutes and Commission rules have on these proposed business
12 models.
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15 Order 01 in WUTC Docket TV-170999 at ¶ 13 (Oct. 31, 2017).

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17 In December 2017, Dolly met with Commissioner David Danner, then-WUTC Executive
18 Director Steven King, and other WUTC Staff regarding drafting legislation to expressly allow for app-
19 based enterprises such as Dolly. The fruits of that labor resulted in House Bill 2604 (2018) and
20 Substitute Senate Bill 6234 (2108). Although the bills passed through their respective legislative
21 committees they ultimately failed to pass out of their respective chambers. Nevertheless, Dolly and
22 Commission Policy Staff built a working relationship that helped the Legislature pass Supplemental
23 Operating Budget, ESSB 6032, which directs “the Commission to convene a task force to make
24 recommendations and report to the legislature regarding the most effective method of regulation of
25 digital application-based micro-movers and the small goods movers that utilize their digital
26 application. The report is due to the legislature by December 15, 2018.” ESSB 6032, Sec. 141(6),
27 Order 02 at note 27.
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38 On January 18, 2018, while the bills were still working their way through the legislature, the
39 Commission issued Order 01 in Docket TV-171212, seeking to impose penalties against Dolly for
40 violations of the Commission’s household goods carrier regulations. The Commission held a Brief
41 Adjudicative Proceeding, and presiding Administrative Law Judge (“ALJ”) Dennis Moss entered
42 Order 02, which: 1) Classified Dolly as a household goods carrier, a common carrier, and a solid waste
43 company; 2) Ordered Dolly to cease and desist operating unless and until it obtained a permit from the
44 Commission; 3) Imposed a \$69,000 penalty, and 4) Required Dolly to immediately remove its web-
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1 based application from the internet and remove all presence from Facebook, Twitter, Pinterest, and any
2 other social media sites or other platforms it uses or has ever used. Initial Order 02 at pp. 15-16.
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4 On April 2, 2018, Senior Assistant Attorney General Sally Brown filed a Petition for
5 Administrative Review of Order 02 on behalf of WUTC Staff. One week later, before Dolly had an
6 opportunity to file either its own challenge to Initial Order 02 or an answer to WUTC Staff's petition
7 challenging Initial Order 02, ALJ Moss issued a "Corrected" Order 02. Initial Order 02 (Corrected)
8 contains several significant and substantive modifications to Order 02. One of these modifications
9 removed an order requiring Dolly to shut down its app and replaced it with an order requiring Dolly to
10 "clearly indicate in its web-based application on the Internet and in its advertising on Facebook,
11 Twitter, Pinterest, and any other social media sites or other platforms it uses or has used to make its
12 services known that it does not offer or perform services in the state of Washington as a household
13 goods carrier, as a common carrier transporting property other than household goods, or as a solid
14 waste hauler unless" Initial Order 02 (Corrected) at ¶ 56. ALJ Moss referred to these and other
15 substantive edits as corrections of obvious errors, ministerial errors, and scrivener's errors. See Notice
16 of Correction of Initial Order (April 9, 2018).
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29 Dolly requested that ALJ Moss clarify the deadline to respond to WUTC Staff's petition
30 because it was incorrectly filed under WAC 480-07-825 rather than WAC 480-07-610, which governs
31 the Brief Adjudicative Proceeding process and procedure. However, instead of ALJ Moss, ALJ Rayne
32 Pearson (who previously led the division that investigated Dolly) responded to Dolly's request for
33 clarification. ALJ Pearson was not the presiding ALJ in the docket, gave no notice to the parties that
34 she was substituted for ALJ Moss, and was not present at the Brief Adjudicated Proceeding.
35 Regardless, ALJ Pearson apparently replaced ALJ Moss as presiding ALJ in the proceeding.
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43 Dolly filed a Petition for Administrative Review of Initial Order 02, and In the Alternative,
44 Corrected Initial Order 02. By Order 04 the Commission denied Dolly's Petition and affirmed and
45 adopted Initial Order 02 (Corrected). Dolly is now in the process of obtaining the WUTC permits
46 necessary to operate as a household goods carrier, common carrier, and solid waste hauler.
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AUTHORITY AND ARGUMENT

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3 The Washington Administrative Procedures Act (“APA”) expressly provides for judicial
4 review of an agency’s final order. RCW 34.05.514. Once a party has filed a petition for judicial
5 review, the reviewing court may then stay enforcement of the agency’s order pursuant to
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7 RCW 34.05.550(2). Dolly has filed a Petition for Judicial Review and files this motion pursuant to
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9 RCW 34.05.550(2).
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12 A court has discretion to grant a stay or other temporary relief, but specific findings are
13 necessary if the agency order is based on public health, safety, or welfare grounds. In that case, the
14 court must find that (1) that the moving party is likely to succeed on the merits; (2) the applicant will
15 suffer irreparable injury without relief; (3) issuance of the stay will not substantially harm the other
16 parties in the proceeding; and (4) the threat to the public health, safety, or welfare is not sufficiently
17 serious to justify the agency action in the circumstances. RCW 34.05.550.
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24 **A. A Stay is Appropriate Because the Orders are not Based on Public Health, Safety or**
25 **Welfare.**
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27 Here, the agency action of applying penalties and requiring Dolly to cease and desist operations
28 is not based on public health, safety or welfare grounds. While the public service laws in general
29 protect overall public safety, these specific orders against Dolly are not based on public safety. The
30 ALJ and the Commission itself acknowledges that, “[t]here is no evidence in the record, to substantiate
31 significant actual harm arising from Dolly’s operations.” Second Initial Order 02 at ¶ 30. Further, the
32 fact that the Commission was aware of Dolly’s business operations for three years before initiating an
33 enforcement action indicates that the orders are not based on a threat to the public health, safety, or
34 welfare. The legislative purpose behind the household goods carrier regulations is to minimize the
35 effect of large, motor carrier freight traffic. Ironically, by requiring Dolly to cease and desist
36 operations, consumers desiring small, micro-moves will be forced to hire large, traditional moving
37 vans that actually increase large, motor carrier freight traffic. Accordingly, the Court should grant
38 Dolly’s request for a stay of enforcement pending judicial review without further analysis.
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1 **B. A Stay is Appropriate Even if the Orders are Based on Public Health, Safety or Welfare.**

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3 But even if this Court finds that the orders were issued on public health, safety or welfare
4 grounds, this Court should stay the litigation pending judicial review because: (1) Dolly is likely to
5 succeed on the merits of an appeal; (2) Dolly will suffer irreparable injury without a stay; (3) the
6 Commission will not be substantially harmed if the Court grants a stay, and (4) the threat to the public
7 health, safety, or welfare is not sufficiently serious to justify the agency action under the
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9 circumstances.
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14 **1. Dolly Is Likely to Succeed on the Merits of an Appeal**

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16 For the reasons set forth in Dolly's Petition for Judicial Review, Dolly is likely to succeed on
17 the merits of a review. Even if the Commission's orders were based on public health, safety, or
18 welfare grounds, which they are not, Dolly would need to show that it is likely to prevail on only one
19 claim of error. Dolly is likely to prevail on several claims of error; among them, (1) there is
20 insufficient evidence to support a finding that an app-based software company that owns no vehicles
21 and performs no moving services engages in business as a household goods carrier, and (2) significant
22 procedural errors violated Dolly's due process.
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30 **a. There is insufficient evident to find that Dolly is a household goods carrier,**
31 **common carrier, or solid waste hauler.**
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34 A household goods carrier is defined a person who transports for compensation, by motor
35 vehicle within this state, or who advertises, solicits, offers, or enters into an agreement to transport
36 household goods. RCW 81.80.010. As Dolly will demonstrate, it does not conduct household moves,
37 nor does it advertise, solicit, offer, or enter into contracts to conduct household goods moves. Dolly
38 does not own or operate vehicles; therefore, it has no reason to advertise, solicit or enter into contracts
39 to conduct household goods moves. Instead, Dolly maintains and manages a web-based application
40 that connects consumers to individuals who are available to perform micro-moves. Such a business
41 model could not have been contemplated when the household goods carrier regulations were adopted
42 in 1935. Dolly will demonstrate that its advertisements, web presence, and terms and conditions
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1 clearly inform the consumer that Dolly does not transport household or any other goods and there was
2 insufficient evidence to find that Dolly is a household goods carrier, common carrier, or solid waste
3 hauler.
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6 The Commission simply isolated portions of Dolly's social media platforms out of context to
7 conclude that Dolly was advertising to transport goods. For example, Dolly's website advertises,
8 "Retail Store Delivery. Convenient, faster and often cheaper than traditional store delivery options."
9 This statement, the Commission finds, amounts to advertising to transport household goods, other
10 property, and solid waste. Order 04 at ¶¶ 24-25. First, the Commission's order as written would apply
11 to an enormous number of companies such as Amazon Flex, Uber, Postmates, and essentially any
12 company whose social media mentions delivery or transportation of any good to any person in
13 Washington. Second, the Commission isolated certain statements out of context and ignored other
14 internet statements, sworn testimony, and even Dolly's terms of service, which clearly describe Dolly's
15 service as connecting, facilitating, arranging, or brokering, but not transporting. The Commission
16 nonetheless states that a reasonable consumer could be led to believe that Dolly owns trucks and
17 employs its Helpers. Order 04 at ¶ 25. Despite Dolly's several years of operation and over 100,000
18 transactions, WUTC Staff could show no evidence that any consumer has ever been misled to believe
19 that Dolly owns trucks or employs its Helpers. Dolly will show that the evidence contradicts, rather
20 than supports the Commission's orders.
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35 **b. Multiple and substantial procedural errors violated Dolly's due process.**
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38 In addition to the substantive errors described above and in Dolly's Petition for Judicial
39 Review, Dolly will show that the Commission made numerous procedural errors that ultimately
40 violated Dolly's due process. For example, WUTC Staff filed a Petition for Administrative Review of
41 Order 02, raising the constitutional overreach by ALJ Moss in Order 02 when he ordered Dolly to shut
42 down all internet presence anywhere in the world. Instead of allowing the Commission to
43 appropriately grant administrative review,¹ and instead of allowing Dolly an opportunity to answer
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51 ¹ Note that administrative review would have been conducted by the full Commission, rather than the ALJ.

1 WUTC Staff’s petition and additionally challenge Initial Order 02, ALJ Moss re-invents Staff’s
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3 Petition as creating a tacit request for a post-hearing “motion ... to correct [an] obvious error” of Initial
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5 Order 02’s fatal constitutional issue. ALJ Moss then re-writes Initial Order 02, making several
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7 unrelated substantive changes and modifying the principles applied, the analysis, and the outcome.
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9 ALJ Moss justifies his autonomous decision by stating that Commission rule permits him to “correct
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11 ministerial errors.” Then, without explanation or notice, ALJ Pearson suddenly replaced ALJ Moss as
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13 presiding judge in the proceeding.

14 ALJ Moss had to interpret WUTC Staff’s Petition for Administrative Review as a Motion to
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16 Correct an Obvious error because the Commission has no authority to alter, amend, or rescind any
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18 order that it has entered without prior notice and an opportunity to be heard – unless it is to correct for
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20 obvious or ministerial errors in orders. WAC 480-07-875. Requiring Dolly to shut down its app, its
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22 website, and all internet advertising was not an “obvious error”, however, because it is exactly what
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24 this Commission has demanded of other app-based software companies. *See WUTC v. Ghostruck*,
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26 Order 05, Denying Petition for Administrative Review at ¶ 34 WUTC Docket TV-160308 (June 1,
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28 2017), “Ghostruck Inc. must immediately cease operating as a household goods carrier, including but
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30 not limited to taking down or otherwise deactivating its electronic app, its website, and any online
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32 advertising of the Company.” In fact, following the final order in that docket, WUTC Staff
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34 recommended that the Commission impose that company’s suspended penalty, stating, “Staff went to
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36 the website and there was no indication that it was disabled.” *See* WUTC Staff Letter to Steven V.
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38 King in WUTC Docket TV-160308, (July 6, 2017). Demanding that Dolly take down all internet
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40 presence is certainly not an “obvious error” if it is precisely what ALJ Moss intended to do and what
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42 the Commission has ordered in the past.

43 Dolly was entitled to challenge ALJ Moss’s Initial Order 02 pursuant to WAC 480-07-825. By
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45 substantively altering Initial Order 02 without providing notice or an opportunity to be heard, ALJ
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47 Moss sidestepped Dolly’s rights in violation of WAC 480-07-875. The Commission disregards
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49 Dolly’s right to be heard, stating, “Whether we affirm the ALJ’s correction to the initial order or
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51 independently adopt that correction on review, the result is the same.” Order 04 at ¶ 29. The

1 Commission misses the crucial point behind a right to be heard: the three commissioners may not have
2 adopted the ALJ's correction if Dolly had been able to speak.
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6 **2. Without a Stay, Dolly will Doubtless Suffer Irreparable Injury.**
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8 Enforcement of Order 04 means Dolly must effectively shut down all operations in its home
9 state. Even if Dolly is eventually successful in obtaining the required permits from the Commission, a
10 temporary shutdown of operations will be devastating and irreparable. Additionally, despite direction
11 from the legislature to engage a task force and submit a report on potential regulations in the digital
12 marketplace, the Commission clearly intends to enforce Order 04 and require Dolly to cease
13 operations. *See* Order Denying Dolly's Motion to Stay Enforcement of Order in Docket TV-171212.
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20 **3. The Balance of Hardships Sharply Favors a Stay**
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22 While enforcement of Order 04 will certainly cause Dolly irreparable harm, the Commission
23 will not be harmed if the Court grants Dolly's motion for stay because Dolly is willing to obtain a
24 supersedeas bond to insure full payment of Dolly's penalty in the event Dolly is unsuccessful in this
25 appeal. Dolly is currently in the process of obtaining such bond.
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31 **4. The Threat to the Public Health, Safety, or Welfare is Not Sufficiently Serious to**
32 **Justify the Agency Action Under the Circumstances**
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35 As the Commission acknowledges and as described above, there is no threat to the public
36 health, safety or welfare by allowing Dolly to continue to operate pending judicial review. As Dolly
37 will show from the administrative record, Dolly's Helpers and Hands are licensed contractors who
38 undergo background checks and who carry insurance. Further, Dolly carries additional insurance to
39 cover any gaps in coverage. There is no evidence of any safety issue related to Dolly's operations, and
40 there is no evidence that any consumer has even ever complained to the WUTC about Dolly's services.
41 Granting a stay of enforcement of the Commission's orders maintains the status quo during this appeal,
42 and there is no public health, safety, or welfare concern that would justify changing the status quo.
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1 Finally, the public interest favors a stay in this case because Dolly is currently in in the process
2 of obtaining all permits necessary to operate as a household goods carrier, common carrier, and solid
3 waste carrier. Therefore, a stay will save both the parties and the Court substantial time and money on
4 litigation that might be mooted on judicial review.
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8 **CONCLUSION**
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10 For these reasons, Dolly respectfully requests that the Court enter a stay of Initial Order 02,
11 Initial Order 02 (Corrected), and Order 04 pending their judicial review.
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16 DATED: June 18, 2018
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19 **PERKINS COIE LLP**
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