



April 12, 2018

VIA WEB PORTAL

Mr. Steven V. King
Executive Director and Secretary
Washington Utilities and Transportation Commission
1300 S. Evergreen Park Dr. SW
P.O. Box 47250
Olympia, Washington 98504-7250

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State Of WASH.
UTIL. AND TRANSP.
COMMISSION

RE: *In the Matter of Determining the Proper Carrier Classification of and Complaint for Penalties against Dolly, Inc.*
Docket No. TV-171212

Dear Mr. King:

Enclosed for filing please find the original and one (1) copy of the following documents:

- 1) Dolly's Answer Supporting Commission Staff's Petition for Administrative Review, and
- 2) Certificate of Service.

If you have any questions, please contact the undersigned.

Sincerely,

Armikka R. Bryant
Attorney for Dolly, Inc.

AB/ck

Enclosures

cc: Parties w/enc.

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

In the Matter of

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

DOLLY, INC.

DOCKET NO: TV-171212

**DOLLY’S ANSWER TO COMMISSION
STAFF’S PETITION FOR
ADMINISTRATIVE REVIEW**

I. INTRODUCTION AND REQUESTED RELIEF

1 Dolly, Inc. (“Dolly”) supports Washington Utilities and Transportation Commission
Staff’s (“Staff” or “Commission Staff”) Petition for Administrative Review (“Staff Petition”),
filed in Docket Number TV-171212 on April 2, 2018 under WAC 480-07-825, for the reasons
set forth therein.

2 Accordingly, pursuant to WAC 480-07-825, Dolly files this Answer supporting
Commission Staff’s Petition for Administrative Review by the Washington Utilities and
Transportation Commission (“UTC” or “Commission”) of the Initial Order (“Order 02”) filed
by Administrative Law Judge (“ALJ”) Dennis Moss in UTC Docket Number TV-171212,
dated March 29, 2018.¹

3 To the extent not covered here, Dolly incorporates by reference Staff’s rationale for
reviewing Order 02. Further, additional reasons follow below why the Commission must

¹ Dolly did not file a motion requesting the recusal of ALJ Pearson, who was never assigned to this docket.

rescind Order 02. In the event the Commission modifies Order 02, it should reduce the penalties to \$0 and stay the classification and cease and desist rulings.²

II. PROCEDURAL HISTORY

4 The scope of this Answer is limited to supporting Staff's Petition filed under WAC 480-07-825. Dolly intends to file a separate Petition for Administrative Review under WAC 480-07-610 pursuant to the "Notice to Parties" contained in Order 02.³

A. The Brief Adjudicative Proceeding

5 On March 13, 2018 the Commission held a Brief Adjudicative Proceeding pursuant to WAC 480-07-610 to review evidence and testimony regarding Commission Staff's recommendation that the Commission find that Dolly:

- 1) Engaged in business as a household goods carrier 11 times by advertising to do so on its company website, billboards, Facebook, Instagram, Twitter, LinkedIn, iTunes, Craigslist, YouTube, Pinterest, Yelp, and newspaper articles;
- 2) Advertised for the transport of property for compensation on its company website, billboards, Facebook, Instagram, Twitter, LinkedIn, iTunes, Craigslist, YouTube, Pinterest, Yelp, and newspaper articles; and
- 3) Operated for the hauling of solid waste a total of three times by advertising to do so on its website, YouTube, and Yelp.⁴

6 Both Dolly and Commission Staff presented testimony and exhibits and declined the opportunity to file briefs.⁵ See TR at 98:5-21.

B. Initial Order 02

² Staying the classification and cease and desist rulings aligns with the 2018 Supplemental Operating Budget (ESSB 6032), where 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).

³ Order 02 at 17.

⁴ See Order 01 at 7 ¶ 46 – 48.

⁵ See Order 02 at 4 at ¶ 6 which states the parties declined to argue orally, however the parties did not request nor were asked to argue orally.

7 On March 29, 2018, the Commission filed Order 02 which: 1) Classifies Dolly 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; 2) Orders Dolly to cease and desist from all such operations unless and until it first obtains a permit from the Commission; 3) Imposes \$69,000 in penalties for the above alleged violations; and 4) Requires that Dolly, “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.”⁶ The Initial also found that Dolly, “enters into agreements to transport household goods for compensation in the state of Washington as indicated in its Terms of Service”⁷ and states, “the Commission retains jurisdiction over the subject matter and the parties.”⁸

C. Commission Staff’s Petition for Administrative Review

8 On April 2, 2018, less than two business days after the Commission filed Order 02, Commission Staff filed a Petition for Administrative Review of Order 02 on the grounds that the Order’s fourth finding which requires 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” does not comport with the Commerce Clause of the United States Constitution.”⁹

⁶ Order 02 at 15 ¶ 1 - 16 ¶ 4.

⁷ Order 02 at 8 ¶ 18.

⁸ Order 02 at 16 ¶ 5.

⁹ Staff’s Petition at ¶’s 2 and 4.

D. Corrected Initial Order 02

9 On April 9, a week later, the Commission filed a “Corrected” Order 02 which attempted to address the constitutional deficiencies of Order 02 as well as correct other errors.

E. Scope of this Filing

10 This Answer addresses only Staff’s Petition filed under WAC 480-07-825 and does not address Corrected Order 02. Under WAC 480-07-825(4)(b), Dolly has 10 (ten) days to respond to Staff’s Petition. Dolly intends to file a separate Petition for Administrative Review under WAC 480-07-610 to address both Initial Order 02 and Corrected Initial Order 02.

III. RELEVANT FACTUAL BACKGROUND

11 Dolly is an Internet and app-based software company that provides a technology platform that creates a marketplace for the transportation of consumer goods. Consumers who need an item transported use Dolly’s proprietary web-based and app-based smart phone software to connect with independent contractors who are willing to transport the item. Dolly does not own, lease, or rent any moving trucks nor does Dolly control the manner or means in which the independent contractors complete the transportation of the consumer’s goods. In addition to the proprietary software Dolly developed, Dolly also uses different Internet websites to inform people about its platform. Both Dolly’s smart phone app and the websites Dolly uses to communicate with consumers are available wherever Internet access exists.¹⁰

¹⁰ See Shawver, TR. at 84:4-6, in this docket, which states, “Dolly.com ... is available to anybody with internet access in the world.”

IV. ARGUMENT

A. The Initial Order's Cease and Desist Ruling Violates the Commerce Clause of the Federal Constitution

1) The Constitutions of the United States and Washington State Prevents the Commission from Regulating Foreign and Interstate Commerce

¹² Like all government agencies in the state, the Commission is bound by the limits of the Constitutions of Washington State and the United States. Commission Staff, through its counsel, Sally Brown,¹¹ has requested the Commission review and modify Order 02 to comport with the Commerce Clause of the United States Constitution.¹² The Commerce Clause states that only the United States Congress has the power to regulate the instrumentalities of commerce with foreign nations and among the several states; it is an affirmative grant of power to Congress and an implied restriction on the power of states.¹³ U.S. Const. Art. I, Sec. 8. The United States Constitution is undeniably the supreme law of the land that establishes Congress' power to regulate foreign and interstate commerce.¹⁴ This power is so absolute and exclusive that the Washington Constitution contains no similar clause attempting to regulate these activities. Simply stated, under both the federal and Washington State Constitutions, Washington state cannot regulate foreign and interstate commerce without Congress' express authority.

¹¹ At the Hearing, the ALJ took appearances from Jeff Roberson, Assistant Attorney General, Olympia, Washington, represents Commission Staff and Armika [*sic*] R. Bryant, Attorney for Dolly, Inc., Seattle, Washington, represents the Company. Order 02 at 4 ¶ 7.

¹² See generally Staff's Petition.

¹³ *Laborers Local Union No. 374 v. Felton Const. Co.*, 98 Wash. 2d 121, 131 (1982).

¹⁴ Washington State Constitution, Art. I, Sec. 2

2) Congress has not Authorized or Delegated Authority to the Commission to Regulate the Internet or Dolly’s use of the Internet to Engage in Interstate Commerce

13 The websites Dolly uses to engage in interstate commerce are ubiquitous, crossing international and state boundaries and are available anywhere on Earth where Internet access is available.¹⁵ Therefore, as Staff’s Petition explains, the Commission lacks authority to regulate Dolly’s Internet presence because Dolly uses it to engage in commerce occurring outside Washington and any attempt to regulate it runs afoul of the Commerce Clause of the United States Constitution and the Washington State Constitution. Additionally, Order 02 does not cite any evidence that Congress authorized the Commission to regulate, in any capacity, Dolly’s Internet presence, use of the Internet, use and contents of its website, use and contents of its smartphone app, or Internet activity when used in interstate commerce. When Congress chooses to regulate use of the Internet it passes a Congressional Act doing so.¹⁶ In short, it takes an Act of Congress to regulate Internet activity and Congress has not acted in this instance.

3) The Commission Does Not Have Congressional Authority to Determine the Content of a Company’s Internet Presence When Used in Interstate Commerce

14 Order 02 requires that Dolly, “remove immediately its web-based application from the Internet and its presence from Facebook, Twitter, Pinterest, and any other social media sites or

¹⁵ See *supra* note 10.

¹⁶ The exhaustive but short list of Congressional acts censoring Internet activity are: The Communications Decency Act (CDA); The Child Online Protection Act (COPA); The Digital Millennium Copyright Act (DMCA); The Children’s Online Privacy Protection Act (COPPA); The Children’s Internet Protection Act (CIPA); The Trading with the Enemy Act (TWEA); The Americans with Disabilities Act (ADA); and The Fight Online Sex Trafficking Act (FOTSA).

other platforms it uses or has used to make its services known.”¹⁷ Order 02 neither contends that Congress has delegated authority to the Commission or performs a Commerce Clause analysis to rationalize such a draconian measure. Yet, Order 02 concludes that the Commission has the authority to censor Dolly even though Congress has only passed eight acts in American history censoring Internet speech.¹⁸ Order 02’s cease and desist ruling is without merit and an extralegal extension of Commission authority.

4) Dolly does not Perform Regulated Activities in Washington State

15 Dolly does not perform or advertise that it performs any services in Washington state that are regulated by the Commission. In fact, Dolly Senior Director of Marketing, Kevin Shawver testified that he ensures Dolly does not advertise that it performs regulated services, mainly because Dolly does not perform those services, but also because Dolly is cognizant of running afoul of Commission statutes and regulations.¹⁹ Mr. Shawver’s testimony substantiates Dolly’s Answer and Affirmative Defenses which stated that Dolly’s acts and/or practices have fully complied with Washington law and that Dolly has not violated any Commission statute or rule.²⁰ Incredibly, Order 02 finds that Mr. Shawver’s testimony somehow buttressed Commission Staff’s findings.²¹ The Commission need only to consult the record to discover the truth of the matter.

5) Initial Order 02 is Overbroad in its Application of Commission Statutes and Regulations

¹⁷ Order 02 at 15 ¶ 1 - 16 ¶ 4.

¹⁸ See *supra* note 16.

¹⁹ See Shawver, TR at 81:22 – 83:10 which contains a colloquy between Mr. Shawver and Mr. Moss in which Mr. Moss questions Mr. Shawver regarding the details of Dolly’s Internet websites.

²⁰ See Docket No. TV-171212, Dolly Answer and Affirmative Defenses at 6 ¶ 2 and 3.

²¹ See Order 02 at 9 ¶ 20.

16 Initial Order 02 seeks to impose requirements, conditions, restrictions, and penalties on Dolly for engaging in interstate commercial activity as if that commercial activity occurs solely within Washington state. Indeed, Mr. Shawver, testified that the Internet applications and websites Dolly uses are available anywhere Internet access is available.²² Accordingly, anyone anywhere can conduct business with Dolly using the Internet. Rather than applying the law to those facts, Order 02 ignores the constitutional limitations of the Commission's statues and regulations, ignores Mr. Shawver's testimony, and concludes the record actually supports imposing requirements, conditions, and restrictions, that infringe on Dolly's constitutional rights.²³ The Commission must not enforce Order 02 or permit it to become final as currently drafted.

B. The Commission Must Rescind or Vacate the Initial Order

17 The Commission has great latitude in determining the means of regulating entities subject to its jurisdiction. However, requiring that a business engaged in Interstate commerce essentially shutter its windows in violation of the Constitution is not one of them. Rescinding Order 02 in its entirety or partially is the only logical remedy to invalidate its unconstitutional rulings.

18 Unfortunately, there is no potential 'correcting' language that can possibly modify Order 02 to render it constitutional, either facially or as applied. This is because: 1) Dolly is engaged in interstate commerce; 2) The Commission does not have the authority to regulate interstate commerce; and 3) Requiring Dolly to delete or modify its Internet presence in any manner is

²² See *supra* note 10.

²³ See Order 02 at 9 ¶ 21.

still an impermissible intrusion into, “Congress’s regulatory jurisdiction over interstate commerce by regulating commercial conduct occurring in another state.”²⁴ As a result, the Commission lacks constitutional and congressional authority to require Dolly to delete or modify its website, smartphone app, etc. in any way other than when used solely to engage in intrastate commerce.

19 Initial Order 02 also holds that Dolly must obtain permits and pay a penalty because it advertised to perform regulated services. However, Dolly did not and does not advertise that it performs regulated services in Washington state.²⁵ Therefore, classifying Dolly as regulated intrastate carrier is wholly nonsensical, especially in light of the unconstitutional basis for that classification. As such, it follows that Order 02’s unconstitutional finding cannot be the basis to classify Dolly as a regulated carrier, impose penalties, or order it to cease and desist all Internet activity. For these reasons, the Commission’s only alternatives are to rescind or drastically modify Order 02. If the Commission chooses to only modify Order 02, it should also stay the rulings classifying Dolly as a regulated carrier and reduce the penalty amount to \$0 because there are no constitutional grounds upon which Order 02’s rulings can stand.²⁶

²⁴ See Commission Staff’s Petition for Administrative Review at 2 ¶ 4.

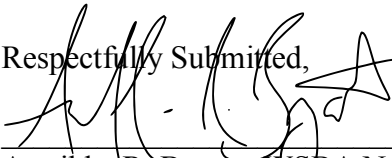
²⁵ See *supra* note 19.

²⁶ Staying the classification and cease and desist rulings aligns with the 2018 Supplemental Operating Budget (ESSB 6032), where 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).

V. CONCLUSION

20 In addition to containing many substantive inaccuracies and clerical errors, Order 02 ignores over a century of Commerce Clause jurisprudence to arrive at an unconstitutional conclusion. Further, in spite of Order 02 finding, “the Commission retains jurisdiction over the subject matter and the parties”, the Commission in fact does not have jurisdiction over Dolly’s Internet presence. To be sure, Dolly supports Staff’s Petition, but concludes the Commission must rescind Order 02 or modify it as stated above to comport with the United States and Washington State Constitutions.

DATED this 12th day of April 2018.

Respectfully Submitted,


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CERTIFICATE OF SERVICE

DOCKET NO. TV-171212

Determining the Proper Carrier Classification and Complaint for Penalties


I, Casey Klaus, do hereby certify that, pursuant to WAC 480-07-150(6), I have this day served a true and correct copy of *Dolly's Answer Supporting Commission Staff's Petition for Administrative Review* to all parties of record listed and by the manner indicated below:

SERVICE LIST

**HC = Receive Highly Confidential; C = Receive Confidential;
NC=Receive Non-Confidential**

<p>COMMISSION STAFF:</p> <p>Jeffrey Roberson Office of the Attorney General Utilities & Transportation Commission 1400 S. Evergreen Park Dr. S.W. P.O. Box 40128 Olympia, Washington 98504-0128 Phone: (360) 664-1188 Fax: (360) 586-5522 Email: jeff.roberson@utc.wa.gov</p> <p><input type="checkbox"/> via ABC Legal Messenger <input type="checkbox"/> via FedEx Overnight Delivery <input type="checkbox"/> via U.S. First-Class Mail <input type="checkbox"/> via Hand-Delivery <input checked="" type="checkbox"/> via E-Mail</p>	
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Dated at Seattle, Washington, this 12TH day of April 2018.



Casey Klaus
Office Manager & Administrative Assistant