

**BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION**

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

DOLLY, INC.

DOCKET TV-171212

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

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I. INTRODUCTION

1 A Commission ALJ, after presiding over a special proceeding, entered Corrected Order 02 in this docket, finding that Dolly, Inc. (Dolly) engaged in business as a household goods carrier and operated for the transportation of property and solid waste without authority from the Commission to do so. The ALJ imposed penalties for Dolly's violations of the public service laws and, as required by the legislature, ordered Dolly to cease and desist from future violations.

2 Dolly now petitions for administrative review of Corrected Order 02, as well as the initial, uncorrected Order 02.¹ Dolly raises over two-dozen alternative claims for relief, which generally fall into five categories: that the ALJ erred by: (1) classifying the company as a household goods carrier, a common carrier of general commodities, and a solid waste collection company; (2) imposing penalties based on each of its internet advertisements; (3) ordering it to cease and desist; (4) ignoring a proviso included in the 2017 Washington State budget; and (5) correcting Order 02 in a way Dolly deems procedurally defective.

3 The Commission should affirm Corrected Order 02 because: (1) the record contains overwhelming evidence that Dolly entered into agreements to transport household goods, property, or solid waste and also held itself out as a carrier through its advertisements; (2) the ALJ properly imposed on Dolly a penalty for each of its advertisements in accordance with RCW 81.80.075(4)(a); (3) Corrected Order 02 does not infringe on Dolly's rights to free speech or due process or unduly burden interstate commerce; (4) the 2017 budget

¹ Corrected Order 02 is identical to Order 02 except for: (1) a substantive correction to the scope of one of the order's cease and desist provisions and (2) certain editorial corrections.

proviso is irrelevant to these proceedings; and (5) the entry of Corrected Order 02 comported with the Commission's rules and, in any event, did not prejudice Dolly.

II. BACKGROUND²

4 Dolly operates a digital application and website used by customers who want to purchase the transportation of household goods, other property, or solid waste.³ Customers arrange this transportation by providing Dolly with information such as the type of household goods, other property, or junk the customer wants transported; the places between which the customer wants the item or items transported; and a date and time for the transportation.⁴ Dolly then provides the customer with a guaranteed price quote.⁵ After the move, the customer pays Dolly, and only Dolly.⁶ Dolly insures shipments booked through its services, or at least it tells customers that it does.⁷ Dolly has booked revenue in Washington State for engaging in business in this manner.⁸

² Dolly repeatedly makes reference to matters outside of the record, and Staff asks the Commission to disregard any unsupported assertion. *See* WAC 480-07-825(3).

³ *E.g.*, Paul, Exh. SP-7 at 1 (offering “Apartment Moves” for household goods), 2 (offering “Retail Store Delivery” and “Junk Removal. Dolly Helpers will remove and haul away your junk. Includes trash removal and responsible disposal.”); Paul, SP-9 at 1 (offering service for “[m]ov[ing] furniture between apartments, storage units, or a friend’s house” and “[p]ick[ing] up big items purchased on Craigslist, at a garage sale, or at Ikea, Lowe’s, Crate & Barrel, or other retailers” and explaining “How [Dolly] works.”); Paul, Exh. SP-10 at 1 (Dolly – Truck & Muscle Anytime You Need It. Use our app to load, haul, and deliver just about anything, whenever you need it!”); Paul, Exh. SP-11 at 1 (again stating that Dolly provides “Truck & Muscle Anytime” a consumer needs it, again explaining ways to use Dolly, and advising customers to “[r]equest a truck and Helper with the tap of a button and relax. We’ll keep large items off the roof of your car, save you a trip to the chiropractor and help make moving things—big and small—easy and fast.”); Paul, Exh. SP-12 at 1 (“Dolly connects you with truck and muscle, anytime you need it . . . Dolly is a fast, easy, and affordable way to get help with your apartment move.”); Paul, Exh. SP-13 (“Need a truck[?] Use the new Dolly app instead” and “Dolly is Your Move[] Anything App,” among other advertisements); Paul, Exh. SP-15 at 1 (“The Moves We Made: Dolly’s 2017 in Review”); Paul, Exh. SP-17 at 1 (describing Dolly as “Movers, Couriers & Delivery Services, Junk Removal & Hauling).

⁴ Paul, TR. at 27:7-20; Paul, Exh. SP-9 at 1 (describing “[h]ow it works).

⁵ Paul, TR. at 27:21-23; Paul, Exh. SP-9 at 1 (describing “[h]ow it works).

⁶ Paul, TR. at 27:24-28:15; Paul, Exh. SP-6 at 2-3.

⁷ Paul, TR. at 35:11-13; Paul, Exh. SP-9.

⁸ *In re Determining the Proper Carrier Classification of, and Complaint for Penalties Against Dolly, Inc.*, Docket TV-171212, Staff Investigative Report, at 6 (Dec. 2017). Dolly claims that Staff’s revenue figures include worldwide revenue, but neither disputed them at hearing nor offered any evidence to the contrary. Pet. for Review at 28 n.55. Regardless, Dolly appears to concede that it booked revenue in Washington. *Id.*

5 Dolly advertises its services in a number of ways. In 2016, the company displayed a billboard directing customers to a Dolly-sponsored website in Seattle, Washington.⁹ The company also maintained, and currently maintains, a significant presence on social media, which it uses to advertise its services. This presence includes, or has included, its own website¹⁰ and extends to websites such as Facebook,¹¹ Twitter,¹² LinkedIn,¹³ Apple's iTunes store,¹⁴ Craigslist,¹⁵ YouTube,¹⁶ Pinterest,¹⁷ Instagram,¹⁸ Craigslist, and Yelp.¹⁹ Many of Dolly's social media advertisements show men wearing clothing marked with Dolly's logo moving what appear to be household goods into trucks.²⁰ Some of these trucks fly a flag emblazoned with Dolly's logo.²¹ Dolly does not, in any of these advertisements, state that it does not transport or haul items for customers.²²

6 After a lengthy investigation and significant contact with Dolly, Staff produced an investigation report.²³ Staff submitted this report to the Commission along with a request that it find probable cause to: (1) institute a special classification proceeding to determine whether Dolly had engaged in jurisdictional conduct and (2) complain for penalties.²⁴ A

⁹ Paul, TR. at 32:23-34:13; Paul, Exh. SP-8.

¹⁰ Paul, TR. at 30:7-32:21; Paul, Exh. SP-7.

¹¹ Paul, TR. at 34:16-35:13; Paul, Exh. SP-9.

¹² Paul, TR. at 35:13-36:5; Paul, Exh. SP-10.

¹³ Paul, TR. at 36:6-23; Paul, Exh. SP-11.

¹⁴ Paul, TR. at 36:24-37:19; Paul, Exh. SP-12.

¹⁵ Paul, TR. at 37:20-38:25; Paul, Exh. SP-13.

¹⁶ Paul, TR. at 39:1-40:6; Paul, Exh. SP-14.

¹⁷ Paul, TR. at 40:7-41:2; Paul, Exh. SP-15.

¹⁸ Paul, TR. at 41:3-41:22 Paul, Exh. SP-16.

¹⁹ Paul, TR. at 41:23-42:17; Paul, Exh. SP-17.

²⁰ Paul, TR. at 32:12-21, 36:2-5, 36:20-21, 42:12-13; Paul, Exh. SP-7; Paul, Exh. SP-9; Paul, Exh. SP-10; Paul, Exh. SP-11; Paul, Exh. SP-13; Paul, Exh. SP-17.

²¹ Paul, Exh. SP-15.

²² See generally Paul, Exh. SP-7; Paul, Exh. SP-9; Paul, Exh. SP-10, Paul, Exh. SP-11; Paul, Exh. SP-12; Paul, Exh. SP-13; Paul, Exh. SP-14; Paul, Exh. SP-15; Paul, Exh. SP-16; Paul, Exh. SP-17; Shawver, TR. at 94:19-96:8.

²³ *In re Determining the Proper Carrier Classification of, and Complaint for Penalties Against Dolly, Inc.*, Docket TV-171212, Staff Investigative Report, at 6 (Dec. 2017).

²⁴ *In re Determining the Proper Carrier Classification of, and Complaint for Penalties Against Dolly, Inc.*,

Commission ALJ found probable cause, and a different Commission ALJ presided over the resulting special proceeding, where Staff’s investigator, Ms. Susie Paul, and Dolly’s Senior Director for Marketing, Mr. Kevin Shawver, testified.²⁵

7 After hearing and the close of the record in the special proceeding, the assigned ALJ entered Initial Order 02 in this docket.²⁶ The ALJ found that Dolly had engaged in jurisdictional conduct by entering into agreements with customers to provide regulated services and also by holding itself out as a carrier in its advertisements.²⁷ The ALJ therefore: (1) classified Dolly as a household goods carrier, a common carrier of general commodities, and a solid waste collection company;²⁸ (2) imposed penalties;²⁹ and (3) ordered Dolly to cease and desist from further violations of the public service laws.³⁰ One of the provisions of the cease and desist order required Dolly to remove its application, website, and social media presence from the internet.³¹

8 Concerned about that cease and desist provision, which would have interfered with commerce conducted solely within the boundaries of other states, Staff petitioned for review, citing the extraterritoriality doctrine of the dormant commerce clause.³² The ALJ construed that motion as one to correct an obvious error and subsequently issued Corrected

Docket TV-171212, Order 01 (Jan. 10, 2018); *see* Paul, TR. at 12:17-26:9 (describing Staff’s interactions with Dolly from the time Staff began its investigation of the company).

²⁵ *See generally*, TR. at 1:5-99:13.

²⁶ *In re Determining the Proper Carrier Classification of, and Complaint for Penalties Against Dolly, Inc.*, Docket TV-171212, Order 02 (Mar. 29, 2018).

²⁷ *Id.* at 8 ¶ 9, 15 ¶ 1.

²⁸ *Id.* at 15 ¶ 1.

²⁹ *Id.* at 10 ¶ 23 through 14 ¶ 44, 16 ¶ 3.

³⁰ *Id.* at 16 ¶¶ 2, 4.

³¹ *Id.* at 16 ¶ 4.

³² *In re Determining the Proper Carrier Classification of, and Complaint for Penalties Against Dolly, Inc.*, Docket TV-171212, Commission Staff’s Petition for Administrative Review, at 2 ¶ 4 (Apr. 2, 2018) (citing *Bostain v. Food Exp., Inc.*, 159 Wn.2d 700, 720, 153 P.3d 846 (2007); *Healy v. Beer Institute, Inc.*, 491 U.S. 324, 335-37, 109 S. Ct. 2491, 105 L. Ed. 2d 275 (1989)).

Order 02.³³ Corrected Order 02 is identical to Order 02 save for two changes. First, it makes certain copy edits.³⁴ Second, it corrects the cease and desist provision of which Staff sought review by requiring Dolly to state on its website, application, and social media presence that it does not provide services in Washington State rather than remove its presence from the internet.³⁵ Three days later, Dolly filed an answer supporting Staff’s petition for review.³⁶

9 Dolly now petitions for administrative review of both Order 02 and Corrected Order 02.³⁷

III. ARGUMENT

10 Dolly’s petition raises two sets of alternative requests for relief, with the two sets of claims collectively presenting 25 claims. As mentioned above, these generally fall into five categories: claims that the presiding ALJ erred by: (1) classifying the company as a household goods carrier, a common carrier of general commodities, and a solid waste collection company; (2) imposing penalties based on each of its different internet advertisements, (3) ordering it to cease and desist, (4) ignoring a budget proviso that Dolly contends amends the public service laws as they relate to its operations, and (5) correcting Order 02 in the manner that the presiding ALJ did. The Commission should affirm Corrected Order 02, which correctly applies the relevant law, complies with the constitution, and whose entry was not erroneous and did not prejudice Dolly.

³³ *In re Determining the Proper Carrier Classification of, and Complaint for Penalties Against Dolly, Inc.*, Docket TV-171212, Notice of Correction of Initial Order, at 1-2 (Apr. 9, 2018).

³⁴ *Id.*

³⁵ *Id.*

³⁶ *In re Determining the Proper Carrier Classification of, and Complaint for Penalties Against Dolly, Inc.*, Docket TV-171212, Dolly’s Answer to Commission Staff’s Petition for Administrative Review, at 1 ¶ 1 (Apr. 12, 2018).

³⁷ *In re Determining the Proper Carrier Classification of, and Complaint for Penalties Against Dolly, Inc.*, Docket TV-171212, Dolly’s Petition for Administrative Review of Initial Order 02, and in the Alternative, Corrected Initial Order 02 (Apr. 19, 2018) (hereinafter Pet. for Review).

A. The Commission Enforces the Public Service Laws, the Provisions of which Require Operating Authority from the Commission Before A Person May Lawfully Advertise to Provide Regulated Services

11 The legislature directed the Commission to enforce the public service laws.³⁸ Those laws subject three kinds of motor carriers, among others, to regulation. These three carrier types include solid waste collection companies,³⁹ common carriers of general commodities,⁴⁰ and household goods carriers.⁴¹ A person must obtain operating authority from the Commission before engaging in business as a household goods carrier or operating as a common carrier of general commodities or as a solid waste collection company.⁴² This means that a person may not advertise his or her provision of regulated services without first obtaining a permit from the Commission.⁴³

12 Where the Commission believes a person has operated, or is operating, in violation of the public service laws, it may institute a special proceeding and order the person to appear and give testimony about his or her activities.⁴⁴ Whether the person has engaged, or is engaging, in activities falling within the Commission’s jurisdiction is “a question of fact to be determined by the Commission.”⁴⁵ The Commission “may consider any and all facts that may indicate the true nature and extent of the operations or acts” of the person when determining whether or not he or she has engaged in, or is engaging in, jurisdictional conduct.⁴⁶

³⁸ RCW 80.01.040; RCW 81.01.010.

³⁹ Chapter 81.77 RCW.

⁴⁰ Chapter 81.80 RCW.

⁴¹ Chapter 81.80 RCW.

⁴² RCW 81.77.040; RCW 81.80.070, .075.

⁴³ RCW 81.77.040; RCW 81.80.075, .355.

⁴⁴ RCW 81.04.510.

⁴⁵ RCW 81.04.510.

⁴⁶ RCW 81.04.510.

13 If the Commission determines that a person has engaged in, or is engaging in, jurisdictional conduct, it must order the person to cease and desist from violating the public service laws.⁴⁷ It may also impose penalties for such violations.⁴⁸

B. The Presiding ALJ Correctly Determined That Dolly Engaged In Business As A Household Goods Carrier And Operated As A Common Carrier Of General Commodities And As A Solid Waste Collection Company

14 The ALJ determined, based on the evidence presented at the special proceeding, that Dolly had engaged in business as a household goods carrier and operated as a common carrier of general commodities and as a solid waste collection company. Dolly appeals those findings, claiming that the ALJ erred by determining that it: (1) entered into agreements to transport household goods for compensation in Washington based on Dolly's terms of service,⁴⁹ and (2) provided regulated services based on Dolly's advertising.^{50,51} Dolly also repeatedly assails Corrected Order 02 as a "[t]autological [c]ontradiction" that "[i]nvalidates [i]tself as a [m]atter of law" based on what Dolly incorrectly perceives as tensions between the classification and cease and desist provisions in the order.⁵² The ALJ's findings were compelled by the weight of the evidence at the hearing, and Dolly bases its claim that Corrected Order 02 invalidates itself on a misunderstanding of what the order is and does.

1. The ALJ properly determined that Dolly engaged in business as a household goods carrier, operated as a common carrier, and operated for the hauling of solid waste based on the nature of its agreement with its customers.

15 The Commission should affirm the ALJ's finding that Dolly enters into agreements

⁴⁷ RCW 81.04.510.

⁴⁸ RCW 81.04.380-.390, .405.

⁴⁹ Pet. for Review at 24-25 ¶¶ 45-46.

⁵⁰ Pet. for Review at 27-28 ¶ 50.

⁵¹ Dolly argues that the Commission cannot classify Dolly as a household goods carrier, common carrier, or solid waste collection company based on a variant of its dormant commerce clause challenge, which this answer addresses below. See Pet. for Review at 25-26 ¶ 47-48.

⁵² Pet. for Review at 38, 39.

for the transportation of household goods, other property, or solid waste because the overwhelming weight of the evidence supports it. Customers using Dolly’s service provide the company with the information necessary to accomplish this transportation: the types of goods involved, the origin and destination of the transportation, and a date and time for the transportation.⁵³ Dolly provides the customers with the controlling price quote.⁵⁴ Customers must pay Dolly, and only Dolly, for the transportation in accordance with the company’s terms of services.⁵⁵ Dolly insures shipments booked through its website.⁵⁶ Dolly has reported revenue for the provision of its services in Washington State.⁵⁷ Essentially, this record shows that Dolly’s customers tell the company that they want goods or solid waste transported. Dolly provides the transportation. The customers then pay Dolly.⁵⁸ This record evidence readily allows the finding that Dolly and its customers enter into an agreement for the transportation of household goods, other property, or solid waste within this state.

16 Dolly nevertheless contends that the presiding ALJ erred for three reasons. First, Dolly contends that the ALJ should not have relied on its terms of service because none of those terms “conform to Chapter RCW 19.36 or Washington State’s statutory framework governing contract formation.”⁵⁹ The Commission should find this argument unpersuasive, for three reasons.

17 As an initial matter, the public service laws forbid an “agreement,” not a just a legal contract, between an unpermitted household goods carrier or solid waste collection company

⁵³ Paul, TR. at 27:7-20; Paul, Exh. SP-9 at 1.

⁵⁴ Paul, TR. at 27:21-23; Paul, Exh. SP-6 at 2-3.

⁵⁵ Paul, TR. at 27:24-28; Paul, Exh. SP-6 at 2-3.

⁵⁶ Paul, TR. at 35:11-13; Paul, TR. at Exh. SP-9.

⁵⁷ *In re Determining the Proper Carrier Classification of, and Complaint for Penalties Against Dolly, Inc.*, Docket TV-171212, Staff Investigative Report, at 6 (Dec. 2017).

⁵⁸ Paul, Exh. SP-9 at 2-3.

⁵⁹ Pet. for Review at 25 ¶45.

and one of its customers.⁶⁰ Dolly and its customers undoubtedly enter into an agreement, as just described.⁶¹ That should end the inquiry, and the Commission should affirm the finding.

18 Further, the evidence suffices to show that the agreements Dolly enters into with its customers are contracts. Formation of a contract requires offer, acceptance, and the exchange of consideration.⁶² By accepting Dolly's price quote, the company and customer have exchanged offer and acceptance, and the transportation and payment constitute an exchange of consideration, meaning that the company and its customer form a valid contract.

19 Finally, Dolly citations to statutes governing contract formation are irrelevant. The statute of frauds, chapter 19.36 RCW, does not apply to the type of contract formed between Dolly and its customers.⁶³ The provisions of the Uniform Commercial Code, Title 62A RCW do not apply because Dolly sells a service, not a good.⁶⁴ The common law, not the revised code, governs. And, again, as just discussed, the record evidence compels the finding that the company enters into common-law contracts with its customers.

20 Second, Dolly claims that the ALJ could not have found that it enters into agreements with customers because Staff did not produce written copies of the agreements or testimony from anyone with firsthand knowledge of those agreements.⁶⁵ Dolly essentially asks the Commission to require direct evidence. That request fails on the well-recognized

⁶⁰ See, e.g., RCW 81.80.010(2) (distinguishing between "special and individual contracts" and agreements).

⁶¹ See Webster's New World Dictionary at 26 (3d College ed. 1988) (defining agreement to mean "an understanding or arrangement between two or more people."); *State v. Marohl*, 170 Wn.2d 691, 699, 246 P.3d 177 (2010) (ordinary meaning controls unless there is evidence that the legislature used the word as a term of art.).

⁶² *Storti v. Univ. of Wash.*, 181 Wn.2d 28, 35-36, 330 P.3d 159 (2014).

⁶³ See RCW 19.36.010.

⁶⁴ RCW 62A.2-102.

⁶⁵ Pet. for Review at 25 ¶ 46.

principle that direct and circumstantial evidence are of equal evidentiary weight.⁶⁶ And while Staff did not present any agreement between Dolly and a customer, it did provide significant evidence that allowed the ALJ to infer the existence of those agreements. That the ALJ reasonably did so is seen from the fact that the Commission drew the very same inference when Dolly described its business model when petitioning the Commission for a rulemaking to disclaim jurisdiction over the company.⁶⁷

21 Third, Dolly contends that it could not have entered agreements to transport goods or solid waste because, as its witness testified, it does not employ movers or own moving trucks. That fact is irrelevant. Dolly enters into agreements to transport goods or solid waste: the fact that it enters into a second agreement to subcontract or delegate its performance does not nullify the first agreement. Indeed, the Commission has already decided in *Ghostruck*⁶⁸ that a company conducting business in this manner engages in jurisdictional conduct.⁶⁹ While *stare decisis* carries less force in administrative proceedings, agencies must strive to treat similarly situated companies similarly,⁷⁰ and that docket should compel a similar result here.

22 The Commission should note that, even if it were to set aside the concerns about unequal treatment and approach the issue as if it were writing on a blank slate, it decided this issue correctly in *Ghostruck*. As discussed above, when Dolly's customers accept its guaranteed price quote they accept an offer by the company to transportation their property

⁶⁶ *State v. Goodman*, 150 Wn.2d 774, 781, 83 P.3d 410 (2009).

⁶⁷ Paul, Exh. SP-19.

⁶⁸ *In re Determining the Proper Carrier Classification of, and Complaint for Penalties Against Ghostruck, Inc.*, Docket TV-161308, Order 05, at 3-4 ¶¶ 11 (May 31, 2017).

⁶⁹ *Ghostruck*, Docket TV-161308, Order 05, at 2-4 ¶¶ 7-14; accord *In re Determining the Proper Carrier Classification of, and Complaint for Penalties Against Transit Sys. Inc., d/b/a Moves For Seniors*, Docket TV-170747, Order 04, at 4-6 ¶¶ 10-13 (Mar. 21, 2018).

⁷⁰ *Stericycle of Wash., Inc. v. Wash. Utils. & Transp. Comm'n*, 190 Wn. App. 74, 359 P.3d 894 (2015).

or waste for compensation. Dolly procures someone to perform the transportation and the customer then, and only then, pays Dolly. That is an exchange of consideration between the customer and Dolly. Dolly and its customers thus enter into a valid, legally binding contract. That Dolly's business model involves subcontracting is irrelevant to whether it enters into an agreement with its customers, and the Commission should so find.

2. The presiding ALJ properly found that Dolly engaged in jurisdictional conduct based on its advertising.

23 The record also contains un-contradicted evidence that Dolly advertised for the transportation of household goods, property other than household goods, and solid waste. Dolly repeatedly makes statements to that effect in its advertisements, which are in the record for the Commission's review.⁷¹ Dolly's advertisements also repeatedly show images of men wearing Dolly shirts loading what appear to be household goods into trucks;⁷² in at least one of these advertisements the truck is flying a flag marked with the Dolly logo. These statements are similar to the ones that caused the Commission to classify *Ghostruck* as a household goods carrier in Docket TV-161308.⁷³ Again, the Commission must treat similarly situated companies similarly, meaning that it must affirm the ALJ's finding that Dolly engages in jurisdictional activity.

24 Dolly, nevertheless, insists that Mr. Shawver testified that he "ensures Dolly does not advertise that it performs regulated services" in Washington State.⁷⁴ To the contrary, he made no such guarantee,⁷⁵ and, in any event, Dolly's words and the images on its website

⁷¹ Paul, TR. at 30:16-42:17; Paul, Exhs. SP-7 through SP-17.

⁷² Paul, TR. at 32:12-21, 36:2-5, 36:20-21, 42:12-13; Paul Exh. SP-7, Paul Exh. SP-9, Paul Exh. SP-10, Paul Exh. SP-11, Paul Exh. SP-13, Paul Exh. SP-17.

⁷³ *Ghostruck*, Docket TV-161308, Order 05, at 4 ¶¶ 13.

⁷⁴ Pet. for Review at 16 ¶ 30, 27-28 ¶ 51.

⁷⁵ See Shawver, TR. at 82:5-15, 83:3-9.

and social media contradict such testimony. Dolly repeatedly holds itself out to customers as a carrier or solid waste collection company.⁷⁶ A person holding himself or herself out as a carrier is a carrier in the eyes of the law.⁷⁷

25 Dolly also argues that any classification based on advertising is ultra vires because its advertisements are constitutionally protected speech.⁷⁸ Dolly is incorrect, as discussed below in the context of its speech and dormant commerce clause claims.⁷⁹

3. Corrected Order 02 neither contradicts nor moots itself.

26 Finally, Dolly argues that Corrected Order 02 contradicts or moots itself because it both classifies Dolly as a household goods carrier, common carrier, and solid waste collection company, but also orders the company to state that it does not offer services in Washington on its website, application, and social media presence.⁸⁰ Corrected Order 02 does no such thing.

27 There is no contradiction. Under the public service laws, a person may not advertise to transport household goods, other property, or solid waste without first obtaining a permit from the Commission. The evidence showed that Dolly has done so, and the presiding ALJ based the classification finding on Dolly's past conduct,⁸¹ which made it a household goods carrier, common carrier, and a solid waste collection company. The ALJ inserted the provision Dolly claims moots the classification order to force Dolly to cease and desist from

⁷⁶ Paul, TR. at 30:16-42:17; Paul, Exhs. SP-7 through SP-17.

⁷⁷ *Ghostruck*, Docket TV-161308, Order 05, at 4 ¶ 13; *accord Ensco, Inc. v. Weicker Transfer & Storage Co.*, 689 F.2d 921, 925 (10th Cir. 1982); *Hewlett-Packard Co. v. Brother's Trucking Enter. Inc.*, 373 F. Supp. 2d 1349, 1352 (S.D. Fla. June 16, 2005).

⁷⁸ Pet. for Review at 26 ¶ 48, 29 ¶ 53.

⁷⁹ Staff notes that one of the violations was for advertising on a billboard in Seattle, which Dolly does not allege violates the dormant commerce clause. If the Commission accepts Dolly's dormant commerce clause claim, that does not affect Corrected Order 02's classification of the company.

⁸⁰ Pet. for Review at 38-39 ¶¶ 71-75.

⁸¹ RCW 81.04.510 (allowing classification for past conduct).

violating the public service laws. The provision is a cease and desist order,⁸² meaning that it looks forward, not backward, and does not conflict with the classification finding in any way.

C. Corrected Order 02 Properly Applies The Penalty Provisions In RCW 81.80.075(4)(a)

28 Dolly also maintains that Corrected Order 02 imposed penalties based on an erroneous interpretation of RCW 81.80.075. Specifically, Dolly contends that both Staff and the presiding ALJ erred by treating “different Internet websites as multiple mediums” and imposing “penalties based on each website, instead of on the singular medium.”⁸³ Dolly simply misreads the statute.

29 The legislature has authorized the Commission to impose penalties for violations of the public service laws. For persons engaging in business as a household goods carrier without authority, the Commission may impose a fine of up to a maximum of \$5,000 per violation, with “[e]ach advertisement reproduced, broadcast, or displayed via a particular medium constitute[ing] a separate violation.”⁸⁴ The general penalty provision applicable to other violations of the public service laws also allows a penalty for each separate violation.⁸⁵

30 The ALJ properly imposed penalties. Each means “every one of two or more considered separately”⁸⁶ or “[b]eing one of two or more regarded individually: EVERY. . . Every one of a group regarded individually: each one.”⁸⁷ Staff sought, and the presiding ALJ

⁸² Black’s Law Dictionary 215 (7th ed. 1999) (defining a cease and desist order as “[a] court or agency’s order prohibiting a person from continuing a particular course of conduct”).

⁸³ Pet. for Review at 26-27 ¶ 49.

⁸⁴ RCW 81.80.075(4)(a).

⁸⁵ RCW 81.04.380.

⁸⁶ Webster’s New World Dictionary of American English at 425 (3d College Ed. 1988).

⁸⁷ Webster’s II New Riverside University Dictionary at 413 (1984).

imposed, penalties for each different advertisement found on the internet or broadcast through other media.⁸⁸

31 In contrast, Dolly’s interpretation of RCW 81.80.075(4)(a) runs counter to bedrock rules of statutory interpretation. The Commission must attempt to give effect to each word the legislature uses in a statute.⁸⁹ As just noted, the relevant penalty provision specifies that “each advertisement reproduced, broadcast, or displayed by a particular medium constitutes a separate violation.”⁹⁰ Dolly would have the Commission focus on the word “medium” to a degree that requires it to impermissibly read the word “each” out of the statute. Simply put: Dolly displayed each of the relevant internet advertisements in the same medium, but that does not mean that they are all the same advertisement. A quick look at the record shows that they are not.

D. Corrected Order 02 Does Not Infringe On Dolly’s Constitutionally Protected Rights

32 Dolly next challenges a cease and desist provision originally inserted into Order 02 and then corrected in Corrected Order 02 on numerous constitutional grounds. Staff addresses each in turn.

1. Corrected Order 02 correctly classifies Dolly as a regulated entity and imposes penalties on it because its advertisements receive no protection

⁸⁸ Staff did not seek multiple penalties where Dolly displayed more than one advertisement on a given website. For example, Dolly had multiple Twitter handles, but Staff only sought penalties for one violation. Shawver, TR. at 93:16-94:4. Dolly also had numerous advertisements on YouTube, but Staff only sought a single violation. Paul, TR. at 40:3-6. In other words, Staff could have sought penalties for many more violations that it did, and the Commission could have permissibly imposed penalties for those additional violations.

⁸⁹ *State v. Ervin*, 169 Wn.2d 815, 823, 239 P.3d 354 (2010) (quoting *Rivard v. State*, 168 Wn.2d 775, 783, 231 P.3d 186 (2010)).

⁹⁰ RCW 81.80.075(4)(a) (emphasis added).

under the First Amendment to the United States Constitution or Article I, section 5 of the Washington State Constitution.

33 Dolly contends that Order 02: (1) abridges its “[f]undamental [r]ight to [c]ommercial [f]ree [s]peech” and (2) acts as an unconstitutional prior restraint on speech.⁹¹ Dolly is incorrect: advertisements that promote unlawful transactions receive no speech protection under either the commercial speech or prior restraint doctrines.

a. Dolly’s advertisements do not receive protection as commercial speech because they concern and promote an unlawful transaction.

34 Commercial speech receives protection under both the state and federal constitutions,⁹² although this protection is more limited than the protection given to other forms of speech.⁹³ Courts evaluate the permissibility of a restriction on commercial speech using a four-factor test: whether (1) the speech concerns a lawful activity and is not misleading, (2) the government has a substantial interest in the regulation, (3) the regulation directly and materially advances the governmental interest, and (4) the restriction is narrowly tailored.⁹⁴

35 The first factor serves as a threshold inquiry which determines whether a regulation of commercial speech warrants a complete analysis under all of the *Central Hudson* factors.⁹⁵ This is because “there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity.”⁹⁶

⁹¹ Staff addresses Dolly’s speech challenges to Order 02 in case the Commission rescinds Corrected Order 02 in response to Dolly’s claims about its entry.

⁹² *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 563, 100 S. Ct. 2343, 65 L. Ed. 2d 341 (1980); *Kitsap County v. Mattress Outlet/Gould*, 153 Wn.2d 506, 511-12, 104 P.3d 1280 (2005).

⁹³ *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 64-65, 103 S. Ct. 2875, 77 L. Ed. 2d 469 (1983).

⁹⁴ *Mattress Outlet/Gould*, 153 Wn.2d at 511-12 (citing *Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 563).

⁹⁵ *United States v. Bell*, 414 F.3d 474, 480 (3d Cir. 2005).

⁹⁶ *Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 563; accord *Bates v. State Bar Ass’n of Ariz.*, 433 U.S. 350, 384, 97 S. Ct. 2691, 53 L. Ed. 2d 810 (1977) (“Advertising concerning transactions that are themselves illegal

Accordingly, if the speech concerns unlawful activity or misleads consumers, the restriction is valid and receives no further scrutiny under the remaining factors.⁹⁷

36 Dolly, in reciting the *Central Hudson* factors, omits the first factor and instead relegates any discussion of that element to a footnote.⁹⁸ Its discussion of the element there consists only of the assertion that “[i]t is undisputed that Dolly’s speech is lawful and non-misleading.”⁹⁹ Not exactly. Dolly’s advertisements concern and promote the unpermitted, and therefore illegal, provision of regulated services, meaning that they do not concern lawful activity as that term is used within the commercial speech doctrine. Further, by advertising to provide a regulated service Dolly implicitly misleads the public into thinking that it provides service in Washington State because, legally, it cannot. Dolly’s advertisements receive no constitutional protection and Order 02 does not infringe on any commercial speech rights that the company has.

b. Dolly’s advertisements receive no protection under the prior restraint doctrine because they are not protected speech.

37 As Dolly notes, both the state and federal constitutions forbid the prior restraint of protected speech. But neither constitution forbids the restraint of unprotected speech.¹⁰⁰ As

obviously may be suppressed.”); *Pittsburg Press Co. v. Pittsburg Comm’n on Human Rights*, 413 U.S. 376, 388, 93 S. Ct. 2553, 37 L. Ed. 2d 669 (1973) (“We have no doubt that a newspaper constitutionally could be forbidden to publish a want ad proposing a sale of narcotics or soliciting prostitutes.”); *Erotic Serv. Provider Legal Ed. & Research Project v. Gascon*, 880 F.3d 450, 460 (9th Cir. 2018); *Bell*, 414 U.S. at 480-81; *Casbah, Inc. v. Thone*, 651 F.2d 551, 563-64 (8th Cir. 1981).

⁹⁷ *Gascon*, 880 F.3d at 460; *Bell*, 414 F.2d at 480; *Casbah*, 651 F.2d at 564.

⁹⁸ Dolly does not explicitly list the first factor with the others and implicitly mentions it only in a footnote. *See* Pet. for Review at 19 & n.33.

⁹⁹ Pet. for Review at 19 n.33.

¹⁰⁰ *Pittsburg Press Co.*, 413 U.S. at 390 (rejecting a prior restraint challenge, stating that “[t]he present order does not endanger arguably protected speech” after determining the speech was not protected commercial speech); *State v. Coe*, 101 Wn.2d 364, 375, 679 P.2d 353 (1984) (“we have expressly rejected an absolute bar against prior restraint on speech which is *not* constitutionally protected”); *cf. JJR, Inc. v. City of Seattle*, 126 Wn.2d 1, 5-6, 891 P.2d 720 (1995) (“Under Const. art. 1, § 5, we have held that prior restraint of constitutionally protected expression is per se unconstitutional”) (emphasis added).

discussed above, Dolly’s advertisements receive no constitutional protection. The prior restraint doctrine does not apply, and Order 02 does not infringe on any right Dolly has to speak.

2. Corrected Order 02 does not discriminate against or unduly burden interstate commerce.

38 Dolly next contends that a cease and desist provision in Order 02¹⁰¹ and the revised version of that provision in Corrected Order 02 violate the dormant commerce clause because: (1) Congress did not authorize state regulation of internet advertising¹⁰² and (2) the cease and desist provision applies extraterritorially.¹⁰³ Dolly is flatly incorrect with regard to Corrected Order 02.

39 The Commerce Clause provides Congress with the power to regulate commerce “among the several states”¹⁰⁴ and courts have long recognized that the clause implicitly limits state power to unduly burden interstate commerce.¹⁰⁵ The courts refer to this limitation as the dormant commerce clause.¹⁰⁶

40 Tribunals review a dormant commerce clause challenge to state action using a two-part test. Given that courts view the dormant commerce clause as aimed at economic protectionism, the first step of the analysis looks to whether the state regulation has a

¹⁰¹ Staff petitioned for review of the provision as it existed in Order 02, and Dolly adopted Staff’s analysis. If the Commission rescinds Corrected Order 02, it should enter the version of the cease and desist provision found in that order in its final order because the corrected provision comports with the constitution, as discussed below.

¹⁰² Pet. for Review at 15-16 ¶¶ 28-29.

¹⁰³ Pet. for Review at 15 ¶ 8 (incorporating Staff’s petition for review, which applied the extraterritoriality line of dormant commerce clause cases), 17 ¶ 31, 37 ¶ 70 (again incorporating the dormant commerce clause claim from Staff’s petition for review).

¹⁰⁴ U.S. Const. art. I, § 8, cl. 3.

¹⁰⁵ *Bostain v. Food Express, Inc.*, 159 Wn.2d 700, 717, 153 P.3d 846 (2013).

¹⁰⁶ *Id.* at 717-18.

discriminatory purpose or effect.¹⁰⁷ The party alleging discriminatory purpose or effect bears the burden of showing it.¹⁰⁸

41 Where a state regulation has no discriminatory purpose or effect, whether it survives a dormant commerce clause challenge depends on whether (1) it serves a legitimate state interest and (2) the burden it imposes on interstate commerce clearly exceed the local benefits it generates.¹⁰⁹ The person asserting that a regulation creates burdens that clearly exceed the local benefits provided bears the burden of proving that assertion.¹¹⁰

42 Corrected Order 02 passes muster under the first step of the dormant commerce clause analysis. Dolly does not allege, let alone show, discriminatory purpose or effect in Corrected Order 02, and cannot have carried its burden. Dolly's principal place of business is in Washington State, and Corrected Order 02 regulates its intrastate activities.¹¹¹ The public service laws, which Corrected Order 02 enforces, are facially neutral with regard to in-state and out-of-state persons.¹¹² Nothing in the record shows discriminatory application of those laws. Simply put, the cease and desist order directly regulates Dolly's intrastate operations, and any burdens on interstate commerce are incidental.

43 Corrected Order 02 also passes constitutional muster under the second step of the dormant commerce clause analysis. Dolly makes no claim about the legitimacy of Washington's interest in ordering it to cease and desist or the relative benefits and burdens of Corrected Order 02, and therefore cannot have carried its burden. Regardless, the

¹⁰⁷ *Rouso v. State*, 170 Wn.2d 70, 76, 239 P.3d 1084 (2010); *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S. Ct. 844, 25 L. Ed. 2d 174 (1970).

¹⁰⁸ *Hughes v. Oklahoma*, 441 U.S. 322, 336, 99 S. Ct. 1727, 60 L. Ed. 2d 250 (1979).

¹⁰⁹ *Rouso*, 170 Wn.2d at 81-82; *Pike*, 397 U.S. at 142.

¹¹⁰ *Frank & Sons, Inc. v. State*, 136 Wn.2d 737, 757, 966 P.2d 1232 (1998).

¹¹¹ Paul, Exh. SP-16 (linking to an article describing Dolly as a Seattle-based business).

¹¹² See RCW 81.77.040, RCW 81.80.070, .075.

legislature has identified the local benefits provided by Order 02: it forces Dolly to seek a permit, ensuring the Commission regulates it to protect consumers and public safety.¹¹³ Any burden on interstate commerce would come from Dolly having to add a sentence to its advertisements informing its Washington consumers that it cannot provide service here until it obtains a permit. That burden is less than negligible and dwarfed by the benefits created by ensuring that Dolly complies with the public service laws.

44 Dolly appears to make two claims related to the dormant commerce clause. First, it incorporates the argument made by Staff in its petition for review. Staff supported its argument with citation to cases applying the extraterritoriality doctrine of the dormant commerce clause.¹¹⁴ The extraterritoriality doctrine invalidates state regulation of conduct occurring “wholly” outside of the state’s borders.¹¹⁵ But that doctrine does not apply to Corrected Order 02¹¹⁶ because it does not concern conduct occurring wholly outside

¹¹³ As the legislature put it:

The Washington Utilities and Transportation Commission (UTC) regulates several types of transportation companies under Title 81, including household goods movers, who are required to obtain a permit from the UTC before operating. All of these regulated transportation companies are subject to a series of public safety and consumer protection requirements, including:

- Obtaining and maintaining liability and cargo insurance;
- Providing information to consumers regarding services and pricing;
- Charging only the proper rates for services rendered;
- Conducting background checks of potential employees’ driving records;
- Maintaining a drug and alcohol testing program for all employees; and
- Maintaining specific vehicle safety levels.

The UTC’s employees conduct safety and consumer protection audits of permitted companies to ensure statutory requirements are met. The UTC is also empowered to impose penalties for a company’s failure to comply with these requirements.

H.B. Analysis, H.B. 1536, 61st Leg., 2009 Sess., at 1-2 (Wash. 2009); accord S.B. Rep., H.B. 1536, 61st Leg., 2009 Sess. at 1 (Wash. 2009).

¹¹⁴ *In re Determining the Proper Carrier Classification of, and Complaint for Penalties Against Dolly, Inc.*, Docket TV-171212, Commission Staff’s Petition for Administrative Review, at 2 ¶ 4 (Apr. 2, 2018) (citing *Bostain v. Food Exp., Inc.*, 159 Wn.2d 700, 720, 153 P.3d 846 (2007); *Healy v. Beer Institute, Inc.*, 491 U.S. 324, 335-37, 109 S. Ct. 2491, 105 L. Ed. 2d 275 (1989)).

¹¹⁵ *Bostain*, 159 Wn.2d at 719.

¹¹⁶ As discussed in Staff’s petition for review, the extraterritoriality doctrine would apply to the cease and desist provision as it existed in Order 02, which would, for example, affect the ability of a person living in Chicago from using Dolly’s service to move household goods between two apartments in Chicago.

Washington's borders: customers may view the company's website and advertisements in Washington.¹¹⁷

45 Dolly also argues that Corrected Order 02 violates the dormant commerce clause because Congress did not authorize regulation of its internet advertising. Whether or not Congress has authorized state regulation is a threshold question that determines whether the dormant commerce clause applies, not an aspect of the dormant commerce clause analysis itself.¹¹⁸ Dolly's argument is therefore misplaced: a lack of congressional authorization begins the dormant commerce clause analysis; it does not end it. Even where Congress did not authorize state regulation, the regulation may survive a dormant commerce clause challenge in multiple ways.¹¹⁹ And, as discussed above, Corrected Order 02 survives under the appropriate dormant commerce clause analysis, and the Commission should affirm it.

3. Corrected Order 02 does not deprive Dolly of life, liberty, or property without due process of law.

46 Dolly next contends that the cease and desist provision in Corrected Order 02 violates Dolly's right to due process, both procedural and substantive. The procedural claim is meritless given that Dolly had notice that the Commission could and would order it to cease and desist and an opportunity to argue that the Commission should not do so. The substantive claim is likewise meritless given the rational relationship between the cease and desist provision and the Commission's vehicle-safety and consumer-protection duties.

¹¹⁷ Paul, TR. at 42:18-43:1.

¹¹⁸ *Rouso*, 170 Wn.2d at 75-76 (citing *Ne Bancorp, Inc. v. Bd. Of Governors*, 472 U.S. 159, 174, 105 S. Ct. 2545, 86 L. Ed .2d 112 (1985)).

¹¹⁹ *Id.* at 76 (noting that a non-discriminatory state regulation will survive a dormant commerce clause challenge if it serves a legitimate state purpose and does not unduly burden interstate commerce in comparison to local benefits and that even a discriminatory regulation will survive if it achieves important state interests unrelated to economic protectionism).

47

Both the state and federal constitutions forbid the deprivation of “life, liberty, or property without due process of law.”¹²⁰ The Due Process Clauses of the state and federal constitutions “confer both procedural and substantive protections.”¹²¹ The former protections ensure that “an individual receive notice of the deprivation and an opportunity to be heard to guard against erroneous deprivation.”¹²² The latter protections forbid “arbitrary and capricious government action even when the decision to take action is pursuant to constitutionally adequate procedures.”¹²³

a. Dolly had notice of, and an opportunity to be heard about, the cease and desist order.

48

The procedural aspect of the due process clauses “requires notice and an opportunity to be heard.”¹²⁴ Dolly’s procedural due process claim is that

[i]n essence, Corrected Initial Order 02 imposes a cease and desist order, penalties, and demands that Dolly obtain permits because it has failed to, “immediately state clearly in its web-based application on the internet, and in its advertising on Facebook, Twitter, Pinterest, and any other social media sites or platforms it uses or has used to make its services known, that it does not offer or perform services in the state of Washington as a household goods carrier, as a common carrier transporter of property other than household goods, or as a solid waste hauler.” At no time was Dolly given notice that such a disclaimer was required or even necessary to comply with Commission statutes and regulations.¹²⁵

49

As described above, Dolly has it backwards: the ALJ did not impose a cease and desist order (or classify it or impose penalties) and order Dolly to obtain permits because it failed to post the above-quoted disclaimer. The provision Dolly complains about is a cease

¹²⁰ U.S. CONST. amend. XIV; accord WASH. CONST. art. I, § 3.

¹²¹ *Amunrud v. Bd. of Appeals*, 158 Wn.2d 208, 216, 143 P.3d 571 (2006).

¹²² *Id.* at 216.

¹²³ *Id.* at 218-19.

¹²⁴ *State v. Rogers*, 127 Wn.2d 270, 275, 898 P.2d 294 (1995).

¹²⁵ Pet. for Review 31 ¶ 58 (quoting Corrected Order 02) (emphasis in original).

and desist order imposed by the ALJ because Dolly failed to obtain permits before engaging in jurisdictional conduct.

50 As to Dolly's claim that it received no notice, the Commission provided it with extensive notice that the special proceeding might result in a cease and desist order. The complaint made by the Commission through its Staff explicitly referenced the Commission's statutory authority to order companies to cease and desist from violating the public service laws; it also requested relief in the form of an order that Dolly cease and desist operating in violation of the public service laws.¹²⁶ Further, as Dolly notes, the presiding ALJ opened the special proceeding by noting the legislature's directive that the Commission order a company to cease and desist from providing regulated services without authority upon a finding that it did so without the necessary permit.¹²⁷ Dolly had constitutionally sufficient notice.

51 The Commission also provided Dolly with an opportunity to be heard. After the Commission served Dolly with its complaint, a Commission ALJ presided over the special proceeding instituted by that complaint.¹²⁸ During this proceeding, Dolly had a chance to present evidence.¹²⁹ The ALJ offered Dolly a chance to brief its legal arguments, but the company declined to do so.¹³⁰ Nothing in those facts speaks to a deprivation of the right to be heard.

52 Dolly received constitutionally adequate procedure; it simply appears to misunderstand what the challenged portions of Corrected Order 02 do. The Commission

¹²⁶ *In re Determining the Proper Carrier Classification of, and Complaint for Penalties Against Dolly, Inc.*, Docket TV-171212, Order 01, at 1-2 ¶¶ 5, 7 ¶¶ 52 (Jan. 10, 2018).

¹²⁷ Pet. for Review at 32-33 ¶ 60 (citing TR. at 4:24-7:24).

¹²⁸ See generally TR. at 4:5-99:15.

¹²⁹ Shawver, TR. at 79:21-98:1.

¹³⁰ TR. at 98:5-15.

should decline to modify the cease and desist provision based on the company's procedural due process claim.

b. Order 02 and Corrected Order 02 rationally relate to Washington's interest in public safety and consumer protection.

53 Tribunals generally review substantive due process challenges under the traditional tiers of constitutional scrutiny.¹³¹ This general rule holds true in the context of Dolly's appeal, which involves review of governmental decisions concerning licensing and the right to engage in business.¹³² A tribunal reviews those decisions under the rational basis standard.¹³³

54 Under rational basis review, a governmental action passes constitutional muster if it is "rationally related to a legitimate state interest."¹³⁴ Rational basis review is extremely deferential, and the tribunal may "assume the existence of any necessary state of facts which it can reasonably conceive in determining whether a rational relationship exists between the challenged law and a legitimate state interest."¹³⁵

55 RCW 81.80.075 serves several legitimate state interests, as do companion statutes such as RCW 81.77.04 and RCW 81.80.355. In 2009, the legislature amended the public service laws concerning household goods movers to include persons who advertise as within the definition of a household goods carrier. When it did so, the legislature identified public

¹³¹ *Amunrud*, 158 Wn.2d at 219.

¹³² *Ongrom v. Dep't of Health, Office of Prof'l Standards*, 159 Wn.2d 132, 145-47, 148 P.3d 1029 (2006), *overruled on other grounds by Hardee v. Dep't of Soc. & Health Servs.*, 172 Wn.2d 1, 256 P.3d 339 (2011); *Amunrud*, 158 Wn.2d at 220-22 (collecting cases).

¹³³ *Amunrud*, 158 Wn.2d at 220-22 (collecting cases).

¹³⁴ *Id.* at 222.

¹³⁵ *Id.*

health and consumer protection as the interests served by the amendments.¹³⁶ The United States Supreme Court has repeatedly stated that these are legitimate state interests.¹³⁷

56 The legislative history also identified the way that the 2009 amendments served the state's interests in consumer protection and public safety. The 2009 amendments, which require a permit before advertising, make it easier for the Commission to pursue enforcement action, providing an incentive for companies to seek a permit, facilitating the Commission's consumer protection and public safety functions.¹³⁸

57 Corrected Order 02 serves the interests identified by the legislature in the manner it intended. It is rationally related to the achievement of legitimate state purposes and therefore does not deprive Dolly of substantive due process.

58 Dolly, however, argues that Corrected Order 02 violates substantive due process, citing the three-pronged test set out for certain substantive due process claims by the Washington State Supreme Court in *Presbytery of Seattle v. King County*¹³⁹ and later applied by that court in *Robinson v. City of Seattle*.¹⁴⁰ Dolly's invocation of *Robinson* and *Presbytery* is misplaced. Those cases concerned substantive due process in a very specific context, namely where land use regulation, regulatory takings, and substantive due process overlap.¹⁴¹ The factors those cases offer for consideration make little sense outside that specific context,¹⁴² and Dolly cites no authority for the proposition that the *Presbytery* test

¹³⁶ H.B. Analysis, H.B. 1536, 61st Leg., 2009 Sess., at 1-2 (Wash. 2009); accord S.B. Rep., H.B. 1536, 61st Leg., 2009 Sess. at 1 (Wash. 2009).

¹³⁷ *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 535, 69 S. Ct. 657, 93 L. Ed. 2d 865 (1949).

¹³⁸ S.B. Analysis, H.B. 1536, 61st Leg., 2009 Sess., at 2 (summary of testimony in support of bill).

¹³⁹ 114 Wn.2d 320, 787 P.2d 907 (1990).

¹⁴⁰ 119 Wn.2d 34, 830 P.2d 318 (1992).

¹⁴¹ See *Sintra, Inc. v. City of Seattle*, 119 Wn.2d 1, 12, 829 P.2d 765 (1992) (“*Presbytery* set forth the appropriate analysis for claims of overly severe land use regulation and delineated the tests to be used under the alternative analyses.”).

¹⁴² See *Robinson*, 119 Wn.2d at 48, 51-56 (discussing substantive due process, takings, and land use regulation); *Presbytery*, 114 Wn.2d at 327-32 (same).

applies in the licensing context, despite on-point authority to the contrary.¹⁴³ The Commission should ignore Dolly’s attempt to invoke the *Presbytery* test and any argument based thereon.

4. Corrected Order 02 does not impose criminal liability retroactively, and therefore does not violate the Ex Post Facto clauses of the state and federal constitutions.

59 Dolly further challenges the constitutionality of Corrected Order 02 by claiming that it violates the ex post facto clauses of the state and federal constitutions.¹⁴⁴ Dolly claims that Corrected Order 02 “impos[es] a requirement on Dolly that did not exist in law prior to ALJ Moss rewriting Corrected Initial Order 02.”¹⁴⁵ Dolly is again incorrect.

60 As discussed above, the provision Dolly cites is an order to cease and desist. The public service laws forbade Dolly from advertising without obtaining authority to do so before the conduct at issue, and its liability for violating those laws likewise existed before Dolly put up its advertisements.¹⁴⁶ Corrected Order 02 does not retroactively add to that potential liability; it simply creates the possibility that Dolly will incur future liability for violations of the cease and desist order if it fails to comply with laws that Dolly was already obligated to comply with.

E. The Budget Proviso Cited By Dolly Is Irrelevant To This Special Proceeding

61 Dolly next argues that the legislature recently “[p]assed a [p]roviso [w]hich [r]ecognizes that “[c]urrent Commission [s]tatutes and [r]egulations [d]o [n]ot [a]pply to Dolly’s [b]usiness [m]odel.”¹⁴⁷ Dolly’s assessment of the proviso is inaccurate. It did

¹⁴³ See *Amunrud*, 158 Wn.2d at 220-22 (collecting cases).

¹⁴⁴ U.S. CONST. art. I, § 10; WASH. CONST. art. I § 23.

¹⁴⁵ Pet. for Review at 36-37 ¶ 69.

¹⁴⁶ E.g., LAWS OF 1911 ch. 117 §§ 94-95; LAWS OF 1953 ch. 95, § 22; LAWS OF 2009 ch. 94, §§ 1, 4; LAWS OF 2010 ch. 24, § 1.

¹⁴⁷ Pet. for Review at 40.

nothing more than provide an appropriation for the Commission to study “the most effective method of regulation” of companies like Dolly.¹⁴⁸

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In other words, the budget proviso does not do what Dolly claims. A proviso modifies only its enacting clause unless the legislature evidences clear intent that it apply more broadly.¹⁴⁹ That the legislature did not intend the budget proviso to amend the public service laws is demonstrated by its decision not to enact a bill proposed by Dolly in the very same legislative session.¹⁵⁰ By rejecting Dolly’s bill, the legislature explicitly declined to amend the definition of household goods carrier, common carrier, or solid waste collection company to provide that companies like Dolly are not any of those things. And in passing the proviso the legislature did not order the Commission to cease enforcing the public service laws against companies like Dolly or to arrest proceedings already underway.¹⁵¹ Simply put, the proviso funds a study of how to best regulate companies like Dolly, nothing more.

Dolly also misstates the events that led to its proposing H.B. 2604 and S.S.B. 6234 last session. It contends that it sought passage of H.B. 2604 and S.S.B. 6234 because the Commission, in rejecting Dolly’s rulemaking petition in Docket TV-170999, stated “that it required legislative authority to regulate Dolly and similarly situated companies.”¹⁵² That is not what the Commission determined in that docket. The Commission, in fact, stated that

¹⁴⁸ LAWS OF 2018, ch. 299, § 141(6).

¹⁴⁹ *State ex rel. Morrison v. City of Seattle*, 6 Wn. App. 181, 187, 492 P.2d 1078 (1971); *Wash. State Leg. v. Lowry*, 131 Wn.2d 309, 328, 931 P.2d 885 (1997) (quoting *State v. Wright*, 84 Wn.2d 645, 652, 529 P.2d 453 (1974)).

¹⁵⁰ See H.B. 2604, 65th Leg., 2018 Sess., at §§ 1-6 (Wash. 2018); S.S.B. 6234, 65th Leg., 2018, at §§ 1-9 (Wash. 2018).

¹⁵¹ The Commission should deny Dolly’s request that it stay the classification determination for this same reason. Pet. for Review 29 ¶ 53. The Commission must enforce the public service laws as written, not as Dolly hopes they may be at some unknown time, if at all, in the future.

¹⁵² Pet. for Review at 41 ¶ 78.

“[a]s [Dolly’s] Petition depicts the company, Dolly ‘advertises, solicits, offers, or enters into an agreement to transport household goods’ and thus is an HHG carrier as defined by the statute. . . The Commission cannot modify this definition or otherwise exempt Dolly and its Helpers from regulation.”¹⁵³ It also noted that “[t]he Commission’s authority, however, remains constrained by the statute, which requires HHG carriers to obtain a permit from the Commission. Dolly and each of its Helpers, as HHG carriers, must obtain a permit from the Commission, regardless of any new classification or rates, regulations, and requirements that the Commission could otherwise establish.”¹⁵⁴ The bill would not have given the Commission the authority to regulate Dolly; it would have given it the authority to regulate Dolly differently. And the fact that Dolly petitioned for a rulemaking and then sponsored that bill is an explicit acknowledgement that it engages in jurisdictional conduct because there was no need to amend rules or statutes that do not apply to the company.

F. The ALJ did Not Err Or Prejudice Dolly By Entering Corrected Order 02

63 Finally, Dolly makes several claims related to the act of correcting Order 02. Specifically, Dolly contends that: (1) the presiding ALJ erroneously construed Staff’s petition for review as a motion for correction of an obvious error under WAC 480-07-875 because the Commission’s rule does not allow for substantive changes to an Order,¹⁵⁵ and (2) it had no chance to respond to Staff’s motion to correct.¹⁵⁶ Neither has merit.

64 The Commission should decline to adjudicate Dolly’s claims about the correction of Order 02 because it lacks standing to bring them. Dolly appears to claim that it suffered

¹⁵³ *In re Petition of Dolly, Inc. To Amend Motor Carrier Rules or in the Alternative to Initiate Rulemaking*, Docket TV-170999, Petition to Amend Motor Carrier Rules or in the Alternative to Initiate Rulemaking, Order 01, at 3 ¶ 8 (Oct. 31, 2017).

¹⁵⁴ *Id.* at 3-4 ¶ 9.

¹⁵⁵ Pet. for Review at 11 ¶ 22 – 14 ¶ 26, 29 ¶ 54 – 31 ¶ 57.

¹⁵⁶ Pet. for Review at 30 ¶ 56.

three kinds of injury from the correction, namely that: (1) it lost its ability to appeal a provision of the original cease and desist order, (2) the correction prejudices it, and (3) it would not have supported Staff's petition for review if it knew how the ALJ would treat Staff's petition. Each claim falters on the general rule that a party needs standing to appeal, and it only has standing if it can show the "denial of some personal or property right, legal or equitable, or the imposition upon a party of a burden or obligation."¹⁵⁷

65 As to the first claim, Dolly cannot claim standing based on an injury allegedly suffered from a provision not applicable to it by virtue of the correction. Put otherwise, the correction cured the injury Dolly wants to complain of, and it therefore lacks standing.

66 Dolly's second claim fares no better. Everyone involved in this litigation, Staff, Dolly, and the ALJ below, all agree that the original cease and desist provision violated the dormant commerce clause. As discussed above, the corrected cease and desist provision comports with the constitution. In other words, the correction eliminates an injury to Dolly's rights. It therefore cannot claim injury from the very fact of correction, and it lacks standing.

67 Finally, Dolly's third claim involves no injury, and is contradicted by the record. Dolly filed an answer in support of Staff's petition for review. It did so after the ALJ entered Corrected Order 02, meaning that Dolly knew exactly how the ALJ had treated Staff's petition for review. The Commission gave Dolly exactly what it wanted, and it cannot now claim that the Commission aggrieved it by doing so.

68 If the Commission reaches the merits of Dolly's claim, it should determine that any error here was harmless. This state has long applied the rule that any alleged error must, in

¹⁵⁷ See *Mestrovac v. Dep't of Labor & Indus.*, 142 Wn. App. 693, 704, 176 P.3d 536 (2008) (discussing what makes a party "aggrieved," granting it standing to appeal).

fact, prejudice a person to warrant reversal.¹⁵⁸ That rule applies in the administrative context as well.¹⁵⁹ As just discussed, Dolly suffered no injury, and therefore no prejudice from the entry of Corrected Order 02. The Commission should affirm that Order.

IV. CONCLUSION

69 The Commission should affirm Corrected Order 02, which properly applied the law as it exists to classify Dolly as a household goods carrier, common carrier of general commodities, and solid waste collection company. It should also affirm the penalty imposed by the ALJ, which properly applied the relevant penalty provisions. Finally, it should affirm the cease and desist provisions of Corrected Order 02, which comports with the constitutional protections for certain kinds of speech and due process and which does not unduly burden interstate commerce.

DATED this 8th day of May 2018.

Respectfully submitted,

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¹⁵⁸ *E.g., State v. Britton*, 27 Wn.2d 336, 341-42, 178 P.2d 341 (1947); *Hafner v. U.S. Fidelity & Guar. Co.*, 126 Wash. 670, 675, 219 P. 16 (1923).

¹⁵⁹ RCW 34.05.570(1)(d).