

**Exh. SP-8  
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**

*Order 04, Docket TV-171212*

**November 30, 2018**

**Attachment C**

Service Date: May 18, 2018

**BEFORE THE WASHINGTON  
UTILITIES AND TRANSPORTATION COMMISSION**

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

DOCKET TV-171212

ORDER 04

FINAL ORDER DENYING PETITION  
FOR ADMINISTRATIVE REVIEW OF  
CORRECTED ORDER 02

DOLLY, INC.

**BACKGROUND**

- 1 On January 18, 2018, the Washington Utilities and Transportation Commission (Commission) entered Order 01, Order Instituting Special Proceeding; Complaint Seeking to Impose Penalties; and Notice of Mandatory Appearance at Hearing (Order 01) initiating this docket on its own motion. Order 01 alleged that Dolly, Inc. (Dolly) should be classified as a household goods carrier under RCW 81.80.010(5) because it has advertised, solicited, offered, or entered into one or more agreements to transport household goods, for compensation, by motor vehicle, within the state of Washington. Order 01 further alleges that Dolly has advertised as a motor freight carrier for the transportation of property other than household goods without first obtaining a common carrier permit in violation of RCW 81.80.070, and that Dolly has operated as a solid waste collection company by advertising for the hauling of solid waste for compensation without first obtaining a certificate of public convenience and necessity in violation of RCW 81.77.040.
- 2 On March 13, 2018, the Commission convened a brief adjudicative proceeding in Olympia, Washington before Administrative Law Judge (ALJ) Dennis J. Moss.
- 3 On March 29, 2018, the Commission entered Order 02 in this docket, its Initial Order Classifying Respondent as a Household Goods Carrier; Ordering Respondent to Cease and Desist; Imposing and Suspending Penalties on Condition of Future Compliance. Initial Order 02 found that Dolly: 1) engaged in business as a household goods carrier 11 times by advertising moving services on its Company website, billboards, Facebook, Instagram, Twitter, LinkedIn, iTunes, Craigslist, YouTube, Pinterest, Yelp, and in other newspaper articles; 2) advertised the transportation of property for compensation using those same mediums; and 3) operated as a solid waste collection company on three occasions by advertising solid waste hauling services on its website. Initial Order 02

**DOCKET TV-171212**  
**ORDER 04**

**PAGE 2**

required Dolly to cease and desist operating as a household goods carrier, common carrier, and solid waste collection company; assessed a \$69,000 penalty for violations of state laws; and required Dolly to remove its Internet presence.

4 On April 2, 2018, Commission staff (Staff) filed a Petition for Review seeking to correct Order paragraph 4 in Order 02, which required 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.” Staff contended this requirement was overbroad and could be construed as violating the extraterritoriality doctrine of the dormant commerce clause of the United States Constitution because it impacted Dolly’s ability to conduct business in other states.

5 The presiding ALJ treated the filing as a motion to correct an obvious error pursuant to WAC 480-07-875(2).<sup>1</sup> On April 9, 2018, the Commission issued a Notice of Correction of Initial Order (Notice) and served Corrected Order 02, which amends paragraph 43 and Order paragraph 4 of the original Order 02.<sup>2</sup> The Notice confirmed that the period during which parties could file petitions for, or the Commission could initiate, administrative review of the initial order would run from the date that Corrected Order 02 was served on April 9, 2018.

6 On April 12, 2018, Dolly filed an Answer to Staff’s Petition for Administrative Review. Dolly expressed support for Staff’s Petition, and raised additional arguments contesting Order 02.

7 On April 13, 2018, Staff filed a letter responding to Dolly’s Answer. Staff asserted that Dolly’s Answer, which requested the Commission to either rescind Order 02, stay its effectiveness, or modify the penalty, went well beyond the limits of a response to Staff’s Petition. In essence, Staff argued, Dolly filed its own petition for review. Staff requested

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<sup>1</sup> WAC 480-07-395(4) provides that “[t]he Commission will liberally construe pleadings and motions with a view to effect justice among the parties.”

<sup>2</sup> In its Notice, the Commission explained that “Although Order 02 clearly is concerned with, and discusses exclusively, Dolly’s activities in the state of Washington, it is true that the quoted language from the order does not recognize that Dolly’s Internet presence is not limited to the state of Washington. Dolly, in fact, operates in states other than Washington and may rely on the same Internet presence and platforms in other states. Overlooking these facts is an obvious error in Order 02 that requires correction, as provided under WAC 480-07-875(2).”

**DOCKET TV-171212**  
**ORDER 04**

**PAGE 3**

the Commission notify the parties whether the Commission would accept a second petition for review from Dolly and how Staff should respond.

- 8 On April 13, 2018, by email to the parties, the Administrative Law Director provided the following clarification:

WAC 480-07-395(4) provides for liberal construction of pleadings and motions to effect justice among the parties. Corrected Order 02, entered on April 9, treated Staff's petition as a *motion* for correction of an obvious error under WAC 480-07-875 and not as a petition for review under WAC 480-07-825. Although unnecessary under the circumstances, the Commission considers Dolly's answer to be one supporting Staff's motion.

Staff's motion and Dolly's answer to that motion were fully resolved by the entry of Corrected Order 02 and require no further action in this proceeding. It is not necessary to rescind Order 02; it is effectively and completely replaced by Corrected Order 02. Please note that Corrected Order 02 differs substantively from the original order only to the extent corrected. Also note that Corrected Order 02 is the only effective initial order in this docket. Corrected Order 02 is subject to a petition for review within the time-frame allowed for such petitions following the service date of the order. Any petition for review filed with respect to Corrected Order 02 should address only the terms and requirements of Corrected Order 02.

- 9 On April 19, 2018, Dolly filed a Petition for Administrative Review (Petition).<sup>3</sup> In its Petition, Dolly contends that Staff's Petition was improperly filed, that the Commission erred in construing Staff's Petition as motion to correct Initial Order 02, and that Corrected Order 02 improperly addressed and changed substantive legal rulings without identifying the clerical errors it corrected.<sup>4</sup> Dolly further contends that Initial Order 02 is the only effective order in this docket. In the alternative, Dolly argues that Corrected

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<sup>3</sup> On April 20, 2018, Staff filed a Motion for a Continuance to Respond to Dolly's Petition for Review. On April 23, Dolly filed a Response Opposing Staff's Motion for Continuance. On April 24, the Commission entered Order 03, Granting Staff's Motion for Continuance.

<sup>4</sup> The Commission's Notice explained that Corrected Order 02 includes several copy edits that correct scrivener's errors in the original order, but did not identify the errors individually. But for the need to correct the substantive error in Order 02, the Commission would not have elected to issue an errata to address the clerical errors, which were minor.

**DOCKET TV-171212**  
**ORDER 04**

**PAGE 4**

Order 02 violates numerous provisions of the United States Constitution. Dolly requests the Commission rescind Corrected Order 02 in its entirety.

10 On May 8, 2018, Staff filed an Answer to Dolly's Petition (Answer). Staff urges the Commission to affirm Corrected Order 02 because: 1) the record evidence supports a finding that Dolly enters into agreements to transport household goods, property, or solid waste, and also holds itself out as a carrier through advertisements; 2) the ALJ properly imposed a penalty for each of Dolly's advertisements; 3) Corrected Order 02 does not infringe on Dolly's constitutional rights; 4) the entry of Corrected Order 02 comported with the Commission's rules, and, in any event, did not prejudice Dolly.

### **DISCUSSION**

11 We deny Dolly's Petition for Administrative Review. Corrected Order 02 appropriately resolves the disputed matters in this proceeding and imposes a reasonable penalty relative to the violations at issue. We adopt Corrected Order 02 as our own, as expanded by the discussion below.

12 As Staff notes in its Answer, Dolly's Petition presents two alternative requests for relief, alleging a total of 25 legal errors, in the following general categories:

- Classification of Dolly as a household goods carrier, a common carrier, and a solid waste collection company;
- Correction of Order 02;
- Constitutional challenges;
- Penalty calculation;
- The relationship between the Commission's classification proceeding and a legislative budget proviso.

13 We address each of Dolly's claims, by topic, in turn.

#### **1. Classification of Dolly as Commission-regulated Carrier**

14 We affirm the ALJ's finding that Dolly should be classified as a household goods carrier, a common carrier, and a solid waste collection company.

15 RCW 81.80.010(5) defines "household goods carrier" as "a person who transports for compensation, by motor vehicle within this state, or who advertises, solicits, offers, or enters into an agreement to transport household goods."

**DOCKET TV-171212**  
**ORDER 04**

**PAGE 5**

- 16 Similarly, RCW 81.80.355 makes it unlawful for persons to advertise to transport property other than household goods for compensation in Washington as a common carrier without a permit from the Commission authorizing such transportation. In addition, RCW 81.77.040 makes it unlawful to operate for the hauling of solid waste in Washington for compensation — including advertising, soliciting, offering, or entering into an agreement to provide that service — without first obtaining from the Commission a certificate of public convenience and necessity.
- 17 Dolly operates a digital application and website used by consumers who wish to purchase the transportation of household goods, other property, or solid waste. Consumers arrange this transportation by providing Dolly with information such as the type of goods the consumer wants transported, the origin and destination addresses, and the date and time for transportation. Dolly provides a guaranteed price quote, and the consumer pays Dolly for the transportation services. Dolly uses independent contractors, or “Helpers,” to perform the physical transportation of goods.
- 18 Based on this business model, Corrected Order 02 found that Dolly unquestionably met the statutory definitions of “household goods carrier,” “common carrier,” and “solid waste hauler” because it: 1) advertises, solicits, and offers on its website and social media to transport for compensation, by motor carrier, household goods in the state of Washington; 2) enters into agreements to transport household goods for compensation in the state of Washington as indicated in its terms of service; 3) advertises, solicits, and offers on its website and social media, and enters into agreements, to transport for compensation, by motor carrier, property other than household goods in the state of Washington; and 4) advertises, solicits, and offers on its website and social media, and enters into agreements, to transport solid waste for compensation.
- 19 Dolly first argues that it does not provide regulated services because it does not own any moving trucks and does not employ the individuals who perform its moving services. We disagree. The Commission has addressed whether companies who engage third parties to perform regulated activities are subject to Commission jurisdiction several times in the context of both household goods and passenger transportation, and has consistently reached the same conclusion: such companies are subject to the Commission’s jurisdiction.<sup>5</sup>

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<sup>5</sup> In Docket TC-143691 *et al*, the Commission specifically addressed the use of independent contractors to provide regulated service. In that case, an auto transportation carrier, Shuttle Express, Inc. (Shuttle Express) entered into agreements with its customers to provide auto transportation service, then subcontracted that service to limousine operators. Shuttle Express

**DOCKET TV-171212**  
**ORDER 04**

**PAGE 6**

- 20 Most recently, in Dockets TV-170747 and TV-161308, we have classified as household goods carriers “persons alleged to be household goods movers subject to the Commission’s jurisdiction by virtue of their activities that typically involve the use of third party independent contractors to physically move a customer’s household goods from one location to another.”<sup>6</sup> Like Dolly, those persons focused their operations on soliciting, offering, advertising, or entering into agreements to transport household goods rather than physically moving household goods using company employees and vehicles. In both of those dockets, we recognized that companies “need not physically transport goods to be classified as a household goods carrier.”<sup>7</sup>
- 21 The same is true of Dolly’s operations. Consumers contact Dolly to arrange transportation. Dolly then provides the consumer with a guaranteed price quote, and the consumer pays Dolly for services rendered. Dolly’s “terms of service” establish the rates, terms, and conditions under which the customer’s goods or solid waste will be transported. As Staff correctly observes, “the fact that Dolly then enters into a second agreement or subcontract to delegate its performance does not nullify the first agreement.”<sup>8</sup> Dolly – not its Helpers – is the party ultimately responsible for complying with its customer agreements. Accordingly, Dolly’s “attempt to distinguish its activities from ‘conducting’ the move is a distinction without a legally significant difference.”<sup>9</sup> The existence of a contractual relationship, regardless of who actually performs the service that Dolly agrees to provide, subjects Dolly to Commission regulation under RCW 81.80.075, RCW 81.80.070, and RCW 81.77.040.

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collected payment from its customers, then remitted a portion thereof to the contracted driver. Shuttle Express unsuccessfully argued that the service was not subject to Commission regulation because it was provided in vehicles the company did not own, which were driven by drivers the company did not employ. Similarly, in the Commission’s final order in Docket TE-151667, a proceeding that classified Blessed Limousine, Inc. (Blessed Limousine) as a charter and excursion service carrier, we found that Blessed Limousine practice of subcontracting party bus services violated the public service laws.

<sup>6</sup> *In the Matter of Determining the Proper Carrier Classification of, and Complaint for Penalties Against Transit Systems, Inc. d/b/a Moves for Seniors*, Docket TV-170747, Final Order 04 ¶ 10 (March 21, 2018).

<sup>7</sup> *In re Determining the Proper Carrier Classification of, and Complaint for Penalties Against Ghostruck, Inc.*, Docket TV-161308, Order 05 ¶ 13 (May 31, 2017).

<sup>8</sup> Staff’s Answer ¶ 21.

<sup>9</sup> *Ghostruck Inc.*, Order 05 ¶ 13.

**DOCKET TV-171212**  
**ORDER 04**

**PAGE 7**

- 22 Next, Dolly argues that its terms of service do not create a contractual agreement because those terms do not conform to RCW 19.36 or Washington’s statutory framework governing contract formation. We disagree. RCW 19.36 and Title 62A RCW do not apply to contracts for services.<sup>10</sup> More to the point, public service laws forbid an “agreement.” We agree with Staff that Dolly and its customers unquestionably enter into agreements.
- 23 We also find unconvincing Dolly’s argument that the Commission is precluded from finding that the Company enters into agreements with its customers because Staff failed to produce written copies of any agreement. Staff correctly observes that the record contains sufficient circumstantial evidence that Dolly enters into such agreements. For instance, Dolly advertises that its services are available in Seattle, allows users to book a move in Seattle, and discloses its terms of service on its website. Moreover, Staff presented evidence that Dolly reported revenue for its operations in Washington. Overall, we find that the record amply demonstrates that Dolly enters into agreements with its customers to transport goods or solid waste.<sup>11</sup>
- 24 Next, Dolly argues that it does not advertise regulated services. According to Dolly, it ensures that it “does not advertise that it performs regulated services” in Washington.<sup>12</sup> The record evidence shows, however, that Dolly advertises its services in a number of

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<sup>10</sup> RCW 19.36.010 is Washington’s Statute of Frauds, which requires certain contractual agreements be reduced to writing. The primary purpose of the Statute of Frauds is to provide reliable evidence of the existence and terms of a contract. (*See* Restat 2d of Contracts, § Scope (2<sup>nd</sup> 1981)). The remainder of Chapter 19.36 RCW deals exclusively with the scope and enforceability of credit agreements. To the extent that the Uniform Commercial Code (UCC) affects basic contract law, those provisions are contained in Article 2, which governs the sale of goods in Washington. “Goods generally include all things which are moveable at the time of identification to the contract for sale.” 25 David K. DeWolf *et al.*, *Washington Practice: Contract Law and Practice* §1:13, at 21. (2d ed. 2007).

<sup>11</sup> On September 25, 2017, Dolly filed a Petition to Amend Motor Carrier Rules or in the Alternative to Initiate Rulemaking in Docket TV-170999 that stated “Dolly is engaged in the business of arranging small goods transportation and labor services for customers in the state of Washington and in five other states,” and “while there are hundreds of providers of traditional moving services in the state of Washington, Dolly is currently the ONLY provider of on demand micro-moving.” It is disingenuous for Dolly to argue that there is insufficient evidence to support a finding that it enters into agreements to provide service in Washington when it has admitted in other proceedings that it has and does.

<sup>12</sup> Dolly Petition ¶ 30.



**DOCKET TV-171212**  
**ORDER 04**

**PAGE 8**

ways, including on its own website and on numerous social media platforms. Dolly's advertisements include the following language:

- “Request a truck and Helper with the tap of a button, then relax. We’ll keep the 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.”<sup>13</sup>
- “Dolly – Truck and Muscle Any Time you Need it. Use our app to load, haul, and deliver just about anything, whenever you need it!”<sup>14</sup>
- “Dolly provides the truck in fact the labor to promptly and affordably move your stuff when you need it.”<sup>15</sup>
- “Dolly Helpers will remove and haul away your junk. Includes trash removal and responsible disposal.”<sup>16</sup>
- “Retail Store Delivery. Convenient, faster and often cheaper than traditional store delivery options.”<sup>17</sup>

25 We find that these statements amount to advertising to transport household goods, other property, and solid waste despite the existence of other statements describing Dolly's Helpers as “independent contractors.” In fact, none of Dolly's advertisements state directly that Dolly *does not* transport or haul items for its customers. Rather, the above-quoted language could lead a reasonable consumer to believe that Dolly owns trucks and employs its Helpers. As such, Corrected Order 02 properly concluded that Dolly holds itself out as a household goods carrier, common carrier, and solid waste collection company in its advertisements.

26 Dolly contends that its business model is unique, and that its operations fall outside the Commission's current statutory authority. We disagree. So long as the Commission is charged by the legislature with regulating companies that solicit, offer, advertise, and enter into agreements to transport goods or haul solid waste, companies who subcontract the services they agree to provide have two choices: obtain a permit from the

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<sup>13</sup> Paul, Exh. No. SP-9.

<sup>14</sup> Paul, Exh. No. SP-10.

<sup>15</sup> Paul, Exh. No. SP-13.

<sup>16</sup> Paul, Exh. No. SP-7.

<sup>17</sup> *Id.*

**DOCKET TV-171212**  
**ORDER 04**

**PAGE 9**

Commission, or cease and desist operations in Washington. As we noted in Docket TV-170999, this presents a unique problem for Dolly because both Dolly and its Helpers meet the statutory definition of a household good carrier. As such, Dolly and each of its Helpers must be permitted by the Commission.

27 Although we are cognizant of the challenges this presents, we are, first and foremost, obligated to regulate in the public interest. We reaffirm our position that, “although the digital marketplace may alter how customers obtain service, provisioning [household goods] moving service remains the same as it has been for centuries – using vehicles to move items from one household to another. We will not sacrifice safety and consumer protection for convenience, nor will we authorize entities purporting to be ‘brokers’ to do so.”<sup>18</sup> Accordingly, we uphold the ALJ’s finding in Corrected Order 02 that Dolly must cease and desist its operations unless and until it obtains a permit from the Commission.

## **2. Correction of Order 02**

28 Dolly asserts three claims related to the ALJ’s Notice of Correction: 1) Dolly lost its ability to appeal the corrected provision of the cease and desist order, 2) the correction prejudices Dolly, and 3) Dolly would not have supported Staff’s Petition for Review if it knew how the ALJ would treat Staff’s Petition.

29 Staff contends that the Commission should decline to adjudicate Dolly’s claims related to the ALJ’s correction of Order 02.<sup>19</sup> We agree. Dolly cannot reasonably argue that it was deprived of its right to complain against a possible or arguable constitutional infirmity

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<sup>18</sup> *In the Matter of the Petition of Dolly, Inc. to Amend Motor Carrier Rules or in the Alternative to Initiate a Rulemaking*, Docket TV-170999, Order 01 ¶ 11 (October 31, 2017).

<sup>19</sup> Dolly makes a number of claims related to Staff’s Petition for Administrative Review, which the Commission construed as a Motion to Correct an Obvious Error. Among them: 1) Staff’s April 2, 2018, Petition for Administrative Review was incorrectly filed under WAC 480-07-825, and should have been filed pursuant to WAC 480-07-610; 2) the presiding administrative law judge should have applied WAC 480-07-395(4) to correct Staff’s error and construe that Staff’s Petition was properly filed under 48-07-610, then apply the 10-day deadline to file answers rather than the 7-day deadline afforded under 480-07-610 or 480-07-375; and 3) its answer supporting Staff’s Petition was timely filed on April 12 pursuant to WAC 480-07-610. We find each of Dolly’s contentions meritless. First, any issue related to the way in which Staff styled its Petition was rendered moot by the ALJ’s decision to construe Staff’s Petition as a Motion to Correct. Moreover, Staff’s reference to WAC 480-07-825 was a clerical error that has no bearing on the substance of Staff’s request. Finally, Dolly provides no basis for its assertions that the Commission should have allowed the Company 10 days, rather than 7, to respond to Staff’s Motion, or that its response – filed 10 days after Staff filed its Motion – was timely.

that has since been cured, and thus rendered moot. Whether we affirm the ALJ's correction to the initial order or independently adopt that correction on review, the result is the same. Additionally, Dolly's answer to Staff's Petition contained the same arguments it later set forth in its own Petition; the Company is therefore unable to establish that it was somehow prejudiced or deprived of its right to be heard.

30 We find that the ALJ properly exercised his discretion to enter Corrected Order 02 for the reasons discussed below. As such, Corrected Order 02 replaced the original order in its entirety, and is the only effective order in this docket. WAC 480-07-875(2) provides that "the time available for any post-hearing review begins with the service of the correction, as to the matter corrected." Adjusting the timeframe for post-hearing review demonstrates that the rule contemplates the possibility that matters in need of correction may be substantive in nature. There would be no need for a party to challenge an error that had no potentially substantive affect, let alone be afforded an extension of time for doing so.

31 Dolly cites WAC 480-07-395(4) as a basis for its claim, which, it argues, expressly permits only correction of "errors or defects in pleadings, motions, or other documents that do not affect the substantial rights of the parties." Dolly removes this language from the context of the rule, which provides as follows:

The commission will liberally construe pleadings and motions with a view to effect justice among the parties. The commission will consider pleadings and motions based primarily on the relief they request and will not rely solely on the name of the document. The commission, at every stage of any proceeding, will disregard errors or defects in pleadings, motions, or other documents that do not affect the substantial rights of the parties.

32 Dolly's interpretation of WAC 480-07-395(4) is facially incorrect, and its argument thus fails. The relief Staff requested was to narrow language in Order 02 that was overbroad, unintentionally implicating as it did Dolly's advertising in other states. Dolly supported Staff on this issue. Corrected Order 02 provided the relief Staff requested.

### **3. Constitutional Challenges to Corrected Order 02**

33 **Dormant Commerce Clause.** Dolly claims Corrected Order 02 violates the dormant commerce clause of the US Constitution because Congress has not authorized state regulation of its Internet activities. According to Dolly, Washington cannot regulate foreign and interstate commerce without Congress's express authority. Because Dolly uses its Internet presence to engage in commerce outside Washington, Dolly claims that any attempt to regulate its activities runs afoul of the commerce clause. Dolly's approach,

**DOCKET TV-171212**  
**ORDER 04**

**PAGE 11**

however, is inappropriate because it fails to undertake a complete commerce clause analysis. Although Dolly failed to meet its burden, we nevertheless address the Company's claim of error and dispose of it on the merits.

34 The commerce clause provides Congress with the power to regulate commerce "among the several states," which implicitly limits state power to burden interstate commerce.<sup>20</sup> This limitation is referred to as the "dormant commerce clause."<sup>21</sup> Where Congress has not expressly granted regulatory authority to the states, courts review a dormant commerce clause challenge to state action using a two-part test. In other words, 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. Staff correctly observes that, "[e]ven where Congress did not authorize state regulation, the regulation may survive a dormant commerce clause challenge in multiple ways."<sup>22</sup>

35 In *Rouso v. The State of Washington*, the Washington Supreme Court addressed whether a statutory prohibition on Internet gambling violated the dormant commerce clause. As a threshold matter, the Court examined whether Congress delegated its authority to regulate Internet gambling and found that it did not. Similarly, Congress has not delegated to the states its authority to regulate Internet advertising. Thus, we "must determine (a) whether the language of the statute openly discriminates against out-of-state entities in favor of in-state ones or (b) whether the direct effect of the statute evenhandedly applies to in-state and out-of-state entities."<sup>23</sup> If the statute does not openly discriminate and applies evenhandedly, it does not violate the dormant commerce clause if there is a legitimate state purpose and the burden imposed on interstate commerce is not "clearly excessive" in relation to the local benefit.<sup>24</sup> We address each inquiry in turn.

36 First, we find that the language in the Commission's public service laws that prohibits persons from operating as a household goods carrier, common carrier, or solid waste collection company without first obtaining a permit from the Commission is not

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<sup>20</sup> *Bostain v. Food Express, Inc.*, 159 Wn.2d 700, 717, 153 P.3d 846 (2013).

<sup>21</sup> *Id.* at 717-18.

<sup>22</sup> Staff's Answer ¶ 45.

<sup>23</sup> *Rouso v. State*, 170 Wn.2d 70, 76, 239 P.3d 1084 (2010), citing *Ne. Bancorp, Inc. v. Bd. of Governors*, 472 U.S. 159, 174 (1985).

<sup>24</sup> *Id.*, citing *State v. Heckel*, 143 Wn.2d 824, 832, 24 P.3d 404 (2001).

**DOCKET TV-171212**  
**ORDER 04**

**PAGE 12**

discriminatory.<sup>25</sup> The laws prohibit offering, soliciting, or advertising unauthorized services regardless of whether the individual or entity offering, soliciting, or advertising those services is located in Washington, in another state, or in another country. Second, the statute applies evenhandedly to in-state and out-of-state entities. As Staff notes, the Commission's public service laws are facially neutral with regard to the physical location of the persons to whom they apply. The public service laws thus pass muster under the first two prongs of the dormant commerce clause analysis.

37 Third, the public service laws, which require carriers to obtain permits so the Commission may carry out its legislatively-mandated duties to protect consumers and the public safety, serve a legitimate state purpose.

38 Finally, the burden imposed on interstate commerce is not "clearly excessive" in relation to the local benefit. Any burden to Dolly would arise only from requiring the Company to add a disclaimer to its advertisements informing consumers that its services are not available in Washington. As a point of clarification, Dolly may remove Seattle from its list of cities that it serves and remove its "Moving and Delivery Help in Seattle" page from its website to satisfy the cease and desist requirement.<sup>26</sup> The Company need not affirmatively state that it does not provide services in Washington; rather, it must ensure that consumers in Washington are not able to engage its services. The burden of undertaking such action is minimal, and cannot be characterized as "clearly excessive" in relation to the local benefit of ensuring the public safety is protected by Commission regulation.

39 **Ex Post Facto.** Dolly argues that Corrected Order 02 violates the Article I, Section 10 of the Constitution by imposing an *ex post facto* law. Dolly claims that Corrected Order 02 imposes a legal requirement that did not exist prior to the entry of that order. We disagree. As Staff notes in its Answer, Corrected Order 02 did not retroactively create liability; its cease and desist provisions simply create the possibility that Dolly will incur future liability should it choose to ignore the Commission's directive to stop advertising the availability of its unauthorized services to Washington consumers. In other words, Dolly was always required to obtain a permit before operating in Washington, and the public service laws make clear that "operating" includes advertising. While Dolly is

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<sup>25</sup> RCW 81.80.75, RCW 81.77.040 and RCW 81.80.355.

<sup>26</sup> Presently, Dolly's website represents that it provides service in Seattle, Portland, San Diego, Denver, Chicago, Philadelphia, and Boston.

**DOCKET TV-171212**  
**ORDER 04**

**PAGE 13**

correct that there is no explicit statutory requirement that it publish a disclaimer on its website, the law prohibits, and always has prohibited, Dolly from advertising services it is not authorized to provide. It logically follows that the Company must, in some way, alter its advertisements to ensure it no longer holds itself out as providing unauthorized services in Washington. As discussed above, this can be accomplished in more than one way. Even if Corrected Order 02 had been silent with respect to Dolly's advertisements, failure to discontinue its services in Washington (including its advertisements) would subject the Company to further enforcement action.

40 **Due Process.** Dolly argues that Corrected Initial Order 02 violates the procedural and substantive due process clauses of the Constitution. We disagree.

41 The procedural due process clause requires "notice and an opportunity to be heard."<sup>27</sup> Dolly claims that it was not given notice that it was required to publish a disclaimer on its website to make it known that its services are not available in Washington. However, the ALJ did not impose a cease and desist order and require Dolly to obtain permits because it failed to publish a disclaimer on its website. Dolly simply misunderstands Corrected Order 02. The corrections to Dolly's advertisements are required *prospectively* as just one aspect of Dolly's operations (including soliciting, offering, and providing regulated services) that the Company must cease and desist.

42 Dolly's procedural due process claim ultimately fails because the Company received notice in Order 01 that the special proceeding may result in a cease and desist order. The Complaint referenced statutory authority and requested relief in the form of a cease and desist order. The ALJ opened the hearing by noting the legislature's directive that the Commission order companies to cease and desist upon a finding that they provide regulated services without a permit. Dolly was also given an opportunity to be heard. Dolly presented witness testimony, evidence, and oral argument at hearing, and declined the ALJ's offer to brief its legal arguments.

43 Dolly's substantive due process claim is similarly without merit. Substantive due process protections forbid "arbitrary and capricious government action even when the decision to take action is pursuant to constitutionally adequate procedures."<sup>28</sup> Substantive due

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<sup>27</sup> *State v. Rogers*, 127 Wn.2d 270, 275, 898 P.2d 294 (1995).

<sup>28</sup> *Amunrud v. Bd. of Appeals*, 158 Wn.2d 208, 218-19, 898 P.2d 294 (1995).

process is reviewed under the rational basis standard.<sup>29</sup> A governmental action survives if it is rationally related to a legitimate state interest.<sup>30</sup> RCW 81.80.075 serves several legitimate state interests, as do RCW 81.77.040 and 81.80.070. Corrected Order 02 rationally serves the interests identified by the legislature in the manner it intended – protecting consumers and the public safety – and therefore does not deprive Dolly of substantive due process.

44 **First Amendment.** Dolly argues that Corrected Initial Order 02 violates the First Amendment of the Constitution, and that it must be rescinded in its entirety on that basis. We disagree.

45 Courts evaluate whether commercial speech may be restricted using a four-part test set out in *Central Hudson Gas & Elec. v. Public Serv. Comm'n*.<sup>31</sup> The first prong of that test provides that for such speech to be protected, “it at least must concern lawful activity and not be misleading.”<sup>32</sup> Dolly’s advertisements promote the unauthorized provision of regulated services. As such, Dolly’s advertisements are unlawful and receive no constitutional protection. Corrected Order 02 does not infringe on the Company’s commercial speech rights.<sup>33</sup>

#### 4. Penalty Calculation

46 RCW 81.80.075 provides that any person who engages in business as a household goods carrier is subject to a penalty of up to \$5,000 per violation. If the basis for the violation is advertising, each advertisement reproduced, broadcast, or displayed via a particular medium constitutes a separate violation. RCW 81.04.380 provides that any public service company that fails to comply with any provision of Title 81 RCW is subject to a penalty

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<sup>29</sup> Staff’s Answer ¶ 53, citing *Amunrud v. Bd. of Appeals* at 220-222.

<sup>30</sup> *Id.* at 222.

<sup>31</sup> *Central Hudson Gas & Elec. v. Public Serv. Comm’n* 447 U.S. 557 (1980).

<sup>32</sup> *Id.* at 566. The remaining *Central Hudson* factors consider whether the government’s interest in restricting the speech is substantial, whether the restriction directly and materially serves the asserted interest, and whether the restriction is no more extensive than necessary. See *Kitsap County v. Mattress Outlet/Gould*, 153 Wn.2d 506 at 512 (2005).

<sup>33</sup> Dolly also argues that Corrected Order 02 imposes prior restraints on Dolly’s right to free speech by requiring Dolly to acquire a permit or license before speaking and by prohibiting certain speech. Dolly’s advertisements, however, receive no protection under the prior restraint doctrine because they are not protected speech. Dolly’s complaint related to the original order’s requirement that it remove its Internet presence is rendered moot by Corrected Order 02, which is the only effective order in this docket.

**DOCKET TV-171212**  
**ORDER 04**

**PAGE 15**

of up to \$1,000 per violation. Every violation is a separate and distinct offense, as is every day's continuance. Corrected Order 02 imposed a \$69,000 penalty, calculated as follows:

- \$5,000 for each of the 11 violations RCW 81.80.075
- \$1,000 for each of the 11 violations of RCW 81.80.355
- \$1,000 for each of the 3 violations of RCW 81.77.040

47 Dolly argues that Order 02 incorrectly interprets and applies the Commission's penalty-imposing statutes, pointing specifically to the fact that the RCW 81.80.075 does not define the term "medium."<sup>34</sup> According to Dolly, 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."<sup>35</sup> We disagree.

48 In a colloquy with the ALJ, Dolly's counsel confirmed the Company's belief that different advertisements published in multiple newspapers – for example, in both the Olympian and the Seattle Times – constitute one advertisement because newsprint is the same medium. The statutory language, however, is not susceptible to Dolly's interpretation, and the Company failed to cite any authority to support its claim.<sup>36</sup> "Each" means "being one of two or more distinct individuals having a similar relation and often constituting an aggregate."<sup>37</sup> Moreover, a plain reading of the statute reveals that "each" modifies the word "advertisement," not the word "medium." Accordingly, we reject Dolly's argument as it relates to how penalties must be calculated.

49 We also affirm the penalty amount assessed by Corrected Order 02. The presiding ALJ undertook a thorough 13-factor analysis, which includes two factors identified in statute and 11 factors identified in a policy statement the Commission issued on January 7, 2013, in Docket A-120061.<sup>38</sup> Corrected Order 02 appropriately assessed a \$69,000 penalty, a \$34,500 portion of which is suspended for a period of two years, and then waived, conditioned on Dolly ceasing and desisting unauthorized operations as a household goods carrier, common carrier, and solid waste collection company. The penalty amount is

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<sup>34</sup> Dolly's Petition ¶ 49.

<sup>35</sup> *Id.*

<sup>36</sup> At hearing, the presiding ALJ specifically requested that Dolly cite authority to substantiate its interpretation of the laws related to advertising penalties.

<sup>37</sup> *See* Merriam-Webster.com.

<sup>38</sup> The statutory factors are set out in RCW 81.80.075.



**DOCKET TV-171212**  
**ORDER 04**

**PAGE 16**

supported by the evidence in the record and is proportionately punitive in light of the Company's past conduct. In addition, the suspended penalty significantly deters future violations.

### **5. Applicability of Budget Proviso**

50 Dolly argues that the Washington state legislature passed a budget proviso that recognizes that current Commission statutes and regulations do not apply to Dolly's business model and thus Corrected Order 02 errs by concluding to the contrary. We disagree with Dolly's characterization. While the budget proviso is a clear indication of legislative interest in the regulation of companies like Dolly,<sup>39</sup> it does not effect a change in the law or affect our responsibility to enforce it. The legislature did not, by passing the proviso, order the Commission to cease enforcing the public service laws that do not allow for Dolly to operate as it does without a permit. The legislature also declined to amend the definition of household goods carrier, common carrier, and solid waste collection company to exclude companies like Dolly from those definitions.

51 Therefore, we find no merit in the legal arguments contained in the Company's Petition. Nonetheless, in light of the 2018 legislative deliberations on regulation of companies like Dolly, the enacted budget proviso with a report due by December 15, 2018, and likely consideration of legislation in the 2019 session, we will establish a due date for the penalty assessed in Corrected Order 02 that will allow for work on the study directed in the budget proviso to continue and to provide an opportunity for the 2019 legislature to amend current Commission statutes in this area if it so chooses. This postponement of the due date for the penalty assessed is contingent on the Company's full compliance with the terms of this Order, including those requiring it to cease and desist from operations described in and found unlawful in Corrected Order 02. Should the Commission find going forward that Dolly has failed to cease and desist from such operations, the full penalty assessed will become due immediately.

### **FINDINGS AND CONCLUSIONS**

52 (1) The Commission is an agency of the State of Washington vested by statute with authority to regulate persons engaged in the business of transporting household

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<sup>39</sup> The 2018 legislature also considered Senate Bill No. 6234 and House Bill No. 2604 which would have authorized the Commission to regulate carrier network companies and operators.

**DOCKET TV-171212**  
**ORDER 04**

**PAGE 17**

goods, property other than household goods, and solid waste for compensation over public roads in Washington.

- 53 (2) The Commission has jurisdiction over the subject matter of this proceeding and over Dolly, Inc.
- 54 (3) It is unlawful, under RCW 81.80.075(1), to operate as a household goods carrier in Washington without first obtaining the required permit from the Commission. Any person who engages in business as a household goods carrier without the required permit is subject to a penalty of up to five thousand dollars per violation under RCW 81.80.75(4).
- 55 (4) Since March 2015, using at least 11 separate platforms, Dolly, Inc. continuously has advertised, solicited, or offered to transport household goods, for compensation, by motor vehicle, within the state of Washington, without first having obtained a household goods carrier permit from the Commission, thus violating RCW 81.80.075.
- 56 (5) Dolly, Inc. is a “household goods carrier” as that term is defined in RCW 81.80.010(5) because it has continuously since 2015 advertised, solicited, offered, or entered into agreements to transport household goods. RCW 81.80.075(1) provides that “No person shall engage in business as a household goods carrier without first obtaining a household goods carrier permit from the commission.”
- 57 (6) Dolly, Inc. has neither applied for nor obtained a permit from the Commission authorizing it to conduct business as a household goods carrier.
- 58 (7) Dolly, Inc. violated RCW 81.80.75(1) at least 11 times since 2015.
- 59 (8) RCW 81.04.510 authorizes and requires the Commission to order an unpermitted household goods carrier such as Dolly, Inc. to cease and desist immediately its activities. Any person who engages in business as a household goods carrier in violation of a cease and desist order issued by the Commission under RCW 81.04.510 is subject to a penalty of up to \$10,000 per violation under RCW 81.80.75(5).
- 60 (9) Since March 2015, using at least 11 separate platforms, Dolly, Inc. continuously has advertised, solicited, or offered to transport property other than household goods, for compensation, by motor vehicle, within the state of Washington, without first having obtained a household goods carrier permit from the Commission, thus violating RCW 81.80.355 at least 11 times. Dolly is subject to

**DOCKET TV-171212**  
**ORDER 04**

**PAGE 18**

a penalty of up to \$1,000 per violation. The Commission is authorized and required by RCW 81.04.510 to order Dolly, Inc. to cease and desist immediately from these activities.

- 61 (10) Since March 2015, using at least three separate platforms, Dolly, Inc. continuously has advertised, solicited, or offered to haul solid waste, for compensation, by motor vehicle, within the state of Washington, without first having obtained a certificate of public convenience and necessity from the Commission, thus violating RCW 81.77.040 at least three times. Dolly is subject to a penalty of up to \$1,000 per violation. The Commission is authorized and required by RCW 81.04.510 to order Dolly, Inc. to cease and desist immediately from these activities.
- 62 (11) The Commission's public service laws are not discriminatory, and apply even-handedly to in-state and out-of-state entities.
- 63 (12) The Commission's public service laws serve a legitimate state purpose because they protect consumers and the public safety.
- 64 (13) The Commission's public service laws withstand a dormant clause challenge.
- 65 (14) The Commission's public service laws prohibit persons from advertising, offering, or soliciting services they are not authorized to provide.
- 66 (15) Corrected Order 02 does not impose an *ex post facto* law.
- 67 (16) Dolly, Inc. received adequate notice that the Commission may enter a cease and desist order, and Dolly, Inc. was given an opportunity to be heard.
- 68 (17) Corrected Order 02 does not violate Dolly, Inc.'s procedural due process rights.
- 69 (18) The Commission's public service laws serve the legitimate state interests of protecting consumers and the public safety.
- 70 (19) Corrected Order 02 does not violated Dolly, Inc.'s substantive due process rights.
- 71 (20) Dolly, Inc.'s advertisements promote the unauthorized provision of regulated services, and thus are not protected commercial speech.
- 72 (21) Corrected Order 02 does not violate Dolly, Inc.'s First Amendment rights.

**ORDER**

73 THE COMMISSION ORDERS:

**DOCKET TV-171212**  
**ORDER 04**

**PAGE 19**

- 74 (1) The Commission denies Dolly, Inc.'s Petition for Administrative Review of Corrected Order 02 and affirms and adopts that order, which is attached as Appendix A.
- 75 (2) Dolly, Inc. must immediately cease operating as a household goods carrier, common carrier, and solid waste collection company unless it obtains authority from the Commission.
- 76 (3) Dolly, Inc. must clearly indicate in its web-based application on the Internet and in its advertising on Facebook, Twitter, Pinterest, and any other social media sites or other 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 transporting property other than household goods, or as a solid waste hauler unless it obtains authority from the Commission.
- 77 (4) The Commission assesses a penalty of \$69,000 against Dolly, Inc., the entire amount of which is suspended until June 30, 2019, subject to the requirement that Dolly, Inc. immediately cease and desist from the operations described, and found unlawful, in Corrected Order 02. If Dolly, Inc. is found to have continued such operations in Washington after the date of this Order at any time before June 30, 2019, the full penalty will be due upon notice of that finding to Dolly, Inc.
- 78 (5) If Dolly, Inc. continues to comply with the terms of this Order until June 30, 2019, Dolly must pay a \$34,500 portion of the penalty by July 10, 2019. The remaining \$34,500 portion will be suspended until June 30, 2020, and waived thereafter, subject to Dolly, Inc.'s continued compliance with the terms of this Order. If Dolly, Inc. fails to comply after June 30, 2019, the \$34,500 suspended portion of the penalty will be due and payable immediately upon notice of that finding to Dolly, Inc.
- 79 (6) The Commission retains jurisdiction over this proceeding to effectuate the terms of this Order.

DATED at Olympia, Washington, and effective May 18, 2018.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

**DOCKET TV-171212**  
**ORDER 04**

**PAGE 20**

DAVID W. DANNER, Chairman

ANN E. RENDAHL, Commissioner

JAY M. BALASBAS, Commissioner

**NOTICE TO PARTIES: This is a Commission final order. In addition to judicial review, administrative relief may be available through a petition for reconsideration, filed within 10 days of the service of this order pursuant to RCW 34.05.470 and WAC 480-07-850, or a petition for rehearing pursuant to RCW 81.04.200 and WAC 480-07-870.**