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

In the Application of

DOLLY, INC.

To Operate as a Common Carrier  
pursuant to RCW 81.28, RCW 81.80,  
WAC 480-12, and WAC 480-14

DOCKET TV- \_\_\_\_\_

LEGAL MEMORANDUM REGARDING USE  
OF INDEPENDENT CONTRACTORS BY  
COMMON CARRIERS IN SUPPORT OF  
APPLICATION OF DOLLY, INC., FOR  
PERMIT TO OPERATE AS A COMMON  
CARRIER

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## I. INTRODUCTION AND PURPOSE

1 Dolly, Inc. (Dolly), seeks a common carrier permit to do business in the State of Washington pursuant to RCW 81.28 and 81.80. As stated in its Petition for Exemption and in the supporting Declaration of Michael Howell, both filed with the Commission concurrently with this Memorandum, Dolly seeks to use independent contractors in the conduct of its delivery service operations, as it does in at least 20 other states.

2 However, as described in detail below, we understand that Commission Staff has taken the position, or may take the position, that such use of independent contractors is contrary to state statute. The purpose of this memorandum is to describe Staff's legal concern as we understand it and to explain why, under Washington statutes and past decisions and statements by the Commission, such legal position would be wrong.

## II. BACKGROUND

3 We understand Staff to rely on a statement made by the Commission in an Order Denying a Petition for Rulemaking by Dolly in UTC Dkt. No. TV-170999. On September 26, 2017, Dolly had filed a petition requesting the Commission to, by rule exempt Dolly's operations from regulation as a Household Goods Carrier (HHG) or to modify the regulations applicable to Household Goods Carriers as they may apply to Dolly's operations. The Commission denied the petition because Dolly meets the statutory definition of a Household Goods Carrier and therefore a permit is required.<sup>1</sup> That conclusion – that a permit is required – could have ended the matter in the context of that Petition for Rulemaking. However, the

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<sup>1</sup> Order Denying Petition, *In re Petition of Dolly, Inc.*, ¶8, UTC Dkt. No. TV-170999 (Oct. 31, 2017) (Order on Petition for Rulemaking).

Commission went further. Even though the documents filed in that matter and available online do not reflect any brief or argument relating to limitations on Dolly's business operations that may be inherent in the permit requirement,<sup>2</sup> the Commission offered up what is at most an advisory opinion:

The statute requires that all HHG carriers, regardless of size, obtain a permit from the Commission. *Dolly, therefore, must obtain an HHG carrier permit and either (1) own its own vehicles and employ the Helpers transporting the goods, or (2) require each of its Helpers also to have an HHG carrier permit.*<sup>3</sup>

4            Though in the current matter Dolly does not seek authority to transport household goods, we understand that Staff could rely on this statement as a basis for advocating prohibition of independent contractors in the common carrier context as well.

5            The alternative requirements articulated by the Commission in its Order on Petition for Rulemaking are not required. They are not required by the plain language of the statute, are inconsistent with past administrative implementation of transportation statutes in other contexts, and are inconsistent with general law relating to employees and independent contractors.

6            On May 8, 2020, the Commission declined to issue a declaratory order requested by the Washington Movers Conference (WMC) that could have addressed this issue. WMC had petitioned the Commission to determine that the rules for HHG carriers prohibit those carriers from using third-party contractors to perform regulated services. Dolly filed a response

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<sup>2</sup> Indeed, the only person or entity to file comments in the proceeding other than Dolly was Public Counsel, which supported the Petition. Public Counsel's Response to Dolly, Inc.'s Petition to Amend Motor Carrier Rules or in the Alternative to Initiate Rulemaking, UTC Dkt. No. TV-170999 (Oct. 16, 2017).

<sup>3</sup> Order on Petition for Rulemaking, ¶12 (emphasis added).

questioning the procedural adequacy of WMC’s Petition but also argued the merits of the independent contractor issue. Commission Staff declined to argue on the merits and simply requested that the Petition be dismissed for procedural reasons. The Commission agreed with Staff and dismissed the Petition. In doing so, the Commission declined to decide the issue WMC attempted to raise. Instead the Commission found that the issue needs further guidance and stated it would open an inquiry “to consider whether a rulemaking or policy statement is the appropriate method to clarify and resolve such issues.” It said it would do so by December 31, 2020. While Dolly agrees that the Commission should address the third-party contractor issue, waiting to do so for a policy statement or rulemaking that may not begin until the end of this year would unreasonably delay the resolution of this matter. Instead, the Commission can and should address the issue in responding to this permit application.<sup>4</sup>

### III. ARGUMENT

#### A. The Plain Language of the Statute Does Not Limit the Permittee to Using Only Employees to Fulfill its Permitted Functions.

7 In a December 19, 2019, conference call, representatives of the Commission staff suggested that the limitation on the use of independent contractors is based on the requirement for a permit in RCW 81.80.070(1) and the definition of “common carrier” in RCW 81.80.010(3). Neither provision supports that position.

8 RCW 81.80.070 states:

(1) A common carrier, contract carrier, or temporary carrier shall not operate for the transportation of property for compensation in this state without first obtaining from the commission a permit for such operation.

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<sup>4</sup> The Commission can set policy either through rulemaking or on a case-by-case basis. See footnote 11, *infra*.

(2) The commission shall issue a common carrier permit to any qualified applicant if it is found the applicant is fit, willing, and able to perform the service and conform to the provisions of this chapter and the rules and regulations of the commission.

(3) Before a permit is issued, the commission shall require the applicant to establish safety fitness and proof of minimum financial responsibility as provided in this chapter.

9 RCW 81.80.010(1) defines “common carrier” to:

mean[] any person who undertakes to transport property for the general public by motor vehicle for compensation, whether over regular or irregular routes, or regular or irregular schedules, including motor vehicle operations of other carriers by rail or water and of express or forwarding companies.

10 Subsection (3) of that section elaborates that the term:

includes persons engaged in the business of providing, contracting for, or undertaking to provide transportation of property for compensation over the public highways of the state of Washington as brokers or forwarders.

11 There is nothing in the language of these provisions that requires, or even implies, that those who meet the definition of “common carrier” are required either to use their own employees or subcontract the common carrier work out to other holders of common carrier permits.

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

12 In administering an analogous statutory permitting requirement, that for auto transportation companies, the Commission has determined that a carrier may use independent contractors and is not limited to using only equipment it owns or only its own employees to carry out its permitted functions.



13 As with common carriers, for auto transportation companies to operate they must have a permit, called a “certificate,” from the Commission.<sup>5</sup> Unlike the regulations for common carriers, the regulations for auto transportation companies previously required that “the driver of a vehicle operated by a transportation company . . . be the certificate holder or an employee of a certificate holder.”<sup>6</sup> But, as the regulatory history shows, the statute itself never prohibited auto transportation companies from using independent contractors.

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

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

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

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<sup>5</sup> RCW 81.68.040.

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

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

<sup>8</sup> *Id.* ¶15.

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

16 In other words, the rule prohibiting use of independent contractors in the auto transportation context was designed to ensure that the permittee, or certificate holder, had control over, and was responsible for, its obligations as a carrier.

17 As the Commission indicated, this prohibition on common carriers using independent contractors was a matter of regulatory, not statutory, law. That was made clear in 2017 when the Commission repealed WAC 480-30-213(2) prohibiting auto transportation companies from using independent contractors, and replaced it with a new rule that allowed use of such contractors in certain circumstances:

**WAC 480-30-022 Contractors.**

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

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

18 If the statutory requirement for a certificate prohibited the use of independent contractors, then the Commission could not have adopted this rule.

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

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

The proposed rules appropriately balance those concerns. *The rules would allow regulated companies to use independent contractor vehicles and drivers to provide auto transportation service. The regulated companies, however, would continue to be responsible for compliance with appropriate safety and consumer protection standards, regardless of whether the company or a contractor physically provisions the service.* The proposed rules also better tailor those standards to the smaller capacity vehicles some companies increasingly are using, as well as streamline company record-keeping obligations to reduce duplication and recognize consumers' increased access to information in a digital format.<sup>10</sup>

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<sup>10</sup> *In the Matter of Amending WAC 380-30 Relating to Passenger Transportation Companies*, UTC Dkt. No. TC-161262, General Order R-590, Order Repealing, Amending and Adopting Rules Permanently, ¶¶16-17 (July 31, 2017) (emphasis added).

20 To summarize: At one time, the Commission prohibited, by rule, the use of independent contractors in the auto transportation industry, basing that prohibition on the need to ensure that the certificate holder maintained control of its permitted operations. However, as the auto transportation market evolved, so did the Commission's views. It now recognizes that carriers use a network of independent contractors to efficiently provide auto transportation service. So, the Commission changed its rule to allow such a network, at the same time safeguarding the statute's overall policy of ensuring safe service and protecting consumers.

21 As it did with auto transportation companies, the Commission, in the context of common carriers (or other types of carriers) is free to adapt its regulation to the evolving nature of the industry, while ensuring adherence to the state statutory policy of protecting consumers.

22 In the context of the auto transportation industry, the Commission made its policy shift through rulemaking. This was necessary because the Commission had on the books an existing regulation contrary to the policy the Commission wanted to effect. In the common carrier context, there is no such rule, so the Commission is free to establish policy either through rulemaking or on a case-by-case basis.<sup>11</sup>

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<sup>11</sup> See, e.g., *SEC v. Chenery Corp.*, 332 U.S. 194, 202-03, 67 S.Ct. 1575, 91 L.Ed. 1995 (1947) (agency may set policy by either general rule or on a case-by-case basis); *Budget Rent-a-Car v. Department of Licensing*, 144 Wn.2d 889, 898, 31 P.3d 1174 (2001) (provisions on rulemaking in administrative procedure act "were not designed to serve as a straitjacket of administrative action" requiring rulemaking to the exclusion of case-by-case decision-making).

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

23 In 2018, at the Legislature’s direction, the Commission convened a task force “to make recommendations and report to the Legislature regarding the most effective method of regulation of digital application-based micro-movers and the small goods movers that utilize their digital application.”<sup>12</sup> The resulting “Report on the Digital Application Based Micro-Mover Task Force” (Task Force Report) states:

When a new business model involves the use of independent contractors who themselves may not be permitted, the UTC must be confident that the contractors who actually perform the moves have appropriate insurance and are carefully screened to provide service that is safe and reliable. This is reflected in the commission’s consideration of a number of recent cases before it, as discussed below.<sup>13</sup>

24 So, in the context of companies like Dolly, the Commission has stated that independent contractors may be used even when those contractors themselves do not have permits and indicated that “a number of recent cases” support this argument.<sup>14</sup>

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

25 In addition to lacking a basis in the statute, Staff’s alternative requirements for operating as a common carrier are in tension with authority indicating that, in many contexts, there is little or no legal distinction between “employees” and “independent contractors.” For

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

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

<sup>14</sup> In those cases, the companies had argued that their use of independent contractors removed them from Commission jurisdiction. *See, e.g., In the Matter of Determining the Proper Carrier Classification of, and Complaint for Penalties Against: Blessed Limousine, Inc.*, UTC Dkt. No. TE-151667, Order 03 (Final Order) (Jan. 26, 2016); *In the Matter of Determining the Proper Carrier Classification of, and Complaint for Penalties Against Ghostruck, Inc.*, UTC Dkt. No. TV-161308, Order 04 (Initial Order) (April 25, 2017). The Commission rejected such arguments holding that use of such contractors did not immunize the companies from Commission regulation. The Commission did not hold that the use of contractors by a permitted carrier was unlawful.

example, as the Commission recognized in its December 2018 Task Force Report, the Washington Department of Labor and Industries considers digital-app-based businesses to be employers and individuals they hire to be covered workers for purposes of workers' compensation insurance.<sup>15</sup> This is true whether the individuals are independent contractors or employees.

**E. The Commission has Acquiesced in the Operation of Other Companies Using Independent Contractors.**

26 Public Counsel also has noted in a Dolly-related proceeding that “other TNCs are currently operating or seeking permission to operate in Washington” and “there is a need to adapt traditional regulatory frameworks to meet the realities of a 21<sup>st</sup> Century economy.”<sup>16</sup> Indeed, the Commission has recognized in the rulemaking regarding auto transportation companies and in the Task Force Report, both cited above.

27 The Commission also has recognized, by acquiescence, that new market reality by permitting other companies that use the same business model that Dolly proposes, using independent contractors to make deliveries on behalf of retailers.<sup>17</sup>

**F. There are No Regulations Limiting the Use of Independent Contractors.**

28 As there are no statutory limits on common carriers using independent contractors, we likewise see no Commission regulations that limit their use. This is unlike the situation with

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<sup>15</sup> Task Force Report at 42-44; *see* WAC 296-17-31004(1), -31005; RCW 51.08.180, 51.08.195.

<sup>16</sup> Initial Comments of Public Counsel, *In re Application of Dolly, Inc. for Authority to Operate as a Household Goods Moving Company and Motor Freight Common Carrier*, UTC Dkt. No. TV-190594. ¶3 (Sept. 9, 2019).

<sup>17</sup> *See* Declaration of Michael Howell, ¶ 25.

auto transportation companies, where there was a rule specifically disallowing use of independent contractors. As described above, that rule was later replaced.<sup>18</sup>

29           The only regulation that comes close to addressing the independent contractor issue is WAC 480-14-110, which states:

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

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

30           However, Dolly’s independent contractors would use the permit issued to Dolly and be part and parcel of the permitted operation. Therefore, this regulation would not be relevant. However, to the extent that the Commission reads this rule differently, and WAC 480-14-110 does serve to limit Dolly’s use of independent contractors, we have included that regulation among the three from which Dolly seeks exemption in our Petition for Exemption, filed concurrently with this Memorandum and with the Application.

**IV. CONCLUSION**

31           In sum, the statutes defining “common carriers” and requiring them to obtain a permit do not require that such carriers use only their own employees, the advisory language in the Commission’s Order on Petition for Rulemaking notwithstanding.

32           Consistent with its recognition of the evolution of transportation markets in the auto transportation industry, the Commission should allow Dolly to incorporate independent contractors into its permitted common carrier operations provided that, as stated in the above-cited Commission order amending the auto transportation rules, Dolly “would continue to be

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<sup>18</sup> See Part III.B., above.

responsible for compliance with appropriate safety and consumer protection standards, regardless of whether the company or a contractor physically provisions the service.”

DATED this 20th day of August, 2020, at Olympia, Washington.

*s/ Jeffrey D. Goltz*

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