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No. 53388-0-II

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

DOLLY, INC.,

Appellant,

v.

**WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION,**

Respondent.

OPENING BRIEF OF APPELLANT DOLLY, INC.

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I. INTRODUCTION

Appellant Dolly Inc. (“Dolly”) is a Washington-based virtual marketplace company that operates an electronic platform to instantly connect consumers who need help transporting large, heavy, or bulky items within Washington with local pick-up truck owners. Dolly operates in seven states throughout the U.S. Beginning in 2015, Dolly worked with staff of the Washington Utilities and Transportation Commission (“WUTC” or “Commission”) to navigate Washington statutes and the Commission’s regulations related to motor freight transportation. In January 2018, after a large turnover in staff at the Commission, the Commission issued a complaint that found probable cause to seek penalties against Dolly for 25 violations of Washington’s motor freight carrier statutes. All the allegations were based on advertising.

After a brief adjudicative proceeding, the presiding administrative law judge (“ALJ”) issued an initial order finding, among other things, that Dolly violated the motor freight carrier statutes not just for advertising, but for entering into agreements. WUTC staff (“Staff”) filed a petition for administrative review because even Staff believed the order exceeded the Commission’s authority. Before Dolly had the opportunity to respond to Staff’s petition or file its own petition challenging the order, the presiding ALJ rescinded the initial order (“Initial Order 02”) and replaced it with a

significantly different corrected initial order (“Corrected Order 02”). The Commission ultimately adopted the corrected initial order, issued a final order (“Order 04”), assessed penalties against Dolly, and ordered Dolly to shut down operations.

On May 18, 2018, the Commission entered Order 04 in Docket TV-171212 in which it denied Dolly’s Petition for Administrative Review of Corrected Order 02. Dolly filed a petition for judicial review of Order 04 with the Thurston County Superior Court, and the Thurston County Superior Court affirmed the Commission’s Order 04 in Docket TV-171212 on March 8, 2019.

II. ASSIGNMENTS OF ERROR¹

1. Finding and Conclusion Nos. 4, 5, 7, 9, 16, 17, 19: The Commission committed an error of law because the Commission violated RCW 81.04.110, RCW 80.04.210, WAC 480-07-825, and WAC 480-07-875. CP 000183-84, CP 000200, ¶ 42.

2. Finding and Conclusion Nos. 4, 5, 7, 9, 10: The Commission erred because Order 04 resulted from an unlawful procedure,

¹ This is an Administrative Procedure Act (“APA”) appeal in which no new issues were raised and no new evidence was presented at the trial court level. Assigning error to actions of the superior court is thus not necessary. *Waste Mgmt. of Seattle, Inc. v. Utils. & Transp. Comm’n*, 123 Wn.2d 621, 632, 869 P.2d 1034 (1994) (because “we are conducting our review on the administrative record . . . assignment of error to the superior court findings is not necessary”).

decision-making process, or failure to follow a prescribed procedure, in violation of RCW 81.04.110, RCW 80.04.210, WAC 480-07-825 and WAC 480-07-875. CP 000183-84, CP 000200, ¶ 42.

3. Finding and Conclusion No. 4, 5, 7, 9, 10: The Commission erred because Order 04 was not supported by substantial evidence. CP 000183-84, AR 000302-03.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the Commission's Order 04 contained an error of law when the Commission violated RCW 81.04.110 and RCW 80.04.210, and failed to follow WAC 480-07-610, -825, and -875. The standard of review for this issue is *de novo*. *Arishi v. Wash. State Univ.*, 196 Wn. App. 878, 896, 385 P.3d 251, 259 (2016).

2. Whether the Commission's Order 04 resulted from an unlawful procedure, decision-making process, or a failure to follow prescribed procedure, when the Commission failed to follow the procedures prescribed in RCW 81.04.110, RCW 80.04.210, WAC 480-07-610, -825, and -875. The standard review for this issue is *de novo*. *Arishi v. Wash. State Univ.*, 196 Wn. App. 878, 896, 385 P.3d 251, 259 (2016).

3. Whether the Commission's Order 04 was supported by substantial evidence. The standard of review for this issue is whether there was a sufficient quantum of evidence in the record to persuade a

reasonable person that the declared premise was true. *Wenatchee Sportsmen Ass'n v. Chelan Cty.*, 141 Wn.2d 169, 176, 4 P.3d 123, 126 (2000).

IV. STATEMENT OF THE CASE

A. Definitions

This appeal involves the interpretation of various definitions, which are compiled here for the Court:

- Household goods: “The personal effects and property used, or to be used, in a residence when transported or arranged to be transported between residences or between a residence and a storage facility with the intent to later transport to a residence or when referenced in connection with advertising, soliciting, offering, or entering into an agreement for such transportation.” WAC 480-15-020.
- Household goods carrier: “[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 as defined by the commission.” RCW 81.80.010(5).
- Common carrier: “[A]ny 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.” RCW 81.80.010(1).
- Solid waste collection company: “[E]very person or his or her lessees, receivers, or trustees, owning, controlling, operating, or managing vehicles used in the business of transporting solid waste for collection or disposal, or both, for compensation, except septic tank pumpers, over any public highway in this state as a “common carrier” or as a “contract carrier.” RCW 81.77.010.

B. Dolly's Business

Consumers use Dolly's proprietary software on a smart phone or internet-enabled device to request labor or transportation to help them move items. AR 000008-10. Similar to other well-known virtual marketplace companies, independent contractors known as "Helpers" or "Hands" use Dolly's platform to review customer requests. *Id.* Dolly owns no trucks and employs no drivers because Dolly's service is its electronic platform. AR 000045-55. As explained in Dolly's Terms of Service, there is no agreement between the consumer and Dolly to transport household goods, nor is Dolly compensated for performing moving services. *Id.* Rather, Dolly finds available Helpers and connects those Helpers with a customer. AR 000041, 45. Any moving services that are performed are completed at the Helpers' and Hands' and customers' discretion and agreement. AR 000049. Dolly is not involved in that agreement other than hosting the platform that facilitates the parties' meeting, and its Terms of Service do not govern that relationship. *Id.*

Shortly after Dolly was incorporated, its Chief Executive Officer suggested meeting with the Commission's Consumer Protection and Communications department to, in Staff's words, "give staff a full view of the company's operations and its compliance with the appropriate regulations." AR 000006-7, AR 000028. Dolly and Staff met and

exchanged correspondence several times over two years. AR 000007. In response to these conversations, Dolly developed its website and social media in way that emphasized and clarified that Dolly's service is not transporting or moving, but rather connecting the consumer with those people who can transport or move. TR 82:5-83:9.² Staff was aware of Dolly's operations for years and did not recommend any complaint against Dolly until the beginning of 2018, just after the head of the Consumer Protection and Communications department left and the Commission "had a complete turnover in the investigations unit." TR 21:21-22.

On January 10, 2018, the Commission issued a complaint against Dolly alleging the following: (1) eleven violations of RCW 81.80.075, (2) eleven violations of RCW 81.80.355, and (3) three violations of RCW 81.77.040. All of the Commission's allegations were based on advertisements using the following: Dolly's website, billboards, Facebook, Instagram, Twitter, LinkedIn, iTunes, Craigslist, YouTube, Pinterest, Yelp, and newspaper articles. AR 000078. Similarly, Staff's investigation recommended enforcement solely related to advertising. AR 000005.

RCW 81.80.075 prohibits engaging in business as a household goods carrier without a household goods permit. As stated in the definition

² The administrative record does not number the pages of the administrative hearing transcript in the same manner as the other pages of the record. Accordingly, Dolly will identify the transcript pages with "TR" rather than "AR".

above, a person is a household goods carrier if they (1) advertise to transport household goods, (2) solicit the transportation of household goods, (3) offer to transport household goods, or (4) enter into an agreement to transport household goods. The Commission did not allege that Dolly transports, solicits, offers, or enters into agreements to transport household goods. AR 000078. Instead, the Commission alleged that Dolly violated RCW 81.80.075 “a total of 11 times” by *advertising* for the transportation of household goods without a household goods permit. *Id.*

RCW 81.77.040 prohibits a solid waste collection company from operating for the hauling of solid waste for compensation without a certificate of public convenience and necessity requiring such operations. A person operates for the hauling of solid waste for compensation if they (1) advertise to transport solid waste, (2) solicit the hauling of solid waste, (3) offer the hauling of solid waste, or (4) enter into an agreement to haul solid waste. The Commission did not allege that Dolly hauls solid waste, or solicits, offers, or enters into agreements to haul solid waste. *Id.* Instead, the Commission alleged that Dolly violated RCW 81.77.040 “a total of three times” by *advertising* to haul solid waste without authority. *Id.*

RCW 81.80.355 prohibits advertising without a common carrier permit. The Commission alleged that Dolly violated RCW 81.80.355 “a

total of 11 times” by advertising for the transportation of property without a common carrier permit. *Id.*

There was no discovery in this Brief Adjudicative Proceeding, and the entire March 13, 2018, hearing lasted two hours, including a break. TR 4, TR 99. On March 29, 2018, the presiding ALJ entered Initial Order 02, which found that Dolly violated RCW 81.80.355 and RCW 81.77.040 because it advertised for the transportation of freight and solid waste without authority. AR 000132-33. Initial Order 02 also found that Dolly violated RCW 81.80.075 for entering into agreements to transport household goods. AR 000126. Initial Order 02 ordered Dolly to pay penalties of \$55,000 for entering into agreements for the transportation of household goods, plus \$14,000 related to the transport of freight other than household goods and the hauling of solid waste. AR 000131 at ¶ 42. Initial Order 02 also ordered Dolly to cease and desist operating and required Dolly to immediately remove all Internet presence it uses or has ever used. AR 000134.

On April 2, 2018, Staff filed a Petition for Administrative Review of Order 02 challenging Initial Order 02 as overbroad. AR 000139. On April 9, 2018, before Dolly could respond to Staff’s Petition and add its own claims challenging Initial Order 02 and before Dolly filed its own petition for review, the ALJ issued simultaneously a Notice of Correction

of Initial Order and Initial Order 02 (Corrected), which interpreted Staff's petition as a motion to correct obvious or ministerial errors under WAC 480-07-875. AR 000143. Corrected Order 02 amended Initial Order 02 to resolve Staff's concerns with a major change to the order's cease and desist language. *Id.* Corrected Order 02 also included significant alterations that were outside the scope of Staff's petition AR 000143-44. Corrected Order 02 also included other amendments that the ALJ referred to as "several copy edits that correct scrivener's errors in the original". AR 000143 n.1.

Despite Initial Order 02 being rescinded, Dolly filed an answer to Staff's Petition for Administrative Review. AR 000166. Dolly also filed its own petition for administrative review of both Initial Order 02 and Corrected Order 02. AR 000180. On May 18, 2018, by Order 04, the Commission denied Dolly's petition. Order 04 adopted in full the Findings and Conclusions of Corrected Order 02. AR 000304, ¶ 74. The Commission found that Dolly's challenges to Initial Order 02 were moot because Initial Order 02 had been "cured." AR 000294-5 at ¶ 29.

Dolly filed a Petition for Judicial Review with the Thurston County Superior Court. CP 000003. The Court held oral arguments and asked no questions of either party. RP 1-19. In his oral ruling, the Court acknowledged the Commission and ALJ's errors, describing them as "less

than ideal” procedures and circumstances. RP 19-20. The Court, without explanation or analysis, refused to reverse or remand the order and simply labelled the errors “a round peg-square hole situation.” RP 20:13-19.

Dolly is a qualified party under RCW 4.84.350 because Dolly’s net worth did not exceed five million dollars at the time of the initial petition for judicial review. AR 000007, 14, RCW 4.84.340. Accordingly, if Dolly substantially prevails in this appeal, the Court should award attorneys’ fees pursuant to RCW 4.84.350.

V. ARGUMENT AND AUTHORITY

A. Standard of Review

This is a review of an administrative order. As the party that filed the petition for review and this appeal, Dolly must establish that the Commission erred under any one of the nine standards articulated in RCW 34.05.570(3). *Edelman v. State*, 160 Wn. App. 294, 304, 248 P.3d 581, 586 (2011). Of those nine, the three standards at issue in this petition are:

- (c) The Commission engaged in unlawful procedure or decision-making process, or failed to follow its prescribed procedure;
- (d) The Commission’s decision erroneously interpreted or applied the law, and
- (e) The order is not supported by substantial evidence.

RCW 34.05.570(3). As identified above, standards (c) and (d) are questions of law this Court reviews de novo. *Arishi v. Wash. State Univ.*,

196 Wn. App. 878, 896, 385 P.3d 251, 259 (2016). Also as identified above, standard (e) involves a factual question that the Court reviews for substantial evidence. *Id.* Under the substantial evidence standard, there must be a sufficient quantum of evidence in the record to persuade a reasonable person that the declared premise is true. *Wenatchee Sportsmen Ass'n v. Chelan Cty.*, 141 Wn.2d 169, 176, 4 P.3d 123, 126 (2000).

Court of Appeals review of an agency order is governed by Chapter 34.05 RCW, the Administrative Procedures Act (“APA”). *Courtney v. Wash. Util. and Transp. Comm’n*, 3 Wn. App. 2d 167, 176, 414 P.3d 598, 603 (2018) *citing Campbell v. Emp’t Sec. Dep’t*, 180 Wn.2d 566, 571, 326 P.3d 713 (2014). The Court sits in the same position as the superior court and applies APA standards directly to the administrative record. *Id.* The Court reviews the decision of the agency, not of the superior court. *Id.*

B. The Commission Erred in Finding That Dolly Entered into Agreements to Transport Household Goods and Haul Solid Waste

The Commission erred when it found that Dolly engages in regulated services by entering into agreements to perform regulated services. When the Commission issues a complaint against a company for a violation of a provision of law, order, or rule, it must clearly set forth in writing the aggrieved act or omission. RCW 81.04.110. While multiple

matters may be joined in one hearing, “[a]ll grievances to be inquired into shall be plainly set forth in the complaint.” *Id.* The fundamental point of such requirement is to ensure that the appellant was apprised of the charge against it. *State ex rel. Ne. Transp. Co. v. Abel*, 10 Wn.2d 349, 353, 116 P.2d 522 (1941). It was well settled almost 80 years ago that the Commission is limited to hearing and determining only those issues that are raised by the pleadings. *State ex rel. Bohon v. Dep’t of Pub. Serv.*, 6 Wn.2d 676, 682, 108 P.2d 663, 667 (1940). “The purpose of the rule just stated is, of course, to insure [sic] to the carriers or utilities affected full opportunity to be heard upon any matter before any ruling is made.” *Id.* An order regarding an issue not raised in the complaint is void. *State v. R.R. Comm’n of Washington*, 52 Wash. 440, 443, 100 P. 987, 988 (1909) (order setting rates was void when the complaint listed certain rates, but not others.) The issue is not whether the Commission has power, generally, but whether the company had notice of the intention of the Commission to exercise that power. *Id.*

The Commission never alleged that Dolly entered into any agreements, and that issue was never raised at the hearing. Staff’s investigation, which triggered the complaint, was limited solely to Dolly’s advertising. Staff entered no evidence of any such agreements and propounded no testimony regarding any such agreements. As

demonstrated below, Dolly was not given the opportunity to defend such a claim. Yet the ALJ nonetheless concluded that Dolly entered into agreements to transport household goods and ordered Dolly to pay \$55,000 as penalty. While this seems inexplicable, the simple explanation is that the conclusion was based on a copying error, as discussed in Section 3, below.

1. The Complaint Did Not Allege that Dolly Entered into Agreements to Transport Household Goods or Haul Solid Waste

The Commission's complaint claimed that Dolly violated three motor carrier statutes a total of 25 times. Specifically, the Commission alleged that Dolly violated RCW 81.80.075 eleven times, RCW 81.80.355 eleven times, and RCW 81.77.040 three times. AR 00078. While RCW 81.80.355 is expressly limited to advertising, a person violates RCW 81.80.075 or RCW 81.77.040 by (1) advertising, (2) soliciting, (3) offering, or (4) entering into an agreement to transport household goods or haul solid waste, respectively. All the Commission's allegations, however, are plainly laid out on page AR 000078 and they are all limited to advertising. Nowhere in the document is there any fact claiming or supporting a finding that Dolly entered into an agreement to transport household goods or haul solid waste.

Regarding RCW 81.80.075, the Commission alleged, “Specifically, Dolly engaged in business as a household goods carrier 11 times by advertising to do so on its company website, billboards, Facebook, Instagram, Twitter, LinkedIn, iTunes, Craigslist, YouTube, Pinterest, Yelp, and newspaper articles.”³ In claiming violations of RCW 81.80.355, the Commission claimed, “Specifically, Dolly advertised for the transport of property for compensation on its company website, billboards, Facebook, Instagram, Twitter, LinkedIn, iTunes, Craigslist, YouTube, Pinterest, Yelp, and newspaper articles.” And in claiming violations of RCW 81.77.040, “Specifically, Dolly operated for the hauling of solid waste a total of three times by advertising to do so on its website, YouTube, and Yelp.” AR 000078.

The Commission never alleged that Dolly solicited, offered, or entered into an agreement to transport household goods or haul solid waste. Every fact in the Commission’s complaint is directly related to advertising, and no fact even attempts to support an allegation that Dolly entered into any agreement to transport household goods or haul solid waste. At no time did the Commission state that it had probable cause to seek penalties against Dolly for entering into an agreement to transport

³ Apparently, the Commission combined billboards and newspaper articles into one allegation. TR. 53:18-25.

household goods or haul solid waste. Dolly, therefore, had no notice of any allegation related to soliciting, offering, or entering into any agreement. Therefore, the Commission did not comply with RCW 81.04.110.

2. The Hearing Did Not Involve any Testimony that Dolly Entered into Agreements to Transport Household Goods or Haul Solid Waste

No party made any mention of Dolly entering into agreements to transport goods or haul solid waste at any time during the hearing. On the contrary, several times during the hearing Staff's witness, counsel for Staff, and the presiding ALJ each insisted that all allegations against Dolly were limited to advertising.

COUNSEL FOR DOLLY: [T]he investigation and the complaint do not allege that Dolly actually transports any household goods, collects solid waste or any other goods, is that correct?⁴

STAFF WITNESS: The investigation covered advertising, which is a -- requires a permit. They advertised for household goods moves, common carrier moves, and the hauling of solid waste.⁵

COUNSEL FOR DOLLY: So the underlying allegation for your belief that the Commission should regulate Dolly as a household goods carrier, solid waste collector and

⁴ Bryant, TR 46:16-19.

⁵ Paul, TR 46:20-23.

common carrier is that they advertise, not that they actually perform any of those activities; is that correct?⁶

STAFF WITNESS: Yes.⁷

Further and most importantly, counsel for Dolly was censured each time he attempted to address any issue not related to advertising. In a discussion between counsel for Dolly and Staff's witness regarding the scope of allegations against Dolly, the ALJ interrupted counsel for Dolly to instruct him to focus his questioning to the definition of household goods carrier, "[B]ecause the allegation is that they've advertised as a household goods carrier." TR 50:25-51:1. Dolly later attempted to provide testimony regarding soliciting, which, like entering into agreements, is also prohibited by RCW 81.80.075 and RCW 81.77.040. Counsel for Staff immediately objected on the basis of relevance because, "The complaint is for advertising." TR 64:4-6. The ALJ agreed with Staff and shut down Dolly's attempt to provide testimony refuting anything other than advertising. The ALJ explained that testimony regarding solicitation was meaningless for the purposes of this complaint because, "The complaint is that the company advertised in each of these 11 sites." TR 64:7-18. The ALJ further described how the alleged violations were calculated,

⁶ Bryant, TR 46:25-47:5.

⁷ Paul, TR 47:6.

explaining added that the 11 separate internet sites were treated as 11 different advertisements, resulting in 11 alleged violations of RCW 81.80.075. TR 65:12-18.

3. The Commission’s Order is Based on a Copying Error

Dolly was surprised, therefore, when Initial Order 02 read, “the Commission determines that it should impose a penalty of \$5,000 for each of 11 violations of the prohibition against entering into agreements to transport household goods in Washington without the required permit.” AR 000131 at ¶ 42 (emphasis added). Upon a closer look at Initial Order 02, it became obvious that the result was due to an error in copying a prior order involving a different company in a different docket – one that *did* allege a violation based on entering into agreements.⁸ Comparing paragraph 42 of Initial Order 02 with paragraph 56 of Order 04 in *Ghostruck*, they are almost identical. Several other paragraphs in the two orders are identical. Typos were even duplicated,⁹ and Initial Order 02 copied a footnote referencing the recusal of the ALJ in Docket TV-161308.¹⁰ There was no such recusal in the Dolly docket. The presiding

⁸ See *In re Ghostruck Inc.*, No. TV-161308, 2017 WL 1507678, at *1 (Wash. U.T.C. Apr. 25, 2017) (“*Ghostruck* Order 04”), *aff’d*, 2017 WL 2423799 (Wash. U.T.C. May 31, 2017). Compare *Ghostruck* Order 04 ¶ 56 and Initial Order 02 ¶ 42 in this case (AR 000131).

⁹ See, e.g., three typos in *Ghostruck* Order 04 ¶¶ 54, 65, and 66 referring to “RCW 81.80.75” instead of RCW 81.80.075. Compare the same three typos in ¶¶ 47, 51 and 52 of Initial Order 02 (AR 000132-33).

¹⁰ Compare n.1 in *Ghostruck* Order 04 with n.3 in Initial Order 02 (AR 000122).

ALJ simply replaced the company name “Ghostruck” with “Dolly” in drafting Initial Order 02. There is no dispute regarding the copying errors because the ALJ himself acknowledged correcting Order 02 for “copy edits.” AR 000143. The ALJ’s errors resulted in a \$55,000 penalty and an order for Dolly to cease and desist operations for eleven violations that were never alleged. There is certainly nothing wrong with using a prior order from one docket as a basis for a new order in another, but when a finding of a violation is merely transcribed by accident from one order to another, that is reversible error.

When presented with the opportunity to correct the ALJ’s mistake, the Commission instead doubled down by issuing Order 04, which adopted Corrected Order 02 in its entirety. Despite the violations never having been alleged and despite the ALJ prohibiting Dolly from defending any allegations except advertising, the Commission nonetheless determined there was sufficient “circumstantial evidence” in the record to conclude that Dolly entered into agreements to transport household goods and haul solid waste. AR 000292 at ¶ 23. The Commission’s analysis of the circumstantial evidence was limited to two sentences, concluding that Dolly enters into agreements to transport household goods and solid waste because (1) Dolly advertises that it serves Seattle, (2) “allows” users to book a move in Seattle, (3) posts its terms of service to its website, and (4)

generates revenue in Washington. *Id.* Remarkably, the only piece of evidence cited by the Commission is not even from this proceeding. It is a sentence taken out of context from a petition in a completely different docket filed months before this proceeding was ever opened. *Id.* at n.11. The Commission’s analysis is nothing more than a general observation that Dolly operates a business, and it does not support a finding that Dolly entered into even one agreement to transport household goods, much less eleven agreements. Yet the penalty assessment is unequivocal: “All things considered, the Commission determines that it should impose a penalty of \$69,000 reflecting a penalty assessment of \$5,000 for each of the 11 violations of the prohibition against entering into agreements to transport household goods in Washington without the required permit. . . .” AR 000157. The Commission took what was obviously a scrivener’s error and, instead of correcting it, affirmed an unsupported penalty that now must be reversed.

4. The Commission’s Order is Void

State law requires each complaint to clearly set forth any aggrieved act or omission by a public service company. RCW 81.04.110; *R.R. Comm’n of Washington*, 52 Wash at 443. Multiple matters may be joined in one hearing, provided, “All grievances to be inquired into shall be plainly set forth in the complaint.” RCW 81.04.110. The Commission did

not comply with state law when it determined that Dolly had entered into agreements to transport household goods and haul solid waste because those grievances were not raised in the complaint. It is not reasonable to presume that the complaint was sufficiently comprehensive to include the grievance, either, since the Commission prohibited testimony related to solicitations and other issues. If the complaint were intended to encompass allegations beyond advertisements, then the ALJ would have allowed testimony defending against such allegations. But he actively prevented Dolly from presenting a defense against anything not related to advertising.

The impact of the Commission's unauthorized action is highlighted when you consider the purpose behind RCW 81.04.110: a company must be given the opportunity to be heard on any matter before the ruling is made. *Bohon*, 6 Wn.2d at 682. Even though the complaint was limited to advertising, it is undisputed that the Commission's order requires Dolly to cease and desist all operations, not just advertising. An order to cease and desist operations is very different from an order to cease and desist unlawful advertising. Because the complaint addressed advertising, Dolly was on notice that the Commission could order it to cease and desist its advertising. Dolly understood that risk and was prepared to defend against that claim. While not desirable, Dolly could tolerate an order to cease and

desist advertising. Dolly could modify its advertisements if ordered to, or Dolly could remove certain social media platforms altogether. Dolly could even stop advertising completely. But Dolly had no reason to anticipate that the Commission would order it to cease and desist all operations, which is exactly what happened. CP 000068, ¶ 75, AR 000304, ¶ 75. Dolly walked into the hearing with no idea that it could potentially lose its Washington business. Dolly was not provided notice that such an outcome was possible, there was no hearing on the issue, and Dolly was actively prohibited from defending itself against such an outcome even when it tried. The Commission violated RCW 81.04.110, engaged in unlawful decision-making, and erroneously applied the Commission's motor freight carrier statutes when it decided that Dolly violated those statutes by entering into agreements to transport household goods and haul solid waste. Those allegations were not before the Commission and Dolly had been prohibited from defending against them; therefore, the Commission's order is void.

C. The Commission Erred When It Failed to Follow Prescribed Procedures

Relief from an agency order is appropriate when the agency engages in unlawful procedure or decision-making process or fails to follow its prescribed procedure. RCW 34.05.570(3)(c); *Seattle Area*

Plumbers v. Wash. State Apprenticeship and Training Council, 131 Wn. App. 862, 873, 129 P.3d 838, 844 (2006). The Commission failed to follow Washington statutes and its own prescribed procedure multiple times. It failed to follow the express language of Initial Order 02 and WAC 480-07-610 regarding procedures for seeking administrative review of initial orders in brief adjudicative proceedings. The Commission also failed to follow WAC 480-07-825 regarding administrative review of initial orders. Additionally, the Commission violated RCW 80.04.210 and WAC 480-07-875 when it allowed the ALJ to amend Initial Order 02 without providing notice or an opportunity to be heard.

1. The Commission Failed to Follow WAC 480-07-825 and WAC 480-07-610

The Commission established rules governing the procedure following the issuance of an ALJ's initial order, and they are contained in WAC 480-07-825. Corrected Order 02 also instructs the parties to follow the procedures in WAC 480-07-825 if they disagree with the initial order. AR 000162. The procedures in WAC 480-07-825 state that parties can allow the initial order to become final through the operation of law;¹¹ they can seek clarification of the order;¹² they can challenge the initial order

¹¹ WAC 480-07-825(1)(c).

¹² WAC 480-07-825(3).

through a petition for administrative review;¹³ or they can seek judicial review after the initial order becomes final.¹⁴ If one party files a petition for administrative review, the Commission will not accept another petition, but another party may raise new claims challenging the initial order by filing a response to the petition within ten days.¹⁵ Upon a petition for administrative review, the Commission may enter a final order that adopts, modifies, or rejects that initial order. Alternatively, the Commission may remand the order for further proceedings with instructions to the presiding officer. If the Commission issues a final order, then the ALJ who drafted the initial order may not assist the Commissioners in entering the final order; another ALJ must assist the Commissioners. WAC 480-07-825(5).

Initial Order 02 provided Staff or Dolly an opportunity to request review of the order pursuant to WAC 480-07-610 (Brief Adjudicative Proceedings), which gives a party twenty-one days to challenge the order. AR 000135. Under WAC 480-07-610(7)(c), a party may respond to any other party's petition by filing a response within seven days. Although WAC 480-07-825 allows only one petition for administrative review in a proceeding, there is no such restriction in WAC 480-07-610. Accordingly,

¹³ WAC 480-07-825(2).

¹⁴ WAC 480-07-825(7).

¹⁵ WAC 480-07-825(2)(c).

Dolly had the right to challenge Initial Order 02 by responding to Staff's petition, filing its own petition, or both.

On April 2, 2018, Staff filed a petition for administrative review pursuant to WAC 480-07-825. AR 000138, AR000139 at ¶ 1. Staff opposed Initial Order 02's requirement that Dolly remove all its internet presence: "The provision of Order 02 noted above goes well beyond requiring Dolly to modify its advertisements to cease and desist from unpermitted operations in the state of Washington; it impermissibly requires actions that affect Dolly in the six other states in which it operates." AR 000140. Dolly had until April 12 to answer Staff's petition and raise new issues pursuant to WAC 480-07-825. Alternatively (or additionally), Dolly had until April 19 to file its own petition for review of Initial Order 02 pursuant to WAC 480-07-610. But on April 9 the presiding ALJ issued a "corrected" Order 02, which, among other things, deleted the portion of the order requiring Dolly to remove all its Internet presence and replaced it with an order for Dolly to:

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 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.

AR 000144.

In addition to addressing Staff's concern regarding an unconstitutional prohibition against advertising, Corrected Order 02 also broadened the cease and desist provision in paragraph 43. AR 000143. Initial Order 02 required Dolly to cease and desist "from activities that define it as a household goods carrier under RCW 81.80.010(5)." But Corrected Order 02 replaced that cease and desist language with a broader order to cease and desist from all activities "such as described in this order" that define Dolly not only as a household goods carrier, but also as "a common carrier transporting property other than household goods (i.e., a motor freight carrier), and a solid waste hauler." AR 000143-44. This change went well beyond Staff's petition since the petition requested a correction of only one provision of the order "to comport with the Commerce Clause of the United States Constitution." AR 000139. It was not necessary to expand the cease and desist language to add activities as a common carrier and solid waste hauler in order to correct the constitutional defect.

Corrected Order 02 also contained several unidentified "copy edits" including removal of Initial Order 02's footnote regarding the recusal of ALJ Pearson. AR 000143 n.1, AR 000148. Curiously, many other errors were not corrected, including the typos. AR 000159, ¶¶ 51-52. The ALJ also inexplicably changed the NOTICE TO PARTIES at the end

of the order. Specifically, the last page of Initial Order 02 requires the parties to follow WAC 480-07-610 if they disagree with the order. AR 000135. Corrected Order 02 changed that instruction to require the parties to follow WAC 480-07-825 if they disagree with the order. AR 000162. This change was inappropriate because the case is a brief adjudicative proceeding, so WAC 480-07-610 is the applicable procedure. Further, as stated above, WAC 480-07-825 and WAC 480-07-610 have notable procedural differences, including different deadlines for seeking relief.

The Commission failed to follow its prescribed procedure when it allowed the presiding ALJ to issue Corrected Order 02 before Dolly's time had expired to challenge Initial Order 02. Under either WAC 480-07-825 or WAC 480-07-610, Dolly was entitled to respond to Staff's petition and file its own challenges to Initial Order 02. The ALJ's correction, and the Commission's subsequent deference to the ALJ, foreclosed Dolly's right.

2. The Commission Violated RCW 80.04.210 and Failed to Follow WAC 480-07-875

RCW 80.04.210 prohibits the Commission from rescinding, altering or amending any order without notice to the parties and, in the case of a complaint, an opportunity for the company to be heard. It is undisputed that (1) this case was a complaint, (2) the ALJ altered Initial

Order 02, (3) rescinded the original, and (4) replaced it with Corrected Order 02, all without an opportunity for Dolly to be heard.

The Commission's own regulations go further than RCW 80.04.210 because they prohibit unilaterally changing any order that it has entered, stating that the Commission may "propose" to alter, amend, or rescind an order and may take no action on such proposal until after providing:

- (a) Notice of the petition or proposed commission action to the affected public service company or companies and to all parties in the underlying proceeding; and
- (b) An opportunity for parties to respond in writing or at a hearing consistent with due process.

WAC 480-07-875(1). The Commission provided neither, but it nonetheless allowed the ALJ to alter, rescind and replace Initial Order 02 with Corrected Order 02. The Commission relies on WAC 480-07-875(2), which states,

Correction. The commission may act on its own initiative or on the motion of any party to correct obvious or ministerial errors in orders. The commission may enter a corrected order or make any corrections to the order by notice or letter without prior notice or opportunity to respond unless due process requires otherwise.

Interpreting Staff's Petition for Administrative Review as a Motion to Correct an Obvious or Ministerial Error is a façade. Staff's petition

unequivocally requested that the Commission review and amend Initial Order 02 because the cease and desist language was too broad.

Staff's request for the Commission to review Initial Order 02 and narrow its outcome is not a request to correct an obvious or ministerial error. An obvious or ministerial error is when the Commission incorrectly identifies one of the parties to a settlement agreement,¹⁶ inadvertently omits the word "not" when stating a party's position,¹⁷ inserts three extra zeros on a figure typed as \$3,746,000,000,¹⁸ performs incorrect arithmetic in calculating the amount of a penalty,¹⁹ or refers to "paragraph 14" rather than "paragraph 13" in a final order.²⁰

Further, the alterations the ALJ made to Initial Order 02 go beyond Staff's request and involve changes that broaden, rather than narrow, the cease and desist language. The ALJ broadened the cease and desist

¹⁶ *WUTC, v. Puget Sound Energy, Inc.*, Nos. UE-111048/UG-111049, 2012 WL 1898611, at *1 (Wash. U.T.C. May 22, 2012) ("NWIGU requests the Commission correct an obvious and ministerial error in Paragraph 346 of Order 08 which incorrectly identifies ICNU instead of NWIGU as one of the 'Settling PartiesGas.'").

¹⁷ *WUTC v. Avista Corp.*, Nos. UE-090134/UG-090135, 2009 WL 2139092, at *1 (Wash. U.T.C. July 14, 2009). ("NW Energy Coalition expresses its opinion that any later modifications to Avista's decoupling mechanism should *not* be retroactive to the interim period (emphasis added)").

¹⁸ *WUTC v. Whidbey Tel. Co.*, No. U-86-105, 1989 WL 1785182, at *1 (Wash. U.T.C. June 8, 1989).

¹⁹ *In re Tel W. Commc'ns, LLC.*, No. UT-040572, 2005 WL 1771944, at *1 (Wash. U.T.C. Jan. 7, 2005).

²⁰ *WUTC, v. Puget Sound Energy, Inc.*, Nos. UE-011570/UG-011571/UE-100177, 2010 WL 3994790, at *3 (Wash. U.T.C. Oct. 8, 2010) ("WAC 480-07-875(2) allows the Commission to correct 'obvious or ministerial errors.' The reference in each of these paragraphs was inadvertently and incorrectly listed as 'Paragraph 14' when the reference clearly should have been to 'Paragraph 13.'").

provision to ban activities that were clearly not prohibited in Initial Order 02. AR 000143-44. Corrected Order 02 includes changes to issues that Staff did not raise and that cannot be reasonably interpreted as corrections of obvious and ministerial errors. Also, the ALJ shortened the time allowed for parties to file a petition for review when he inappropriately changed the review procedure from WAC 480-07-610 to WAC 480-07-825. Therefore, even if one could reasonably interpret Staff's petition as a motion to correct an obvious error, the ALJ's amendments went far beyond correcting obvious or ministerial errors.

Finally, contrary to the Commission's determination, Initial Order 02's cease and desist language was not an obvious or ministerial error because the Commission has previously reviewed and approved identical cease and desist language. Ordering Dolly to shut down its app, website, and all Internet advertising is exactly what this Commission has demanded of other app-based software companies: "Ghostruck Inc. must immediately cease operating as a household goods carrier, including but not limited to taking down or otherwise deactivating its electronic app, its website, and any online advertising of the Company." *In re Ghostruck Inc.*, 2017 WL 2423799, at *8. The Commission cited this very *Ghostruck* decision twice in Dolly's Order 04, the ALJ referenced the *Ghostruck* proceeding during Dolly's hearing, and Staff personally provided the

Ghostruck order to Dolly. AR 000291, TR 73:18-23, and TR 22:18-21.

Demanding that Dolly take down all Internet presence is not an obvious or ministerial error if it is precisely what the Commission intended, has ordered, and has enforced in the past.

D. Substantial Evidence Does Not Support a Determination That Dolly Violated State Law through Advertising because a Yelp page and newspaper articles are not advertisements

“A person advertises to transport household goods if, in the Commission’s judgment, a publication for which the person is responsible is reasonably susceptible to being interpreted by consumers as an advertisement to transport household goods.” *Ghostruck Inc.*, 2017 WL 2423799, *8. “Substantial evidence” to support an administrative agency’s findings of fact is evidence in sufficient quantum to persuade a fair-minded person of the truth of declared premises. *Hardee v. State Dep’t of Social and Health Servs.*, 172 Wn.2d 1, 7, 256 P.3d 339, 343 (2011); *In re Elec. Lightwave, Inc.*, 123 Wn.2d 530, 869 P.2d 1045 (1994). The Commission’s conclusion that a Yelp page and newspaper articles are advertisements is unsupported by substantial evidence.

Under the Commission’s own standard, a publication must be one for which the person is responsible or else the publication is not an advertisement. *Ghostruck Inc.*, No. TV-16130, 2017 WL 2423799, at *8.

The Commission erred when it found that a Yelp page and newspaper articles are advertisements because Dolly is not responsible for either.

The Commission found that Dolly engaged in regulated activities by advertising through newspaper articles and a Yelp page. AR 000286, ¶ 3. The newspaper article in question reported on the meaning behind a provocative billboard that appeared in a Seattle neighborhood in 2016. AR 000376. Staff's witness acknowledged that the article was about, but not by, Dolly. TR 54:7-21. Yet she testified that the article was nonetheless an advertisement because when she went to a website that was mentioned in the article, "it immediately took me to advertisements for Dolly." TR 53:5-8. She said it was an advertisement also because the co-founder of Dolly was quoted in the article, "So I would say that Dolly was aware of this article." TR 54:12-15. This in no way meets the Commission's definition of advertisement. Accepting Staff's claim that a newspaper article is really an advertisement if it references a website, a person is quoted in it, or because a party knew of the article before it was published illustrates the scope of overreach committed by the Commission. There is no testimony or other evidence anywhere in the record that alleges that Dolly had anything to do with the newspaper article described on AR 000376 or any other newspaper article.

Other newspaper articles that the Commission erroneously interpreted as advertisements include an article in the Technology section of the Seattle Times by a Seattle Times business reporter about Dolly's investment funding and an article in the Chicago Tribune about Dolly's seed funding. AR 000017-20, AR 000021-22. None of the newspaper articles in evidence were written by Dolly; they were not published as advertisements (they were published as news), and Staff acknowledged that Dolly was not responsible for them. Yet the Commission determined that these newspaper articles were advertisements and ordered Dolly to cease and desist such advertising. It is impossible for Dolly to cease and desist having a newspaper article written about it because Dolly is not responsible for newspaper articles. Accordingly, a newspaper article is not an advertisement and the Commission erred in finding that it is.

The Commission similarly erred in finding that a Yelp page about Dolly is an advertisement. Like a newspaper article, Dolly is not responsible for its Yelp page. Staff claims that Dolly's Yelp page is an advertisement because there were photos of men in Dolly T-shirts on the page, there were customer reviews of Dolly, and the page had been "claimed" by Dolly, "which means that the company has acknowledged that this is their company." TR 42:11-17. Staff acknowledged that the Yelp page was not created by Dolly, but it nonetheless insisted that it was

an advertisement merely because Dolly “claimed” it. “I think that’s understood in the -- you know, in the Yelp world, that the companies are created and the companies then claim it, and then they can respond to reviews about the company.” TR 61:25-62:3. There is no evidence that Dolly created or is any way responsible for the Yelp page. On the contrary, the Senior Director of Marketing for Dolly testified in more detail about Yelp, explaining that Yelp is a third-party site that aggregates reviews from people that either had an experience with, or want to learn about an experience with, a company. TR 87:18-21. A Yelp page can be created by anyone, typically a customer. TR 87:22-88:1. When one claims a Yelp page, as Dolly has, it means only that the company can respond to customers who have provided a review for the company. Dolly is not able to remove or edit any information on the web page. TR: 88:5-10. As with a newspaper article, a Yelp page is not an advertisement because Dolly is not responsible for it. Dolly cannot change or remove it, and Dolly cannot “cease and desist” having it.

It is impossible for Dolly to comply with the Commission’s Order. The Commission assessed penalties to Dolly for actions over which it has no control. It is impossible for Dolly to comply with the Commission’s order to edit or cease statements in a newspaper article or on a Yelp page because Dolly has no control over what is written in either one. The

Commission erred in finding that Dolly advertised through a Yelp page and newspaper articles.

VI. CONCLUSION

For the reasons set forth above, the Court should reverse the Commission's orders, direct the Commission to refund penalties paid by Dolly, and order the Commission to pay attorneys' fees pursuant to RCW 4.84.350.

DATED: June 13, 2019

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CERTIFICATE OF SERVICE

On June 13, 2019, I caused to be served upon the below named counsel of record, at the address stated below, via the method of service indicated, a true and correct copy of the foregoing document.

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**I certify under penalty of perjury under
the laws of the State of Washington that
the foregoing is true and correct.**

EXECUTED at Bellevue, Washington, on June 13, 2019.



 Amanda Weis, Legal Practice Assistant

PERKINS COIE LLP

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