

COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON  
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NO. 39643-2

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION II

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SPRINT SPECTRUM, L.P.,

Appellant,

v.

STATE OF WASHINGTON, DEPARTMENT OF REVENUE,

Respondent.

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SPRINT'S REPLY BRIEF

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## **I. INTRODUCTION**

In Respondent's Brief, the Department of Revenue ("Department") does not argue that it has been prejudiced in any way by the fact that Sprint Spectrum, L.P. ("Sprint") did not serve the petition for judicial review on the Board of Tax Appeals ("BTA") or that service on the BTA serves any real purpose.

The Department's position serves no purpose except to shield it from having to defend the merits of its position. The Department would deny Sprint its day in court despite the fact that no harm or even inconvenience resulted from the lack of service on the BTA. A simple letter or filing will tell the BTA to prepare a copy of the administrative record. To make service on an entity that has only a ministerial role in the proceedings jurisdictional is to elevate procedure over justice.

## **II. ARGUMENT**

The Department seeks to hide behind an unclear procedural statute. RCW 34.05.542 requires that a petition for judicial review be "served on the agency." The statute uses "agency" in the singular, but, in fact, two agencies are involved here—the Department, which initially disapproved Sprint's position, and the BTA, which heard the appeal from the Department.

The Department makes three arguments, none of which stand up to scrutiny. First, the Department argues that the statute is unambiguous, despite the obvious problem. Second, the Department argues that Sprint's reading of the statute would render it unworkable, but fails to show how. And third, the Department asserts that Sprint's position is contrary to caselaw, but it offers little caselaw support and fails to distinguish Sprint's cases.

**A. RCW 34.05.542 Is Ambiguous.**

The Department argues that the statute is not ambiguous because it is a party, and so the BTA must be the agency. Labeling the Department as a party rather than an agency, however, deprives it of the powers granted to agencies by the Administrative Procedure Act ("APA"), ch. 34.05 RCW. Obviously, the Department is an agency for rule-making purposes. Thus the Department must be arguing that it is not an agency only for purposes of judicial review. However, actions are routinely brought against the Department when there has been no BTA proceeding. The Department is clearly an agency under the judicial review section of the APA and the act as a whole. The Department cannot create an exception out of whole cloth. And if both the Department and the BTA are agencies, then the statute is ambiguous.

The Department's reading of the statute also conflicts with the practice of many agencies within state government, which delegate their hearing functions to the Office of Administrative Hearings, but which remain the "agency" for judicial review purposes. RCW 34.05.542 cannot be read one way for the Department of Revenue and another way for other agencies.

In fact, as noted in Sprint's Opening Brief, at least one adjudicative agency expressly does not require service on itself. The Pollution Control Hearings Board ("PCHB") interprets RCW 34.05.542 to require service on the parties, which would always include Department of Ecology, but does not require service on itself for a simple petition for review. WAC 371-08-555. The Department argues that the rule requires filing a copy of the petition for review with the PCHB and that filing is the same as service. *See* Respondent's Brief at 8, n. 2. However, the next rule, WAC 371-08-560, which governs a petition for direct review by the Court of Appeals requires "service" on the PCHB. The difference is that service is a jurisdictional requirement, necessary because the PCHB must certify appealability in the case of a direct appeal to the Court of Appeals. In the case of an appeal to the Superior Court, the PCHB has decided that formal service is not necessary under RCW 34.05.542.

**B. Sprint's Reading of the Statute is Not Unworkable.**

The Department's efforts to point to unworkable or absurd results are themselves absurd. The best the Department can do is to point out that to read "agency" as the Department of Revenue might require the agency to serve itself. Actually, the Department is required to serve itself no matter how you construe "agency" because the statute requires service on "all parties of record," which would include itself. Civil Rule 5 also requires service on "each of the parties." This type of requirement does not render the APA or CR 5 unworkable. Any reasonable person understands that the purpose of service is notice, so you do not have to serve yourself.

Nor does the need for an agency record change this analysis. Not every agency action subject to the APA has an adjudicative record associated with it. And sometimes, when there are multiple administrative appeal layers, the "agency record" does not reside at the highest level, but with the first agency that handled the matter. A simple request to the BTA by the attorneys would produce the administrative record in this case.

The Department also argues that standards for review contained in RCW 34.05.570 would make no sense if applied to the Department of Revenue instead of the BTA. However, when a taxpayer seeks review of a BTA order it is because the BTA has affirmed the Department's

position. Normally, the case involves the proper interpretation of the law, and RCW 34.05.570(3)(d) can be read to mean the Department or the BTA interchangeably when it states that the “agency has erroneously interpreted or applied the law.” And since the BTA is not allowed to defend its position because it is a quasi-judicial agency, in reality, the taxpayer is challenging the Department alone.

**C. The Department Has No Caselaw Support for its Position.**

The Department advances only a single case in support of its position, *Banner Realty, Inc. v. Dept. of Revenue*, 48 Wn.App. 274, 738 P.2d 279 (1987). As is explained in Sprint’s Opening Brief, the case involved a different question and a differently worded statute.

The Department admits that *Kaiser Aluminum & Chem. Corp. v. Dep’t of Labor & Indus.*, 121 Wn. 2d 776, 854 P.2d 611 (1993) is good authority for the proposition that adjudicative agencies cannot participate in a Superior Court proceeding, save for when its own procedures are at issue, but the Department fails to grasp the significance of that fact. It argues that the service requirement on the “agency” is justified because of the rare instances where the quasi-judicial procedures are at issue. However, in that case, the quasi-judicial agency becomes a “party” and is

therefore service is required regardless of which agency is the “agency” under RCW 34.05.542.

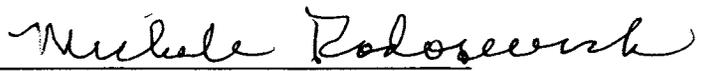
The Department also argues that the out of state cases are based on different statutes. However, the statutes in question were similarly vague as to the identity of the agency to be served, and the important point is that the courts would not let the agency take advantage of the vagueness in a procedural statute to deny its opponent his or her day in court.

### III. CONCLUSION

For these reasons, this Court should reverse the trial court and remand for consideration on the merits.

RESPECTFULLY SUBMITTED this 29th day of  
December, 2009.

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The undersigned certifies under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a citizen of the United States, a resident of the state of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

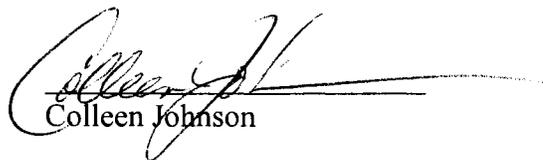
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DATED this 29<sup>th</sup> day of December, 2009.

  
Colleen Johnson