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

SPRINT SPECTRUM, LP,

Appellant,

v.

STATE OF WASHINGTON, DEPARTMENT OF REVENUE,

Respondent.

RESPONDENT'S BRIEF

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I. INTRODUCTION

This case involves the Washington Administrative Procedure Act's ("APA") requirement that a petition for judicial review of an agency order must be served on "the agency, the office of the attorney general, and all parties of record within thirty days after service of the final order." RCW 34.05.542(2). Sprint Spectrum and the Department of Revenue ("Department") were parties to an adjudicative proceeding before the Board of Tax Appeals ("Board"). The Board issued an order upholding the Department's position and Sprint Spectrum filed a petition for judicial review under the APA. Sprint served the petition on the Department and the Office of the Attorney General, but it never served a copy of the petition on the Board, which issued the order Sprint Spectrum was challenging.

RCW 34.05.542(2) clearly requires Sprint Spectrum to serve the agency that issued the order it is challenging—in this case the Board—as well as the parties appearing before the Board. Since this service requirement is jurisdictional, Sprint Spectrum's failure to serve the Board deprived the superior court of jurisdiction, and the superior court properly dismissed the petition for judicial review.

II. RESTATEMENT OF THE ISSUES

Does the requirement in RCW 34.05.542(2) that a petition for judicial review of an agency order must be served on "the agency, the office of the attorney general, and all parties of record" require Sprint Spectrum to serve the Board of Tax Appeals as the agency that issued the order?

III. RESTATEMENT OF THE CASE

In October 2001, the Department assessed Sprint Spectrum for uncollected sales tax on certain sales of wireless telephone service. CP 5. Sprint Spectrum paid these assessments and timely filed a notice of appeal to the Board of Tax Appeals. CP 5. Sprint Spectrum elected to have a formal proceeding under the APA. In December 2008, the Board held a hearing on cross-motions for summary judgment. CP 29. The Board served the parties with its final decision on February 11, 2009, upholding the Department's assessment and denying Sprint Spectrum's request for a refund. CP 44.

On March 6, 2009, Sprint Spectrum filed a petition for judicial review, asking the superior court to set aside the Board's final decision alleging that the Board erroneously applied the law and that its decision was not supported by substantial evidence. CP 6. In the petition, Sprint Spectrum identified itself and the Department as parties to the adjudicative

proceeding and the Board as the agency that took the agency action at issue. CP 5 (¶¶ 1.3-1.4).

The same day, Sprint Spectrum served its petition for judicial review on the Department and the Attorney General's Office. CP 47-48. However, Sprint Spectrum never served the Board with a copy of the petition for judicial review. CP 21. On May 13, 2009, the Department moved to dismiss Sprint Spectrum's petition for lack of jurisdiction because it failed to serve the Board. CP 25. The superior court granted the Department's motion to dismiss on July 17, 2009, and Sprint Spectrum timely appealed. Notice of Appeal.

IV. ARGUMENT

Under the APA, a party that wishes to contest an agency order must file a petition for judicial review and serve it on "the agency, the office of the attorney general, and all parties of record within thirty days after service of the final order." RCW 34.05.542(2). Judicial review of an agency action under the APA invokes the appellate jurisdiction of the superior court. *Skagit Surveyors and Engineers, LLC v. Friends of Skagit County*, 135 Wn.2d 542, 555, 958 P.2d 962 (1998). Since the superior court is acting in an appellate capacity, the court has limited statutory jurisdiction and all statutory procedural requirements must be met before jurisdiction is properly invoked. *Id.*

If a party fails to serve the agency that issued the order, the superior court lacks subject matter jurisdiction to consider the petition and it should be dismissed.[1] *Cheek v. Employment Sec. Dep't*, 107 Wn. App. 79, 83, 25 P.3d 481 (2001). In this case, the Board of Tax Appeals is the agency that issued the challenged order.

In *Banner Realty v. Dep't of Revenue*, 48 Wn. App. 274, 278, 738 P.2d 279 (1987), this Court addressed a situation identical to the current case, and held that the taxpayer's failure to serve the Board within 30 days deprived the superior court of jurisdiction to review the Board's decision. *Banner Realty*, 48 Wn. App. at 275, 278. While *Banner Realty* was decided under the prior version of the APA, there has been no material change in the statutory service requirements. *See Banner Realty*, 48 Wn. App. at 276, citing former RCW 34.04.130(2) (1987). The prior version of the APA stated:

> The petition shall be served and filed within thirty days after the service of the final decision of the agency. Copies of the petition shall be served upon the agency and all parties of record...

Former RCW 34.04.130(2) (1987).

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[1] Sprint Spectrum alleges the Department initially began defending the petition for review and filed its motion to dismiss to avoid a decision on the merits. App. Br. at 7. However, the Department is not aware of any actions it took to defend this action in the superior court other than filing a notice of appearance and then a motion to dismiss. Also, the Department was not trying to avoid a decision on the merits, but rather bring Sprint Spectrum's failure to comply with the jurisdictional requirements of the APA to the court's attention. *See* CR 12(h)(3) (whenever it appears that the court lacks subject matter jurisdiction it shall dismiss the action).

The current version states:

> A petition for judicial review of an order shall be filed with the court and served on the agency, the office of the attorney general, and all parties of record within thirty days after service of the final order.

RCW 34.05.542(2).

When the Legislature enacted the current version of the APA, it expressly stated "to the greatest extent possible and unless this chapter clearly requires otherwise, current agency practices and court decisions interpreting the Administrative Procedure Act [previously in effect] shall remain in effect." RCW 34.05.001 (emphasis added). Nothing in the APA or the subsequent case law suggests *Banner Realty* is no longer good law.

Sprint Spectrum attempts to distinguish *Banner Realty* based on inconsequential textual differences. Brief of Appellant ("App. Br.") at 7. Sprint Spectrum has not shown how the Legislature's choice to collapse two sentences into one, when it enacted the current version of the APA, materially changed the meaning of the RCW 34.05.542(2). Nor has Sprint Spectrum met its burden under RCW 34.05.001 to show that the Legislature clearly intended to change the meaning of RCW 34.05.542 so that the decision in *Banner Realty* does not apply.

Since Sprint Spectrum failed to serve the agency that issued the order Sprint Spectrum is challenging, the superior court lacked jurisdiction and properly dismissed Sprint Spectrum's petition.

Sprint Spectrum tries to find ambiguity in RCW 34.05.542(2) in order to excuse its failure to serve the Board. In doing so, Sprint Spectrum ignores the statutory provisions of the APA that cannot be reconciled with its strained reading of the statute. Moreover, Sprint Spectrum's own petition for review shows that it understood the Board was "the agency" and the Department was a "party." Accordingly, this Court should reject Sprint Spectrum's arguments and affirm the superior court's order dismissing the petition for review.

A. The APA Unambiguously Requires The Agency That Issued The Order To Be Served As "The Agency" And Other Agencies To Be Served As "Parties Of Record."

Sprint Spectrum argues that the APA fails to contemplate situations where more than one agency is involved in adjudicative proceedings. App. Br. at 2. Sprint Spectrum is incorrect. The APA expressly contemplates that an agency can be a "party" to an adjudicative proceeding conducted by another agency. In this situation, a straightforward reading of RCW 34.05.542(2) shows that the agency that issues the order is "the agency" and any other agencies are "parties of record."

The APA defines a "[p]arty to agency proceedings" or "party" as a "person named as a party to the agency proceeding or allowed to intervene or participate as a party in the agency proceeding." RCW 34.05.010(12). The term "person" expressly includes "another agency." RCW 34.05.010(14).

Reading RCW 34.05.542(2), it is obvious that there are three distinct entities or groups of entities that must be served with a petition for review: (1) the "agency" that issued the order; (2) the office of the attorney general; and (3) the "parties of record," which may include "another agency."

> A petition for judicial review of <u>an order shall be</u> filed with the court and <u>served on the agency</u>, the office of the attorney general, <u>and all parties of record</u> within thirty days after service of the final order.

RCW 34.05.542(2) (emphasis added). This reading is consistent with the case law, which holds that the petitioner must serve the agency that issued the decision. *See Cheek*, 107 Wn. App. at 83 ("[T]he APA requires that a petition for judicial review of an agency order must be filed with the court and <u>served on the agency that issued the decision.</u>") (emphasis added). Reading the statutory provisions together, the agency that conducts the

proceeding and issues the final order is "the agency" and any other agency is one of the "parties of record."[2]

Here, the Department was a party of record to the Board proceeding and the Board was the agency issuing the order. CP 5, 29; App. Br. at 1. Sprint Spectrum correctly acknowledged these facts in its Petition for Review:

> 1.3. The Board of Tax Appeals ("BTA") is the state agency created under RCW 82.03.010 that took the action at issue in this appeal. The BTA's mailing address is 910 Fifth Avenue, Olympia, Washington 98504-0925.
>
> 1.4. The Department and Sprint were the parties in the administrative adjudicative proceeding that resulted in the final decision being appealed herein.

CP 5 (Petition for Judicial Review) (emphasis added).

This shows that Sprint Spectrum itself understood that the Board was "the agency" whose decision was at issue.

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[2] Sprint Spectrum suggests that "[a]djudicative agencies themselves do not agree as to which agency should be served when more than one agency is involved," citing two administrative rules to support the suggestion. App. Br. at 3. Putting aside the issue of whether an administrative rule can determine the appellate jurisdiction of the superior court in a manner that would conflict with RCW 34.05.542, the rule Sprint Spectrum cites does not conflict with the statute or the other rules. That rule, which addresses appeals from orders issued by environmental hearings boards, provides in pertinent part: "The petitioner shall file a copy of the petition for review to superior court with the board and shall serve all parties of record." WAC 371-08-555 (emphasis added). Sprint Spectrum has not shown how there is a difference between "filing" a copy of the petition with the board and "serving" a copy on the board.

Under RCW 34.05.542(2), Sprint Spectrum was required to serve the Board as "the agency" that issued the order and the Department as a "party of record."

B. Sprint Spectrum's Reading Of The Statute Would Lead To Absurd Results And Render The Judicial Review Provisions Of The APA Unworkable.

Sprint Spectrum's argument that the Department is "the agency" for purposes of RCW 34.05.542(2) would create absurd results. Therefore, Sprint Spectrum's argument should be rejected. *See State v. Elgin*, 118 Wn.2d 551, 555, 825 P.2d 314 (1992) (courts avoid reading statutes in ways that create absurd results); *Simpson Inv. Co. v. Dep't of Revenue*, 141 Wn.2d 139, 149, 3 P.3d 741 (2000) (same).

The Department has the same statutory right as a taxpayer to judicial review of a formal Board decision. RCW 82.03.180. Under Sprint Spectrum's interpretation, however, if the Department loses before the Board and files a petition for judicial review, the superior court would lack jurisdiction to hear the petition unless the Department served <u>itself</u> and would not need to serve the Board. In contrast, reading "the agency" to mean the agency that issued the challenged order (the Board of Tax Appeals) renders the service requirement sensible regardless of which party (the Department or the taxpayer) seeks judicial review of a Board decision. It also avoids the absurd result of requiring the Department to

serve itself with a copy of its own petition for judicial review to secure appellate review.

Sprint Spectrum's interpretation would also result in other inconsistencies. For example, judicial review of agency action is ordinarily limited to "the agency record." RCW 34.05.588. If, as Sprint Spectrum suggests, the Department is "the agency," the Department's administrative record would be reviewed, not the Board's. Yet adjudicative proceedings before the Board are de novo proceedings, and the decision must be based on the record established before the Board. RCW 82.03.190; WAC 456-09-010. Any administrative record the Department has is irrelevant to the Board's decision. Sprint Spectrum appears to realize this and contradicts itself by agreeing that it is the Board's record that should be reviewed by the court. App. Br. at 5 n.2.

Sprint Spectrum's suggestion that the Board does not need to be served produces another problem. RCW 34.05.566 defines the mechanism by which the "agency record" is transmitted to the court: "Within thirty days after service of the petition for judicial review,... the agency shall transmit to the court the original or a certified copy of the agency record for judicial review of the agency action." RCW 34.05.566(1) (emphasis added). Failing to consider the Board as "the agency" to be served with a petition for review removes the Board's statutory duty to transmit the

administrative record. *See Banner Realty,* 48 Wn. App. at 278 ("Service on the agency rendering the final decision in question is a prerequisite to and triggers transmittal of the record to the court."). In fact, in this case there is no certified administrative record because the Board was never served with a copy of the petition for review.

Moreover, RCW 34.05.546 requires the petition to set forth:

> (3) The name and mailing address of the agency whose action is at issue;
> (4) Identification of the agency action at issue, together with a duplicate copy, summary, or brief description of the agency action;
> (5) Identification of persons who were parties in any adjudicative proceedings that led to the agency action

RCW 34.05.546 (emphasis added). The plain language of these subsections refer to the "agency" as the entity whose action is being reviewed, and not the "parties" that participated in the adjudicative proceedings leading to that action.

In this case, Sprint Spectrum is challenging the final order issued by the Board, not the Department, and it even identified the Board as "the agency whose action is at issue" in its petition for review. *See* CP 5(¶ 1.3). This admission flatly contradicts its assertion that the Department is "the agency" for purposes of service.

Under RCW 34.05.554, "issues not raised before the agency may not be raised on appeal." (Emphasis added.) It is nonsensical to

characterize the Department as having raised issues to itself in a de novo adjudicative proceeding in which the Board is the decision maker. Clearly, in adjudications before the Board, "the agency" that RCW 34.05.544 refers to is the Board, not the Department, and issues must have been raised before the Board.

Finally, in reviewing agency orders, the court is authorized to grant relief only if the petitioner demonstrates the invalidity of the agency's order on one of six enumerated grounds:

> (a) The order, or the statute or rule on which the order is based, is in violation of constitutional provisions on its face or as applied;
> (b) The order is outside the statutory authority or jurisdiction of the agency conferred by any provision of law;
> (c) The agency has engaged in unlawful procedure or decision-making process, or has failed to follow a prescribed procedure;
> (d) The agency has erroneously interpreted or applied the law;
> (e) The order is not supported by evidence that is substantial when viewed in light of the whole record before the court, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this chapter;
> (f) The agency has not decided all issues requiring resolution by the agency;

RCW 34.05.570(3) (emphasis added). Again, if the Department were "the agency," these provisions would make no sense. The Department did not issue the final order in this case. Also, the Department

did not hold the hearing, interpret or apply the law, or create the record supporting the final order at issue.

All the judicial review provisions of the APA are consistent: references to "the agency" are references to the quasi-judicial entity that conducted the adjudicative proceeding and issued the order, not to a different agency that was a party to the proceeding. Consistent with all these provisions, as well as the statutory definitions in the APA, and the applicable case law, the only reasonable interpretation of RCW 34.05.542(2) is that the Board is "the agency," the Department is a "party of record," and both must be served when filing a petition for judicial review of the Board's decision.

C. Sprint Spectrum's Argument That Quasi-Judicial Agencies Are Not "The Agency" To Be Served Under RCW 34.05.542(2) Conflicts With The Language Of The Statute And Prior Case Law.

Sprint Spectrum also argues that the Department must be "the agency" referred to in RCW 34.05.542(2) because the Board as quasi-judicial agency cannot participate as a party in the superior court action, citing *Kaiser Aluminum & Chem. Corp. v. Dep't of Labor & Indus.*, 121 Wn.2d 776, 780, 854 P.2d 611 (1993). App. Br. at 4. However, nothing in the APA or the holding of *Kaiser* establishes different service requirements for quasi-judicial agencies under the APA.

Nothing in *Kaiser* addresses service requirements.[3] In fact, RCW 51.52.110 requires a party seeking judicial review of a final decision of the Board of Industrial Insurance Appeals to serve both the Director of the Department of Licensing and the Board within 30 days. *See* RCW 51.52.110. The Court of Appeals has even held a petitioner's failure to serve the Board of Industrial Insurance Appeals deprived the superior court of jurisdiction. *Hernandez v. Dep't. of Labor & Indus.*, 107 Wn. App. 190, 197-98, 26 P.3d 977 (2001). Accordingly, *Kaiser* is not on point and does not support Sprint Spectrum's argument that the Board of Tax Appeals does not need to be served under the APA.

Furthermore, while the Court in *Kaiser* held that quasi-judicial agencies are "generally not permitted to bring appeals of adverse court decisions," 121 Wn.2d at 781, the Court recognized exceptions to that general rule, including instances in which the "integrity of their decision making process" is at issue. *Id.* at 782. Accordingly, there are instances in which a quasi-judicial agency such as the Board of Tax Appeals would have a right to participate in an appeal of its decision, which justifies the statutory service requirement. *See Snohomish County v. Forest Practices Appeals Bd.*, 69 Wn. App. 655, 661-62, 850 P.2d 546 (1993) (Forest

[3] Whether the Board of Industrial Insurance Appeals was served or was required to have been served was not at issue in *Kaiser*. Moreover, judicial review in *Kaiser* was authorized under the Industrial Insurance Act, RCW 51.52.110, not under the APA.

Practices Appeals Board, a quasi-judical agency, had standing to participate in judicial review action under APA), *review denied*, 123 Wn.2d 1003 (1994); *Port of Seattle v. Pollution Control Hearing Bd.*, 151 Wn.2d 568, 592-94, 90 P.3d 659 (2004) (considering arguments by PCHB, a quasi-judicial agency, that court should defer to its interpretation of the statutes, not Department of Ecology's).

More fundamentally however, as noted above, service of a petition for review may have other purposes, such as notifying the agency whose action has been challenged that it now has a duty to transmit the record of the proceedings. *See* RCW 34.05.566(1); *Banner Realty,* 48 Wn. App. at 278. In any event, there is nothing in RCW 34.05.542(2) that allows agencies to be served only when some kinds of claims are raised or only when the record must be forwarded to the reviewing court.[4] RCW 34.05.542(2) simply requires that all petitions for judicial review of an agency order must be served on "the agency." As explained above, "the agency" unambiguously refers to the quasi-judicial agency whose decision has been appealed.

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[4] Sprint Spectrum claims that the Board has not taken a position on whether or not it needs to be served. App. Br. at 3. This is irrelevant as the statute plainly requires the Board to be served. Also, Sprint Spectrum never served the Board, so there is no indication that the Board's decision makers are aware of this action. Further, the Board may believe that the Department's interests are aligned with the Board's and there is no need for the Board to appear.

Finally, Sprint Spectrum cites two out-of-state cases to support its argument that the Department is "the agency" referred to in RCW 34.05.542(2). App. Br. at 5-6. However, these cases turn on specific statutory provisions that are not present here. In the North Dakota case, the court stated: "[o]rdnarily, the adjudicative agency must be a named party to an appeal and must be served with a notice of appeal." *North Dakota Dep't of Human Services v. Ryan*, 672 N.W.2d 649, 657 (N.D., 2003). The court concluded the quasi-judicial agency in that case did not need to be served because there was a specific statute providing that the quasi-judicial agency should not to be named in the type of personnel action at issue. *Id.* Thus, the holding and analysis in the North Dakota case do not support Sprint Spectrum's arguments. If anything, the case contradicts Sprint Spectrum's argument that quasi-judicial agencies do not need to be served, because the court treated the specific statute as an exception to the general rule that the quasi-judicial agency must be served.

In the Wisconsin case, a specific statutory provision stated that the decision of the Division of Hearings and Appeals in the Wisconsin Department of Transportation was the final decision of the agency subject to judicial review. *All Star Rent-a-Car v. Wisconsin Dep't of Transp.*, 716 N.W.2d 506, 514 (2006). This provision, combined with All Star's argument that the Division was not included in the definition of "agency,"

created an ambiguity as to whether the Division was an "agency" that must be served, or simply a part of an agency, the Department of Transportation. *Id.* Notwithstanding the ambiguity, the Wisconsin court held that the Division was the quasi-judicial agency that must be served. *Id.*, at 516.

Here, there is no statutory provision converting the Board of Tax Appeals' decision into the Department's decision, nor is there an ambiguity as to whether the Board is an agency under the APA. *See* RCW 34.05.010(2) ("agency" includes "any state board...authorized by law...to conduct adjudicative proceedings"). As such, the holding in *All Star* is not relevant to the current case.

The plain language of RCW 34.05.542(2) does not treat quasi-judicial agencies any differently, nor is there case holding that quasi-judicial agencies do not need to be served under RCW 34.05.542(2). For these reasons, Sprint Spectrum's argument that RCW 34.05.542(2) does not require parties to serve quasi-judicial agencies, such as the Board of Tax Appeals, is incorrect and should be rejected.

V. CONCLUSION

Because Sprint Spectrum failed to serve the Board of Tax Appeals with a copy of the petition for judicial review within 30 days of the final order, the superior court lacked jurisdiction to consider the petition under

the APA and correctly granted the Department's motion to dismiss. Sprint Spectrum's arguments that it needed to serve only the Department are clearly contradicted by the language of the APA and the case law interpreting RCW 34.05.542(2) and its predecessor statute. Accordingly, the Department respectfully requests that this Court affirm the superior court's order dismissing the petition.

RESPECTFULLY SUBMITTED this 20th day of November, 2009.

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SPRINT SPECTRUM, LP, Appellant, v. STATE OF WASHINGTON, DEPARTMENT OF REVENUE, Respondent.	CERTIFICATE OF SERVICE

I certify that I served a copy of Respondent's Brief and this Certificate of Service, by U.S. Mail, postage prepaid, through Consolidated Mail Services and electronically via email, on the following:

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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.

DATED this 25th day of November, 2009, at Olympia, WA.

Candy Zilinskas

CANDY ZILINSKAS, Legal Assistant

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