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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.

REPLY BRIEF OF APPELLANT DOLLY, INC.

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I. INTRODUCTION

Dolly asks this Court to reverse the Commission's Corrected Order 02 and Order 04 because the Commission erred in finding that Dolly entered into agreements. The Commission's complaint and Staff's arguments were based on allegations of unlawful advertising, not on Dolly entering into unlawful agreements. The issue of agreements was not litigated, and Dolly was not on notice that it needed to defend against such a claim. Yet the Commission's orders require Dolly to shut down operations based on the conclusion that Dolly entered agreements. The result was an order requiring Dolly to completely terminate all business in Washington rather than simply cease unlawful advertising. Dolly raised this issue below, *see, e.g.*, AR 203-04, and did not waive the argument. The Commission also erred for the reasons set forth in Dolly's Opening Brief, and this Court should reverse Order 04.

II. ARGUMENT AND AUTHORITY

A. **Dolly Raised the Issue of Jurisdictional Agreements Before the Commission; the Issue is Not Waived.**

The heart of Dolly's appeal is that the Commission erred by finding that Dolly entered into agreements. The complaint did not allege that Dolly entered agreements, instead alleging that Dolly's violations were for advertising. The hearing testimony was silent as to agreements. Yet the Commission orders found that Dolly had entered into agreements.

Staff argues that Dolly waived the issue of whether the Commission erred when it ruled that Dolly entered agreements, claiming that Dolly did not raise the issue before the Commission. But Dolly *did* argue, in its petition before the Commission, that the issue of entering agreements was not raised by Staff nor litigated, making the Commission's ruling on agreements an error. Further, Staff briefed it and the Commission ruled on the issue. Staff's waiver argument is wrong for at least four reasons.

First, Staff incorrectly claims in its response brief that "Dolly did not raise this issue at any time before the Commission and cannot now raise it here." Resp. Br. at 19. This is incorrect because Dolly argued in its petition for administrative review that the issue of agreements was not before the Commission, and that there was no evidence in the record regarding any agreements. AR 203-04. Contrary to its waiver argument, Staff itself acknowledges that Dolly raised the issue before the Commission. Resp. Br. at 19-20. It is not accurate for Staff to state that Dolly is raising this issue on appeal for the first time when Dolly's petition addresses the issue head on.

Second, Staff argues that Dolly did not raise the issue during the hearing. Resp. Br. at 19. Staff's observation only supports Dolly's argument because Dolly attempted to address agreements at the hearing and was denied the opportunity. Counsel for Dolly attempted to address

each part of the definition of Household Goods Carrier, raising the issue of transporting,¹ soliciting,² and advertising³ to transport household goods. It is obvious that counsel for Dolly was attempting to sequentially address each part of the definition of Household Goods Carrier under RCW 81.80.010(5), but the ALJ stopped counsel from doing that. First, when counsel for Dolly attempted to use the definition of “household goods” to argue that Dolly could not be a Household Goods Carrier when its business model did not include the transportation of household goods, the ALJ instructed counsel to focus his question, “because the allegation is that they’ve advertised as a household goods carrier.” TR 50:25-51:1. Second, counsel for Dolly raised the issue of solicitation, and counsel for Staff objected because, “I’m not sure this is relevant to the complaint. The complaint is for advertising.” TR 64:4-6. The ALJ sustained Staff’s objection, stating, “[t]he distinction between an advertisement and a solicitation for the purposes of this complaint seems to me to be meaningless. The complaint is that the company advertised on each of the 11 sites.” TR 64:8-13. Dolly was unequivocally and repeatedly instructed to limit questioning only to the issue of advertizing. Accordingly, Dolly was not permitted to raise the issue of entering into agreements.

¹ TR 46:16-19.

² TR 63:11-64:2.

³ TR 89:20-21.

Dolly had no reason to believe that it was being accused of entering agreements unlawfully. The complaint said nothing of entering agreements, and both the ALJ and Staff affirmed that the complaint was for advertising. Staff cannot now argue that Dolly should have pressed the issue further when the ALJ prevented such argument, and Staff objected to arguments related to issues other than advertising.

Third, Dolly's opposition to the finding that it entered into agreements does not constitute an admission that agreements were properly at issue before the Commission. Resp. Br. at 19-20; 27-28. Instead, in the face of orders requiring Dolly to cease and desist from its Washington operations based on a finding that Dolly had entered into agreements, Dolly appealed the findings related to claims never before alleged or litigated. Dolly challenged the findings because neither Staff nor Dolly had presented evidence on the topic. AR 000204. It is only reasonable that Dolly would challenge such findings, and that challenge should not be construed as an admission. Instead, the challenge is conclusive evidence that the issue was raised in the proceedings below.

Fourth, Staff never argues that it alleged that Dolly entered agreements. Instead, Staff relies on an odd argument that Dolly itself raised this claim against it by simply answering the complaint. Resp. Br. at 25-26. Staff's claim is based on the following two statements from

Dolly's Answer and Affirmative Defenses: (1) "Dolly's acts and/or practices have fully complied with Washington law" and (2) "Dolly denies the allegations that it violated any Commission statute or rule." AR 000103. Dolly remains confounded as to how these two general statements could indicate that Dolly "put at issue" whether Dolly entered agreements. Nowhere in Dolly's Answer and Affirmative Defenses does Dolly even mention the word "agreement." Certainly, Dolly was not on notice that it needed to defend against such allegations. And having been told repeatedly that the complaint was limited to the issue of advertising, there was certainly no reason to brief the issue of entering into agreements following the hearing.

Here, as shown above, Dolly raised the issue of the Commission's findings regarding entering agreements in its petition. Dolly argued that the finding was in error and should be reversed. AR 000203-04. Dolly argued that Staff entered no evidence of agreements to transport goods and there was no testimony regarding agreements at the hearing. AR 000204. Staff dedicated more than four pages of briefing to the issue before the Commission. AR 000262-66, AR 000276-77. The Commission ruled on the issue. AR 000292. On judicial appeal the arguments have been refined, certainly, but in no way is the issue new on appeal. And questions about how the procedural statutes and regulations were applied were also

raised in the petition. AR 000181-82. Here, the issue of entering agreements and compliance with mandated processes were raised before the Commission and refined on appeal; the Court has authority to consider such issues.

It is important to point out that the prejudice Dolly experienced as a result of the Commission's error is nothing less than having to fully shutdown all its Washington operations. AR 000304. The difference between finding that Dolly unlawfully advertised versus finding that Dolly unlawfully entered into agreements means that for one, Dolly must change its advertising. For the other, Dolly shuts down its business. The latter is exactly what the Commission ordered.

B. This Court Has Inherent Authority to Consider All Issues Necessary to Reach a Proper Decision.

Even if Dolly had not raised the issue before the Commission, this Court may consider it in order to reach a proper decision. *Maynard Investment Company, Inc. v. McCann*, 77 Wn.2d 616, 465 P.2d 657 (1970). Staff quickly dismisses the applicability of *Maynard*, based on the Washington Supreme Court's decision in *King County v. Wash. State Boundary Review Board.*, 122 Wn.2d 648, 860 P.2d 1024 (1993). Resp. Br. at 23-24. But the Court in *King County* chose not to apply the *Maynard* rule because Ordinance 9849 was in no way raised or mentioned

before the agency; its presence was entirely novel on appeal. *King County*, 122 Wn.2d at 669. Further, *King County* does not bind this Court because it may hear any issue, even under an Administrative Procedures Act (“APA”) appeal. “The court, however, has inherent authority to consider all issues necessary to reach a proper decision.” *Hertzke v. State Dep’t of Ret. Sys.*, 104 Wn. App. 920, 928, 18 P.3d 588, 592 (2001) (rejecting waiver argument under an APA appeal).

Staff states that the court in *Hertzke* erred because it erroneously relied on a case interpreting “the old” APA. Resp. Br. at 24. This is misleading. Staff is correct only in that the court in *Hertzke* cited *Shoreline Cmty. Coll. Dist. No. 7 v. Emp’t Sec. Dep’t*, 120 Wn.2d 394, 402, 842 P.2d 938 (1992). But it was one of multiple cases “relied on” by that court. The court in *Hertzke*, applying the current APA provision, specifically raised the applicable waiver provision and declined to apply it because of the court’s inherent authority to consider all issues necessary to reach a proper decision. *Id.* In addition to *Shoreline*, the court in *Hertzke* cited *Heidgerken v. State, Dep’t of Nat. Res.*, 99 Wn. App. 380, 387, 993 P.2d 934, 939 (2000). The court in *Heidgerken* also interpreted the waiver provision of the “the new” APA and *also* declined to apply it. “However, this court has inherent authority to consider all issues necessary to reach a proper decision.” *Id.* at n.3. But there is more: *Heidgerken* quoted

Nielsen v. Employment Sec. Dep't of State, 93 Wn. App. 21, 43, 966 P.2d 399, 410 (1998), another case in which the court declined to apply the general waiver provision of the APA in favor of its inherent authority to apply any issue necessary to reach a proper decision. In finding one case that applied the APA's waiver provision, Staff reveals three other cases that declined to apply it in favor of the court's inherent authority. Considering that the issues in this case are important statutory and due process issues, even if Dolly had not raised the issues before the Commission, this Court can and should hear them now.

C. Dolly was Prejudiced by the Commission's Violation of its Procedural Rules When the Commission Allowed Amendment of Initial Order 02.

The Commission violated its own procedural rules when it allowed the ALJ to correct Order 02 without notice and an opportunity to be heard. Staff again erroneously argues that Dolly waived this issue. Resp. Br. at 21. Dolly raised this issue at length before the Commission. "ALJ Moss Disregarded Commission Rules Governing Proper Procedure Regarding Staff's Petition for Administrative Review." AR 000190-93.

Staff next argues that the Commission's violations of statute and its procedural rules do not matter because Dolly was not prejudiced by those errors. Resp. Br. at 35. Error is prejudicial if it affects the outcome of the case. *Magana v. Hyundai Motor Am.*, 123 Wn. App. 306, 315, 94 P.3d 987, 992 (2004) (internal citations omitted). Dolly challenged Initial

Order 02 on several grounds, only one of which was shared by Staff. AR 000170-75. And Dolly was entitled to seek review of the entire Initial Order 02, not just the constitutional problem raised by Staff. By rescinding Initial Order 02 and replacing it entirely with Corrected Order 02 in violation of the Commission's procedures, the presiding ALJ inappropriately withheld Initial Order 02 from the Commission and deprived Dolly of its code-protected opportunity to challenge the order. The ALJ "fixed" the initial order before the Commission could review it so that the only version the Commission ever saw was sanitized; it was modified to cure unconstitutional defects, remove a footnote, fix other unidentified "copy edits," change the review language, and enlarge the scope of the cease and desist language.

If the ALJ had not intercepted and cleaned up the initial order, the Commission would have seen the ALJ's errors and the outcome would have been different. Instead of adopting Order 02, the Commission likely would have granted Staff's petition for review of the initial order because of the glaring defects. At a minimum, the Commission would have considered Dolly's challenges to Initial Order 02 instead of dismissing them as moot. If the Commission had complied with state law and its own procedures, Dolly's objections would have been heard.

It is impossible to know exactly what the Commission would have done in response to Staff's and Dolly's challenges, but the Commission could not have independently adopted the presiding ALJ's corrections because the ALJ who entered the initial order is unable to assist the

Commission on its review of that order. WAC 480-07-825(5). By changing Initial Order 02 before the Commission was able to review it, the ALJ inserted himself into the review process and created a new outcome—exactly what the rules prohibit. If the ALJ had not intercepted Initial Order 02, the Commission would have reviewed a completely different order, one that was riddled with errors and that had obviously been copied from a prior order in another docket. The Commission might have drastically changed the order or thrown it out altogether. Instead, the Commission never saw Initial Order 02. It saw only a sanitized version of Order 02, one that was now supported by Staff and that the Commission could adopt without hesitation. The Commission could get to that result only by violating Washington statute and its own rules and by depriving Dolly of its statutory right to be heard. The initial order was re-written by the very person who was prohibited from reviewing it. That alone created a different outcome than what would have occurred had the Commission followed its rules and statutes, and that meets the standard of prejudice.

D. Dolly was Prejudiced by an Unlawful Penalty Assessment.

Staff is also incorrect that Dolly waived the issue of advertising before the Commission. Resp. Br. at 21. Dolly raised this issue in its petition for administrative review. “Dolly Does Not Advertise that it Performs Regulated Services in Washington State.” AR 000206-07. Staff agrees that the correct standard for whether Dolly advertised to transport household goods is whether a publication for which Dolly is responsible is

reasonably susceptible to being interpreted by consumers as an advertisement to transport household goods. Resp. Br. 42. The Commission did not apply that standard in this proceeding, however. Specifically, there was never any finding, by either the Commission or the ALJ, that Dolly is responsible for the Yelp page. The Commission simply adopted the ALJ's explanation that by claiming a Yelp page, "Dolly can interact with its customers, or anyone else, who posts a review." AR 000314. Such explanation is irrelevant and insufficient, however, because simply being capable of responding to a customer after that customer posts a review does not make Dolly responsible for the webpage. In fact, a reviewing customer has more control of the Yelp page than Dolly because a customer can write a review at any time. Dolly must wait until a customer leaves a review before it can respond to that customer in a comment. The Commission erred when it found that a Yelp page is an advertisement by Dolly.

Staff understandably acknowledged that Dolly is not responsible for newspaper articles. TR 54:7-21. Yet the Commission nonetheless penalized Dolly for unlawfully advertising because newspaper articles were written about it. No fair-minded person could be persuaded that Dolly is responsible for another company's webpage or a newspaper article. Accordingly, the Commission's order penalizing Dolly for unlawful advertising must be reversed.

Staff makes the strange argument that the Commission did not actually penalize Dolly for violations based on advertising newspaper

articles or billboards. Resp. Br. at 42-43. Staff's argument is clearly contradicted by its own investigation recommendations, the complaint, the orders, and the penalty assessments. Order 04 states that Order 02 found that Dolly advertised using the following separate platforms: (1) Company website, (2) billboards, (3) Facebook, (4) Instagram, (5) Twitter, (6) LinkedIn, (7) iTunes, (8) Craigslist, (9) YouTube, (10) Pinterest, (11) Yelp, and (12) in newspaper articles. AR 000286. Staff is correct that the Commission may have "combined" newspaper articles and billboards into one violation for some reason,⁴ but there can be no dispute that a portion of the \$69,000 penalty calculation is inappropriately based on newspaper articles and a Yelp page. The Commission even broke down the penalty violations for the newspaper articles, explaining that each of the multiple newspapers constituted separate advertisements, and therefore separate penalties. AR 000300. The Commission obviously penalized Dolly for newspaper articles and a Yelp page. As stated above and in Dolly's Opening Brief, there is not sufficient evidence that Dolly advertised using newspaper articles or a Yelp page because Dolly is not responsible for either. Accordingly, the Commission's order penalizing Dolly for such unlawful advertising must be reversed.

⁴ Resp. Br. at 8.

E. Dolly is Entitled to Attorneys' Fees Under the Equal Access Justice Act.

“A court shall award a qualified party that prevails in judicial review of an agency action fees and other expenses, including reasonable attorneys' fees, unless the court finds that the agency action was substantially justified or that circumstances make an award unjust.”

RCW 4.84.350. The agency bears the burden of proving that a prevailing party is not entitled to attorneys' fees. *Union Elevator & Warehouse Co., Inc. v. State ex rel. Dep't of Transp.*, 144 Wn. App. 593, 608, 183 P.3d 1097 (2008) (“The government has the burden of showing that the fees should be denied.”); *Construction Industry Training Council v. Wash. State Apprenticeship and Training Council*, 96 Wn. App. 59, 68, 977 P.2d 655 (1999) (“A prevailing party is entitled to an EAJA award unless an agency can convince the trial court that its actions were substantially justified or that circumstances would make that award unjust.”); *Schrom v. Board for Volunteer Firefighters*, 117 Wn. App. 542, 551, 72 P.3d 239 (2003) (“[T]he [agency] bears the burden of demonstrating a party is *not* entitled to an award.”) (reversed on other grounds by *Schrom v. Board for Volunteer Firefighters*, 153 Wn.2d 19, 100 P.3d 814 (2004)).

Dolly is not aware of case law requiring the administrative record to include evidence demonstrating whether a party meets the definition of

a qualifying party. The administrative record does not include financial statements from Dolly to demonstrate that it is a qualified party, and because review is constrained to the record below, Dolly's ability to present such information is limited. As a practical matter, Dolly offers to provide financial information to the Court that demonstrates Dolly's status as a qualified party, and that information can be provided *in camera* or to the Court at a later date.

The Commission bears the burden of proving that its actions were substantially justified. *Union Elevator & Warehouse Co., Inc. v. State ex rel. Dep't of Transp.*, 144 Wn. App. 593, 608, 183 P.3d 1097 (2008). The Commission's actions below are not substantially justified. "Substantially justified" means justified to a degree to satisfy a reasonable person. *Arishi v. Wash. State Univ.*, 196 Wn. App. 878, 910, 385 P.3d 251 (2016). Its actions were not substantially justified for the reasons described in Dolly's opening brief and in the administrative record, summarized here:

- The Commission copied and pasted erroneous and inapplicable information from an order from a different proceeding.
- The Commission violated its own procedural rules regarding amending an order.

- The Commission argues that Dolly saying that it complied with applicable law constitutes putting jurisdictional agreements at issue, even though the complaint never makes an allegation that Dolly entered jurisdictional agreements.
- The ALJ and Staff stopped Dolly from providing information about agreements during the hearing, saying that the complaint was about advertising.

A reasonable person would see that these errors are not justifiable, and have harmed Dolly, in part by requiring it to pursue legal action. The Commission should be required to pay attorneys' fees under RCW 4.84.350.

III. CONCLUSION

Dolly respectfully requests that the Court reverse the Commission's Order 04 and Corrected Order 02, direct the Commission to refund the penalties paid by Dolly, and order the Commission to pay attorneys' fees pursuant to RCW 4.84.350.

DATED: August 9, 2019

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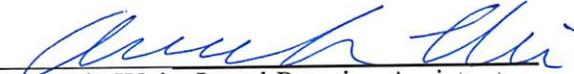
CERTIFICATE OF SERVICE

On August 9, 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 August 9, 2019.


 Amanda Weis, Legal Practice Assistant

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