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

DOLLY, INC.,

Appellant,

v.

WASHINGTON UTILITIES AND TRANSPORTATION
COMMISSION,

Respondent.

**BRIEF OF RESPONDENT
WASHINGTON UTILITIES AND TRANSPORTATION
COMMISSION**

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I. INTRODUCTION

The Washington Utilities and Transportation Commission (the Commission) regulates household goods carriers, motor freight carriers, and solid waste collection companies to protect consumers from unfair business practices and the general public from the operations of unsafe carriers.

A Commission administrative law judge (ALJ), after a hearing, concluded that Dolly was operating unlawfully based on an investigation by the Commission's regulatory staff (Staff). The ALJ, accordingly, ordered the company to cease and desist. Dolly then filed a 43-page petition for administrative review where it raised nearly two dozen claims, only one of which it continues to press in this Court, and all of which the Commission denied.

Dolly now appeals the denial of its petition for judicial review. This Court should reject the company's claims and affirm the Commission's order without an award of attorney fees, for two reasons. First, Dolly waived nearly all of the claims it raises here by failing to raise them before the Commission, and this Court should not consider those waived claims. Second, to the extent that this Court does review Dolly's claims, they are meritless because: (1) Dolly placed the issue of whether it entered into jurisdictional agreements before the Commission in its answer to the Commission's complaint, the parties litigated it, and Dolly explicitly asked

the Commission to decide it on administrative review; (2) the Commission followed its procedural rules concerning the correction of an order and, regardless, Dolly suffered no prejudice from any failure to follow procedures; and (3) Dolly's own advertisements provided substantial evidence for the Commission's findings about the company's advertising. This Court should affirm the Commission's order in all aspects.

II. RESTATEMENT OF THE ISSUES

Dolly's appeal presents five issues:

(1) Did Dolly waive all but its claim that the Commission's procedural rules did not allow the administrative law judge (ALJ) to correct the initial order because it did not raise the remainder of its claims before the Commission?

(2) Did Dolly place the issue of whether it entered into jurisdictional agreements before the Commission by raising it as an affirmative defense in its answer and then contesting the issue at hearing and on administrative review?

(3) Did the Commission properly construe its staff's petition for review as a motion to correct an obvious error, and did the correction prejudice Dolly?

(4) Does substantial evidence support the Commission's findings that Dolly engaged in conduct subject to the Commission's jurisdiction given the record evidence of the company's advertising?

(5) Should this Court deny Dolly's request for attorney fees because it is not a qualified party and should not prevail, and because the Commission's order was substantially justified?

III. RESTATEMENT OF THE CASE

A. The Commission

In the 1930s, the legislature tasked the Commission's forerunner with regulating the transport of property within Washington. LAWS OF 1935 ch. 184 §§ 1, 5. These days, the Commission regulates the transport of freight, household goods, and solid waste in the state. RCW 81.77.040; RCW 81.80.070, .075.

The Commission's regulation serves two purposes. First, the Commission protects consumers from predatory business practices. *E.g.*, WAC 480-15-490 (limiting the rates that carriers may charge), -550 (requiring cargo insurance to protect consumers). The Commission also ensures that carriers operate safely to protect those on the roads. *E.g.*, WAC 480-15-560 (setting out equipment safety requirements), -570 (setting out driver safety requirements).

Chapters 81.77 and 81.80 RCW both require a person to obtain authority from the Commission before engaging in regulated activities. RCW 81.77.040; RCW 81.80.070, .075. These regulated activities include entering into agreements to transport solid waste or household goods, RCW 81.77.040; RCW 81.80.010(5), .075, and advertising as a household goods carrier, a motor freight carrier, or a solid waste collection company. RCW 81.77.040, RCW 81.80.010, .075, .355.

The legislature authorized the Commission to initiate a special proceeding to investigate whether a person has engaged in jurisdictional conduct without the requisite authority. RCW 81.04.510. Whether the person has done so, and therefore violated Title 81 RCW, presents a question of fact for the Commission's determination. *Id.* Where the Commission finds that the person has violated provisions of Title 81, it must order the person to cease and desist. RCW 81.04.510.

B. The Investigation of Dolly and the Resulting Complaint

Staff launched an investigation after receiving a complaint about Dolly's operations. Tr. (Mar. 13, 2018) (TR.) at 12:19-13:5. Staff subsequently contacted Dolly twice to alert it to the fact that Title 81 required a permit to engage in certain regulated activities. TR. at 13:24-14:18. Staff also met several times with the company to discuss its operations. TR. 15:12-16:7, 19:5-20:7, 21:7-22:24. Dolly assured Staff that

it was simply a broker that connected customers with carriers and that it was not a party to any agreement to transport property, household goods, or solid waste. TR. at 18:7-20.

Staff later came to believe that Dolly's business model differed from how the company had described it. TR. at 21:7-22:17. Specifically, Staff came to believe that Dolly was operating as a carrier, not a broker, because it entered into agreements to transport property, household goods, and solid waste. TR. at 21:7-22:17. Staff spoke with Dolly on several occasions to express its concerns, but the company took no action to address them. TR. at 21:7-27:4.

Given Dolly's inaction, Staff requested that the Commission find probable cause to complain against Dolly and initiate a special proceeding to determine its jurisdiction over the company. Administrative Record (AR) at 72. The Commission did so and served the company with a complaint alleging 25 violations of chapters 81.77 and 81.80 RCW based on Dolly's advertisements to transport household goods, other property, and solid waste by motor vehicle for compensation over the public highways of Washington. AR at 78-79.

Dolly answered the complaint and generally denied the allegations. *See* AR at 99-103. Dolly in its answer also raised a number of issues for hearing as affirmative defenses. Specifically, Dolly claimed that it "ha[d]

fully complied with Washington law,” AR at 103, that it had not “violated any Commission statute or rule,” AR at 103, and that it had “operated . . . as a household goods broker, not a household goods carrier.” AR at 104. By raising these issues in its affirmative defenses, Dolly contested the Commission’s jurisdiction over it because the Commission had previously determined that it lacked jurisdiction over brokers. *See In re Investigation into Commission Jurisdiction to Regulate Brokers of Household Goods Moving Services*, Docket TV-150185, Order 01, at 4 ¶ 9 (Apr. 14, 2015).¹

C. The Special Proceeding

At hearing, Staff’s investigator, Ms. Susie Paul, testified about Dolly’s social media advertisements, and Dolly stipulated to the admission of those advertisements. TR. at 9:5-6.

Ms. Paul testified that Dolly advertised its services on its website and on its Facebook, Twitter, LinkedIn, iTunes, Craigslist, YouTube, Pinterest, Instagram, Craigslist, and Yelp pages. AR 367-86. Those advertisements generally invited customers in Washington and other states to use Dolly to move household goods or other property or to discard solid waste, *e.g.*, TR. at 31:10-32:10; AR 367-68, 378, 380B, 380C, and

¹Available at <http://apps.utc.wa.gov/apps/cases/2015/150185/Filed%20Documents/00017/TV-150185%20Order%20Closing%20Investigation.pdf>.

described Dolly as a moving company.² In fact, a number of Dolly’s ads showed people wearing Dolly shirts loading household goods onto trucks; at least one of those trucks flies a flag marked with the Dolly logo. *E.g.*, TR. at 32:16-21; AR at 378, 380A, 380B, 381, 384, 386.

In her testimony, Ms. Paul specifically discussed Dolly’s Yelp page. TR. 41:23-42:17. That page described Dolly as providing “Movers, Couriers & Delivery Services, [and] Junk Removal & Hauling.” AR at 386. It showed pictures of men in Dolly shirts unloading household goods from a truck. AR at 386; TR. at 42:12-13. Dolly claimed its Yelp page, meaning that it acknowledged that the page describes the company. *Id.* at 42:13-17. Because it claimed the page, Dolly can use it to communicate with customers and respond to reviews. TR. at 96:9-97:3.

Ms. Paul also testified about Dolly’s Instagram page. She explained that Dolly’s page displayed an article from the *Chicago Tribune*. TR. at 41:3-22. The article described Dolly as a moving company, explaining the services that it offered. *Id.*; AR at 385.

² For example, several of Dolly’s advertisements provided that the company would supply “[t]ruck and [m]uscle, [a]nytime you [n]eed [i]t.” TR. at 36:2-5; AR 378, 380A. Another stated that “Dolly makes moving stuff fast, easy, and affordable” TR. at 37:18-19. A different advertisement provided that customers could “[u]se our app to load, haul, and deliver just about anything.” AR at 380A. Another described Dolly as the “mov[e] anything app.” AR at 381. And Dolly’s Pinterest page had a pin describing “The Moves we Made: Dolly’s 2017 in Review.” AR at 384.

Ms. Paul further testified that Dolly combined physical and digital advertising. She described a 2016 newspaper article about a billboard Dolly displayed in Seattle, Washington. AR 376-77. The billboard directed viewers to a Dolly website, *see* TR. at 33:19-23, where the company advertised itself as providing a “move anything app.” TR at 33:21-34:13.

Ms. Paul further testified, without objection, that Dolly entered into jurisdictional agreements with its customers. Customers use Dolly’s platform by providing it with the information necessary to perform a move, such as the origin, destination, date, and time of the move, as well as the types of objects involved. AR 8, 378; TR. at 27. Dolly uses this information to calculate a “[g]uaranteed” price quote for the transportation, AR 370; *see* TR. at 27:8-12, which it provides to the customer “immediate[ly].” AR 378; *see* TR. at 27:8-12. Dolly only secures a person to physically transport the customer’s property, household goods, or solid waste after the customer accepts its guaranteed price quote. AR 357. Dolly’s terms of service require customers to pay Dolly for the transportation, TR. 27:24-28:15, which Dolly insures. TR. at 35:11-13. Ms. Paul explained that the Commission had, in a prior docket involving Dolly, stated that it considered Dolly’s business model, which involved the exchange of the promise to transport

goods, property, or solid waste for a promise to pay, jurisdictional. TR. at 28:16-29:6; Exh. SP-19.³

Mr. Kevin Shawver testified for Dolly and addressed both Dolly's advertisements and the company's operations. Mr. Shawver testified that in its advertisements Dolly attempted to convey that it connected customers to movers. TR. at 82:5-11, 87:4-12. He noted that Dolly does not ever explicitly state that it performs any moves itself. *E.g.*, TR. at 85:13-16. Mr. Shawver explained that Dolly's business model involved using independent contractors rather than employees to perform moves. TR. at 81:12-21, 83:12-18, 84:12-18. He added that this meant that Dolly owned no moving vehicles. TR. at 84:8-10.

At the close of the special proceeding, the presiding ALJ offered the parties the chance to submit briefs. Dolly declined the opportunity and, consequently, so did Staff. TR. 98:6-11.

³ The Commission did not include Exhibit SP-19 in the record, apparently because it took judicial notice of the order in addition to admitting it. TR. at 28:20-29:6. The order arose from a docket wherein Dolly petitioned the Commission to amend its rules so that the company was not classified as a household goods carrier. *In re Petition of Dolly, Inc., to Amend Motor Carrier Rules or in the Alternative to Initiate Rulemaking*, 2017 WL 5565293 (Wash. U.T.C. Oct. 31, 2017). The Commission, after reviewing Dolly's description of its business model, determined that the company was, in fact, a household goods carrier as the legislature defined the term. *Id.* at *3. The Commission therefore denied the petition because granting it would have been inconsistent with chapter 81.80 RCW. *Id.* at * 2.

D. The Initial Order

The ALJ found that Dolly entered into agreements with customers to provide regulated services, AR 132-33, and that Dolly advertised to provide jurisdictional services by “hold[ing] itself out as” a carrier in its advertisements, AR 126. The ALJ based the first finding largely on Dolly’s terms of service. AR 124-27. The ALJ based the second on Dolly’s advertisements. AR 125-26. The ALJ specifically rejected Dolly’s affirmative defenses after finding them “belied” by the evidence. AR at 127.

Given the findings, the ALJ imposed penalties and ordered Dolly to cease and desist from further violations of Title 81 RCW. AR at 133-34. One provision of the cease and desist order required Dolly to remove its website and all of its advertisements from the internet. AR 133-34.

E. The Correction of the Initial Order

Staff petitioned for administrative review of the internet-related cease and desist provision based on commerce clause grounds. AR 139-40. The ALJ construed Staff’s petition as a motion to correct an obvious error, issued a notice of correction, AR 143-44, and entered a corrected initial order. AR 145-61. The corrected initial order replaced the cease and desist provision at issue with one requiring Dolly to state on its digital platform that it does not provide moving services in Washington. AR at 159-60.

Dolly later filed an answer supporting Staff's petition for review and requesting additional relief. AR 166-75.

F. Dolly's Petitions for Administrative and Judicial Review

Dolly then petitioned for administrative review of both the uncorrected and corrected versions of the initial order. Its petition spanned 43 pages and raised nearly two dozen claims for relief. AR 180-222. Relevant to this appeal, Dolly asserted that: (1) the Commission's procedural rules did not allow the ALJ to correct the initial order in response to Staff's petition, AR at 190-92, 208-10; (2) the ALJ erred in finding that Dolly entered into jurisdictional agreements because the evidence showed otherwise, AR at 195; (3) the ALJ erred by imposing penalties for each advertisement rather than a single penalty for all internet advertisements, AR at 205-06; and (4) Dolly did not advertise jurisdictional services because it did not provide those services. AR at 205-06. With regard to the second of those claims, Dolly requested that the Commission find that it "[d]oes not enter into agreements to provide regulated services in the state of Washington." AR at 222.

The Commission denied Dolly's petition and adopted the corrected initial order as modified by the discussion in its final order, AR at 289, making several determinations relevant here.

First, the Commission concluded that Dolly entered into jurisdictional agreements. It did so based on the evidence about Dolly's interactions with its customers, its conclusions in prior dockets involving companies with similar business models, and its conclusion that Dolly's business model was jurisdictional in previous a docket involving Dolly. AR at 290-92 (paragraphs 17 through 23), 293-94 (paragraphs 26-27).

Second, the Commission concluded that Dolly engaged in jurisdictional advertising. It reached that conclusion based on the text of Dolly's advertisements. AR at 292-93, 302-03. Accordingly, the Commission affirmed the imposition of advertising-based penalties. *See* AR at 299-301.

Finally, the Commission determined that its procedural rules authorized the correction and narrowing of the cease and desist provision because it was an obvious error. AR at 295 (paragraphs 30 through 32). Regardless, the Commission concluded that Dolly had waived its claim by supporting Staff's claim for relief, *see* AR at 295 (paragraph 32), and stated that the ALJ's treatment of Staff's petition as a motion to correct had not affected the outcome in the docket. AR at 295 ("Whether we affirm the ALJ's correction to the initial order or independently adopt that correction on review, the result is the same").

Dolly petitioned for judicial review. Clerk's Papers (CP) at 3-70. The superior court affirmed the Commission's order after finding that Dolly waived most of the arguments it raised on judicial review and, in the alternative, rejecting Dolly's claims on their merits. Verbatim Report of Proceedings (Mar. 8, 2019) at 20:5-12.

Dolly now seeks review of the superior court order affirming the Commission's final order. CP at 162-222.

IV. ARGUMENT

Dolly raises three claims on appeal, specifically that: (1) the Commission should not have decided whether it entered into jurisdictional agreements because the complaint did not raise that issue, (2) the Commission committed several errors when correcting the initial order, and (3) that substantial evidence does not support several of the Commission's findings that it engaged in jurisdictional advertising. This Court should decline to reach the merits of most of these arguments because Dolly waived them. Regardless, Dolly's claims are meritless, and this Court should reject them for that reason as well.

Initially, Dolly waived most of the issues it raises here. This Court should decline to reach the merits of Dolly's first and third claims in their entirety because the company did not raise them before the Commission. This Court should decline to address most of the arguments Dolly makes in

its second claim for that same reason, and therefore only reach the merits of Dolly's claim that the Commission's rules did not authorize the correction of the initial order.

With regard to Dolly's first claim on appeal, the issue of whether it entered into jurisdictional agreements was properly before the Commission. Dolly raised the issue in its affirmative defenses, thereby contesting the Commission's jurisdiction; litigated the issue at hearing along with Staff; and then specifically asked the Commission to decide the issue on administrative review. The issue was thus before the Commission because Dolly put it there. Once the Commission decided the issue against Dolly, RCW 81.04.510 required the Commission to order the company to cease and desist.

As concerns Dolly's second claim on appeal, the Commission's procedural rules authorized correction of obvious or ministerial errors. All parties agreed that the initial order was constitutionally infirm, and the error was not difficult to grasp, making it obvious and therefore correctable. Regardless, Dolly supported the correction and the Commission explicitly rejected that the outcome would have been different if it had addressed the error in the manner Dolly argues was correct. Dolly was not prejudiced and cannot obtain relief in this Court.

Finally, Dolly's third claim on appeal is meritless because Dolly's Yelp page provides substantial evidence supporting the relevant Commission finding about Dolly's jurisdictional advertising.

Accordingly, this Court should affirm the Commission's order and deny Dolly's request for attorney fees.

A. Standard of Review

This Court reviews a Commission order under the APA. *U S West Commc'ns, Inc. v. Wash. Utils. & Transp. Comm'n*, 134 Wn.2d 48, 55, 949 P.2d 1321 (1997). Dolly, as the petitioner, bears the burden of showing the invalidity of the Commission's order. *Id.* (citing RCW 34.05.570(1)(a)). Doing so requires Dolly to show both: (1) an error upon which the APA permits this Court to grant relief, RCW 34.05.570(3)(a)-(i), and (2) that it "has been substantially prejudiced by the action complained of." RCW 34.05.570(1)(d).

Under the APA, this Court reviews de novo Dolly's claims that the Commission (1) engaged in unlawful procedure or unlawful decision-making process, and (2) erroneously interpreted or applied the law. *Arishi v. Wash. State Univ.*, 196 Wn. App. 878, 896, 385 P.3d 251 (2016). This Court accords "substantial weight" to the Commission's interpretation of regulations it promulgated when reviewing their meaning. *Verizon Nw., Inc. v. Emp't Sec. Dep't*, 164 Wn.2d 909, 915, 194 P.3d 255 (2008).

Dolly's challenges to the Commission's factual findings are reviewed for substantial evidence, RCW 34.05.570(3)(e), meaning "evidence sufficient to persuade a fair-minded person" of the finding's truth. *PacifiCorp v. Wash. Utils. & Transp. Comm'n*, 194 Wn. App. 571, 586, 376 P.3d 389 (2016) (quoting *City of Vancouver v. State Pub. Emp't Relations Comm'n*, 180 Wn. App. 333, 347, 325 P.3d 213 (2014)). This Court's review is "highly deferential," *ARCO Prods. Co. v. Utils. & Transp. Comm'n*, 125 Wn.2d 805, 812, 888 P.2d 728 (1995), and it does not reweigh the evidence, *Stericycle of Wash. Inc. v. Wash. Utils. & Transp. Comm'n*, 190 Wn. App. 74, 89, 359 P.3d 894 (2015), or substitute its judgment for the weight given to competing reasonable inferences. *City of Univ. Place v. McGuire*, 144 Wn.2d 640, 652, 30 P.3d 453 (2001) (quoting *State ex rel. Lige & Wm. B. Dickson Co. v. County of Pierce*, 65 Wn. App. 614, 618, 829 P.2d 217 (1992)).

B. Dolly Waived Nearly All of its Claims by Not Raising Them Before the Commission

This Court should decline to consider all of Dolly's claims, save its contention that the Commission misapplied its procedural rules when correcting the initial order, because Dolly waived those claims by failing to raise them before the Commission.

Washington's courts "are committed to the rule that, insofar as possible, there shall be one trial on the merits with all issues fully and fairly presented to the trial court at that time so the court may accurately rule on all issues involved and correct errors in time to avoid unnecessary retrials." *Haslund v. City of Seattle*, 86 Wn.2d 607, 614, 547 P.2d 1221 (1976). Accordingly, a reviewing court generally will not review an issue not presented to the trial court. RAP 2.5(a); e.g., *Kut Suen Lui v. Essex Ins. Co.*, 185 Wn.2d 703, 719, 375 P.3d 596 (2016).

An analogous rule applies in the administrative context. The APA provides, subject to limited exceptions not relevant here, that "[i]ssues not raised before the agency may not be raised on appeal." RCW 34.05.554.

The APA's bar to new issues on appeal serves "important" administrative and judicial "policy purposes." *King County v. Wash. State Boundary Review Bd.*, 122 Wn.2d 648, 668, 860 P.2d 1024 (1993). For agencies, the bar discourages "frequent and deliberate flouting of administrative processes," and protects the agency's autonomy by giving it the first opportunity to "apply its expertise, exercise its discretion, and correct its errors." *Id.* (quoting *Fertilizer Inst. v. EPA*, 935 F.2d 1303, 1312-13 (D.C. Cir. 1991)). For the judiciary, the bar ensures the development of

an adequate record to facilitate review and reduces or obviates the need for judicial involvement. *Id.* (quoting *Fertilizer Inst.*, 935 F.2d at 1312-13).

To properly preserve an issue, a petitioner must do two things.

First, the petitioner must have raised the same issue before the agency that he or she raises on judicial review. A petitioner fails to preserve an issue by raising a “related” one before the agency. *Kitsap All. of Prop. Owners v. Cent. Puget Sound Growth Mgmt. Hr’gs Bd.*, 160 Wn. App. 250, 270, 270-74, 255 P.3d 696 (2011) (*KAPO*).

Second, the petitioner must make “more than simply a hint or slight reference to the issue in the record.” *King County*, 122 Wn.2d at 668. To determine whether a petitioner has cleared that threshold, this Court looks to, among other things, the amount of argument devoted to the issue before the agency and the amount of argument devoted to other issues, whether the petitioner cited authority in support of the argument, whether the petitioner separated the argument from others in presenting it, and whether the petitioner applied facts to the law when presenting the issue. *Aho Constr. I, Inc. v. City of Moses Lake*, 6 Wn. App. 2d 441, 464, 430 P.3d 1131 (2018).

1. Dolly waived its argument that whether it entered into jurisdictional agreements was not before the Commission.

This Court should decline to consider Dolly’s claim that whether it entered into jurisdictional agreements was not before the Commission.

Dolly did not raise this issue at any time before the Commission and cannot now raise it here. RCW 34.05.554.

Dolly did not raise its claim during the evidentiary portion of the hearing below. Staff, without objection, presented significant evidence showing that Dolly entered into jurisdictional agreements with its customers. That evidence demonstrated that customers give Dolly all the information necessary to accomplish a move, TR. at 27:7-20, that Dolly uses that information to provide a guaranteed price quote to the potential customer, TR. at 27:21-23; AR at 370; and that Dolly's customers pay Dolly for the move. TR. at 27:24-28:15. The evidence also included previous statements by the Commission, made after consideration of Dolly's business model, that the company was a jurisdictional carrier. TR. at 28:20-29:6; Exh. SP-19. Dolly, in fact, introduced evidence to show that it was a broker, not a carrier. TR. at 83:12-18 (describing Dolly's business model), TR. at 81:12-21 (describing Dolly's use of independent contractors), 84:12-22 (same), 84:8-10 (testifying that Dolly owned no vehicles).

Moreover, Dolly did not raise the issue as a post-hearing argument before the ALJ. Dolly, in fact, explicitly declined the opportunity to provide legal argument when given the chance to brief the issues. TR. at 98:6-11.

Nor did Dolly raise the issue before the full Commission in its petition for administrative review. In its 43-page petition, *see* AR at 180-

222, Dolly only mentioned RCW 81.04.110 when stating that the provision and a number of others gave the Commission jurisdiction over the petition. AR at 184. Dolly did not cite any authority, much less the cases it now cites, in support of anything even approaching the argument it makes here. *See* AR at 180-222. And Dolly did not in any other way contend that the issue of whether it entered into jurisdictional agreements was not before the Commission. *See* AR at 180-222.

Dolly, to the contrary, informed the Commission that the issue was properly before it on administrative review. Dolly contended several times in its petition that the Commission had erred in not finding in its favor on the issue, not that it erred in making a finding at all. *E.g.*, AR at 195, 203-04, 221-22. In this regard, this Court need not look any further than Dolly's request that the Commission find that it "[d]oes not enter into agreements to perform regulated services in the state of Washington." AR 222. To support that request, Dolly marshalled the evidence that it claimed showed it was a broker not a carrier and pointed out what it saw as shortcomings in Staff's evidence. *E.g.*, AR at 195, 204.

Under RCW 34.05.554, Dolly cannot raise the issue of whether the Commission should have decided whether it entered into jurisdictional agreements because it failed to raise the issue below. This Court should decline to review the alleged error.

2. Dolly waived its arguments that the Commission changed the procedures for review, did not comply with RCW 81.04.210, and expanded the scope of its cease and desist provision when correcting the initial order.

This Court should also decline to consider most of Dolly's claims related to the correction of the initial order because Dolly did not present them to the Commission.⁴

Dolly did not argue before the Commission that the correction of the initial order somehow changed the procedures for review, expanded the scope of the cease and desist order, or violated RCW 80.04.210 or RCW 81.04.210,⁵ *See* AR at 180-222. The APA bars Dolly from now raising those claims before this Court. RCW 34.05.554.

3. Dolly waived its arguments that the evidence about the newspaper articles or its Yelp page did not support the findings that Dolly violated provisions of Title 81 RCW.

This Court should similarly decline to consider Dolly's claims about the Commission's findings because Dolly did not raise them before the Commission.

⁴ Dolly did however present its claim that WAC 480-07-395 and WAC 480-07-875 did not allow correction of the initial order in the manner used by the ALJ to the Commission. The Commission accordingly addresses that claim on its merits later in this brief.

⁵ RCW 80.04.201 and RCW 81.04.210 function identically. *Compare* RCW 80.04.210 *with* RCW 81.04.210. The applicable provision here is RCW 81.04.210.

Dolly never raised an argument about its Yelp page before the Commission. Dolly offered no argument to the ALJ, and therefore did not raise the issue at that level. TR. at 98:6-15. Dolly's petition for review to the Commission references its Yelp page four times. Three of those references are quotations from Staff's complaint in Dolly's fact section. AR at 184. The fourth was a citation to statements by the ALJ at the start of the hearing, *see* TR. at 4:19-8:16, made in the context of a due process claim that Dolly has abandoned on appeal. AR at 212; *see Holder v. City of Vancouver*, 136 Wn. App. 104, 107, 147 P.3d 641 (2006) (explaining abandonment). Dolly never argued that its Yelp page did not support a finding that it engaged in jurisdictional advertising, waiving its claim. RCW 34.05.554; *KAPO*, 160 Wn. App. at 270-72 (a party only preserves the specific issue raised before the agency).

Similarly, Dolly made either no or passing reference to the newspaper articles below. Again, Dolly offered no argument before the ALJ and therefore did not raise the issue at that level. TR. at 98:6-15. Dolly's petition for review mentions the newspaper articles three times. The first two references appear in Dolly's fact section and consist of quotations from Staff's complaint. AR at 184. The third is a single conclusory sentence that the article about Dolly's billboard was not an advertisement made in a section of Dolly's brief devoted to the company's free speech claim, AR at

201, and Dolly did not explain the significance of the statement to any of the violations at issue before the Commission. The free speech claim was one of several dozen that Dolly made in its 43-page petition for review. Dolly did not properly raise its claim before the Commission, thereby waiving it. *Wash. Att’y Gen.’s Office, Pub. Counsel Unit v. Wash. Utils. & Transp. Comm’n*, 4 Wn. App. 2d 657, 677-78, 423 P.3d 861 (2018) (passing reference does not preserve a claim); *Aho*, 6 Wn. App. 2d 464 (factors for determining whether a party gives an issue more than passing treatment).

4. Dolly cannot raise new issues on appeal under the *Maynard* rule or pursuant to this Court’s inherent authority.

Dolly may claim, as it did in its reply in the superior court, that it did not need to preserve its claims because it may raise new issues on appeal under the rule announced in *Maynard Investment Company, Inc. v. McCann*, 77 Wn.2d 616, 465 P.2d 657 (1970), or under this Court’s inherent authority to allow new issues on appeal. This Court should reject both arguments.

The *Maynard* rule exists to ensure that appellate courts apply the correct law, even if the parties fail to properly brief it below. *King County*, 122 Wn.2d at 670 (citing *Maynard*, 77 Wn.2d at 623). On judicial review of an agency order, the law this Court “must apply is RCW 34.05.554.” *Id.*

at 670. Accordingly, the *Maynard* rule does not allow petitioners to sidestep RCW 34.05.554 and raise new issues on appeal. *Id.* at 670.

Nor does this Court's inherent authority permit Dolly to raise new issues on appeal of an agency order. When arguing before the superior court that the courts have inherent authority to allow new issues, Dolly relied on *Shoreline Cmty. Coll. Dist. No. 7 v. Emp't Sec. Dep't*, 120 Wn.2d 394, 402, 842 P.2d 938 (1992), and one of its progeny, *Hertzke v. Dep't of Ret. Sys.*, 104 Wn. App. 920, 928, 18 P.3d 588 (2001). Dolly's argument fails, for two reasons.

First, *Shoreline* addressed a court's discretion and authority to consider issues not raised below under Washington's old APA, which contained no waiver provision. *See generally* former RCW 34.04.010-950; LAWS OF 1988 ch. 288 § 512 (adding a new section rather than re-codifying one from the former APA). That case is therefore inapposite to an appeal under chapter 34.05 RCW, and the *Hertzke* court erroneously relied on it when considering issue preservation under the current APA.

Second, the *King County* court rejected the argument that it could allow parties to raise new issues on appeal pursuant to its inherent authority under the current APA. 122 Wn.2d at 669-70. The Supreme Court adheres to that holding. *E.g., Darkenwald v. Emp't Sec. Dep't*, 183 Wn.2d 237, 245 n.3, 350 P.3d 647 (2015). That adherence reflects that the courts do not have

the inherent authority to waive statutory requirements. *E.g., In re Pers. Restraint of Benn*, 134 Wn.2d 868, 939, 952 P.2d 116 (1998) (holding that the courts may not waive statutory filing deadlines).

Nothing relieved Dolly of its obligation to comply with the APA. Dolly's arguments on this point lack merit and this court should reject them.

C. The Commission Properly Decided that Dolly Entered into Jurisdictional Agreements Because Dolly Placed the Issue Before it for Decision

If this Court does reach the merits of Dolly's claim that the Commission should not have decided the issue of whether it entered in jurisdictional agreements, *see* Opening Br. of Appellant Dolly, Inc. (Opening Br.) at 11-21, it should reject that claim. The issue was properly before the Commission because Dolly put it there in multiple ways.

1. Dolly raised the issue of whether it entered into jurisdictional agreements in its affirmative defenses in its answer to the complaint.

Issues "raised by the pleadings" are properly before the Commission. *State ex rel. Bohon v. Dep't of Pub. Serv.*, 6 Wn.2d 676, 682, 108 P.2d 663 (1940). Such pleadings include the answer. *N. Pac. Pub. Serv. Co. v. Kuykendall*, 127 Wash. 73, 75-76, 219 P. 834 (1923); *see* CR 7(a).

Dolly's answer to the Commission's complaint raised several affirmative defenses. Specifically Dolly contended that it had "fully complied with Washington law," AR at 103 (emphasis added), denied that

it had “violated any Commission statute or rule,” AR at 104 (emphasis added), and alleged that it had “operated . . . as a household goods broker, not a household goods carrier.” *Id.*

These affirmative defenses put the Commission’s jurisdiction at issue. While the Commission has jurisdiction over carriers, *e.g.*, RCW 81.77.040; RCW 81.80.070, .075, it has decided that it had no jurisdiction over certain brokers. *In re Investigation into Commission Jurisdiction to Regulate Brokers of Household Goods Moving Services*, Docket TV-150185, Order 01, at 3 ¶ 7, 4 ¶ 9.

The defenses therefore necessarily also put at issue whether or not Dolly entered into jurisdictional agreements. As relevant here, a person is a broker, not a carrier, if he or she does not enter into jurisdictional agreements. *In re Investigation into Commission Jurisdiction to Regulate Brokers of Household Goods Moving Services*, Docket TV-150185, Order 01, at 4 ¶ 9. On the other hand, a person entering those agreements is a carrier, not a broker. RCW 81.77.040; RCW 81.80.010(5); *In re Determining the Proper Carrier Classification of Ghostruck, Inc.*, 2017 WL 2423799 at *1-4 (Wash. U.T.C. May 31, 2017). By stating that it was a broker, not a carrier, Dolly placed the issue of whether it entered into jurisdictional agreements squarely before the Commission.

2. The parties litigated the issue of whether Dolly entered into jurisdictional agreements at hearing, and Dolly explicitly asked the Commission to decide it on administrative review.

An issue is also properly before the Commission where the parties litigate it. *See N. Pac. Pub. Serv. Co.*, 127 Wash. at 75-76 (a party raises an issue for decision by litigating it before the Commission); *accord Dewey v. Tacoma Sch. Dist. No. 10*, 95 Wn. App. 18, 26, 974 P.2d 847 (1999) (an issue is considered raised by the pleadings where the parties impliedly amend the pleadings by litigating it). The parties litigated the issue of whether Dolly entered into jurisdictional agreements at hearing and on administrative review.

At hearing, the parties introduced evidence as to whether Dolly entered into jurisdictional agreements. As discussed above, Staff introduced evidence concerning the nature of the agreement between Dolly and its customers, which amounted to the exchange of a promise to transport property, household goods, or solid waste for a promise to pay. TR. at 27:7-30:2. Dolly, for its part, offered evidence that it claimed showed that it did not enter into agreements that converted it from a broker to a carrier.

Further, Dolly explicitly asked the Commission to decide the issue on administrative review. Although Dolly declined to brief the issue before the ALJ, it did contest the issue on administrative review. *E.g.*, AR at 195;

see RCW 34.05.464(4) (the Commission had all of the fact-finding authority on review that it would have had if it had presided over the hearing). Indeed, as noted above, Dolly asked the Commission for a finding that it did “not enter into agreements to perform regulated services in the state of Washington.” AR at 222. The issue was properly before the Commission by Dolly’s own request.

Dolly, however, claims that the parties did not litigate the issue, for three reasons. All are meritless.

Dolly first contends that the “[h]earing [d]id [n]ot [i]nvolve any [t]estimony” that the company entered into jurisdictional agreements. Opening Br. at 15. The record flatly contradicts that assertion, as discussed above.

Next, Dolly contends that the ALJ precluded testimony about agreements, citing three particular exchanges. Opening Br. at 15-17. The ALJ did no such thing.

One of these, Opening Br. at 15-16, concerned an exchange where Dolly’s counsel asked Staff’s witness Ms. Paul whether the Commission had alleged that Dolly itself “actually transport[ed]” jurisdictional goods. TR. at 46:16-19. Ms. Paul answered that “[t]he investigation covered advertising, which requires a permit.” TR. at 45:20-21. The exchange concerned the complaint, not Dolly’s affirmative defenses, and the ALJ did

not use the exchange to prevent Dolly from offering evidence about its affirmative defenses. *See* TR. at 45:25-47:8.

Another exchange concerned the definition of household goods. Opening Br. at 16. Dolly fails to convey the full exchange, during which the ALJ and Dolly's counsel agreed that a person or entity could be a household goods carrier if he or she entered into agreements to do so.⁶ TR. at 50:14-51:10. Again, the ALJ did not forbid testimony about whether Dolly entered into jurisdictional agreements, and, in fact, recognized that testimony about such agreements was relevant. *Id.*

⁶ The full exchange reads:

Judge Moss: To be clear Mr. Bryant, your question concerned carrier of household goods, but the definition that you focus on is the definition of "household goods" itself.

Mr. Bryant: Right

Judge Moss: Carrier of – a household goods carrier is a person who transports for compensation by motor vehicle within this state, or who advertises, solicits or offers or enters into an agreement to transport household goods, as later defined.

So let's be clear what we're focusing on here, whether it's the definition of household goods or the definition of carrier or household goods carrier--

Mr. Bryant: Well-

Judge Moss: -because the allegation is that they've advertised as a household goods carrier.

Mr. Bryant: And one can only be a household goods carrier by transporting household goods, correct?

Judge Moss: Or by advertising to do so –

Mr. Bryant: Right.

Judge Moss: -or soliciting or offering or entering into an agreement to do so. Any of those things. That's the point.

TR. at 50:9-51:9.

The final exchange occurred when Dolly's counsel questioned Ms. Paul regarding the difference between advertising and soliciting for purposes of calculating penalties, which was irrelevant to the complaint given that the complaint was for advertising. Opening Br. at 16; *see* TR. at 62:6-64:24. Again, Dolly fails to convey the full exchange,⁷ during which the ALJ offered Dolly a chance to show the relevance of the question. TR. at 64:25-65:7. Dolly's counsel reaffirmed that he intended the question to

⁷ The full exchange reads:

Mr. Bryant: So – I mean, that's a bit to unpackage [sic] there. So are you testifying that every web page is an advertisement and definitely not a solicitation, or could you say that an advertisement could be a solicitation?

Mr. Roberson: I'm going to object at this point. I'm not sure this is relevant to the complaint. The complaint is for advertising.

Judge Moss: I'm not sure where this line of questioning is going either. The distinction between an advertisement and a solicitation for purposes of this complaint seems to me to be meaningless.

The complaint says that the company advertised on each of these 11 sites. They're separate sites on the internet, and so they're treated by the staff as 11 separate advertisements. And if Staff chose to do so, it could treat it as a 11 different advertisements for every day that it occurred, because a continuing violation is just that.

So by picking 11 pages and you treating only 1 as a violation for each, in a sense, is to your benefit, because they certainly could have alleged many, many more violations. So I'm not quite sure where you're going with this.

Mr. Bryant: Okay. Thanks you.

Judge Moss: I mean, if you're going to the idea of mitigation – is that where you're trying to direct this line of questioning? You think some of these should be – there should be some mitigation of the penalties that have been asked for because, in your view, these are all one advertisement or something? I'm not sure where you're going. I'm trying to figure that out.

Mr. Bryant: Well, the statute says that each advertisement is a violation per medium. I'm saying that the internet is one medium through which one can advertise.

TR. at 63:23-65:11.

go to how to calculate penalties based on advertising violations, not whether Dolly had entered into agreements. *See* TR. at 64:25-65:11. Again, the ALJ did not preclude testimony about entering into agreements in the exchange.

Finally, Dolly contends that the parties did not litigate the issue of whether it entered into jurisdictional agreements because the ALJ only decided the issue due to a copy error. Specifically, Dolly contends that the ALJ copied portions of an order involving another company called *Ghostruck*, Opening Br. at 17-19, the proceeding against which was the Commission's case of first impression concerning whether chapter 81.80 RCW applied to digital companies like Dolly. *See generally In re Determining the Proper Carrier Classification of Ghostruck, Inc.*, 2017 WL 2423799 (Wash. U.T.C. May 31, 2017). Dolly did not raise this issue below, and this Court should not address it. RCW 34.05.554. Regardless, while Dolly is correct that the ALJ included portions of the *Ghostruck* order in the corrected initial order, it is incorrect that the Commission addressed the issue inadvertently because of the copying error.

Initially, the ALJ deliberately addressed whether Dolly entered into jurisdictional agreements rather than doing so because of the copy error. As discussed above, Dolly placed the issue before the Commission in its affirmative defenses, and the ALJ addressed the issue when rejecting those defenses as "belied by the evidence." AR at 153.

Regardless, this Court reviews the Commission's final order, *see* RCW 34.05.010(11)(a), .570(3), and not the initial order, except to the extent that the final order adopted the initial order. *See* AR at 289 (final order adopting the initial order as modified by its discussion). Despite Dolly's claims that the Commission gave the issue passing treatment, *see* Opening Br. at 18-19,⁸ the Commission's final order contains significant discussion and citation to evidence explaining why the Commission determined that Dolly entered into jurisdictional agreements. AR at 290-94. Again, the Commission had good reason to engage in that analysis because, as noted above, Dolly specifically asked the Commission to decide whether it entered into jurisdictional agreements. *E.g.*, AR 222. Like the ALJ, the Commission decided the issue deliberately.

Dolly also alleges that, because the parties did not litigate the issue, the Commission erroneously imposed penalties for entering into jurisdictional agreements. Opening Br. at 17-19. It cites a portion of the initial order where the ALJ mistakenly refers to imposing penalties for

⁸ Dolly claims that 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 proceeding filed months before this proceeding was ever opened." Opening Br. at 19. As discussed elsewhere, this was not the only piece of evidence cited by the Commission. AR at 290-92. And, as discussed above in footnote 3, the proceeding involved a petition by Dolly. The Commission denied the petition after determining that Dolly was a household goods carrier based on the company's own description of its business model. *See generally In re Petition of Dolly, Inc., to Amend Motor Carrier Rules or in the Alternative to Initiate Rulemaking*, 2017 WL 5565293 (Wash. U.T.C. Oct. 31, 2017). The matter was quite relevant to the docket on appeal here.

entering into agreements rather than for advertising. Opening Br. at 17 (citing AR at 131 ¶ 42). Again, Dolly failed to raise this argument below, waiving it. RCW 34.05.554. Regardless, Dolly’s argument fails because both the ALJ and the Commission showed a clear intent to impose penalties for advertising violations.

Initially, Dolly’s argument before this Court is inconsistent with the argument it made on administrative review. There it contended that the ALJ imposed penalties for advertising violations rather than for entering into jurisdictional agreements when petitioning for administrative review.⁹ AR at 205 (“Initial Order 02 imposes penalties for advertising based on RCW 81.80.075(4).”). This Court should decline to allow Dolly to change positions on appeal, especially given that Dolly’s argument that the Commission penalized it for advertising shaped the treatment of its petition for administrative review. *Arp v. Riley*, 192 Wn. App. 85, 91-92, 366 P.3d 946 (2015) (judicial estoppel).

Further, Dolly was correct below: the ALJ did impose penalties for advertising violations, not for entering into jurisdictional agreements. Staff sought penalties based on 25 advertising violations. AR at 78. The

⁹ The argument Dolly makes here is also inconsistent with other portions of its brief, where Dolly recognizes that the penalties were for advertising violations. *See* Opening Br. at 33 (contending that the Commission penalized it for published content rather than entering into agreements).

testimony and exchanges at hearing focused on advertising violations as the basis for the penalty. *E.g.*, TR. at 65:7-23. The ALJ found facts that supported 25 advertising violations. AR at 151-52 (paragraphs 15 and 16), 159 (finding 11 household goods advertising violations), 160 (finding 3 solid waste and 11 motor freight advertising violations). The penalty the ALJ imposed was consistent with those findings. AR at 154 (paragraph 23, noting that the advertising penalties sum to \$69,000), AR at 160 (imposing a \$69,000 penalty). The ALJ's inadvertent reference to imposing penalties for entering into agreements, at best for Dolly, creates ambiguity in light of the ALJ's other statements. *City of Vancouver v. Pub. Employment Relations Comm'n*, 180 Wn. App. 333, 350, 353, 325 P.3d 213 (2014) (an agency order is ambiguous if it contains conflicting language). This Court should resolve that ambiguity by holding that the ALJ imposed advertising-based penalties given the overwhelming evidence of the ALJ's intent. *Id.* at 350, 353 (courts interpret ambiguous agency orders to give effect to the agency's intent).

The Commission likewise indicated an intent to impose advertising-based penalties. It discussed only imposing advertising-based penalties in its final order, *see* AR at 299-300, signaling that it intended to impose penalties for advertising rather than for Dolly's entering into jurisdictional

agreements. Again, this Court should interpret the final order to give effect to the Commission's intent. *Id.* at 350.

The parties tried the issue of whether Dolly entered into jurisdictional agreements. The Commission did not err by deciding it.

D. The Commission Complied With its Procedural Rules When Correcting the Initial Order, and the Correction Did Not Prejudice Dolly

Dolly next claims that the Commission failed to comply with various procedural requirements when correcting the initial order. Opening Br. at 21-30. The Commission did not err because its procedural rules expressly authorized the correction, which did not expand the scope of the cease and desist order. Regardless, Dolly does not show prejudice from the correction.

1. The Commission's procedural rules permitted the ALJ to correct the initial order.

Dolly's claim that the Commission failed to comply with its procedural rules is without merit. Those rules allowed the correction of an obvious error, as was present here, under former WAC 480-07-875(2).¹⁰

¹⁰ The Commission amended its procedural rule addressing corrections after adjudicating Dolly's petition for administrative review. The relevant rule for Dolly's appeal provided:

The commission may act on its own initiative or on the motion any party to correct obvious or ministerial errors in orders. The commission may enter a corrected order or effect any corrections by notice or letter. The commission may direct the secretary to effect any corrections by notice

The Commission construes pleadings liberally based largely on the relief requested. WAC 480-07-395(4). Its procedural rules provided that it “may act . . . on the motion of any party to correct obvious or ministerial errors” in an order. Former WAC 480-07-875(2) (2003). It could enter a corrected order “by notice or letter,” and it need not have allowed for a response. *Compare* Former WAC 480-07-875(1) (2003) *with* former WAC 480-07-875(2) (former WAC 480-07-875(1) requires notice and an opportunity to comment; former WAC 480-07-875(2) does not); *Adams v. King County*, 164 Wn.2d 640, 650, 192 P.3d 891 (2008) (*expressio unius est exclusio alterius*).

The term obvious means “capable of easy perception” and “readily and easily perceived by the sensibilities or mind: requiring very little insight or reflection to perceive, recognize, or comprehend.” WEBSTER’S THIRD NEW INT’L DICTIONARY at 1559.

The Commission properly construed Staff’s petition as a motion to correct an obvious error. Staff did not seek to reverse any part of the initial order; it simply wanted to restrict the scope of the cease and desist order, which it considered erroneously overbroad. AR at 139-40. Dolly agreed.

of letter. The time for any available post-hearing review begins with the service of the correction, as to the matter corrected.

Former WAC 480-07-875(2) (2003).

AR at 166-75. The error is not difficult to grasp given that the Commission does not regulate interstate commerce or commerce taking place solely in sister states. The Commission reasonably interpreted WAC 480-07-395 and former WAC 480-07-875(2) as allowing the correction, and this Court should affirm. *See Verizon Nw., Inc.*, 164 Wn.2d at 915 (courts defer to agency interpretations of their own regulations).

Dolly, however, essentially contends that former WAC 480-07-875(2) only allowed the correction of scrivener's errors or similar ministerial errors. In support, it cites a number of Commission orders that it claims stand for that proposition. *See* Opening Br. at 28-30 (collecting cases). This Court should reject Dolly's argument.

Dolly's view of the rule effectively reads the word "obvious" out of former WAC 480-07-875(2). This Court should reject that reading, *Hayes v. Yount*, 87 Wn.2d 280, 290, 552 P.2d 1038 (1976) (courts should interpret a regulation to give effect to all of its language), and preserve the disjunctive "obvious" in the former rule. *See* former WAC 480-07-875(2) (allowing the correction of "obvious or ministerial errors") (emphasis added).

Further, the orders Dolly cites in support of its contentions regarding the limited scope of correction under former WAC 480-07-875(2) are inapposite. No party in any of those matters asked the Commission to correct a similar provision or argued that the Commission could not correct

an order in the way that it did this one.¹¹ *See Cazzanigi v. Gen. Elec. Corp.*, 132 Wn.2d 433, 443, 938 P.2d 819 (1997) (a case is not controlling authority for issues or arguments not presented in it). This Court should defer to the Commission’s reasonable determination that former WAC 480-07-875(2) allowed this correction. *Verizon Nw.*, 164 Wn.2d at 915.

2. The correction contracted, rather than expanded, the scope of the cease and desist order.

Dolly’s claim that the Commission expanded the cease and desist order when correcting the initial order is likewise meritless. The corrected order affirmed by the Commission restricts the scope of the order.

This Court interprets language in a Commission order in light of the entire order, giving particular weight to what the order “actually did.” *City of Vancouver*, 180 Wn. App. at 353. What a Commission order “actually” does is set out in the ordering section. *E.g.*, AR at 133 (“The Commission Orders:”). As relevant here, the ordering language contains the Commission’s cease and desist order. *Id.*

¹¹ Dolly claims that the Commission “reviewed and approved similar cease and desist language” in *Ghostruck*. Opening Br. at 29. That is incorrect. Although *Ghostruck*, petitioned for administrative review, it did not claim that the cease and desist provision was unlawful, and the Commission did not pass on the issue. *See generally, In re Determining the Proper Carrier Classification of, and Complaint for Penalties Against, Ghostruck, Inc.*, 2017 Wash. WL 2423799; *In re Determining the Proper Carrier Classification of, and Complaint for Penalties Against, Ghostruck, Inc.*, 2017 WL 1507678 (Wash. U.T.C. Apr. 25, 2017) . Unlike in *Ghostruck*, Staff pointed out the error here.

Both the uncorrected and corrected initial order share cease and desist ordering language providing that Dolly must:

“immediately . . . cease and desist operations as a household goods carrier within the state of Washington, a common carrier transporting property other than household goods in Washington, and a solid waste company . . . in Washington, and the Company must refrain from all such operations unless and until it first obtains a permit or certificate from the Commission.”

AR at 134, 160. That language captures any conduct by Dolly that constitutes engaging in business as a household goods carrier, a motor freight carrier, or a solid waste hauler.

The uncorrected and corrected initial orders differ in their provisions specifying how Dolly must cease and desist from advertising violations. *Compare* AR at 134 *with* AR at 160. The change between the orders does not expand the order to cover new conduct; to the contrary, it restricts the order to Dolly’s operations in Washington. AR at 160. Dolly’s claim fails.

3. The alleged violations related to the correction of the initial order did not prejudice Dolly.

Even if this Court accepted that the Commission committed procedural errors, it should not grant Dolly relief because Dolly has not shown substantial prejudice, RCW 34.05.570(1)(d), for four reasons.

First, the procedures used to correct the initial order had no effect on the outcome in this matter. The Commission explicitly stated that it

would have entered the same modified cease and desist order if it had decided the matter on administrative review, a statement it made after considering Dolly's various challenges to the corrected order. AR at 294-95. ("Whether we affirm the ALJ's correction to the initial order or independently adopt that correction on review, the result is the same"). Given that any such error had no effect, Dolly was not "substantially prejudiced by the action complained of." RCW 34.05.570(1)(d); *Rice v. Janovich*, 109 Wn.2d 48, 63, 742 P.2d 1230 (1987).

Second, Dolly got exactly what it asked for. Dolly filed an answer supporting Staff's petition for review. The Commission gave Dolly relief that it sought. *See* AR at 295 (paragraph 32). Dolly cannot claim the Commission injured it by doing so. *See Davis v. Globe Mach. Mfg. Co., Inc.*, 102 Wn.2d 68, 77, 684 P.2d 692 (1984) (invited error); *Cf. Reynolds v. Travelers' Ins. Co.*, 176 Wash. 36, 45, 28 P.2d 310 (1934) (discussing express and implied waiver).

Third, the correction benefited rather than prejudiced Dolly. Staff contended that the original cease and desist order violated the dormant commerce clause, AR at 139-40, and Dolly agreed. AR at 166. Dolly has abandoned any claim that the corrected cease and desist order is erroneous, *Holder*, 136 Wn. App. at 107 (abandonment); *see generally* Opening Br. at

1-34, thereby conceding that the correction cured a constitutional error. That cure did not prejudice Dolly.

Fourth, Dolly appears to claim two forms of prejudice, and neither holds any merit.

Dolly initially appears to claim that by treating Staff's petition as a motion to correct, the Commission foreclosed Dolly's right to challenge the initial order. Opening Br. at 26. That claim is baseless. Dolly filed a 43-page petition for administrative review of the uncorrected and corrected initial orders. *See* AR at 180-222. Its petition included the claims Dolly now argues the Commission foreclosed. *Compare* AR 170-74 *with* AR 193-96. The Commission considered and rejected those claims. Dolly was heard, it simply did not prevail, and an unfavorable decision is not synonymous with prejudice.

Dolly also appears to contend that the correction changed the procedures for seeking review to its detriment. Opening Br. at 26, 29. Dolly ignored any change and filed its brief in accordance with the procedures set out in the uncorrected initial order. AR at 134, 222 (brief submitted 21 days after entry of the uncorrected initial order). The Commission did not reject the brief on procedural grounds. Under those facts, Dolly cannot claim prejudice.

E. Substantial Evidence Supports the Commission’s Findings that Dolly Engaged in Jurisdictional Advertising

Finally, Dolly contends that the Commission erred by basing violations of RCW 81.80.075 and RCW 81.80.355 on: (1) an article about its Seattle billboard, (2) a *Seattle Times* article, (3) a *Chicago Tribune* article, and (4) its Yelp page. Opening Br. at 30-34. There was no error: the Commission did not base any findings on the newspaper articles and the Yelp finding is supported by substantial evidence.

A person advertises to transport household goods when “a publication for which the person is responsible is reasonably susceptible to being interpreted by consumers as an advertisement to transport household goods.” *Ghostruck*, 2017 WL 2423799 at *8.

This Court’s review is simplified by the fact that the Commission did not find violations based solely on the three newspaper articles Dolly cites.

First, the Commission did not find an advertising violation based on the newspaper article about Dolly’s billboard. *See* Opening Br. at 31. The ALJ did not discuss the article or otherwise find a violation based on it. AR at 151-52 (finding advertisements on Dolly’s website, billboard, and Facebook, Twitter, LinkedIn, iTunes, Craigslist, YouTube, Pinterest, Instagram, and Yelp pages). And the Commission did not suggest that it

was finding a violation based on the article on review. *See* AR at 152-53, 159, 289-304.

Dolly incorrectly contends that the Commission must have found that the article constituted an advertisement based on Staff's complaint and Ms. Paul's testimony about the article. *See* Opening Br. at 31. Ms. Paul testified that the newspaper article and billboard merged into a single violation. TR. at 32:23-33, 53:16-25. The corrected initial order is consistent with that testimony, as discussed above, finding a violation based on the billboard, but not the article. *See* AR at 151-52.

Second, the Commission did not find an advertising violation based on the *Seattle Times* article cited by Dolly. Opening Br. at 32. Staff did not allege any violations based on the article, *see* AR at 72-81, and did not introduce testimony or other evidence about it at hearing. *See* AR at 113 (Staff's amended exhibit list). Neither the ALJ nor the Commission mentions the article in the discussion or ordering sections of their respective orders. *See* AR at 149-61, 289-305.

Third, the Commission did not find a violation based on the *Chicago Tribune* article cited by Dolly. Opening Br. at 32. Staff did not allege a violation for the article independently, nor did it offer testimony about it as a stand-alone article. And again, neither the ALJ nor the Commission

discuss this particular article in their discussion or ordering sections. *See* AR at 149-61, 289-305.

Staff did, however, allege a violation for Dolly's Instagram page, where Dolly displayed the *Chicago Tribune* article. *See* AR at 113, 385; TR. at 41:12-22. The Instagram post uses the article to describe Dolly's services. TR. at 41:18-22. The Commission could readily infer that Dolly, the entity responsible for the page, displayed the article to promote those services and find a violation for that promotion. AR at 152 (finding the Instagram page was an advertisement); *Cuesta v. Emp't Sec. Dep't*, 200 Wn. App. 560, 570, 402 P.3d 898 (2017) (this Court reviews the inferences allowed by the evidence in the light most favorable to the party prevailing below).

With regard to the Commission's finding that Dolly's Yelp page constituted jurisdictional advertising, substantial evidence supports it.

A reasonable person would be convinced that Dolly's Yelp page constituted a jurisdictional advertisement. As the ALJ noted, the page identifies Dolly as providing "Moving, Courier, and Delivery Services, [and] Junk Removal and Hauling." AR at 152, 386. The page also displays photos of "men in Dolly T-Shirts loading equipment into vehicles." TR at 42. While Dolly contends that it has no control over the content, it nevertheless "claimed" the Yelp page, meaning that it acknowledged that

the page describes Dolly's business, TR. at 42:11-17, 61:8-62:3, and that it could use it to communicate with customers posting reviews. TR. at 96:9-97:2; *see* TR. at 61:25-62:3. The Commission determined that Dolly adopted the page's description of its business by claiming it and by failing to use its power to disclaim that it provided "Moving, Courier, and Delivery Services" when communicating with customers. *See* AR at 152, 386. This Court should defer to that reasonable inference from the evidence. *Cuesta*, 200 Wn. App. at 570.

Dolly contends that it cannot be responsible for the Yelp page, and thus the page is not an advertisement, because the page "aggregates reviews" from customers. Opening Br. at 33. But Dolly is responsible for its own actions. The company could have disclaimed the page, but did not. Or it could have used its ability to respond to reviews to clarify that it did not provide jurisdictional services but, again, did not. It is responsible for its failure to do either.

F. This Court Should Deny Dolly's Request for Attorney Fees Because Dolly Fails to Show That it is a Qualified Party and Should Not Prevail, and Because the Commission's Order was Substantially Justified

Dolly requests attorney fees under Washington's Equal Access to Justice Act (EAJA), RCW 4.84.350. *See Raven v. Dep't of Soc. & Health Servs.*, 177 Wn.2d 804, 831, 306 P.3d 920 (2013). This Court should deny

that request because: (1) Dolly is not a qualified party, (2) Dolly should not prevail, and (3) the Commission's order was substantially justified.

The EAJA requires a court to award attorney fees and other expenses to a "qualified party that prevails in a judicial review of an agency action" unless it finds "that the agency action was substantially justified or that circumstances make an award unjust." RCW 4.84.350. Action is substantially justified if "it had a reasonable basis in law and in fact." *Raven*, 177 Wn.2d at 832. The action "need not be correct, only reasonable." *Id.*

The requesting party bears the burden of demonstrating that it is qualified under the EAJA. *Edelman v. Pub. Disclosure Comm'n*, 152 Wn.2d 584, 592, 99 P.3d 386 (2004); *Shaw v. Dep't of Retirement Sys.*, 193 Wn. App. 122, 135, 371 P.3d 106 (2016). The agency then bears the burden of showing that its position was substantially justified. *Puget Sound Harvester's Ass'n v. Dep't of Fish & Wildlife*, 157 Wn. App. 935, 952, 239 P.3d 1140 (2010).

This Court should deny Dolly's fee request for three reasons.

First, Dolly failed to shoulder its burden of proving it was a qualified party. *Edelman*, 152 Wn.2d at 592; *Shaw*, 193 Wn. App. at 135. To be a qualified party, Dolly needed to show that its net worth "did not exceed five million dollars" when it filed its petition for judicial review. RCW 4.84.340(5)(b). Dolly offered no evidence that established its net worth at

the time of its petition. Dolly instead cited Staff's investigation, which disclosed Dolly's yearly revenues. As net worth is a function of assets and liabilities, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY at 1520, 1519 (defining net worth and net assets), and not solely a function of revenues, *see id.* at 1943 (defining revenues), Dolly's evidence is irrelevant to the establishment of its qualification for fees, and it cannot have satisfied its burden. This Court should deny its request. *Edelman*, 152 Wn.2d at 592; *Shaw*, 193 Wn. App. at 135.

Second, RCW 4.84.350 provides for a fee award to a party prevailing on judicial review. Dolly should not prevail on any of its claims, as described above.

Third, even if this Court holds that Dolly prevails on one or more of its claims, the Commission was substantially justified in its actions. As explained above, the Supreme Court has recognized that issues raised in an answer are properly before the Commission, and the Commission reasonably believed that Dolly raised the issue of whether it entered into jurisdictional agreements in its answer. Dolly also specifically asked the Commission to make a finding in its favor after the parties tried the issue. AR at 222. The Commission's procedural rules allowed the correction of the initial order, which the Commission performed with Dolly's initial blessing in order to cure a constitutional infirmity in the initial order. And

the Commission had tenable bases for finding that Dolly engaged in jurisdictional advertising. Given that law and those facts, a reasonable person could conclude the Commission acted with substantial justification.

V. CONCLUSION

The Commission respectfully requests that this Court affirm the Commission's final order in all respects and deny Dolly's request for attorney fees.

RESPECTFULLY SUBMITTED this 12th day of July 2019.

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I hereby certify that I have this day served the foregoing Response Brief of Washington Utilities and Transportation Commission upon the persons and entities, addressed as shown below, by electronic mail:

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