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IN THE COURT OF APPEALS
STATE OF WASHINGTON
DIVISION II

AT&T COMMUNICATIONS OF THE PACIFIC NORTHWEST, INC.,
Appellant,
v.
WASHINGTON UTILITIES AND TRANSPORTATION
COMMISSION,
Respondent,
and
SANDY JUDD and TARA HERIVEL,
Intervenors/Respondents,
and
T-NETIX, INC.,
Interested Party.

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INTRODUCTION

This case arises under Washington's telecommunications statutes and rules that were enacted in the late 1980s and 1990s in response to restructuring in the telecommunications industry and the emergence of new types of service providers. A major concern at the time was the new entities, which were neither local exchange carriers (like U.S. West) nor interexchange carriers (like AT&T), that were providing operator or aggregator service without disclosing their rates. In contrast, the carriers like AT&T and U.S. West had long standing obligations to publish their rates in statutorily required tariffs. Because certain new market entrants were not subject to tariffs, the Washington Legislature enacted statutes requiring that "alternate operator services companies" make rate disclosures. The Washington Utilities and Transportation Commission ("Commission") adopted implementing rules. These rate disclosures at issue here involve operator assisted collect calls made from public payphones in prisons in the state of Washington from 1996 to 2000.

The Washington telecommunications statute and rules expressly define an "alternate operator services company" ("AOS") to mean the person "providing a connection to intrastate or interstate long distance services from" locations of call aggregators. *See* RCW 80.36.520 (1988) (emphasis added). Despite clear evidence that AT&T did not perform

operator services for the prisons and did not provide the connection from the prisons to the carriers' networks, the Commission disregarded the facts and clear statutory 'connection' test and instead defined the AOS as the entity with the "direct business relationship" with consumers.

(AR006819.)¹ The Commission, based largely upon a billing relationship between the called party and AT&T, ignored the unambiguous language of the statute and its rules and determined that AT&T, the long distance carrier, was an AOS. As a result of the Commission's clearly erroneous interpretation adopted by the lower court, AT&T wrongly confronts substantial statutory damage claims, even though Plaintiffs-Intervenors have acknowledged they suffered no actual injury.

The Commission further erred because the Legislature never intended for the AOS rules to apply to carriers like U.S. West or AT&T that otherwise disclosed all their rates in tariffs. Indeed, consistent with this legislative intent, the Commission's rules between 1991 and 1999 explicitly exempted local exchange carriers from the definition of an AOS. Even though AT&T was also a registered local exchange carrier during

¹ Pursuant to RAP 9.8 and RAP 10.4(f), citations to the administrative record are designated "AR____" followed by the Bates number of the applicable page in the administrative record. Citations to the Clerk's Papers are designated "CP-____" followed by the Bates number of the applicable page in the Clerk's Papers. Citations to the verbatim report are designated as "RP____" followed by the applicable page in the verbatim report.

this time period, the Commission, based upon a newly identified condition found nowhere in either the statute or rules, refused to include AT&T within the exemption in this case.

ASSIGNMENTS OF ERROR

1. The lower court erred in its determination that AT&T is an AOS because the definition of an AOS in the statutes and rules does not apply to AT&T.²

2. The lower court erred in failing to find that the Commission violated the due process clauses of the U.S. and Washington Constitutions by not giving AT&T fair warning of the Commission's definition of an AOS as the company with the "direct business relationship with consumers," a standard first announced in these proceedings.

3. The lower court erred in its determination that, although prior to 1999 the AOS definition exempted local exchange companies (the "LEC exemption") and as of 1997 AT&T was a registered local exchange company, AT&T could not avail itself of the LEC exemption from AOS rate disclosure requirements.

² Revisions to the regulations enacted in 1999 relabeled an AOS as an "operator service provider" ("OSP") and both of those terms are used at times in this brief.

STATEMENT OF THE CASE

The initial complaint was filed as a putative class action in 2000 in King County Superior Court by Plaintiffs-Intervenors Sandy Judd and Tara Herivel (“plaintiffs”) against GTE Northwest, US West Communications, Centurytel Telephone Utilities, Northwest Telecommunications (a.k.a “PTI Communications, Inc.”), T-Netix and AT&T Communications of the Pacific Northwest (“AT&T”). (AR0000011.) The plaintiffs sought damages on behalf of a purported class of persons who accepted collect calls from inmates incarcerated in Washington state prisons but who allegedly did not receive rate disclosures during the time period from June 20, 1996 to December 31, 2000. (AR000013-14.)

On August 25, 2000, all defendants moved to dismiss the complaint or, in the alternative, to stay the matter while the Commission determined whether the defendants were in violation of the AOS statutes and rules. (AR000004; AR000084-96; AR006948-59.) The King County Superior court dismissed the three local phone companies: U.S. West, GTE and PTI. (AR000004) The plaintiffs appealed that dismissal to the Washington Court of Appeals and the Supreme Court. (AR000004-5; AR000999-1018; AR005143-51.) Both reviewing courts affirmed the dismissals. (AR000004-5; AR000999-1018; AR005143-51.)

The King County Superior Court also referred two questions to the Commission under the doctrine of primary jurisdiction: whether AT&T or T-Netix was an AOS and whether the rate disclosure rules had been violated. (AR000071-72.) Following discovery and briefing, AT&T and T-Netix each moved for summary determination. (AR000120-33; AR000510-25.)

On April 21, 2010, the Administrative Law Judge (“ALJ”) issued an initial order, Order 23, determining that the owner of the P-III platform that made the connection from the prisons to local or long distance services was the AOS. (AR003538-94; AR003577 at ¶97.) In so doing, the ALJ mistakenly determined that AT&T, not T-Netix, owned the P-III platform, contrary to T-Netix’s prior admission in response to written discovery requests that it owned the platform. (AR002097) The ALJ also held that AT&T, a registered local exchange company (“LEC”), could not avail itself of the exemption of LECs from the AOS definition in Commission rule WAC 480-120-021 prior to 1999. (AR003585 at ¶121.) The ALJ declined to rule on whether or not the required rate disclosures had been made because neither AT&T nor T-Netix had raised that issue in their summary determination motions and no party presented evidence to address it. (AR003553 at ¶40.) The ALJ ruled that issue would need to be addressed during a later full evidentiary hearing. (AR003589 at ¶129.)

Following the ALJ's initial order, AT&T petitioned the Commission to review and correct the ALJ's error regarding who owned the P-III platform. (AR004207-37.) In response to AT&T's petition, the Commission issued its Order 25 on March 31, 2011 ("Order 25") in which it created a new reason why AT&T was the AOS, opining for the first time that AT&T was the AOS because it "had a direct business relationship with consumers." (AR006819-21 at ¶¶ 15-19.) It also affirmed the ALJ's determination that AT&T could not invoke the LEC exemption and, even though the ALJ had said that there was an insufficient record on which to determine whether the required rate disclosures were made, it held that AT&T had violated the Commission's rules by failing to make the required rate disclosures. (AR006834 at ¶ 52; AR006835 at ¶ 56; AR006839 at ¶ 70.)

AT&T filed a petition in the Thurston County Superior Court (the lower court in this appeal) to vacate the Commission's determinations in Order 25 on April 29, 2011. (CP-00000007-15.) On February 2, 2012, the lower court issued a four page summary order. (CP-000000001534-37.) It affirmed the Commission's determination that AT&T was the AOS. (CP-000001536.) It also affirmed the Commission's conclusion that AT&T could not invoke the LEC exemption in WAC 480-120-021 for the inmate collect calls made from 1997 to 1999. (*Id.*) The lower court

set aside and remanded to the Commission its determination that AT&T had violated the Commission's rule by failing to make the required rate disclosures on the ground that AT&T and T-Netix were not provided a full opportunity to present evidence on the issue. (CP-000001536-37.)

On January 9, 2012, AT&T filed a notice of appeal. (CP-000001461-63.)

STATEMENT OF FACTS

A. The Parties

The plaintiffs are purported representatives for a class of individuals and entities that received collect calls from Washington prisons from June 20, 1996 to December 31, 2000. Interested Party T-Netix is a company specializing in providing inmate telecommunications services. Appellant AT&T is a telecommunications company authorized to provide local and long distance services in the state of Washington.

B. The Relevant Telecommunications Marketplace

A brief overview of terms and industry conditions may aid in understanding the statutes, rules and the parties' arguments. In 1984, divestiture resulted in the break-up of AT&T and the Bell System, and the creation of 22 separate regional operating companies. The national telephone network changed from one system for local and long distance

services to a system of 164 separate units called local access and transportation areas or LATAs. *Washington Indep. Tel. Ass'n v. Telecommunications Ratepayers Ass'n for Cost-Based & Equitable Rates (TRACER)*, 75 Wn. App. 356, 358, 880 P.2d 50, 52 (1994); *see also United States v. American Tel. and Tel. Co.*, 552 F. Supp. 131 (D.D.C. 1982), *affd. sub nom. Maryland v. United States*, 460 U.S. 1001, 103 S. Ct. 1240, 75 L. Ed. 2d 472 (1983).

Telephone calls often are described as being either intraLATA or interLATA. An intraLATA call is either a local call made within one local calling area or a toll call made from one local calling area to another local calling area within the same LATA. *Washington Indep. Tel. Ass'n.*, 75 Wn. App. at 359. An interLATA call is a call made from one LATA to another. WAC 480-120-021 (2006); *Global NAPs California, Inc. v. Public Utilities Com'n of State of Cal.*, 624 F.3d 1225, 1229 (9th Cir. 2010). LATAs can cross over state boundaries and encompass multiple area codes. *See generally, U.S. v. Western Elec. Co.*, 569 F.Supp. 990 (D.D.C. 1983) (reviewing plan of divestiture and approving various LATAs). Thus, four LATAs are located in the state of Washington, two of which cover most of the state — LATA 674 covering Seattle and the

western half of the state, and LATA 676 covering Spokane and the eastern half of the state, as well as parts of Idaho and Oregon.³

An interexchange telephone service provider or IXC provides long distance service on interLATA calls. *In re Utex Commc'ns Corp.*, 457 B.R. 549, 565 (Bankr. W.D. Tex. 2011). It interconnects calls from one LATA to another through access lines and network interconnection points known as points of presence or POPs. *U.S. v. Western Elec.*, 569 F. Supp. at 994 n.13. Local exchange companies or LECs handle calls between parties within the same LATA. In Washington during the relevant time, AT&T and all LECs were required to file tariffs with the Commission that included their rates. *Washington Indep. Tel. Ass'n*, 75 Wn.App. at 359 n.3.

C. Telecommunications Needs in the Prisoner Call Context

Prisons are “call aggregators” because they make telephones available in the ordinary course of business by way of public payphones. There are a number of service providers involved in completing the calls from the prisons to the called party, including companies providing

³ See *Washington Indep. Tel. Ass'n*, 75 Wn. App. at 359 n.3. LATAs 672 and 960 also cover smaller parts of Washington, along with other states. See http://www.latamaps.com/Telecom_Maps/Regional_LATA_maps/Northwest_LATA_Map_-_Maponics.pdf (map of LATAs in northwest U.S.) (checked June 27, 2012); see also <http://www.wutc.wa.gov/webdocs.nsf/de53b07997d108ea882563b50072c5b3/1cee0d8241dad66b88256f5600609f8a!OpenDocument> (linking to WUTC map of local exchange areas and LATAs in Washington as of Jan. 30, 1997) (checked June 27, 2012).

operator assisted service specific to the prison and the traditional local exchange and long distance service providers.

Turning specifically to the operator assisted services, prisons require specialized operator services on payphones for several reasons. (AR003549.) In addition to traditional operator services, such as assistance connecting calls, inmate prison payphones have unique security concerns. (*Id.*) Inmate telephone calls are generally restricted to calling pre-approved numbers. (*Id.*) Inmates often are prevented from speaking with live operators. (*Id.*) Instead, the security system screens the called number to make sure it was on the inmate's pre-approved list. (AR000125.) This specialized equipment also connects calls to the local exchange carrier after performing these functions. (AR000776.)

Prior to 1992, AT&T assisted with inmate collect calls. (See, e.g., AR002894.)⁴ At that time, AT&T sought and obtained a waiver of certain AOS requirements for inmate collect calls. (*Id.*) AT&T's role changed beginning in 1992 and throughout the relevant time period. After 1992, the local exchange companies or LECs were contractually required to be

⁴ AT&T also provided operator services from other call aggregator locations such as hotels or hospitals prior to 1992 and even during the relevant period.

responsible for inmate call connection and operator services.⁵ *See* I.B, *infra*.

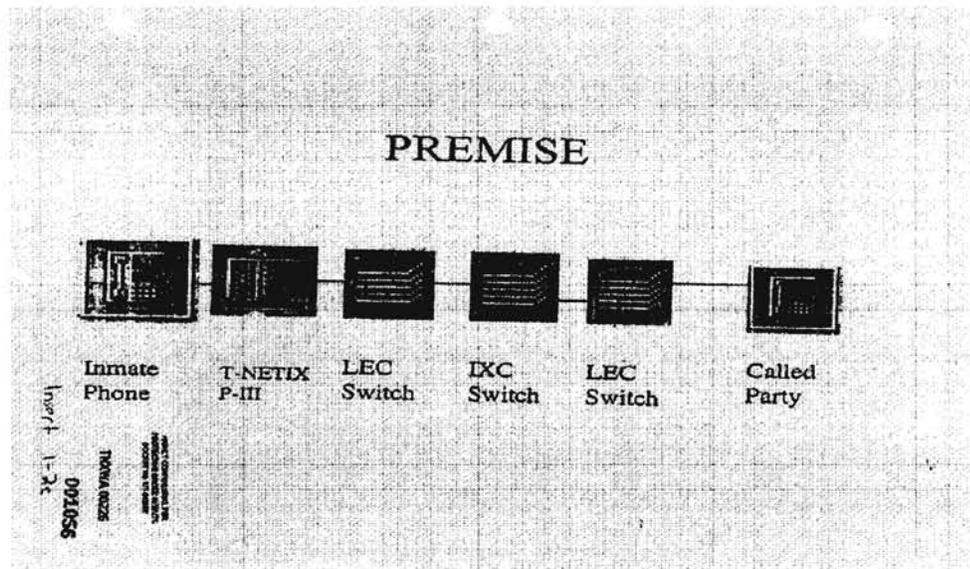
The LECs carried out their connection and operator services responsibilities for the calls at issue by having T-Netix perform these functions. (AR000254-56 at ¶¶6, 9.) T-Netix provided the operator assisted services and inmate call connection services through its premise-based platform called the P-III. (AR003590-91; ¶¶135, 143) (ALJ's findings that P-III Premise platform performed these functions). T-Netix owned the P-III platform. (AR002097; AR003813.) T-Netix personnel designed, installed and autonomously operated the P-III platform. (AR003787-88 at ¶14; AR003808; AR003812-13.) T-Netix's P-III platform performed the operator services whether the calls were local, intraLATA or interLATA. (AR003789 at ¶16.) These operator services included rate quote announcements. (AR003787-91 at ¶¶13-20.) The P-III platform monitored, blocked or recorded inmate calls. (AR000254-55 at ¶6.) Its security system screened the called number to make sure it was on the inmate's pre-approved list. (*Id.*) If the called number was on the pre-approved list and passed the security screening, the P-III platform outpulsed the call to the local exchange carrier. (AR001098 at ¶9; *see also*

⁵ It was because of these responsibilities that the LECs US West, GTE and PTI applied for and received waivers from the Commission with respect to the AOS requirements. (AR000264-278.)

AR003716-18 at ¶¶13, 15; AR002712-13 at ¶¶4-6.) The P-III platform would advise the called party that the call was from an inmate and advise of the procedure to accept the call. (AR003720 at ¶18(g).)

D. The Prisoner Collect Calls

The collect calls at issue began when an inmate used a payphone at one of the prisons and dialed a pre-approved telephone number to make a collect call. (AR003719.) The T-Netix P-III platform performed security checks, provided operator services and connected the call to the local exchange service or LEC for that prison location, either U.S. West, GTE or PTI. (AR000254-55.) For a local or intraLATA call, the LEC for that local area also would make the final connection of the call to the called party. (AR002272.) For an interLATA call, the LEC serving the prison connected the call to AT&T's point of presence or "POP." (AR002272-73.) AT&T, as the IXC, would route the call on to another LEC in the LATA of the called party. The LEC for the called party would complete the call. (*Id.*) In all instances, the call was connected from the prison to local or long-distance services by T-Netix. (AR003790.) A diagram originally created by T-Netix and used by the plaintiffs' expert in the Commission proceeding visually depicts the connections on an interLATA prison collect call that would involve AT&T, depicting AT&T's position as the "IXC switch":



(AR001056).

E. The Contractual Arrangements Confirm the Parties' Respective Roles

The operator services and equipment necessary to provide inmate telecommunications service to the prisons are noted in the contractual arrangement in 1992 between the Washington Department of Corrections (“DOC”) and AT&T and three additional agreements between AT&T and each of the LECs: US West, GTE and PTI. (AR000029-53; AR000207-15; AR000219-27; AR000232-40.) Pursuant to these agreements, AT&T was generally to provide only interLATA long-distance and international service, and the LECs were to provide local and intraLATA long-distance

service, to DOC prisons. (AR000029.)⁶ Specifically the DOC allocated to the LECs the responsibilities to “provide...operator service,” to provide “live or mechanical operator announcements for all personal calls,” to complete “all...local and intraLATA calls from the Public Pay Telephones,” and to deliver “interLATA traffic originating from the Public Pay Telephones to AT&T’s Point of Presence over switched access facilities.” (AR000183; AR000208-09; AR000220; AR000234.) In addition, for interLATA long-distance calls, the LECs were to deliver those calls from the prisons to AT&T’s point of presence. (AR000208; AR000220; AR000233.) The agreements further made the LECs (or someone retained by them) responsible for providing operator services, including “live or mechanical operator announcements,” for prison collect calls. (AR000209; AR000220-21; AR000234.) T-Netix provided the equipment and operator services to originate and carry the calls from the prisons to local and long distance service providers.

F. Washington Rate Disclosure Statutes and Rules Applicable to AOS Companies

In 1988, the Washington Legislature enacted a statutory scheme in response to fundamental industry restructuring and the emergence of new

⁶ Pursuant to its contract with PTI only, AT&T also provided intraLATA services, but not local services, for calls from prisons within PTI’s traditional operating territory. (AR002845-2853.)

service providers, which the history clearly reveals was not aimed at AT&T. RCW 80.36.510 enacted in 1988 notes that “The legislature finds that a growing number of companies provide, in a nonresidential setting, telecommunications services necessary to long distance service without disclosing the services provided or the rate.” (emphasis added.)

The Senate and House Reports explained:

As a result of the Bell System divestiture, a number of companies are providing “alternate operator services” in order to connect callers to long distance service from customer-owned pay phones or phones in hotel rooms and hospitals. Although some companies may charge several dollars to connect a caller to long distance from these phones, the customer is often unaware of the charge until it appears on the monthly bill from a local phone company.

(AR003345-46) (emphasis added.)

A concerned citizen whose complaints became part of the legislative history described the problem:

I have recently received a bill from Pacific Northwest Bell which includes a charge by a company calling itself Central Corp. . . . This item is in respect of a telephone call which my wife made to me . . . from a hotel in San Diego. The amount is \$6.25 for a call which I am informed by AT&T would have cost \$1.51 had it gone directly through them. The services of Central Corp. were neither solicited or needed and, apart from their intercept of the call and request for a credit card number it is difficult to understand what purpose they fulfilled.

(CP-000000941) (Jan. 18, 1988 letter to Commission) (emphasis added.)

As stated during the House debate:

This will attempt to fix the problem with one aspect of deregulated telephone services. Toll calls made from hotels, motels, hospitals, some pay telephones are handled by what are called alternate operator service companies. So that's an alternate to AT&T, the big phone company. Some of these companies charge a thick access fee to handle that call and some customers have received large bills. This bill simply requires that there be a disclosure of those costs so the customer is warned that he or she may pay more than what they normally do at home.

(CP-000000915) (emphasis added.)

The legislative history clearly distinguished AOS providers subject to the rate requirement from AT&T. RCW 80.36.520, defines the alternate operator services company as “a person providing a connection to intrastate or interstate long-distance services from places including, but not limited to, hotels, motels, hospitals, and customer-owned pay telephones.” RCW 80.36.520 (1988). The Legislature also enacted a statute, RCW 80.36.530, making a violation of RCW 80.36.520 an unfair and deceptive act or practice in violation of the Consumer Protection Act subjecting a violator to damages in the amount of the cost of the service provided plus an additional penalty of two hundred dollars. RCW 80.36.530 (1988). It thereafter invited the Commission to adopt rules for AOS companies. RCW 80.36.524 (1990).

The Commission made rules regulating AOS companies in 1989, and subsequently amended those rules in 1991 and 1999.⁷ Each of these versions of the rules closely followed the Legislature’s definition of an AOS in RCW 80.36.520. The 1989 version defined an AOS as an entity “providing a connection to intrastate or interstate long-distance or to local services from places including, but not limited to, hotels, motels, hospitals, campuses, and customer-owned pay telephones.” WAC 480-120-021 (1989) (emphasis added). The 1991 version defined an AOS as an entity “providing a connection to intrastate or interstate long-distance or to local services from locations of call aggregators.” WAC 480-120-021 (1991) (emphasis added). The 1999 version relabeled an AOS “as an operator service provider (OSP),” which it then defined, again following the statutory definition, as an entity “providing a connection to intrastate or interstate long-distance or to local services from locations of call aggregators.” WAC 480-120-021 (1999) (emphasis added). Both the 1991 and 1999 versions defined “call aggregators” as locations with numerous telephones like “hotels, motels, hospitals, campuses, and pay phones.” WAC 480-120-021 (1991); WAC 480-120-021 (1999).

⁷ The Commission sought comments from regulated telecommunications companies in connection with its enactment of the proposed AOS rules in 1989. AT&T which was then providing the connection and operator services for prison collect calls and for other call aggregator locations submitted its comments on December 21, 1988. (AR003086-91.)

The 1989 version of the Commission's rules required notices to be physically posted on telephones at call aggregator locations alerting users of those telephones that charges for services from those telephones may be higher than normal and providing users with dialing directions to obtain information about those charges. WAC 480-120-141 (1989). The 1991 version continued to require this physical posting on the telephones, and added that if consumers requested information regarding call charges, then AOS companies had to disclose such information at no cost to the consumer. WAC 480-120-141 (1991). The 1999 version continued the physical posting requirement, though requiring different information, and introduced for the first time a requirement that certain AOS companies (now referred to as OSPs) verbally advise consumers how to receive a rate quote with no more than two key strokes. WAC 480-120-141 (1999).

SUMMARY OF ARGUMENT

After deregulation of the telecommunications industry, the Legislature enacted statutes to require rate disclosures by AOS companies providing operator services from call aggregator locations to local and long distance service providers. It used clear and unambiguous language to define the AOS required to make the mandatory rate disclosures. The statutory definition, which also appears in materially identical language in the Commission rules, provides that the AOS is the "person providing a

connection to intrastate or interstate long distance services from” call aggregators. RCW 80.36.520 (emphasis added).

More than twenty years after the enactment of the AOS statutes and rules, the Commission interpreted the AOS definition in an adjudicatory proceeding and determined for the very first time that it applied to the interexchange long distance carrier AT&T, not because AT&T was the “person providing a connection to intrastate or interstate long distance services from” call aggregators, but because it had a “direct business relationship” with consumers. In so holding, the Commission gave the AOS definition a meaning inconsistent with its legislative purpose, its express terms and the understanding of the Legislature, the parties, their experts and the ALJ. The Commission’s interpretation ignores and supplants the plain language of the definition. The lower court adopted the Commission’s interpretation, giving it deference it did not deserve in light of the clear definitional language in the AOS statutes and rules. No deference is warranted where an agency replaces actual clear statutory language with terms of its own devising.

In fact, the Commission’s interpretation of the AOS statutes and rules is so unfounded in the AOS definitional language as to deprive AT&T of fair notice in violation of AT&T’s constitutional right to due process under the Fifth and Fourteenth Amendments to the U.S.

Constitution and Article I, Section 3 of the Washington Constitution. U.S. Const. amends. V and XIV, § 1; Wash. Const., art. I, § 3. AT&T had every reason to believe reading the AOS statutes and rules that it was not an AOS. Nothing in that language put AT&T on notice of the Commission's interpretation. Indeed, the Commission's interpretation of the AOS statute and rules is so unclear from the definitional language that the Commission's own ALJ determined, as did AT&T, that the critical "connection" was the T-Netix P-III platform that provided operator services and connected the calls from the prisons to the local exchange companies. The Commission never gave AT&T any pre-enforcement warning of its new "direct business relationship" test prior to its determination in this adjudicatory proceeding. The injustice of applying the Commission's standard announced in 2011 to AT&T's conduct in the 1996 to 2000 time frame is amplified significantly by the draconian penalties AT&T unjustly faces which are far greater than the injury any plaintiff suffered and which serve no legitimate state interest given AT&T's good faith basis to believe it had no disclosure duty.

The AOS statutes and rules at issue never have been interpreted to apply to an interexchange carrier like AT&T. Accordingly, the Commission's retroactive application of its newly created standard to

AT&T violates AT&T's constitutional rights to due process under the U.S. and Washington state constitutions.

In addition, the Commission improperly concluded that AT&T was not entitled to the LEC exemption even though the Commission's pre-1999 rule defined an AOS as an entity "other than a local exchange company" and even though, as of 1997, AT&T was a registered local exchange company. The Commission could reach that conclusion only by importing into the definition an unwritten condition that a local exchange company must have been "providing local exchange services" for the relevant calls. Because the plain language of definition does not bear that interpretation, the Commission's conclusion should be reversed.

STANDARD OF REVIEW

Construction of a statute is a question of law which an appellate court reviews *de novo* under the error of law standard. *Waste Mgmt. of Seattle, Inc. v. Util. and Transp. Comm'n*, 123 Wn.2d 621, 869 P.2d 1034 (1994). The applicability of a constitutional guaranty also raises a question of law subject to *de novo* review. *Weden v San Juan County*, 135 Wn.2d 678, 958 P.2d 273 (1998); *Washam v. Sonntag*, 74 Wn. App. 504, 507, 874 P.2d 188, 191 (1994). An appellate court reviewing agency action "sits in the same position as the superior court, applying the standards of the Washington Administrative Procedure Act directly to the

record before the agency.” *Tapper v. Employment Sec. Dep’t*, 122 Wn.2d 397, 402, 858 P.2d 494, 497 (1993). A reviewing court may reverse an administrative decision if: (1) the agency has erroneously interpreted or applied the law; (2) the decision is not based on substantial evidence; or (3) the decision is arbitrary or capricious.” *Conway v. Dep’t of Soc. & Health Servs.*, 131 Wn. App. 406, 417, 120 P.3d 130, 135 (2005).

Deference to an agency’s interpretation is not appropriate where a statute is unambiguous, *Waste Mgmt. of Seattle Inc. v. Util. and Transp. Comm’n*, 123 Wn.2d 621, 627-28, 869 P.2d 1034, 1038 (1994), or when the agency interpretation is inconsistent with a statutory mandate. *Bostain v. Food Exp., Inc.*, 159 Wn.2d 700, 716-17 & n.6, 153 P.3d 846, 854 & n.6 (2007).

ARGUMENT

I. THE LOWER COURT ERRED IN HOLDING THAT AT&T IS AN AOS FOR THE INMATE COLLECT CALLS AT ISSUE.

A. **Statutes and Agency Rules Must be Interpreted According to their Plain Meaning.**

The Supreme Court of Washington has stated the relevant legal standards as follows:

Construction of a statute is a question of law which we review *de novo* under the error of law standard. The courts retain the ultimate authority to interpret a statute. Whether an agency’s construction of the statute is accorded deference depends on whether the statute is ambiguous. Where an agency is charged with the administration and

enforcement of a statute, the agency's interpretation of an ambiguous statute is accorded great weight in determining legislative intent. Absent ambiguity, however, there is no need for the agency's expertise in construing the statute. Furthermore, we will not defer to an agency determination which conflicts with the statute.

Waste Mgmt. of Seattle, Inc. v. Util. and Transp. Comm'n, 123 Wn.2d 621, 627-28, 869 P.2d 1034, 1038 (1994) (internal citations omitted) (affirming Superior Court's setting aside of the Commission's order on APA review); *see also Bostain v. Food Exp., Inc.*, 159 Wn.2d 700, 716-17 & n.6, 153 P.3d 846, 854 & n.6 (2007) (courts do not defer to an agency's statutory interpretation, even if it is stated in a rule, when the statute is unambiguous or when the agency's interpretation conflicts with the statute).

Where statutory language is plain and unambiguous courts will not construe the statute but will glean the legislative intent from the words of the statute itself, regardless of contrary interpretation by an administrative agency. A statute is ambiguous if susceptible to two or more reasonable interpretations, but a statute is not ambiguous merely because different interpretations are conceivable.

Agrilink Foods, Inc. v. Dep't of Rev., 153 Wn.2d 392, 396, 103 P.3d 1226, 1228-29 (2005).

A court's objective in construing a statute is to determine the legislature's intent. If the statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent. A statutory provision's plain meaning is to be discerned from the ordinary meaning of the language at issue, the context of

the statute in which that provision is found, related provisions, and the statutory scheme as a whole.

* * *

When a term has a well-accepted ordinary meaning, a regular dictionary may be consulted to ascertain the term's definition. When a technical term is used in its technical field, the term should be given its technical meaning by using a technical rather than a general purpose dictionary to resolve the term's definition.

* * *

A reading that produces absurd results must be avoided because it will not be presumed that the legislature intended absurd results. The outcome of plain language analysis may be corroborated by validating the absence of an absurd result.

Tingey v. Haisch, 159 Wn.2d 652, 657-58, 664, 152 P.3d 1020, 1023, 1026 (2007) (internal citations and quotation marks omitted). These same principles apply to interpretation of an agency's rule.⁸

Indeed, just this month, the U.S. Supreme Court applied these principles in an analogous situation to determine the proper scope of deference to be given to a federal agency's interpretation of its own regulations. *Christopher v. SmithKline-Beecham Corp.*, _ U.S. _, 2012 WL 2196779 (June 18, 2012). In *Christopher*, the issue presented was how to define an "outside salesman" for the purpose of determining who was entitled to overtime pay under the Fair Labor Standards Act (FLSA).

⁸ See, e.g., *State Dep't of Labor & Indus. v. Tyson Foods, Inc.*, 143 Wn. App. 576, 581-82, 178 P.3d 1070, 1073 (2008); *Roller v. Dep't of Labor & Indus.*, 128 Wn. App. 922, 926-27, 117 P.3d 385, 388 (2005); *Western Wash. Op. Eng'rs Apprenticeship Comm. v. Wash. State Apprenticeship & Training Council*, 130 Wn. App. 510, 517-18, 123 P.3d 533, 537-38 (2005).

Under the FLSA and certain Department of Labor (DOL) regulations, an “outside salesman” was exempt from the FLSA overtime requirements. The Supreme Court refused to defer to the interpretation of the DOL on this definitional issue. It found, among other things, that: the agency’s interpretation of who was an “outside salesman” was “plainly erroneous or inconsistent with the regulation;” its interpretation would impose potentially massive liability for conduct that had occurred well before the agency’s interpretation was announced; and the agency had never taken any enforcement action to suggest that it believed that the potentially liable parties had been acting unlawfully. *See* 2012 WL 2196779 at 11.

The very same lack of deference is warranted with respect to the Commission’s interpretation of “who is an AOS” in this case. As in *Christopher*, the Commission first announced its test for determining who is an AOS in a litigation context; in that context, it also articulated a ‘nebulous test’ - the “direct business relationship with consumers” test; the AOS rules likewise failed to provide prior notice of its interpretation; AT&T also confronts potentially staggering damages; and AT&T similarly received no clear notice of this test during the Commission’s lengthy period of inaction. As the Supreme Court concludes in *Christopher*, the most likely conclusion to be drawn from these parallel circumstances is that the Commission did not believe that AT&T was

acting in violation of the AOS statutes and rules. *See* 2012 WL 2196779 at 11.

B. The AOS Definition in RCW 80.36.520 Clearly, Unmistakably and Understandably Does Not Apply to AT&T Because AT&T Did Not Connect the Inmate Collect Calls to Local or Long Distance Services from the Prisons or Provide the Operator Services.

RCW 80.36.520, entitled “Disclosure of alternate operator services,” provides, in pertinent part, that:

For purposes of this chapter, ‘alternate operator services company’ means a person providing a connection to intrastate or interstate long-distance services from places including but not limited to, hotels, motels, hospitals, and customer-owned pay telephones.

By its express terms, the AOS statute uses words that clearly and unambiguously designate the AOS by a stated “connection” test. The statutory language removes any possible ambiguity because it defines the “connection” at issue. It stipulates a designated point in the sequence that constitutes a typical telecommunications pathway. The defined points of “to” and “from” provide the contextual information necessary to eliminate other possible meanings of the word “connection” in order to ascertain the statute’s intended reach. This construction gives effect to all words in the AOS definition and renders no portion meaningless or superfluous. The need for such specificity is clear because the person defined as an AOS

needs to know it is the intended target so it can plan its conduct to make the required disclosures.

The designation of a clear point in the telecommunications pathway as the relevant “connection” is consistent with the meaning generally given to “connection” in the telecommunications industry. A “connection” in the telecommunications industry means “[a] path between telephones that allows the transmission of speech and other signals” or “[a] provision for a signal to propagate from one point to another, such as from one circuit, line, subassembly, or component to another.” Harry Newton & Steve Schoen, *Newton’s Telecom Dictionary* at 317 (26th ed. 2011); *ATIS Telecom Glossary 2011*, available at <http://www.atis.org/glossary/default.aspx>.) Thus, the requisite “connection” is the actual path “from” the payphones at the prison to the facilities of the service provider for “intrastate” local calls (*i.e.*, a LEC) or to the facilities of the service provider for “interstate” long-distance calls (*i.e.*, an Interexchange Carrier). And the AOS is the person who “provides,” or makes or supplies, that connection from the prison pay phones to the local exchange company’s or interexchange company’s facilities.

Here T-Netix provided and operated the facilities, equipment and lines, for the “connection” from the call aggregator locations to intrastate

or interstate long distance services during the relevant period. AT&T did not provide that connection. The platform between the specified points belongs to T-Netix which is responsible for its operation, maintenance and repair.

This fact is not in dispute. As T-Netix's own expert explained, T-Netix's P-III platform "intercept[ed] all calls dialed by the inmates and perform[ed] multiple security screening functions prior to outputting the call to the LEC switch. (AR001098 at ¶9; *see also* AR003716-18 at ¶¶13, 15; AR002712-13 at ¶¶4-6.) T-Netix's P-III "platform's automated voice w[ould] announce that [the call recipient had] received a call from an inmate . . . and then prompt[] the called party on the procedure to accept the call." (AR003720 at ¶18(g).) T-Netix's expert was clear that "historically there was an operator that was connecting calls and making . . . the gating determination on letting calls out" but the P-III platform "replaced that gating determination." (AR007243, AR007247, AR007250.) T-Netix operated the platform, including updating any required announcements. (AR007247.)

The plaintiffs' expert agreed that T-Netix, through its P-III platform, both connected calls from the prisons at issue to local and long-distance services and provided the operator services for such calls. (AR003785 at ¶10.) As he explained, "[t]he T-Netix platform . . . [was]

making the connection to intrastate and interstate long-distance services from correctional institutions,” and it “provide[d], or [was] supposed to provide, the operator services for calls from these institutions, including rate quote announcements.” (AR003787-91 at ¶¶13-20.)

The ALJ, applying the plain language of the AOS definition, also determined that the AOS is the person who provided the “connection” from a prison to local or long-distance services:

It should be emphasized that call connection is not the same as call completion. There are many connections made throughout the journey that a telephone call takes. Call completion is just one of these. According to the rules, the crucial connection in establishing the OSP is the connection from the correctional facilities to the appropriate LEC service provider or to AT&T. The definition does not require that the OSP complete the call from end-to-end or even provide the connection between the calling party and the call recipient.

(AR003579 at ¶103.) In addition, the ALJ made the following conclusions of law:

Connection, based on an examination of the call schematics and the plain meaning of the regulation, occurs after the P-III Premise platform verifies that the call is valid and not prohibited, and when the platform passes the ‘0+’ call to the local or long-distance service provider by outpulsing it as a ‘1+’ call.

The P-III Premise platform provided the connection between the intrastate or interstate long-distance or local services and the correctional facilities.

(AR003591 at ¶¶142-43.)

C. The Plain Language of the AOS Definition Reflects the Legislative Intent that the AOS Definition Apply to New Operator Service Providers.

While the AOS definition's meaning is plain on its face such that the Court need look no further than the unambiguous language, it also is consistent with the Legislature's use of the word "alternate" to modify "operator services company" conveying the intention of the Legislature in 1988 to adopt disclosure requirements applicable to post-divestiture non-carrier operator service providers, not carriers like AT&T, who long have been obligated to file tariffs disclosing rates that the public is deemed to know as a matter of public notice. *See* RCW 80.36.510 *Legislative Finding* ("The legislature finds that a growing number of companies provide in a nonresidential setting, telecommunications services necessary to long distance service without disclosing the services provided or the rate, charge or fee."). The Senate and House Reports on Senate Bill (SB) 6745, which became RCW 80.36.520, show that the statute arose from concerns over new companies that emerged to provide "alternate operator services" after the Bell System divestiture — essentially, new middlemen who charged exorbitant rates and were not regulated under the existing statutory and regulatory scheme. (CP-000000909-969.) Indeed, the House Report notes that the AOS companies targeted by the statute

charged amounts that “were very expensive compared to routine long distance calling” — *i.e.*, AT&T’s long-distance service — “of the same distance and duration.” (AR003345.) The citizen whose complaint prompted the legislation, and whose correspondence is included with the Senate and House Reports, expressly contrasted the charges of these “variety of new companies” with AT&T’s charges for the same long-distance service. (CP-000000938.)

D. The Commission Exceeded Its Discretion.

It is well settled that a regulatory agency such as the Commission cannot overwrite the Legislature’s clear and unambiguous language with a new standard that the Commission now deems appropriate.⁹

The Commission’s determination that an AOS is the entity with a “direct business relationship with consumers” constitutes just such an impermissible amendment. The words “direct business relationship with consumers” are totally absent from the AOS definition. Indeed, the Commission’s argument that the definition should be interpreted as if the

⁹ *Littleton v. Whatcom Cty.*, 121 Wn. App. 108, 118, 86 P.3d 1253, 1258 (2004) (finding that though agency was authorized to adopt rules and standards, it was not permitted to “amend or alter the statutory definitions of applicable terms”); *see also Winans v. W.A.S., Inc.*, 112 Wn.2d 529, 540, 772 P.2d 1001, 1006 (1989). (“[R]egulations, in order to be valid, must be consistent with the statute under which they are promulgated. Regulations which operate out of harmony with the statute have no effect.”) (internal citations omitted); *Caritas Servs., Inc. v. Dep’t of Soc. and Health Servs.*, 123 Wn.2d 391, 415, 869 P.2d 28, 41 (1994) (“[A]gencies do not have the power to amend unambiguous statutory language.”)

words “to the consumers” appeared after “connection” betrays its recognition that no explicit language can be found in the AOS definition to support its interpretation. (Order 25 at 7 (AR006819)). The Commission’s insertion of “to consumers” into the definition violates fundamental principles of statutory construction. As the Supreme Court of Washington has stated:

A statute is unclear if it can be reasonably interpreted in more than one way. However, it is not ambiguous simply because different interpretations are conceivable. We are not obliged to discern any ambiguity by imagining a variety of alternative interpretations.

We have consistently held that an unambiguous statute is not subject to judicial construction and have declined to insert words into a statute where the language, taken as a whole, is clear and unambiguous. We will not add to or subtract from the clear language of a statute even if we believe the Legislature intended something else but did not adequately express it unless the addition or subtraction of language is imperatively required to make the statute rational.

State v. Watson, 146 Wn.2d 947, 954-55, 51 P.3d 66, 69-70 (2002)

(internal citations and quotation marks omitted; emphasis added); *see also*

Agrilink Foods, 153 Wn.2d at 396, 103 P.3d at 1228-29. This principle

also applies to agency attempts to insert words into regulations. *Ochoa v.*

Dep’t of Labor and Indus., 143 Wn.2d 422, 429, 20 P.3d 939, 942-43

(2001) (refusing to follow agency interpretation adding “only” to text.)

Not only is this invented language nowhere tethered to the actual statutory language but it also renders the “providing a connection” language totally superfluous. The “direct business relationship” test is not consistent with an analysis of each word in the AOS definition separately or the language as a whole. Rather than tying the language together in a coherent and harmonized definition, it is inconsistent with the express statutory mandate that the AOS is the person “providing the connection to intrastate or interstate long distance services from places, including but not limited to hotels, motels, hospitals, and customer owned pay telephones.” The Commission’s reading does not “construe all of the language in their context and as a whole” in conformity with the “decision maker” test identified by the lower court in its decision.¹⁰ There is no “connection” between the actual AOS definition on the legislative books for more than 20 years and the second interpretation finally announced by the Commission and approved by the lower court this year in this case. The Legislature elected to define an AOS based on who provided a connection from one physical location, the aggregator, to another, the local or long distance service provider. When the Commission chose to define an AOS

¹⁰ The lower court determined that the “direct business relationship test” was reasonable, *inter alia*, because “it is not necessary that the Court and the UTC construe each and every word separately” as long as they “construe all of the language in their context and as a whole.” (RP 62.)

based on who had a “direct business relationship with the consumer,” it rendered the statutory terms “from locations of [call aggregators]” and “to intrastate or interstate long distance services” meaningless. The Commission cannot substitute the language it desires by adding it after-the-fact.

As to the reasonableness of the Commission’s interpretation, the Commission points to no definition of the term “connection” or the phrase “providing a connection to intrastate or interstate long distance services” that gives either the meaning “direct business relationship with consumers.” Nor does the Commission provide any support for the contention that a regulated company would understand the AOS definition to have that meaning. The statute does not become ambiguous because the Commission granted exemptions and waivers to the LECs who arranged for the T-Netix platform. If the Legislature had wanted to define an AOS as the one who had “the direct business relationship with the consumer” it would have done so. The Commission rewrote a statute that was definite and predictable and plainly did not apply to AT&T here.

The Legislature did not grant the Commission the discretion to supplant the AOS statutory definition with its own rewritten definition. RCW 80.36.520 does not state in words or substance that an AOS means “any other person or entity that the Commission determines is providing

those services.” It could have done so. A number of other similar state statutes, in fact, do that. See, for example, the statute in Illinois where the operator service provider statute, 220 ILCS 5/13-901, provides that: “Operator service provider means every telecommunications carrier that provides operator services or any other person or entity that the Commission determines is providing operator services” (emphasis supplied). The same is true in Oklahoma where Okla. Admin. Code 165:57-1-4 provides: “Operator service provider” (“OSP”) means any common carrier that provides intrastate operator services or any other person or entity determined by the Commission to be providing operator services.”) (emphasis added).

II. THE AOS DEFINITION AS APPLIED TO AT&T IN THIS CASE VIOLATES THE DUE PROCESS CLAUSES OF THE U.S. AND WASHINGTON CONSTITUTIONS.

A. Due Process Requires that a Party Receive Fair Notice of its Obligations Before Being Deprived of Property.

The due process clause of the U.S Constitution requires that a party receive “fair notice” of its obligations under the law before it can be deprived of property.¹¹ “This [fair notice] requirement has now been

¹¹ U.S. Const. amends. V and XIV, § 1; *General Elec. Co. v. EPA*, 53 F.3d 1324, 1328 (D.C. Cir. 1995); *see also U.S. v. Chrysler Corp.*, 158 F.3d 1350, 1354 (D.C. Cir. 1998) (declining to enforce regulation against regulated party where agency “failed to provide adequate notice of what it now believes is the appropriate” interpretation of the regulation); *Diamond Roofing Co. v. OSHRC*, 528 F.2d 645, 649 (5th Cir. 1976) (“If a violation of a regulation subjects private parties to criminal or civil sanctions, a regulation cannot be construed to mean what an agency intended but did not adequately express.”).

thoroughly ‘incorporated’ into administrative law.” *General Elec.*, 53 F.3d at 1329 (internal quotations omitted). A “regulation that fails to give fair warning of the conduct it prohibits or requires” cannot be applied to deprive a party of property. *Id.* at 1328.

Washington courts also have recognized and applied the fair notice doctrine in construing the due process clause in the Washington constitution. Const. art. I, § 3; *In re Krier*, 108 Wn. App. 31, 39, 29 P.3d 720, 724 (2001) (“Due process requires that prior notice of proscribed conduct be provided before punishment may be imposed for failing to comply.”); *Postema v. Pollution Control Hearings Bd.*, 142 Wn.2d 68, 114, 11 P.3d 726, 752 (2000) (“The [fair notice] doctrine serves two important goals — providing fair notice as to what conduct is proscribed, and protection against arbitrary enforcement of the laws.”). A party such as AT&T cannot be expected to conform its conduct to a legal rule, where it is entirely unclear whether the legal rule actually applies.

The “void for vagueness” doctrine is analogous. “A statute is void for vagueness under the Fourteenth Amendment if it is framed in terms so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application.” *Myrick v. Bd. of Pierce County Comm’rs*, 102 Wn. 2d 698, 707, 677 P.2d 140, 146 (1984) (citations

omitted). A provision is unconstitutionally vague when it “fails to give fair warning” of actions which will run afoul of the law. *Id.* at 708.

B. AT&T Has Been Deprived of Due Process Because It Did Not Receive Fair Notice of the Commission’s Interpretation of the AOS Definition Prior to Its Application to AT&T in this Case.

AT&T had every reason to be surprised by the Commission’s newly announced “direct business relationship” with consumers standard. It is inconsistent with the “connection” test in the AOS definition and thus does not emerge from the definitional language. As in the Supreme Court’s recent *Christopher* decision, the agency had never articulated this “direct business relationship” test before applying it to AT&T in a purely litigation context. *See* 2012 WL 2196779 at 11.

Indeed application of the Commission’s “direct business relationship test” to AT&T offends any concept of basic fairness because it is “so far from any reasonable person’s understanding” of the AOS definitional language. *See General Elec.*, 53 F.3d at 1330. On their face, the AOS statutes and rules clearly provide that the AOS is the entity “providing a connection to intrastate or interstate long-distance services” from call aggregator locations. Thus, looking at the most obvious way a regulated party receives fair warning of the conduct that is proscribed, by reading the statutes and rules, AT&T had every reason to believe that it

was not an AOS and that the definitions would be given effect as written. *See General Elec.*, 53 F.3d at 1329 (When an agency first announces or clarifies its interpretation in an enforcement action, courts “must ask whether the regulated party received, or should have received, notice of the agency’s interpretation in the most obvious way of all: by reading the regulations.”) AT&T’s reasonable expectation that it was not an AOS based on the definitional language is reinforced by the fact that it already was obligated to make rate disclosures by tariff.

But even if the Court were to disagree and conclude that the Commission’s interpretation was a permissible reading owed deference by the courts, the fair notice doctrine precludes deference on due process grounds because AT&T did not receive fair warning of the required conduct. *See United States v. Southern Indiana Gas and Electric Co.*, 245 F. Supp. 2d 994, 1010 (S.D. Ind. 2003). Where, as here, fines are imposed as a result of the agency’s interpretation, the fair warning must be “ascertainably certain” from the language of the statutes and rules. *General Elec.*, 53 F.3d at 1330; *see also* RCW 80.36.530.

The Commission’s interpretation of the AOS definition was not “ascertainably certain.” The factual record is remarkable for the degree to which AT&T, plaintiffs and the ALJ all agreed that the AOS definition meant the entity providing the “connection” from the prisons to the

intrastate or interstate long distance services and not the entity that had any “direct business relationship” with the end user.

One need look no further than the Commission’s own interpretative bodies to establish the lack of clarity of the meaning advanced by the Commission. The Commission’s ALJ reasonably understood, as did AT&T, that the AOS definition applied, not to the entity with the “direct business relationship” with consumers, but to the entity that owned and operated the T-Netix P-III platform that provided operator services and made the critical connection.¹² The parties and the ALJ presumed that the T-Netix P-III automated platform was the critical “connection.” The ALJ had previously *rejected* a definition of an AOS that took into account the party that had a relationship with the consumer stating: “The definition [of OSP] does not require that the OSP complete the call from end-to-end or even provide the connection between the calling party and the call recipient.” (003579 at ¶103.) The Commission

¹² The ALJ ruled that the AOS or OSP was the party who owned the P-III platform, the equipment that provided the physical connection from the prisons to local or long-distance services. (AR003577, AR003589, AR003591, ¶¶97, 98, 129, 144.) She then erroneously found, despite all evidence to the contrary, that AT&T was the owner of the P-III platform. (AR003589-91, ¶¶129, 134, 144.) Nonetheless, the ALJ’s interpretation of the definition, that an AOS or OSP is the party who provides the *physical connection* from the call aggregator to local or long-distance services, is the same as AT&T’s. (AR003591, ¶¶142, 143.)

was forced to reject the ALJ's analysis to support its "direct business relationship with consumers" standard.¹³

Courts recognize that an agency's own inconsistent constructions of a rule are strong evidence that a regulated party would not receive adequate notice by simply reading the rule. For example, in *Chrysler Corp.*, 158 F.3d at 1356, the D.C. Circuit stated: "an agency is hard pressed to show fair notice when the agency itself has taken action in the past that conflicts with its current interpretation of a regulation." Similarly in its later decision in *General Elec.*, 53 F.3d at 1334, the D.C. Circuit reiterated its view that: "where the agency itself struggles to provide a definitive reading of the regulatory requirements, a regulated party is not 'on notice' of the agency's ultimate interpretation of the regulations, and may not be punished." Here, the ALJ and Commission actually disagreed in their interpretation of the rule, providing compelling evidence that there was no fair warning of the Commission's interpretation.

And the Commission itself struggled mightily in Order 25 in an effort to find a footing in the AOS statutes and rules that would legitimize its newly announced standard. In so doing, it ignores the use of the word

¹³ Order 25 at page 7 states that: "AT&T interprets WAC 480-120-021 to establish the OSP as the company that provided the physical 'connection' to the local or long distance service used to complete the call. Order 23 [ALJ's decision] accepted this view of the rule..." (AR006819.)

“alternate” to describe “operator services” and other critical language. It reads the words “direct business relationship” and “connection to consumers” as if they appear in the AOS definition when they do not. The Commission also attempts to create an ambiguity by posing an irrelevant question, “to whom” the AOS is providing the connection (Order 25 at 7), when the express text answers the critical question, “who is an AOS,” fully and completely by referencing the critical connection at issue.

Ultimately, even the Commission had to admit that its Order 25 “clarifies the application of its operator services rules to explain that an operator services provider... is the company that has the direct business relationship with consumers.” (Order 25 at 1) (emphasis supplied).¹⁴ There would be no need to “clarify” a standard that was ‘ascertainably certain’ from the language of the AOS statutes and rules. In fact, the Commission’s “direct business relationship” with consumers test is not a

¹⁴ In fact, the Commission’s interpretation is much more than a clarification; it is an impermissible usurpation of the Legislature’s prerogative to draft legislation and shape regulations. See, e.g. *Cerrillo v. Esparza*, 158 Wn.2d 194, 201, 142 P.3d 155, 158 (2006) (citing *Kilian v. Atkinson*, 147 Wn.2d 16, 21, 50 P.3d 638, 640 (2002) (“[c]ourts may not read into a statute matters that are not in it and may not create legislation under the guise of interpreting a statute.”); *Associated Gen. Contractors v. King County*, 124 Wn.2d 855, 865, 881 P.2d 996, 1001 (1994); *Christensen v. Harris County*, 529 U.S. 576, 588 (2000) (deference to an agency decision is unwarranted where the agency seeks “under the guise of interpreting a regulation, to create *de facto* a new regulation.”); *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1024, 1028 (D.C. Cir. 2000) (“It is well-established that an agency may not escape the notice and comment requirements . . . by labeling a major substantive legal addition to a rule a mere interpretation.”); *Cf. Commc’ns Corp. v. F.C.C.*, 128 F.3d 735, 739 (D.C. Cir. 1997) (an agency “may not bypass this [notice-and-comment rulemaking] procedure by rewriting its rules under the rubric of ‘interpretation’”).

clarification but rather an obvious departure from what a regulated entity or even a lay reader would believe to be the clear meaning of the AOS definition. The Commission impermissibly used its adjudicatory process “as the initial means for announcing [its] particular interpretation — or for making its interpretation clear.” *General Elec.*, 53 F.3d at 1329.

The Commission also failed to provide fair warning of its interpretation in any pre-enforcement public notice. For approximately twenty years, the Commission stood silent on its claimed interpretation of the AOS statutes and rules while millions of prisoner collect calls were made from prisons from 1996 through 2000. Now, notwithstanding its reasonable reliance on the plain language of the definition in the AOS statutes and rules for guidance, AT&T confronts potentially substantial liability based on the Commission and lower court’s *ex post* modification of the AOS statutes and rules by judicial construction.

C. The Commission’s Interpretation Is Unconstitutionally Vague.

The AOS definition also is unconstitutionally vague under the Fifth and Fourteenth Amendments of the United States Constitution if it is interpreted to mean that an AOS is the party who has a “direct business relationship” with a consumer or “actually charges” the consumer for services, because a person of common intelligence would be unable to

divine that interpretation from the definition's plain language, which clearly sets forth the "connection" test. *See Myrick v Board of Pierce County Commissions*, 102 Wn.2d 698, 707, 677 P.2d 140 (1984).

A regulation is void for vagueness if it fails to fulfill "at least two connected but discrete due process concerns: first that regulated parties should know what is required of them so that they may act accordingly; second, precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way." *Federal Commc'ns Comm'n et al. v. Fox Television Stations, Inc. et al.*, ___ U.S. ___, 2012 WL 2344462 at *10 (June 21, 2012) (holding the FCC regulations void on vagueness grounds for lack of fair notice as applied to Fox and ABC because they did not have prior notice that the conduct at issue could violate FCC decency guidelines.) Purely economic regulations are subject to a less strict vagueness test than are criminal laws, but a vagueness analysis still applies. *Chalmers v. Los Angeles*, 762 F.2d 753, 757 (9th Cir. 1985). In the commercial context a statute must be sufficiently clear so "that its prohibitions would be understood by an ordinary person operating a profit-driven business." *Irvine v. 233 Skydeck, LLC*, 597 F. Supp. 2d 799, 803 (N.D. Ill. 2009). As discussed in greater detail below, however, where the economic regulation also entails penal fines, heightened scrutiny must be applied. *See*, II.E, *infra*.

Because AT&T and the ALJ each came to the same, reasonable interpretation of the AOS definition, the Commission's interpretation of that definition renders it, at the very least, unclear on its face. The Commission, by attempting to "clarify" the definition in its Final Order, did not provide AT&T or others fair notice of the agency's interpretation when it mattered — before the AOS was expected to act. The definition, if subject to the Commission's interpretation, is sufficiently vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application. Accordingly, any enforcement of the Commission's interpretation against AT&T in this instance would be unconstitutional and under RCW 34.05.570 of the APA, must be invalidated.¹⁵ A regulated party has the right to fair notice of conduct proscribed by agency rules and regulations prior to their enforcement.

D. The Commission's Final Order, Adopted by the Lower Court, Is A New Rule Applied Retroactively in Violation of the Rulemaking Process.

The Commission had a legitimate vehicle, its rule-making procedures, to announce its "direct business relationship" standard. The enabling statutes at issue authorize the Commission to regulate AOS

¹⁵ In addition to violating due process and the "fair notice" doctrine, the Commission's Final Order, by announcing a new "direct business relationship" standard, also violates the constitutional prohibition on *ex post facto* laws and the "many policy reasons that disfavor changing the law retroactively." *Hale v. Wellpinit School Dist. No. 49*, 165 Wn.2d 494, 507-08, 198 P.3d 1021, 1027 (2009); Wash. Const., art. I, § 23; U.S. Const., art. I, § 9.

companies, as defined in RCW 80.36.520, through rules. (*See id.*) (the WUTC “shall by rule . . .”); RCW 80.36.524 (1988) (the WUTC “may adopt rules . . .”). The Administrative Procedure Act governs how the Commission promulgates rules, including the obligation to provide a period for notice and comment. Here, by announcing a new “direct business relationship” standard in its Order 25, the Commission effectively adopted a new rule — a new definition of an AOS — under the guise of “interpreting” or “clarifying” the existing AOS definition in an adjudicatory proceeding. By doing so, the Commission circumvented the notice-and-comment rulemaking process, acted arbitrarily and capriciously, and violated fundamental principles of administrative law as well as violate AT&T’s due process rights.

E. The Substantial Fines That May Be Imposed on AT&T as a Result of the Commission’s Finding of Liability Are Unfair and Constitutionally Barred Because AT&T Was Not on Notice of the Commission’s Interpretation.

Because AT&T had no clear prior notice, the possible imposition of substantial penalties in the circumstances of this case violates due process as an *ex post facto* punishment by an administrative agency that could not agree on the proper reading of its own rules.¹⁶ Courts give

¹⁶ The ALJ ruled that the “plain meaning of the regulation” made the owner of the P-III platform the AOS providing the “crucial connection.” (AR003575 at ¶¶91-93; AR003579 at ¶103; AR003591 at ¶142.)

special scrutiny to the fairness of the notice given by an agency in the context of drastic sanctions. *See e.g., U.S. v. Hoechst Celanese Corp.*, 128 F.3d 216, 224 (4th Cir. 1997) (“Although the Supreme Court has not directly addressed the question, we have concluded that because civil penalties are ‘quasi-criminal’ in nature, parties subject to such administrative sanctions are entitled to similar ‘clear notice.’”); *U.S. v. Clinical Leasing Serv, Inc.* 925 F.2d 120, 122 n. 2 (5th Cir. 1991); *Advance Pharm, Inc. v. U.S.*, 391 F.3d 377, 396 (2d Cir. 2004). Courts have refused to impose fines on due process grounds where the regulated party had no clear prior notice of the agency interpretation. *See General Elec.*, 53 F.3d at 1333-34 (“Where, as here, the regulations and other policy statements are unclear, where the petitioner’s interpretation is reasonable, and where the agency itself struggles to provide a definitive reading of the regulatory requirements a regulated party is not ‘on notice’ of the agency’s ultimate interpretation of the regulations, and may not be punished.”) A similar conclusion is warranted here.

It is clear that the plaintiffs will use the Commission’s determination to seek significant punitive fines against AT&T. Plaintiffs claim “presumed damages of \$200 per call” pursuant to RCW 80.36.530 as well as the entire cost of services and trebling for each putative class member – a penalty that is punitive in nature. Given the volume of collect

calls made from Washington prisons in a typical year,¹⁷ the potential statutory damages in this case are significant, and far exceed any actual injury – economic or otherwise. These substantial sums would be assessed against AT&T even though it had no prior clear notice of the Commission’s interpretation of the AOS definition.¹⁸ These significant penalties are intended to punish conscious wrongdoing and are wholly unjust and disproportionate to any harm caused by AT&T’s unknowing conduct. There is no legitimate state interest served by singling out the highly regulated AT&T for punishment without notice, given the fact that AT&T publishes its rates and many entities other than AT&T, notably the

¹⁷ According to plaintiffs’ allegations in their Complaint, inmates incarcerated in Washington placed at least “hundreds of thousands” of calls during the time at issue. (CP-0000000170).

¹⁸ In the lower court, plaintiffs and respondent T-Netix argued that AT&T had notice of the Commission’s interpretation of the AOS definition by virtue of a Commission Staff Consensus mailing on October 1, 1991 that they assert advised AT&T that it was an AOS within the meaning of the AOS rules. This general mailing states that “In a non-equal access setting, AT&T is an AOS company although the person who controls the instrument has no other option for presubscribed AOS service.” This mailing fails to give clear notice of the Commission’s interpretation of its AOS rules with respect to the issues presented in this case. First it makes no mention of the “direct business relationship” standard and provides no notice that the “connection test” was no longer the applicable test in defining an AOS. Second, in 1991, AT&T was providing operator services and the critical connection referenced in the AOS statutes and rules so it could have satisfied the AOS definition. Third, the statement purports to express a staff consensus and not a ruling or policy announcement by the Commission itself. Fourth, the sentence is virtually incomprehensible, using a number of undefined terms, none of which give affirmative notice that the AOS standard is “direct business relationship” with consumers. As the U.S. Supreme Court recently stated in *FCC v. Fox Television Stations, Inc.*, 2012 WL 2344462 at *11 (June 21, 2012), in language equally applicable here: “An isolated and ambiguous statement from a 1960 Commission decision does not suffice for the fair notice required when the Government intends to impose over a \$1 million fine for allegedly impermissible speech.”

Washington Department of Corrections, T-Netix and the LECs, demanded and received commissions or fees on each of the calls.

III. ASSUMING ARGUENDO THAT AT&T FELL WITHIN THE AOS STATUTES AND RULES, AT&T WAS EXEMPT FROM ANY OBLIGATION TO MAKE RATE DISCLOSURES FROM 1997 TO 1999 PURSUANT TO THE LEC EXEMPTION.

Should AT&T fall within the reach of the AOS disclosure statute and rules (which it strenuously disputes), it is entitled to invoke the LEC exemption provided for in WAC 480-120-121) in effect from 1991 to 1999. WAC 480-120-121 stated that an AOS was “any corporation, company, partnership, or person other than a local exchange company” providing the key connection. WAC 480-120-121 (1991) (emphasis added). There was no dispute that AT&T was registered as a local exchange company or LEC in 1997 (AR000256 at ¶12). Even though it was agreed that AT&T was registered as a LEC as well as an interexchange carrier between 1997 and 1999, the Commission determined that “AT&T was not entitled to the exclusion of local exchange companies from the definition . . . because AT&T did not provide local exchange services in conjunction with any of the collect calls” at issue. (Order 25 at ¶77.)

The Commission’s determination, adopted by the lower court, is clearly erroneous. The language of the LEC exemption is unconditional.

It does not state that it is available only if the LEC is providing intraLATA service. Nothing in WAC 480-120-121 says that the entity with a LEC exemption must be “providing local exchange services” on the relevant calls to use its LEC exemption. The Commission imported an unwritten condition into the definition. It simply ignored the plain meaning of the provision and added language so as to impose liability on AT&T. Moreover, the holding is arbitrary and capricious and also violates AT&T’s due process rights for all the reasons set forth in Point II, *supra*.¹⁹

¹⁹ The issue before the Commission and on appeal here is limited to whether the Commission improperly concluded that, despite the plain language of its rule, AT&T was not entitled to the LEC exemption even though it was a registered LEC, but a separate issue has since arisen in the King County Superior Court after proceedings before the Commission ended. The Commission made a finding of fact that “AT&T was not providing local exchange service or otherwise acting as a local exchange company in connection with any” of the calls at issue (AR006813), and at oral argument below everyone, including counsel for plaintiffs and counsel for the Commission, agreed that the Commission’s finding of fact was not being challenged (RP 70-74). Indeed, that was precisely the position advocated by plaintiffs before the Commission — that AT&T did *not* carry local or intraLATA calls, but rather that local exchange companies did so. However, having taken that position and persuaded the Commission to conclude that AT&T was not entitled to the LEC exemption, plaintiffs have since changed their position, now asserting in the King County Superior Court that AT&T did in fact carry some local and/or intraLATA calls from prisons in the territory serviced by PTI. Given plaintiffs’ change of position, AT&T moved for partial summary judgment, arguing that either judicial estoppel should preclude plaintiffs from asserting that AT&T carried local and/or intraLATA calls, or if they may make that assertion then AT&T should be permitted to take advantage of the LEC exemption. The King County Superior Court denied AT&T’s motion, a ruling that AT&T will separately appeal, if necessary, at the appropriate time in the King County proceeding. AT&T raises this separate issue in this footnote solely for the purposes of clarifying the record and preempting any attempt at a waiver argument in an appeal of the King County proceeding, should there be one. AT&T expressly reserves, and in no way waives, its right to appeal the judicial estoppel issue and related issues arising from plaintiffs change of position in the King County Superior Court.

CONCLUSION

For all the foregoing reasons, AT&T respectfully requests that this Court reverse the lower court's determinations that: (1) AT&T is an AOS under the AOS statutes and rules; (2) AT&T received fair notice of the Commission's interpretation of the AOS statutes and rules under the due process clauses in the U.S. and Washington Constitutions; and (3) the LEC exemption in WAC 480-120-021 was not available to AT&T from 1997 to 1999.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that on this 28th day of June, 2012, I caused to be served a true and correct copy of the foregoing Brief of Appellant as follows:

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

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