

No. 42966-7

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/Respondent.

Brief of INTERESTED PARTY/RESPONDENT

Stephanie A. Joyce (admitted *pro*
hac vice)
ARENT FOX LLP
1050 Connecticut Avenue, NW
Washington, DC 20036
Telephone 202.857.6081

Arthur A. Butler (WSBA # 04678)
ATER WYNNE LLP
601 Union Street, Suite 1501
Seattle, WA 98101-3981
Telephone 206.753.3011

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T-Netix, Inc. (“T-Netix”), Respondent, pursuant to RCW 34.05.570(3), RAP 10.3, files this brief in support of the decision by the Washington Utilities and Transportation Commission (“WUTC”) that AT&T was the Operator Service Provider (“OSP”) for purposes of Complainants/Appellees underlying civil claims.¹

ASSIGNMENTS OF ERROR

1. Did the WUTC err in adopting the “direct business relationship” as a means of implementing and applying RCW 80.36.520 which contains ambiguous and undefined terms?

2. Did the WUTC deprive AT&T of fair notice or otherwise infringe AT&T’s right to due process of law by identifying AT&T as the OSP in keeping with its consumer-centric approach to common carrier regulation?

¹ *Sandy Judd and Tara Herivel v. AT&T Communications of the Pacific Northwest, Inc. and T-Netix, Inc.*, Docket No. UT-042022, Order 25, Final Order Affirming Order 23 in Part on Other Grounds and Responding to Questions Referred from Superior Court (Mar. 31, 2011) (“Final Order”) (R. 6813-6842). Cites to the administrative record are identified as “R.” The Final Order discusses the OSP question at Paragraphs 12 through 44, and made the relevant findings in Paragraphs 67 (Finding of Fact 6) and Paragraphs 75-76 (Conclusions of Law 4 and 5).

STATEMENT OF THE CASE

A. Underlying Statute and Implementing Administrative Rules

The statute at issue in this appeal is RCW 80.36.520 which states:

The utilities and transportation commission shall by rule require, at a minimum, that any telecommunications company, operating as or contracting with an alternate operator services company, assure appropriate disclosure to consumers of the provision and the rate, charge or fee of services provided by an alternate operator services company.

For the 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.

In 1991, the WUTC implemented this statute by adopting WAC 480-120-141 which states in pertinent part:

The alternate operator services company [AOS] shall ... identify the AOS company providing the service audibly and distinctly at the beginning of every call, and again before the call is connected, including an announcement to the called party on calls place collect. ... The AOS company shall immediately, upon request, and at no charge to the consumer, disclose to the consumer: (A) a quote of the rates or charges for the call, including any surcharge; (B) the method by which the rates or charges will be collected; and (C) the methods by which complaints about the rates, charges, or collection practices will be resolved.

WAC 480-120-141(5)(a)(iv) (1991).

In 1998, the WUTC amended this portion of the rule to state:

Before an operator-assisted call from an aggregator location may be connected by a presubscribed OSP, the OSP must verbally advise the consumer how to receive a rate quote, such as by pressing a specific key or keys, but no more than two keys, or by staying on the line. This message must precede any further verbal information advising the consumer how to complete the call, such as to enter the consumer's calling card number. This rule applies to all calls from pay phones or other aggregator locations, including prison phones, and store-and-forward pay phones or "smart" telephones.

WAC 480-120-141(2)(b) (1999).

B. Primary Jurisdiction Referral from King County Superior Court to the WUTC

On August 1, 2000, Sandra Judd and two other plaintiffs² filed a putative class action in the Superior Court of King County seeking damages and injunctive relief pursuant to the Washington Consumer Protection Act, RCW 19.86.010 *et seq.*, against five (5) telecommunications companies, including T-Netix and AT&T, on allegations that they failed to provide audible rate disclosures for inmate-initiated collect calls in violation of WAC 480-120-141 (1991,

² Tara Herivel and Zuraya Wright were the initial Plaintiffs. Ms. Wright subsequently withdrew from the case.

amended 1999). *Judd, et. al. v. AT&T, et al.*, No. 00-2-17565-SEA.

The relevant period of the allegations was 1996 to 2000.

On November 9, 2000, three of the defendants were dismissed from the action on the ground that they were exempt from WAC 480-120-141.³ As to AT&T and T-Netix, Judge Kathleen Learned stayed the claims and issued a primary jurisdiction referral to the WUTC seeking answers to two questions: (1) was AT&T or T-Netix an OSP for the calls at issue; and (2) was WAC 480-120-141 violated.

The Final Order, challenged here, was the outcome of that primary jurisdiction referral. More specifically, AT&T challenges the WUTC's adoption of the "direct business relationship" test, articulated as:

We determine which entity is the OSP by looking at indicia of a direct business relationship with the consumers using the operator services. Such indicia include evidence that the company holds itself out to consumers as the service provider, such as through **"providing the face to the [consumer] in branding the calls, branding the billing, [and] taking the responsibility for those elements being pulled together to deliver [operator] service to that [consumer]."**

Final Order ¶ 29 (quoting Ex. A-24) (R. 6825) (emphasis added).

³ The dismissal of those three entities – GTE, USWest, and CenturyTel – is not the subject of this appeal.

Based on the “direct business relationship” test, the WUTC held that AT&T was the OSP for the calls at issue in the underlying civil case. *Id.* ¶ 43, ¶ 76 (Conclusion of Law 5) (R. 6830-31, 6840).

C. The Service Arrangement For Which AT&T Was Deemed the OSP

AT&T held the contract with the Washington Department of Corrections (“DOC”) for the provision of inmate telecommunications service (“AT&T/DOC Contract”). R. 181-192. It was first executed in 1992. R. 191. The AT&T/DOC Contract stated that AT&T would “provide ‘0+’ interLATA⁴ and international service to all Public Telephones at [DOC] Institutions.” R. 182.

The AT&T/DOC Contract permitted AT&T to enter into subcontracts with GTE (which became Verizon), PTI (which became CenturyTel), and US West (which became Qwest). R. 182-83. Those entities are identified as Local Exchange Carriers (“LECs”) in the AT&T/DOC Contract. R. 181.⁵ GTE, PTI, and US West would “provide local and intraLATA telephone service and operator service” at sites specifically named in the AT&T/DOC Contract. *Id.*⁶ These

⁴ LATA stands for “Local Access and Transport Area”. Newton’s Telecom Dictionary 675 (26th ed.).

⁵ For ease of reference T-Netix will use the term “LEC Contracts” to represent the contracts AT&T held with GTE, US West, and PTI.

⁶ The LECs were exempt from WAC 480-120-141 for the entire relevant period of this case and thus, though they were OSPs for local

four entities together had written a joint response to the DOC Request for Proposal that was named the winner of the public contract. R. 181.

T-Netix was not included among the entities that wrote the RFP response or signed a subcontract. T-Netix was not mentioned in the AT&T/DOC Contract or the LEC Contracts at all.

D. T-Netix Contract With AT&T to Provide Hardware and Software

Amendment No. 2 to the AT&T/DOC Contract, signed in 1995, identified “Tele-Matic Corporation”, a predecessor company to T-Netix, as a new subcontractor. R. 195-96. Amendment No. 2 stated that AT&T “shall arrange for the installation of certain call control features for intraLATA, interLATA and international calls carried by AT&T.” R. 195. Tele-Matic was the entity that provided AT&T with the “call control features”. *Id.*

AT&T and T-Netix entered into the General Agreement for the Procurement of Equipment, Software, Services and Supplies on June 4, 1997 (“AT&T/T-Netix Contract”). R. 7544-7575.⁷ It is telling that

and intraLATA calls, the LECs had no rate disclosure obligations. *Judd v. AT&T Co.*, 116 Wash. App. 761, 66 P.3d 1102 (Wash. Ct. App.), *aff’d*, 152 Wash. 2d 195, 95 P.3d 337 (2004) (*en banc*).

⁷ This document was designated as Confidential pursuant to the Protective Order entered in Docket UT-042022 when it was produced in 2005. Because the P-III platform is no longer in use at any DOC site, and because the AT&T/T-Netix Contract has expired, T-Netix no longer requires confidential treatment of this document. AT&T likewise does not seek confidential treatment for this document.

AT&T does not quote or even reference the 1997 AT&T/T-Netix Contract in its brief.⁸ The core subject matter of the contract was the P-III premise equipment, which is a computer system that was designed to be placed at the premises of an individual correctional facility to provide call control features for inmate phones. The AT&T/T-Netix Contract states that AT&T would purchase the P-III premise equipment from T-Netix and take title to it. R. 7549. It also states that AT&T would purchase a non-exclusive license to the software that runs the P-III equipment. R. 7551. It also states that T-Netix would provide maintenance services for the P-III equipment and the software. R. 7557.

Nothing in the AT&T/T-Netix Contract states that T-Netix would provide “operator services” or “telecommunications” to any entity or individual.

Amendment No. 3 to the AT&T/DOC Contract, signed in 1997, changed the DOC arrangement “to delete ... PTI ... as a subcontractor, and to include T-Netix, Inc. as the **station provider**.” R. 199 (emphasis added).

⁸ The WUTC noted that portions of the AT&T/DOC Contract were in the record, but not “the entire Agreement.” Final Order ¶ 40 (R. 6829). As such, the WUTC refused AT&T’s request that it rely on the AT&T/DOC Contract as evidence that AT&T was not the OSP. *Id.* The WUTC noted, however, that Amendment B to the AT&T/DOC Contract stated that AT&T would provide live operator service if automated operator service was not possible. *Id.* n. 40 (R. 6829-6830).

The WUTC defines “station” as “a telephone instrument installed for a customer to use for toll and exchange service.” WAC 480-120-021. A “station” thus is a piece of equipment, not a service.

Amendment No. 3 did not state that T-Netix would provide operator services, calling services, or telecommunications services. R. 199.

T-Netix explained to the WUTC, in response to Bench Request No. 6, that as the “station provider” under Amendment No. 3 it “lease[d] facilities needed to provide local calls from” the facilities that PTI had served, and that “beginning March 3, 1998, from the five WA DOC facilities, AT&T agreed, among other things, to purchase all inmate telephone sets and reimburse T-Netix for the commissions paid and for the cost of inmate telephone lines.” Docket UT-042022, T-Netix, Inc.’s Response to Bench Request No. 6 (Apr. 2, 2010) (R. 7053-7054).

E. Evidence Regarding the Functions Performed by the P-III Premise Equipment

The parties provided the WUTC with substantial evidence and legal argument regarding the functionality of the P-III premise equipment. More than 30 of the 94 Record Exhibits before the WUTC discussed the P-III equipment and the functions it performed. *E.g.*, R.

3719-3722 (Ex. A-17) (Highly Confidential),⁹ R. 7317-7318 (Ex. A-25), R. 7851-7856 (Ex. T-17), R. 8142 (Ex. C-8). These exhibits included contract documents, deposition excerpts, expert affidavits, and product manuals.

AT&T, T-Netix, and Complainants (Ms. Judd and Ms. Herivel) each submitted multiple briefs discussing the technical aspects of the P-III and explaining how those functionalities did, or did not, constitute operator service. Indeed, both AT&T and T-Netix filed “motions for summary determination” explaining what is operator service and which entity provided it. *E.g.*, R. 4838-4862 (Ex. T-1HC), R. 3955-3974 (Ex. A-1HC). Complainants responded to those motions, *e.g.*, R. 4053-4080 (Ex. C-1C), and T-Netix and AT&T each opposed the other’s motion, *e.g.*, R. 3817-3848 (A-22HC), R. 7996-8020 (Ex. T-25).

The Final Order relies on a technical exhibit that discusses P-III functionality. Final Order ¶ 21 (quoting Ex. A-24) (R. 6821-6822), ¶ 29 (quoting Ex. A-24) (R. 6825). It also noted that the T-Netix equipment was “used to provision operator services.” Final Order ¶ 20 (R. 6821). Based in part on its knowledge, learned from the record, as to what functionality the P-III premise equipment provided, the

⁹ WUTC Exhibits marked “A-xx” were designated by AT&T. Exhibits marked “T-xx” were designated by T-Netix. Exhibits marked “C-xx” were designated by Complainants.

WUTC concluded that AT&T was the OSP. Final Order ¶ 43, ¶ 76 (Conclusion of Law 5) (R. 6830-6831, 6840).

F. Judge Casey of the Superior Court of Thurston County Upheld the Final Order With Regard to the Identity of the OSP

Judge Casey summarized the question on review as “whether the [WUTC] made an error of law in construing that statute.”

Verbatim Report of Proceedings at 61:24-62:2 (Clerk’s Papers 824-839). She reasoned that

The [WUTC’s] decision is consistent with the statutory language. **Its decision makes sense in the context of the purposes of the legislation** to make sure that consumers know how much they are being charged for services.

Id. at 62:15-20 (emphasis added).

In response to AT&T’s attempted textual argument, which it repeats to the Court of Appeals here, Judge Casey stated

[I]t is not necessary that the Court or the UTC construe each and every word in the statute separately. The job of the decision maker is to construe all of the language in their context and as a whole.

Id. at 62:21-25 (emphasis added).

On the basis of that reasoning, Judge Casey held that “I cannot find that there was an error of law made in the construction by the UTC.” *Id.* at 62:5-63:4.

STANDARD OF REVIEW

This appeal regards the WUTC's interpretation of its own rule, WAC 480-120-141. Agencies are afforded deference in the application of their own rules. The Court of Appeals (Division 3) stated in the seminal *Cobra Roofing* decision that "[w]e give substantial weight to the agency's interpretation of statutes and regulations within its area of expertise." *Cobra Roofing Service, Inc. v. Dep't of Labor & Industries*, 112 Wash. App. 402, 409, 97 P.3d 17, 20 (2004). The court went on to explain that "we will uphold an agency's interpretation of a regulation if 'it reflects a **plausible construction** of the language of the statute and is not contrary to the legislative intent.'" *Id.* (quoting *Seatoma Convalescent Ctr. v. Dep't of Soc. & Health Serv.*, 82 Wash. App. 495, 518, 919 P.3d 602, 613 (1998)) (emphasis added).

Courts also will apply considerable deference "when an agency determination is based heavily on factual matters, especially factual matters which are complex, technical, and close to the heart of the agency's expertise." *Hillis v. Dep't of Ecology*, 131 Wash. 2d 373, 396, 932 P.2d 139, 151 (1997) (*en banc*).

In addition, where, as here, the underlying statute is ambiguous, "the agency's interpretation is accorded great weight."

D.W. Close Co., Inc. v. Dep't of Labor and Industries, 143 Wash. App. 118, 128-29, 177 P.3d 143, 149 (2008) (affirming agency order). In the event a statute is ambiguous, “[a]n agency acting within the ambit of its administrative functions normally is best qualified to interpret its own rules, and **its interpretation is entitled to considerable deference** by the courts.” *Id.* (quoting *Pacific Wire Works v. Dep't of Labor & Indus.*, 49 Wash. App. 229, 236, 742 P.2d 168, 172 (1987)).

The Court should, however, accord deference to the WUTC in this appeal, in accordance with *Cobra Roofing*, even if it does not deem RCW 80.36.520 to be ambiguous. That is, the WUTC warrants deference in its finding that AT&T is the OSP under both of these independent grounds.

SUMMARY OF ARGUMENT

AT&T provides very little in its brief that is new. It raised all of its arguments at the Superior Court, citing nearly all of the same authority, and its position was rejected by Judge Casey. AT&T failed then and fails now to demonstrate that the WUTC misread or misapplied RCW 80.36.520.

The Final Order is a reasonable and well-supported application of the WUTC rule governing OSP rate disclosures, WAC 480-120-141, which is itself a proper implementation of the rate disclosure

mandate in the Washington state statute, RCW 80.36.520. The WUTC rule, the soundness of which cannot be attacked collaterally in this appeal, and the statute both define “OSP”, in part, as an entity that is “providing a connection to intrastate or interstate long-distance services”.

The term “providing a connection” is not defined in the Washington statutes and is ambiguous. Faced with this undefined term, the Final Order addresses it directly and draws the well-reasoned conclusion, based expressly on legislative intent, that “providing a connection” means, for purposes of identifying OSPs, the entity that is “providing a connection *to consumers*.” *E.g.*, Final Order ¶¶ 16, 17 (R. 6820) (emphasis in original).

The WUTC reasoned that, because the Legislature wanted to ensure consumers know the amount of money the telecommunications carrier would be charging them for a collect call, the entity connected to the consumer bore the OSP disclosure obligations. The connection to the consumer, the WUTC concluded, is established via a “direct business relationship”. *E.g.*, *id.* ¶ 18 (R. 6821). This reasoning and this conclusion are “a plausible construction” of RCW 80.36.520, *Cobra Roofing*, 112 Wash. App. at 409, 97 P.3d at 20, and should be affirmed.

AT&T's arguments are notable for what they omit. AT&T never references or quotes the AT&T/T-Netix Contract, because that contract – in sharp contrast to the AT&T/DOC Contract and all of the LEC Contracts – never mentions “operator services”. AT&T also omits most of the definition of OSP, which makes clear that operator services necessarily are “telecommunications service”, something that T-Netix never agreed to provide to any entity or individual involved in this case. AT&T also ignores the fact that the WUTC did in fact focus on and implement the phrase “providing a connection”. And despite its position that the WUTC should have employed a more technical gloss for the term “connection”, AT&T ignores technical exhibits that were designated before the WUTC and demonstrate that AT&T was the OSP. When AT&T's omissions are remedied, the inefficacy of its appeal becomes obvious.

Perhaps the most glaring flaw in AT&T's appeal is its position that RCW 80.36.520, which contains the undefined term “connection”, is “definite and predictable,” AT&T Br. at 34, and yet WAC 480-120-141, *which contains the same word “connection”*, is somehow “void for vagueness”. *Id.* at 36. It is puzzling that the two assertions could appear in the same brief.

Finally, and partially for this reason, AT&T's constitutional arguments are baseless. The Final Order does not represent a "new rule" that was improperly promulgated, nor was AT&T denied "fair notice" that customer-service issues would factor into the discussion of what constitutes an OSP. The WUTC's adoption of the "direct business relationship" test to define an OSP is neither a new rule nor an unconstitutional surprise.

ARGUMENT

I. RCW 80.36.520 IS AMBIGUOUS IN ITS USE OF THE WORD "CONNECTION", AND THUS THE WUTC IS ENTITLED TO CONSIDERABLE DEFERENCE

AT&T argues that RCW 80.36.520 is plain and unambiguous in order to support its request that the Court allow no deference to the WUTC's definition of OSP. Brief of Appellant at 30-31 (June 28, 2012) ("AT&T Br."). This argument is quickly refuted, principally by the fact that the Legislature never defined the term "connection". *See id.* at 15-16. AT&T nonetheless argues that the term is clear.

AT&T resorts to Newton's Telecom Dictionary for its definition of "connection". AT&T Br. at 27. But that definition itself demonstrates the ambiguity of the word. Newton's has **four different definitions** for "connection":

1. A path between telephones that allows the transmission of speech and other signals.

2. An electrical continuity of circuit between two wires or two units, in a piece of apparatus.
3. An SCSA term which means a TDM data path between two Resources or two Groups. It connects the inputs and outputs of the two Resources, and may be unidirectional (simplex) if either of the Resources has only an input or an output. Otherwise it is bi-directional (dual simplex). It usually has a bandwidth that is a multiple of a DS0 (64 Kbit) channel. Inter-group connections are made between the Primary Resource of each Resource Group.
4. An ATM connection consists of concatenation of ATM Layer links in order to provide an end-to-end information transfer capability to access points.

Harry Newton & Steve Schoen, Newton's Telecom Dictionary

317 (26th ed. 2011). Plainly the word "connection" is susceptible of many meanings, according to Newton's.

Moreover, the Washington Legislature has enacted definitions that differ substantially from Newton's. Indeed, the term around which AT&T's appeal revolves – "operator services" – is defined very differently in Newton's from how the Legislature defines it. The Legislature defines "operator services" through its definition of "alternate operator services company" in RCW 80.36.520. As we know, RCW 80.36.520 defines "alternate operator services provider" as an entity "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."

Newton's, by contrast, defines "operator services" as "[a]ny of a variety of telephone services which need the assistance of an operator or an automated 'operator' (i.e. [*sic*] using interactive voice response technology and speech recognition)." Newton's Telecom Dictionary 840 (26th ed.).¹⁰ Newton's definition is nothing like the Legislature's. This example demonstrates that resorting to Newton's is not a reliable proxy for discerning the mind of the Washington Legislature on any given term.

WAC 480-120-021, where WUTC definitions are codified, has no definition of "connection". As such, AT&T's attempt to prove that the term "connection" is "clear and unambiguous" falls very short of persuasive.

The U.S. Court of Appeals for the Tenth Circuit has found the term "connection" to be "unclear" in a case involving telecommunications services. In *Mical Communications, Inc. v. Sprint Telemedia, Inc.*, 1 F.3d 1031 (10th Cir. 1993), a customer sued Sprint's long-distance entity to prevent it from terminating a billing-

¹⁰ Newton's goes on to provide a lengthy narrative explaining that the understanding of "operator services" is "confusing", particularly since the break-up of AT&T and the enactment of the Telecommunications Act of 1996. *Id.* It also notes that the larger LECs and many IXCs, including AT&T, "generally provide their own operator services[.]" *Id.*

and-collection agreement. The plaintiff relied on Section 202 of the Communications Act which prohibits a common carrier from acting unreasonably in its provision of, among other things, “services for or in connection with like communication service[.]” 47 U.S.C. § 202(a). The Tenth Circuit found that term to be “**unclear**”, 1 F.3d at 1038 (emphasis added), and remanded the case to the district court with instructions to impose a stay “pending the issuance of a dispositive ruling by the [Federal Communications Commission], whether by application by the parties in this case or otherwise.” *Id.* at 1040.¹¹

Other courts have found the term “connection”, used in other contexts, to be ambiguous. The U.S. Court of Appeals for the Fifth Circuit found that the phrase “in connection with” contained in the Commodity and Exchange Act, 7 U.S.C. §§ 1 *et seq.* (CEA), “is a term of ambiguous scope,” and on that basis accorded deference to the Commodity Futures Trading Commission’s finding that a software retailer engaged in misleading advertising in violation of the CEA. *R&W Technical Svcs. Ltd. v. Commodity Futures Trading Comm’n*, 205 F.3d 165, 171 (5th Cir. 2000). In addition, the Tenth Circuit

¹¹ The Tenth Circuit suggested that the FCC’s interpretation of the statutory phrase “in connection with” would be entitled to deference, because that agency has “expertise and familiarity” with the telecommunications industry and “considerable familiarity” with defining such terms. 1 F.3d at 1040 & n.7.

found the term “causally connected” in an insurance policy was ambiguous. *Stauth v. National Union Fire Ins. Co. of Pittsburgh*, 185 F.3d 875 (10th Cir. 1999).

AT&T in fact agrees that the term “connection” is ambiguous, arguing that WAC 480-120-141, which also uses the word “connection”, should be ““void for vagueness’.” AT&T Br. at 36 (quoting *Myrick v. Bd. of Pierce County Commr’s*, 102 Wash.2d 698, 707, 677 P.2d 140, 146 (1984)). Apparently that term was so vague as to deprive AT&T of “fair notice,” AT&T Br. at 35, and yet when used in RCW 80.36.520 was “definite and predictable.” *Id.* at 34. Thus, in addition to the Legislature’s failure to define the term “connection”, AT&T’s own brief demonstrates that the statute is unclear and thus the WUTC is entitled to deference when interpreting it.

Because the term “connection” is demonstrably ambiguous, the WUTC is entitled to “great weight” and “considerable deference” in its interpretation of that term within the Final Order. *D.W. Close*, 143 Wash. App. at 128-29, 177 P.3d at 149.

II. THE “DIRECT BUSINESS RELATIONSHIP” TEST IS A “PLAUSIBLE CONSTRUCTION” OF THE PHRASE “PROVIDING A CONNECTION” IN RCW 80.36.520

AT&T argues that the “direct business relationship” test applied in the Final Order is an unlawful implementation of RCW

80.36.520. AT&T Br. at 26-35. Its arguments fail to acknowledge how closely the WUTC's rule follows the language of RCW 80.36.520 and how cogently the WUTC explained why the "direct business relationship" test fully comports with the language and intent of that statute. The WUTC expressly and consistently implemented the Legislature's instruction that an OSP is an entity "providing a connection". For purposes of Complainants' allegations in their civil claim, AT&T was that entity.

A. The WUTC Did Not "Ignore" or "Supplant" the Phrase "Providing a Connection" in RCW 36.80.520

AT&T argues that the WUTC simply "ignores and supplants" the statutory phrase "providing a connection" that appears in RCW 80.36.520. AT&T Br. at 19. That suggestion is false. First, the WUTC expressly incorporated the language of RCW 80.36.520 in its implementing rules. The statute states that

The utilities and transportation commission shall by rule require, at a minimum, that any telecommunications company, operating as or contracting with an alternate operator services company, assure appropriate disclosure to consumers of the provision and the rate, charge or fee of services provided by an alternate operator services company. For the 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.

RCW 80.36.520 (emphasis added).

The WUTC adopted that language, and begins its definition of OSP as

Any corporation, company, partnership, or person other than a local exchange company **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 of the definition is substantially the same:

Any corporation, company, partnership, or person **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). (The change from the 1991 version is the omission of the phrase “other than a local exchange carrier”.) Far from “disregarding” the statutory language, the WUTC adopted it. AT&T’s statement that the WUTC ignored key statutory language is thus entirely false.

As shown in Section II.B below, the WUTC also took the “providing a connection” phrase head-on within its analysis in the Final Order. Final Order ¶¶ 14-19 (R. 6819-6821). The WUTC did not “ignore” or “supplant” it. AT&T Br. at 19.

B. The WUTC Fully Comported With the Legislature's Intent in RCW 80.36.520

The Final Order deals squarely with the question of what the Legislature intended when mandating that an entity “providing a connection” must make disclosures. The WUTC considered carefully, and directly quoted, the Legislature’s intent when it enacted the disclosure requirements:

The statute includes an expression of legislative intent, stating 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 legislature finds that provision of these services without disclosure *to consumers* is a deceptive trade practice.”

Final Order ¶ 16 (quoting RCW 80.36.510) (emphasis in original) (R. 6820).

The WUTC went on to state that the Legislature directed it to require that “any telecommunications company, operating as or contracting with an alternate operator services company, assure appropriate disclosure *to consumers* of the provision and the rate, charge or fee of services provided by an alternate operator services company.”

Id. (quoting RCW 80.36.520) (emphasis in original).

Based on this statutory language, the WUTC reasoned that

The legislature was expressly concerned with companies that **provide services to consumers without disclosing to those consumers** the services the companies are providing and **the rates** those companies are charging.

Id. (emphasis added).

This analysis, which the WUTC calls a “consumer-centric approach,” Final Order ¶ 18 (R. 6821), thus draws directly from the Legislature’s focus on making disclosures “to consumers”. The WUTC then considered the question of how telecommunications companies can make disclosures to consumers. *See id.* It noted that, in the context of resold telecommunications services,

As the service provider, the reseller, **not the company that owns and operates the physical infrastructure** used to provide the service, has the direct business relationship with its customers and is responsible for all billing of, notifications to, and other communications with, the end users of that service[.]

Id. (emphasis added).

Returning to the context of operator services, the WUTC reasoned that

The **objective of the statute** and Commission rules governing OSPs **is to ensure that consumers are aware that they are using operator services and know or can request the rates they are paying for calls using those services.** As with other telecommunications services, the company that charges, communicates with, and otherwise is identified as the service provider to, the consumer is obligated to make such disclosures

Id. ¶ 19 (R. 6821) (emphasis added). In other words, the WUTC reached the reasonable conclusion that the entity best suited to making rate disclosures *to consumers* is the entity that routinely communicates *with consumers*, via monthly bills, and identifies itself *to consumers*, via call branding, as the service provider. That conclusion certainly provides “a plausible construction” of RCW 80.36.520. *Cobra Roofing*, 112 Wash. App. at 409, 97 P.3d at 20. It should be affirmed here.

Finally, contrary to AT&T’s position that the “direct business relationship” test is a radically new concept, the WUTC’s approach in this matter is fully consistent with its expert view to regulating utilities:

This consumer-centric approach to determining which company is responsible for complying with our rules governing OSPs is fully consistent with the Commission’s treatment of other telecommunications service providers.

Final Order ¶ 18.

The WUTC provided the following, very apposite example:

Resellers of local or long distance services, for example, are the service providers for the consumers of that service, even though the underlying facilities – or the entire service itself – are physically provisioned by another company. As the service provider, the reseller, not the company that owns and operates the physical infrastructure used to provide the service, has the direct business relationship with its customers and is

responsible for all billing of, notifications to, and other communications with, the end users of that service, as well as for complying with all Commission rules governing the provision of those services to consumers.

Id.

For these reasons, the “direct business relationship” test is not only a reasonable construction of RCW 80.36.520, but it comports with the WUTC’s longstanding policy of directing its regulations and scrutiny toward telecommunications companies that hold themselves out and interface with the consumers of the State of Washington.

C. The Legislative History on Which AT&T Relies Supports the Final Order

AT&T relies on the legislative history of RCW 80.35.520 to argue that the WUTC missed the Legislature’s intent. AT&T Br. at 15-16. That legislative history actually cuts against AT&T.

AT&T relies on the words of “a concerned citizen whose complaints became part of the legislative history,” who stated that “I have recently received a bill ... which includes a charge by a company calling itself Central Corp.” *Id.* at 15 (quoting CP 941). That quote in itself justifies the “direct business relationship test” that the WUTC adopted, because the OSP identified itself to the consumer on the bill – that entity showed its face to the consumer via placing its name on the phone bill. It was that entity that the testifying consumer

believed should have been subject to a rate disclosure rule. The “direct business relationship” test answers that consumer’s demand.

AT&T then relies on a statement “during the House debate” that “Tolls calls made from hotels, motels, hospitals, some pay telephones are handled by what are called alternate operator service companies. ... Some of these companies charge a thick access fee[.]” AT&T Br. at 16 (quoting CP 915). The Final Order is consistent with that concern as well, because here it was AT&T that “handled”, at a minimum, the long distance and intraLATA calls from Washington DOC sites. That fact is clear on the face of the AT&T/DOC Contract. R. 182. AT&T was the telecommunications carrier for those calls. Again, the legislative history on which AT&T relies targets exactly the type of entity that the Final Order addresses: AT&T.

D. The WUTC’s Finding That AT&T Was the OSP Is Supported by Substantial Record Evidence

The Final Order relies on substantial evidence demonstrating that AT&T was the entity with the ability to communicate with consumers and thus to make rate disclosures “to consumers” as RCW 80.36.520 requires. The Washington Administrative Procedure Act, RCW 34.05.010 *et seq.* (“APA”), provides that relief from an agency order is not appropriate if it is “supported by evidence that is

substantial when viewed in light of the whole record before the court[.]” RCW 34.05.570(3)(e). The Final Order satisfies that requirement.

The WUTC “look[ed] at indicia of a direct business relationship,” Final Order ¶ 29 (R. 2825), and relied on the expert testimony of Robert Rae, former CTO of T-Netix, who testified that the term “connection” in terms of operator services

could mean anything from purchasing hardware, purchasing software, procuring network connectivity and more importantly, even if they aren’t doing any of those things, at a higher order, providing the face to the customer in branding the calls, branding the billing, taking the responsibility for those elements being pulled together to deliver service to that customer and, therefore, representing to the customer that complex process behind it to make sure that the customer is served appropriately.

Deposition of Robert Rae at 173:1-10 (Aug. 6, 2009) (WUTC Ex. A-24HC) (R. 3758).¹²

The Final Order paraphrases Mr. Rae to find that “indicia” of being an OSP

include evidence that the company holds itself out to consumers as the service provider, such as through “providing the face to the [consumer] in branding the calls, branding the billing, [and] taking the

¹² This excerpt of Mr. Rae’s deposition was designated as an exhibit by AT&T.

responsibility for those elements being pulled together to deliver [operator] service to that [consumer].

Final Order ¶ 29 (quoting Ex. A-24HC at 173:5-8) (R. 6825).

The WUTC then recited the evidence demonstrating which entity provided “the face to the consumer”, which included telephone bills bearing AT&T’s brand. *Id.* ¶ 36 (R. 6827). It then noted that “AT&T also does not dispute that the automated operator assistance platform in place at the correctional facilities branded the operator-assisted calls AT&T carried as AT&T calls.” *Id.*

The WUTC also considered the fact that AT&T’s tariff lists operator-assisted calls as one item, and “[t]here is no evidence in the record that any company imposed a charge solely for operator services, either to a consumer or to the toll service provider[.]” *Id.* ¶ 41 (R. 6830). Finally, based on the foregoing evidence, the WUTC noted that **“AT&T identified itself as the service provider through its branding of, and bills for, the operator-assisted collect calls.”** *Id.* ¶ 42 (R. 6830) (emphasis added).

Nothing in the record, which was amassed during four years of litigation before the WUTC (in 2005 and in 2008-2010) showed that “any consumers knew or had reason to know that T-Netix was

involved in those calls.” *Id.*¹³ In fact, there still remains, after additional discovery obtained in the civil case, no evidence that a consumer had a direct relationship with T-Netix. As to AT&T, by contrast, the Final Order references a substantial amount of evidence that AT&T had the direct relationship with consumers that would have enabled it to make rate disclosures.¹⁴ The WUTC’s OSP decision in the Final Order thus amply satisfies the “substantial evidence” requirement in the APA and should be affirmed. RCW 34.05.570(3)(e).

E. Record Evidence Demonstrates That AT&T Was the OSP Even Under AT&T’s Proposed Test

Even if AT&T were correct in supplanting the “direct business relationship” test with a more technically-focused test, the WUTC’s conclusion that AT&T was the OSP would survive scrutiny.

¹³ The WUTC held out the possibility that some evidence may exist indicating that T-Netix held the “direct business relationship” with consumers. Final Order n. 43 (R. 6830-6831). That dictum surmises a hypothetical proceeding in which such documents or evidence materializes. The record before the WUTC, however, is the product of years’ worth of discovery and depositions, and not one document or witness was uncovered that could show T-Netix had any relationship with any recipient of an inmate call from DOC sites served by AT&T.

¹⁴ The question whether such disclosures were made, however, was not explored in discovery and was expressly not decided by ALJ Friedlander, as the WUTC admits. Final Order ¶ 53 (R. 6834).

Substantial record evidence shows that AT&T was the entity that ensured inmate calls were connected to the telecommunications network. *See* RCW 34.05.570(3)(e).

AT&T notes that the LECs were responsible for providing operator services. AT&T Br. at 11. There was no contract between AT&T and T-Netix for LEC services. Whereas GTE, USWest, and PTI each signed contracts for LEC and operator service (R. 183-183), the AT&T/T-Netix contract was for the sale of software and premises-based hardware, and the maintenance service applicable to software and hardware. As stated above, the terms “operator service” and “telecommunications” never appear in the AT&T/T-Netix Contract.

AT&T’s brief relies in part on ALJ Friedlander’s statement in her Initial Order that the P-III equipment “made the connection” to calling services. AT&T Br. at 5 (citing Order 23 ¶ 143).¹⁵ That statement does not bind the WUTC here and was not required to be incorporated into the Final Order. The proposed findings and conclusions of ALJs cannot be used to overturn a full agency’s subsequent decision. *E.g., Valentine v. Dept. of Licensing*, 77 Wash.

¹⁵ AT&T also asserts that the P-III equipment “belongs to T-Netix.” AT&T Br. at 28. That assertion is disproved by the clear language of the AT&T/T-Netix Contract which states that AT&T would take title to the equipment. R. 7549.

App. 838, 844, 894 P.2d 1352, 1356 (1995). It is telling, however, that AT&T omits reference to ALJ Friedlander's further statement that "[a]s owner of this platform, **AT&T provided the connection** and was, therefore, the OSP for the correctional facilities." Order 23 ¶ 129 (emphasis added).

AT&T also fails to apprise the Court of other, equally relevant, evidence in the record regarding this "connection" issue. For example, in a document designated by ALJ Friedlander as Ex. B-6, T-Netix informed the WUTC that "T-Netix is not, and was not, a facilities-based carrier and did not provide any network facilities, transmission facilities, network switching facilities, or central office call processing services or facilities." T-Netix, Inc.'s Response to Bench Request No. 6 (Apr. 2, 2010) (Ex. B-6) (R. 7053-7054). T-Netix went on to state that it "did lease facilities needed to provide local calls¹⁶ from five (5) facilities on behalf of AT&T. For those calls, the underlying network, transmission, and switching facilities and central office call processing services were provided by PTI." *Id.* The response also states that

¹⁶ Local calls are outside the scope of the underlying dispute, because all three of the LECs were exempt from the rate disclosure obligation for the entire relevant period of this case. Those three LECs carried every call received by Judd and Herivel. As such, the local calls did not need to have rate disclosures on them. *Judd v. AT&T*, 152 Wash. 2d 195, 95 P.3d 337 (2004).

“[f]or local calls beginning March 3, 1998, from the five WA DOC facilities, AT&T agreed, among other things, to purchase all inmate telephone sets and reimburse T-Netix for the commissions paid and for the cost of inmate telephone lines.” *Id.*

T-Netix’s response makes clear that it did not provide a “connection” at any DOC site, and that the resident LEC (such as PTI) and AT&T did. Even using AT&T’s cryptic definition of “connection”, which speaks of “a designated point in the sequence that constitutes a typical telecommunications pathway,” AT&T Br. at 26, the fact that T-Netix did not provision any “network facilities, transmission facilities, [or] switching facilities” (R. 7053) refutes any assertion that T-Netix provided a “connection”.

AT&T also failed to note that T-Netix’s first expert witness, Alan Schott, filed an affidavit in 2005 stating that “[t]he connection between the inmate and the called party was ultimately accomplished over a transport network provided by the operator services provider, or their contracted carrier.” Supplemental Affidavit of Alan Schott ¶ 14 (July 27, 2005) (Ex. A-19HC) (R. 3717). AT&T marked this document as an official exhibit. The portion quoted herein was not designated as confidential.

AT&T also failed to note that T-Netix's other expert witness, Bob Rae, testified that "the connection" at DOC sites "went from the telephony call processor to an LEC POPs [*sic*] line, which was then connected to the LEC switch." Rae Dep. at 224:22-24 (Ex. A-24HC) (R. 3763).¹⁷ This document also is an AT&T-designated exhibit.

This evidence is summarized herein to show that even if the WUTC had used AT&T's alternate, very unclear definition of "OSP", the WUTC would have found that AT&T was the OSP. Although the WUTC's "consumer-centric" interpretation of the statutory term "connection" in RCW 80.36.520 is both reasonable and "plausible" under *Cobra Roofing*, even if one assumes that the "direct customer relationship" test is invalid, the WUTC's identification of AT&T as the OSP still stands. AT&T has thus provided no ground on which the Court can overturn the OSP analysis or findings in the Final Order.

III. AT&T'S ARGUMENT DEPENDS ABSOLUTELY ON ITS NEED TO IGNORE THE DEFINITION OF "OPERATOR SERVICES"

AT&T's brief focuses entirely on the word "connection" in RCW 80.36.520 and WAC 480-120-141. When AT&T quotes from the WUTC's definition of OSP, it provides only the first sentence.

¹⁷ Mr. Rae adopted all prior statements of Mr. Schott. Declaration of Robert Rae (Aug. 5, 2009) (Ex. A-18) (R. 7204-7205).

AT&T never acknowledges the WUTC's full definition of OSP, which in 1991 was

Any corporation, company, partnership, or person other than a local exchange company providing a connection to intrastate or interstate long-distance or to local services from locations of call aggregators. **The term 'operator services' in this rule means any intrastate telecommunications service** provided to a call aggregator local that includes as a component any automatic or live assistance to a consumer to arrange for billing or completion, or both, of an intrastate telephone call through a method other than (1) automatic completion with billing to the telephone from which the call originated, or (2) completion through an access code use by the consumer with billing to an account previously established by the consumer with the carrier.

WAC 480-120-021 (1991) (AT&T Br., Appendix) (emphasis added).

The 1999 version of WAC 480-120-021 defines OSP as

Any corporation, company, partnership, or person providing a connection to intrastate or interstate long-distance or to local services from locations of call aggregators. **The term 'operator services' in this rule means any intrastate telecommunications service** provided to a call aggregator local that includes as a component any automatic or live assistance to a consumer to arrange for billing or completion, or both, of an intrastate telephone call through a method other than: Automatic completion with billing to the telephone from which the call originated; or completion through an access code use by the consumer with billing to an account previously established by the consumer with the carrier.

WAC 480-120-021 (AT&T Br., Appendix) (emphasis added).

The WUTC, in contrast to AT&T's brief, quotes and discusses the "telecommunications" component of the definition of "operator services". Final Order ¶¶ 12, 16, 18, 19, 25 (R. 6821, 6824). It focused on the facts that:

- RCW 80.36.520 "includes an expression of legislative intent, stating 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.'" *Id.* ¶ 16 (quoting RCW 80.36.510) (emphasis added).
- "This consumer-centric approach to determining which company is responsible for complying with our rules governing OSPs is fully consistent with the Commission's treatment of **other telecommunications service providers.**" *Id.* ¶ 18 (emphasis added).
- AT&T's 'connection' argument "ignores, however, the definition of operator services as '**intrastate telecommunications services** provided to a call aggregator location that includes as a component any automatic or live assistance to a consumer ...'" *Id.* ¶ 25 (emphasis added).

AT&T's exclusion of most of the definition of OSP from its papers is an attempt to shield the Court from the WUTC's cogent analysis that an OSP must be a telecommunications carrier. It is undisputed in this case that AT&T, GTE, US West, and PTI were the telecommunications carriers in the DOC arrangement. It likewise cannot be disputed that nothing in the AT&T/T-Netix Contract, or the amendments thereto, required T-Netix to provide telecommunications

service to any individual or entity. This evidence buttresses the WUTC's identification of AT&T as the OSP for purposes of Complainants' underlying civil claims.

IV. AT&T'S PROPOSED OSP DEFINITION WOULD LEAD TO THE ABSURD RESULT OF CHANGING EQUIPMENT MANUFACTURERS INTO TELECOMMUNICATIONS COMPANIES

AT&T would like the Court to adopt a definition of OSP that would be impossible to implement and would lead to absurd results. AT&T believes that an entity that sells to a telecommunications company any equipment used for operator services suddenly *becomes* a provider of operator services. By that argument, it would convert scores of companies into regulated telecommunications carriers overnight.

Courts and agencies "should not construe a regulation in a manner that is strained or leads to absurd results." *Overlake Hosp. Ass'n v. Dep't of Health of State of Washington*, 170 Wash. 2d 43, 52, 239 P.3d 1095, 1099 (2010) (*en banc*) (affirming agency rule). To the extent AT&T argues that only a statute, and not a rule, is under review here, the same canon applies: "A statute must be read to avoid absurd results." *General Telephone Co. of the Northwest, Inc. v. Washington*

Utilities & Transp. Comm'n, 104 Wash. 2d 460, 471, 706 P.2d 625, 632 (1985) (*en banc*) (affirming WUTC rate decision).

The T-Netix P-III premise equipment at DOC sites was a computer that provided a “gating” function on inmate-initiated calls. AT&T Br. at 7; *see also* Rae Dep. at 235:17 (Ex. A-21HC) (R. 7247). AT&T relied on the P-III to provide long-distance (interLATA) calling to inmates, and the LECs relied on the P-III to provide local and intraLATA calling. AT&T Br. at 6. The P-III allowed a call to go forward if the dialed telephone number was a permissible terminating telephone number. AT&T Br. at 7; *see also* Rae Dep. at 242:6-13 (Ex. A-21HC) (R. 7249); *id.* at 220:20-25 (Ex. A-24) (R. 7243). Based on these facts, AT&T argues that T-Netix was the OSP. AT&T Br. at 7.

AT&T fails to note T-Netix’s unrefuted expert testimony, on which AT&T itself relied at the WUTC, that the P-III did not route or “switch” calls, principally because the configuration at DOC facilities was such that one telephone was assigned to one telephone line. Affidavit of Alan Schott ¶ 7 (June 10, 2005) (Ex. A-17C) (R. 3730-3731).

Placing an inmate telephone call from DOC sites required several components: P-III premise equipment, wires inside the prison walls, the central office switch that provides dial tone to the prison,

copper or fiber optic telephone cables, and of course the telephone set itself. All of those physical components are needed to make a phone call. Or, to borrow AT&T's favorite term, all of those physical components are needed to make a "connection" to the network. Thus, by AT&T's logic, every company that manufactures or installs central office switching equipment, distribution frames, multiplexing equipment, copper cables, fiber optic lines, or telephone sets for use in Washington is an OSP. As such, they **all** must ensure that audible rate disclosures are made from payphones.

Imagine the results: ten or more different equipment manufacturers each would be required to put audible rate disclosures on inmate-initiated calls.

Notably absent from AT&T's proposed definition of OSP: the company that markets and provides the calling services. Thus, under AT&T's definition, although the manufacturers of hardware and software used for inmate telecommunications services must comply with WAC 480-120-141, the entities that performed all of the following functions is exempt from the rule:

- Won and executed the DOC inmate telecommunications contract

- Signed contracts to arrange for telecommunications and “operator services”
- Set the calling rates
- Put its brand on the calls
- Carried the calls
- Billed for the calls under its name; and
- Received the money from the call recipients

In other words, the only entities that the called party even knew were handling the call would be, by AT&T’s logic, exempt from the requirement to tell the called party how much a call would cost. A more absurd outcome is difficult to fathom. The Court should not adopt AT&T’s logic in order to ensure that the WUTC is not forced to create such an absurd, and legally unsupportable, outcome. *E.g.*, *Overlake Hosp. Ass’n*, 170 Wash. 2d at 52, 239 P.3d at 1099.

V. AT&T’S DUE PROCESS ARGUMENT IS WITHOUT MERIT

AT&T raises two procedural arguments in its attempt to reverse the OSP finding in the Final Order. First, it purports that the Final Order creates a new rule. AT&T Br. at 27-28. Second, it raises, just as it did before the WUTC, a “fair notice” argument asserting that it had no idea that the customer-relations components of AT&T

service would be considered within the analysis of which entity was the OSP. *Id.* at 38-31. AT&T is factually and legally incorrect in both assertions.

A. The Final Order Does Not Create a New Rule

AT&T pretends that the Final Order “effectively adopted a new rule.” AT&T Br. at 45. The pretense is a necessary condition for attempting to strip the WUTC of the deference to which it is entitled on this issue. *See* Standard of Review above. It is also a necessary device by which AT&T attempts to mask its appeal as something other than an improper collateral attack on a longstanding WUTC rule – an attempt that Complainants made unsuccessfully at the Court of Appeals and the Supreme Court of Washington. *Judd*, 116 Wash. App. at 771,66 P.3d at 1108,¹⁸ *aff’d*, 152 Wash. 2d at 205, 95 P.3d at 342.¹⁹

¹⁸ “Judd acknowledges that this case is an attempt to challenge the validity of the WUTC regulations as exceeding the statutory authority of the agency but argues that it is not a review proceeding under the Administrative Procedure Act. We disagree. The Administrative Procedure Act, RCW 34.05.510, is the exclusive means of judicial review of agency action.” *Id.*

¹⁹ “The Court of Appeals correctly upheld the dismissal of Judd’s challenge to the WUTC regulations. The suit was not brought pursuant to the terms of the APA.” *Id.*

The Final Order did not create a new rule. It simply applied WAC 480-120-141 to Complainants' allegations as it was ordered to do by the King County Superior Court. R. 104-105 (Judge Learned order dated November 9, 2000).

WAC 480-120-141 has existed in substantially the same form since 1991. And what AT&T carefully avoids admitting is that the WUTC never has had cause to interpret WAC 480-120-141 until the primary jurisdiction referral from King County Superior Court. Its having now interpreted and applied WAC 480-120-141 to a particular set of facts does not render the Final Order a new rule.

B. AT&T's "Fair Notice" Argument Fails, Because AT&T Reasonably Should Have Known It Was the OSP for InterLATA Calls

AT&T's "fair notice" argument, AT&T Br. at 28-31, was considered by the WUTC and shown to be without merit. Final Order ¶ 39 (R. 6829). AT&T had ample notice that the question of which entity held the customer relationship would bear on the conclusion of which entity was the OSP. Moreover, AT&T, having acted since 1992 as an OSP (AT&T Br. at 10 n.4), knew or should have known the actions it took as an OSP – arranging the billing of collect calls, placing its brand on calls (Final Order ¶ 29) – and realized that those

same actions with regard to Washington DOC calls would render it subject to RCW 80.36.520.

Within the WUTC proceeding, AT&T was on notice beginning in at least August 2009 that the question of which entity branded the calls, provided the customer services, and billed for the calls are determinants of which entity acted as OSP. T-Netix made that argument to the WUTC in its Amended Motion for Summary Determination filed August 27, 2009. (R. 2954-2978.) This motion was among the pleadings considered by ALJ Friedlander as she drafted the Initial Order (Order 23) released April 21, 2010 (R. 3538-3593), and was before the WUTC as it crafted the Final Order.

T-Netix argued in its Amended Motion that AT&T complied “with the other OSP mandates – branding, customer service, etc. ...” Amended Motion ¶ 24 (R. 2969). T-Netix also argued that the charges assessed for interLATA calls from DOC sites “are undisputably AT&T’s collect calling rates.” *Id.* These facts, T-Netix argued, demonstrated that AT&T was the OSP for interLATA calls, because it would not “make any sense as a matter of regulatory policy to require T-Netix to disclose rates set by another carrier ...” and because branding calls is “something that only the OSP is required to do.” *Id.* (citing WAC 480-120-141(5) (1991), 480-120-141(4) (1999)).

AT&T responded to this argument. In its Response to T-Netix's Amended Motion for Summary Determination filed September 10, 2009 (R. 7252-7283) (designated Highly Confidential), AT&T argued that "T-Netix engages in circular logic," because the fact that T-Netix's brand *did not appear* on interLATA calls was evidence of T-Netix's failure to comply with WUTC regulations, and the fact that AT&T's brand *did appear* on interLATA calls should not be construed as an admission by AT&T that it was subject to those WUTC regulations. R. 7279-7280 (¶ 44).²⁰ In other words, AT&T attempted to explain away the fact that its brand and its rates were disclosed on interLATA calls from DOC sites. AT&T was thus able to address, over two years ago and well before the Initial Order or Final Order issued, the argument that the entity that showed its face to the consumer was the OSP.

For this reason, the WUTC rejected AT&T's "fair notice" argument. Final Order ¶ 39 (R. 6829). It noted that "T-Netix first asserted that an OSP is the company that interfaces with the consumer of operator services – including billing for those services – and AT&T

²⁰ The AT&T Response was designated as Highly Confidential, but the language quoted here was not identified by AT&T as among the confidential portions of that document. Under the parties' convention for identifying such material, the quote would have been underlined to indicate its confidential nature.

fully responded to that position.” *Id.* (citing AT&T Response to T-Netix Amended Motion). The WUTC also noted that “AT&T also had the opportunity to respond to Bench Request Nos. 7 and 13 and to reply to other parties’ responses.” *Id.*

Bench Requests 7 and 13 asked which entity was identified as the billing carrier on telephone bills. (R. 5297, 6454). Within its responses, AT&T argued that the question of which carrier’s name appears on a telephone bill is irrelevant to the question of which entity is the OSP. In response to Bench Request 7, AT&T stated

Although AT&T is uncertain of the reason underlying the Commission’s interest in the requested information, as a preliminary matter, AT&T respectfully submits that the bench requests appear to suggest some deviation from the Commission’s own regulation. ... The October 6, 2010 bench requests appear to stray from that definition by probing into matters such as billing, tariffs, and cost recovery rationales that have no clear relationship to which entity provided the ‘connection’ at issue.

AT&T’s Responses to October 6, 2010 Bench Requests (Oct. 20, 2010) (R. 6054-6055).

In response to Bench Request 13, AT&T stated

To the extent that Bench Request No. 13, by seeking information regarding billing, deviated from the Commission’s own regulation at issue, WAC § 480-120-021, which expressly defines ... OSP as the entity ‘providing a connection to intrastate or interstate long-distance or to local services from the locations of call

aggregators,' AT&T respectfully objects to this Bench Request. ... billing information is not relevant to the question at issue

AT&T's Response to Bench Request No. 13 (Dec. 8, 2010) (R. 6468).

AT&T had a full and fair opportunity to persuade the WUTC not to consider issues such as billing relationship when deciding which entity was the OSP. As such, the "direct business relationship" test applied in the Final Order was not a surprise, and AT&T suffered no infringement of its right to fair notice and due process.

With regard to AT&T's complaint that it could not have known it would be subject to WAC 480-120-141, AT&T Br. at 37, it stretches credulity that the entity that arranged the AT&T/DOC Contract did not envision itself as the OSP. The Contract expressly identifies the LECs are providing "operator services" for the calls they handled (local and intraLATA). R. 181. AT&T, as the interLATA carrier, surely was aware that it would similarly be providing OSP service for those calls. Indeed, AT&T had provided OSP service to other locations since 1992. AT&T Br. at 10 n.4.

In addition, as the WUTC made clear both in the Final Order and in the appeal below, a "consumer-centric approach" (Final Order ¶ 18) is the agency's long-standing policy. The entities that identify themselves to consumers, through name branding and the issuance of

bills, consistently are the entities whose conduct the WUTC regulates. Here, AT&T knew that it would be billing for interLATA calls under its own name, and also knew that the charges for interLATA calls would be remitted to itself. A “person of common intelligence” would have been on notice that AT&T was acting as an OSP from Washington DOC sites. On this additional ground, AT&T’s “fair notice” argument founders.

Finally, the fact that AT&T may face “significant punitive fines”, AT&T Br. at 46, does not change the applicable standard of review requiring affirmance of the Final Order as a “plausible construction” of RCW 80.36.520. *Cobra Roofing*, 112 Wash. App. at 409, 97 P.3d at 20.

CONCLUSION

For the reasons stated herein, the Court should affirm the WUTC Final Order as to its Findings of Fact and Conclusions of Law that (1) adopt the “direct business relationship” test, and (2) identify AT&T as the Operator Service Provider for purposes of Complainants’ underlying civil claim. Final Order ¶¶ 12-44, 67, 75-76.

RESPECTFULLY SUBMITTED this 30th day of July, 2012

T-NETIX, INC.

By: 

Arthur A. Butler, WSBA # 04678

ATER WYNNE LLP

601 Union Street, Suite 1501

Seattle, WA 98101-3981

Telephone 206.753.3011

Facsimile 206.467.8406

Stephanie A. Joyce *

ARENT FOX LLP

1050 Connecticut Avenue, NW

Washington, DC 20036

Telephone 202.857.6081

Facsimile 202.857.6395

* Admitted *pro hac vice* by order dated July
9, 2012

CERTIFICATE OF SERVICE

VIA E-mail and US Mail

Chris Yourz
Richard E. Spoonemore
Sirianni Yourtz Meier & Spoonemore
999 Third Avenue, Suite 3650
Seattle, WA 98101
chris@sylaw.com
rspoonemore@sylaw.com
Attorneys for Sandy Judd and Tara Herivel

VIA E-mail and US Mail

Gregory J. Trautman
Attorney General of Washington
Utilities & Transportation Division
1400 S Evergreen Park Drive SW
PO Box 40128
Olympia WA 98504-0128
gtrautman@utc.wa.gov
*Attorneys for Washington State Utilites and
Transportation Commission*

VIA E-mail and US Mail

Donald H. Mullins
Duncan Turner
Badgley Mullins Law Group PLLC
Suite 4750
701 Fifth Avenue
Seattle WA 98104
donmullins@badgley Mullins.com
duncanturner@badgley Mullins.com
Attorneys for T-Netix, Inc.

VIA E-mail and US Mail

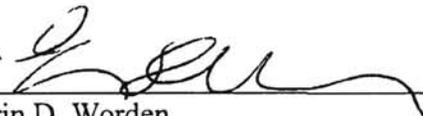
Charles R. Peters
David C. Scott
Brian L. Josias
Schiff Hardin LLP
233 S. Wacker Drive, Suite 6600
Chicago, IL 60606
cpeters@schiffhardin.com
dscott@schiffhardin.com
bjosias@schiffhardin.com
Attorneys for AT&T

VIA E-mail and US Mail

Kelly Noonan
Bradford Axel
Stokes Lawrence, P.S.
800 Fifth Avenue, Suite 4000
Seattle, WA 98104
Kelly.noonan@stokeslaw.com
Bradford.axel@stokeslaw.com
Deborah.messer@stokeslaw.com

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

EXECUTED at Seattle, King County, Washington, this 30th day of July, 2012.


Erin D. Worden

ATER WYNNE LLP

July 30, 2012 - 11:59 AM

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