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DIVISION II

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STATE OF WASHINGTON

BY
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NO. 42966-7-II

IN THE COURT OF APPEALS
OF THE 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.

BRIEF OF INTERVENORS/RESPONDENTS

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2012 AUG 31 PM 1:12
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Table of Contents

I. INTRODUCTION.....1

II. COUNTERSTATEMENT OF THE CASE6

 A. Procedure.....6

 B. Facts.....10

 1. Background to the Statute and Regulations.....10

 2. AT&T’s Exclusive Contract to Provide Operator Services to DOC Facilities.13

 3. AT&T’s Facilitation of the Call Process.....13

III. SUMMARY OF ARGUMENT.....16

 A. The WUTC’s Decision Is Reasonable And Entitled To Deference.....16

 B. Due Process Was Not Violated.....17

IV. STANDARD OF REVIEW18

 A. Appellate Review Under The APA.....18

 B. An Administrative Agency’s Interpretation Of Its Own Regulations And The Enabling Statute Is Entitled To Great Deference.18

 C. AT&T’s Attack On The WUTC’s Decision Is At Odds With Its Earlier Position.....19

V. ARGUMENT21

 A. The WUTC Properly Determined That AT&T Is The OSP.....21

1.	AT&T Was Well Aware That It Was an OSP.	21
	a. AT&T's early comments confirm its pre-1996 knowledge that it was considered an OSP.....	21
	b. Well before 1996, the WUTC advised that AT&T was an OSP.....	22
	c. AT&T's status as OSP did not change in 1992.....	24
	d. AT&T acted like and called itself the OSP.....	27
2.	The Legislature Never Intended to Exclude AT&T From the Definition of OSP.	31
3.	AT&T is "Providing a Connection" to Long-Distance Services.....	33
	a. The term "providing a connection" means making a telephonic connection possible. That is what AT&T does.....	33
	b. AT&T ignores the WUTC's regulations.....	34
	c. The WUTC's definition of AOS/OSP is consistent with industry understanding.....	36
	d. The WUTC's "consumer centric" definition is reasonable.....	37
	e. Ownership of the P-III platform is irrelevant.....	41
B.	AT&T is Not Entitled to the LEC Exemption When It Was Not Acting as an LEC.....	42

C.	The Statute and Regulations Do Not Violate Due Process and Are Not Unconstitutionally Vague.....	43
1.	AT&T Does Not Articulate Independent Grounds for Reversal.	43
2.	The Lenient Due Process Standard.	44
3.	The WUTC’s Articulated Standards are Grounded in the Language and Purpose of the Statutes and Regulations. AT&T Knew These Standards, and Knew It Was the OSP.	45
4.	If AT&T was Confused, It Should Have Inquired.....	47
5.	AT&T Produces No Evidence of Good-Faith Reliance on Its Alleged Non-OSP Status.	48
6.	AT&T Confuses Rationale With Results.	49
VI.	CONCLUSION	50

Table of Authorities

Cases

<i>A. B. Small Co. v. American Sugar Refining Co.</i> , 267 U.S. 233, 45 S.Ct. 295 (1925)	45
<i>Brian B. Brown Const. Co. v. St. Tammany Parish</i> , 17 F. Supp. 2d 586 (E.D. La. 1998).....	48
<i>Buechel v. Dep't of Ecology</i> , 125 Wn.2d 196, 884 P.2d 910 (1994).....	18
<i>Christopher v. SmithKline-Beecham Corp.</i> , __ U.S. __, 132 S.Ct. 2156 (2012)	49
<i>Exxon Corp. v. Busbee</i> , 644 F.2d 1030 (5th Cir. 1981).....	48
<i>Ford Motor Co. v. Texas Dept. of Transp.</i> , 264 F.3d 493 (5th Cir. 2001).....	47
<i>Franklin v. First Money, Inc.</i> , 427 F. Supp. 66 (E.D. La. 1976), <i>aff'd</i> , 599 F.2d 615 (5th Cir. 1979)	45
<i>Gifford Pinchot Task Force v. Clayton</i> , 2011 WL 841331 (W.D. Wash. Mar. 7, 2011).....	19
<i>Judd v. AT&T</i> , 136 Wn. App. 1022 (2006).....	8
<i>Judd v. AT&T</i> , 152 Wn.2d 195, 95 P.3d 337 (2004).....	7, 35
<i>Kaiser Aluminum & Chemical Corp. v. Dept. of Ecology</i> , 32 Wn. App. 399, 647 P.2d 551 (1982).....	19, 21
<i>Maynard v. Cartwright</i> , 486 U.S. 356, 108 S. Ct. 1853, 100 L.Ed.2d 372 (1988).....	44

<i>Pest Comm. v. Miller</i> , 626 F.3d 1097 (9th Cir. 2010)	45
<i>Postema v. Pollution Control Hearings Bd.</i> , 142 Wn.2d 68, 11 P.3d 726 (2000).....	18
<i>Premera v. Kreidler</i> , 133 Wn. App. 23, 131 P.3d 930 (2006).....	19
<i>Public Utility Dist. No. 1 of Pend Oreille County v. State</i> , <i>Dept. of Ecology</i> , 146 Wn.2d 778, 51 P.3d 744 (2002).....	18
<i>Restaurant Development, Inc. v. Cananwill, Inc.</i> , 150 Wn.2d 674, 80 P.3d 598 (2003).....	37
<i>Sacred Heart Medical Center v. State, Dept. of Revenue</i> , 88 Wn. App. 632, 946 P.2d 409 (1997).....	33
<i>Seven Gables Corp. v. MGM/UA Entm't Co.</i> , 106 Wn.2d 1, 721 P.2d 1 (1986).....	45, 48, 50
<i>Silverstreak, Inc. v. Washington State Dept. of Labor & Indus.</i> , 159 Wn.2d 868, 154 P.3d 891 (2007).....	45
<i>United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers</i> , 413 U.S. 548, 93 S.Ct. 2880, 37 L.Ed.2d 796 (1973).....	44
<i>United States v. Doremus</i> , 888 F.2d 630 (9th Cir. 1989)	47
<i>Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc.</i> , 455 U.S. 489, 102 S.Ct. 1186 (1982)	44, 45, 47
<i>Washington State Liquor Control Board v. Washington State Pers. Bd.</i> , 88 Wn.2d 368, 561 P.2d 195 (1977).....	18

<i>ZDI Gaming, Inc. v. Washington State Gambling Comm'n</i> , 151 Wn. App. 788, 214 P.3d 938 (2009).....	19, 21
---	--------

Statutes

RCW 34.05.570	18
RCW 80.36.510	passim
RCW 80.36.520	passim

Regulations

WAC 480-120-021	passim
WAC 480-120-141	passim
WAC 480-121-141	11

Other Authorities

Black's Law Dictionary (6th ed.)	34
http://www.merriam- webster.com/dictionary/providing?show=1&t= 1317841380	33
www.latamaps.com/Telecom_Maps/Regional_LATA_map s/Northwest_LATA_Map_-_Maponics.pdf	14

I. INTRODUCTION

In 1988, the Legislature recognized that consumers were not receiving adequate information when they made or received collect telephone calls placed from hotels, hospitals, prisons and other “aggregator locations.” AR003345-46. RCW 80.36.510. It concluded that consumers should be provided information about these services and the cost of the call before the charges were incurred. As a result, it directed the Washington Utilities and Transportation Commission (“WUTC”) to issue regulations requiring disclosures. It also declared that failure to comply was a “deceptive trade practice” under the Consumer Protection Act.¹

Following the statutory directive, the WUTC proposed amendments to its regulations that: (a) specifically defined the duties of an OSP; (b) explicitly defined an OSP as “any corporation ... providing a connection to ... long distance or to local services from ... places including but not limited to hotels, motels, hospitals, campuses...”; (c) described the types of “operator services” that OSPs would provide; (d) required “branding” the call by identifying the OSP at the beginning of

¹ Companies that provide telephone services from these aggregator locations were originally denominated “Alternate Operator Services” companies (“AOSs”). They became known as “Operator Service Providers” (“OSPs”), the designation used by the trial court, the WUTC, and the parties throughout these proceedings. Like the WUTC, this brief uses the current term “OSP.” AR6815-16, n.4.

the call; and (e) making available rate and other information about the call. AR6844-46 (WAC 480-120-021, 1989); AR6846 (WAC 480-120-141, 1989). The WUTC requested comments on the proposed regulations. AR6844.

AT&T submitted comments. AR3087-91. AT&T objected because the proposed amendments would make it an OSP. It argued that the disclosure rules and other OSP obligations should only be placed on problematic companies that charged “high” rates, but not on companies like AT&T:

The resolution of this problem does not require the inclusion of telecommunications companies such as US West Communications or AT&T within the proposed rules. *Yet, the current definition of an [OSP] provider in the revised rules (WAC 480-120-021, WAC 480-120-141) has just this result.*

AR003088 (emphasis added).

AT&T pleaded that “[t]he rules should be aimed at those companies whose business structure and marketing strategy are aimed at maximizing revenue from the aggregator market and who do not market directly to end-user customers.” AR003089. It asked for an exception so that “a telecommunications company such as AT&T [could] serve the telephone customer of an aggregator – in a manner similar to its other customers in the state – *without being subject to unnecessary rules aimed*

at safeguarding the public from excessive and unexpected charges.”

AR003090 (emphasis added).

The WUTC *rejected* AT&T's requested changes. In August of 1991 it issued final amendments, which kept intact the definition of OSP that, by AT&T's own admission, included AT&T. AR6850. In a follow-up letter on October 1, 1991, to AT&T and other parties, the WUTC reaffirmed that AT&T was an OSP under the regulations:

An AOS company is any which offers service through aggregators -- service as defined in the rule. In a nonequal access setting, *AT&T is an AOS company* although the person who controls the instrument has no other option for presubscribed AOS service.

AR003090 (emphasis added).

Soon after that letter, AT&T prepared its proposal to provide collect call telephone service for inmate phones at the Washington Department of Corrections (“DOC”) facilities. AR29. It offered to provide: (a) interLATA service for all DOC facilities; and (b) intraLATA service for five of the facilities. AR29-31. It proposed that its subcontractors, US West and GTE, provide local and intraLATA service for the remaining facilities and another subcontractor, PTI, provide local service for the five facilities at which AT&T provided intraLATA services. AR29-31.

Thirteen days after the DOC issued its September 4, 1991 request for proposal, AT&T sought a waiver of some of the regulations governing OSPs. AR2894. AT&T asserted that some such regulations – *e.g.*, requiring both informational stickers on a phone and access to 911 services – were not appropriate in a prison setting. AR2894. AT&T represented that it was in compliance with other OSP rules, including the requirement to “brand” inmate calls by identifying itself as the OSP to both the calling and receiving parties. AR2894. The WUTC granted AT&T’s request. AR2895.

On December 21, 1999 the DOC awarded the contract to AT&T, which was finalized on March 16, 1992 (the “Contract”). AR29. Pursuant to the Contract, and throughout the class period of June 20, 1996 to December 31, 2000, AT&T provided operator services on all the calls it carried, *e.g.*, all interLATA calls and certain intraLATA calls. It continued to identify itself as the OSP for these calls. For all these calls, it: (a) billed consumers at its rates for operator services; and (b) collected revenue.

AT&T, however, ignored its obligations under the OSP regulations to provide rate and related information regarding the services it sold to consumers who made and received collect calls. That failure led to this lawsuit.

One of AT&T's first responses to the lawsuit was to: (a) deny that it is an OSP; and (b) ask the trial court to refer this case to the WUTC. AT&T claimed that the WUTC – with special expertise in its own industry and regulations – should determine who was the OSP for the calls. Because the trial court agreed, AT&T was presented another opportunity to convince the WUTC that it was not an OSP. This time, AT&T argued that the word “connection” in the statute and regulation meant that the OSP had to be the entity controlling the equipment that physically completed the call. Thus, AT&T argued, it had no obligation to disclose, among other things, the rates it charged for providing operator services for the collect calls that it billed and profited from. That duty, it alleged, belonged to an equipment supplier, T-Netix.

The WUTC rejected AT&T's argument that an equipment provider that has no business relationship with the consumer is the OSP. As it explained, “the proper focus is on the entity ‘providing’ the connection to the consumer of the service, regardless of which company supplies the physical facilities used to make that connection.” AR6823, ¶23. It is, after all, *AT&T rates that AT&T charges its consumers* for operator services *from AT&T*. AR6827, ¶36; AR3017, Ins. 7-22.

AT&T argued that it was denied due process by this “sudden change” in interpreting the rule. AT&T, however, knew that it was an OSP

when it sought waivers of certain OSP rules in 1991, and while it continued as an OSP for the DOC facilities through 2000. AT&T, in short, wants the benefits of servicing prison calls as an OSP, but wants someone else to bear the burden of disclosing AT&T's rates and other information. The WUTC properly rejected this argument, and this appeal is the result.

II. COUNTERSTATEMENT OF THE CASE

A. Procedure.

In June 2000, Sandra Judd and Tara Herivel filed a class action in King County Superior Court against AT&T, T-Netix and other telecommunications companies.² AR3539. The Complaint, as later amended, alleges that those companies violated a 1988 statute and related regulations by systematically failing to disclose long-distance collect phone call rates and related information. AR3539-40. The victims of this nondisclosure were recipients of collect calls from prison facilities managed by the DOC. Those victims include spouses, children, attorneys and friends of prisoners.

For over twelve years, defendants have bounced this case from decision-maker to decision-maker. Initially, defendants other than AT&T and T-Netix moved to dismiss on grounds, among others, that they had

² Unless otherwise noted, the facts set forth in this section are based on the "Procedural History" portion of Order 23, ¶¶4-23, (AR3539-45) which were unchallenged by AT&T and adopted by the WUTC in Order 25, ¶4 (AR6815).

obtained waivers of rate disclosure requirements.³ AT&T and T-Netix, which had not received any waivers, separately moved to have the case referred to the WUTC under the doctrine of primary jurisdiction. AR3540. AT&T argued that the WUTC was best equipped to resolve the complex telecommunication issue as to the identity of the entity responsible for complying with disclosure requirements. CP150-52. AT&T also argued that the WUTC, which promulgated the disclosure regulations, could best determine if a violation had occurred. CP151 (“The WUTC is fully capable of resolving all issues related to disclosure of intrastate call rates.”).

The trial court agreed, and referred two questions to the WUTC:

- Whether AT&T or T-Netix were “Operator Service Providers” under the contracts at issue? (The answer to that question is critical because only OSPs are subject to the regulations that require long-distance rate-related information.)
- If AT&T or T-Netix was the OSP, whether the Commission’s regulations were violated?

AR3540; AR6816, ¶4. The trial court stayed further court proceedings.

CP141.

³ The King County court granted the moving defendants’ motion to dismiss. The dismissal was affirmed by the Court of Appeals in 2003 and the Supreme Court in 2004. *Judd v. AT&T*, 152 Wn.2d 195, 95 P.3d 337 (2004).

The WUTC proceedings commenced on November 17, 2004. AR3540. The parties undertook extensive discovery and motions practice before the WUTC.⁴ Discovery, responses by the parties to multiple ALJ bench requests, and motions occupied almost three years. In August of 2009, AT&T and T-Netix moved for summary determination of both referred questions. AR3542.

On April 21, 2010, the ALJ issued Order 23. AR3538. The ALJ concluded that: (a) AT&T was an OSP and was legally liable if it had failed to disclose rates; and (b) T-Netix was not an OSP. AR3589-92; AR6816. On May 11, 2010, AT&T petitioned the Commission for review. AR6816.

On March 31, 2011, the Commission issued Order 25, its final order. AR6813-42. It answered both referred questions. *First*, it affirmed the ALJ's ruling that AT&T was an OSP, but T-Netix was not. AR6813, ¶1. It held that AT&T was subject to the rate quote statute and regulations.

⁴ One such motion was made by T-Netix, which sought to dismiss the case on grounds that plaintiffs lacked standing. AR3541. The administrative law judge ("ALJ") denied that motion. T-Netix appealed to the full Commission, which affirmed the ALJ's decision. T-Netix then made the same motion to the trial court, who granted the motion and dismissed the case. Plaintiffs appealed. On December 18, 2006, the Court of Appeals reversed. *Judd v. AT&T*, 136 Wn. App. 1022 (2006). On December 4, 2007, the Supreme Court denied T-Netix's request for review. Thus, on March 21, 2008, the King County court reinstated its referral and the WUTC action proceeded. AR3542.

Second, it concluded that AT&T had failed to quote intrastate collect-call rates during the putative class period – June 20, 1996, through December 31, 2000. AR6813, ¶1. The Commission sent the matter back to the King County court for disposition, including a decision on damages. AR6813, ¶1.

On April 1, 2011, the King County court re-opened the matter. On April 29, it granted plaintiffs leave to amend their Complaint to add Columbia Legal Services as a class representative. On February 23 and July 9, 2011, the court certified relevant classes.

On April 29, 2011, AT&T petitioned in Thurston County court for review of WUTC Order 25. CP7. On February 2, 2012, the Thurston County court ruled that ample evidence supported the WUTC's decision that AT&T was an OSP. CP1534-37. It also ruled, however, that the WUTC prematurely decided whether AT&T had made adequate disclosures. The Superior Court did not determine whether AT&T provided the required information. It made only a procedural ruling. It held that AT&T did not get adequate notice that the WUTC would decide that issue. The Thurston County court remanded that question to the WUTC for further proceedings. CP1536-37. On February 24, 2012, the King County court withdrew its referral of that issue. As a result, that

court, not the WUTC, will determine whether AT&T made proper disclosure to recipients of collect calls from DOC facilities.

AT&T now appeals the Thurston County court's affirmance of the WUTC's conclusion that AT&T is an OSP.

B. Facts.

1. Background to the Statute and Regulations.

In 1988, the Legislature enacted statutory protections for the recipients of collect telephone calls from "call aggregators."⁵ RCW 80.36.510 states:

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....

The Legislature was concerned that recipients of collect calls were "often unaware of the charge until it appears on the monthly bill from a local phone company." AR3345-46. RCW 80.36.510 concludes that failure to disclose rates, charges or fees is a "deceptive trade practice."

⁵ Call aggregators are facilities that provide numerous telephones for use by occupants, *i.e.*, prisons, hotels, schools and hospitals. WAC 480-120-141(2)(b) (1989) specifically defined AOSs (now OSPs) as carriers with which "prisons," among other call aggregators, contract to provide operator services. Although the definition of Alternate Services Provider changed in 1991, the ALJ indicated that prisons were still considered call aggregators. AR3579-80, ¶¶104-106 ("There is no question that the Commission intended to include correctional facilities in the regulatory scheme." *Id.* ¶106.). AT&T does not challenge this conclusion.

Section .530 declares that a violation of Section .510 is a violation of Washington's Consumer Protection Act.

Section .520 directs the WUTC to adopt rules to assure appropriate disclosures by "Alternate Operator Services" companies ("AOSs"). Those rules include the 1988 and 1991 iterations of WAC 480-120-141, titled "Alternate Operator Services."

In 1999, the term "Alternative Operator Services" was changed to "Operator Services Provider." The WUTC found (AR6819, ¶13; *see also* AR6815-16, n.4), and AT&T acknowledges (App. Br., p. 3, n.2 and n.17), that aside from the exemption of local exchange carriers (LECs) in the 1991 version, the definitions of AOS and OSP are identical. *Compare* WAC 480-120-021 (1991) *with* WAC 480-120-021 (1999).

The terms are defined functionally. No telecommunication company is excluded by name or by definition. The disclosure regulations are imposed on an OSP that is "providing alternate operator services" (1991) or "providing operator services" (1999). WAC 480-121-141 (1991); WAC 480-121-141(1) (1999).

The regulations contain objective indicators of OSP status. Thus, an OSP must "brand" its calls. That is, the OSP must:

identify the AOS [*i.e.*, OSP] 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 placed collect.

WAC 480-120-141(5)(a) (1991). *See also* WAC 480-120-141(4) (1999).

The regulations also require that an OSP insure proper billing of its services. It must “[p]rovide to the local exchange company such information as may be necessary for billing purposes, as well as an address and toll free telephone number for customer inquiries.” WAC 480-120-141(5)(b) (1991); WAC 480-120-141(5)(a) (1999).

AT&T did both of those things. It branded calls by identifying itself at the beginning of each inmate-originated call carried by AT&T. AR6827-28, ¶36; AR2894. It provided billing information for all such calls. AR6827, ¶36.

What AT&T did not do as an OSP – but which the regulation requires – was provide a consumer with the opportunity to obtain information relating to the rate. WAC 480-120-141(5)(a)(iv) (1991) (requiring the AOS to provide, “immediately upon request” ... “a quote of the rates or charges for the call; the method by which the rates or charges will be collected; and the method by which complaints about the rates, charges, or collection practices will be resolved.”); WAC 480-120-141(2)(b) (1999) (“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.”).

2. AT&T’s Exclusive Contract to Provide Operator Services to DOC Facilities.

In 1991, AT&T proposed that the DOC award it the prison phone services contract. AR29. The DOC did so. The Contract is dated March 16, 1992. In the Contract, AT&T assumed exclusive responsibility for, and the obligation to provide, prison phone service in Washington. AR29-30. It also agreed to hire three subcontractors – GTE, US West and PTI. Each was a local exchange carrier (“LEC”). AR29-31.

AT&T took full advantage of the monopoly power conferred in it by the Contract. As the WUTC found, “...the rates reflected on AT&T’s bills for operator-assisted toll service [for calls initiated at certain DOC facilities] ... are significantly higher – in some cases several times higher – than the rates in the Verizon and Qwest bills for comparable calls.” AR6832-33, n.51.

3. AT&T’s Facilitation of the Call Process.

All calls originating from inmates are “0+” calls (*i.e.*, operator assisted collect). AR30. The inmate places a call from a phone at the prison phone bank. The call goes to computerized equipment located at the prison. Defendant T-Netix provides that equipment, which is known as a “platform” or “P-III.” The P-III will refuse calls to numbers not on the

approved list. Non-approved numbers include directory assistance, 800 numbers and numbers of individuals who have requested no contact. *See* AR3551-52 (call flow detail). If the call survives P-III screening, it is routed to the designated carrier for the type of call. AR3551.

AT&T had the exclusive responsibility to carry (and charge for) interLATA calls from every DOC facility. AR30, ¶3. “LATA” stands for “Local Access and Transport Area.” There are LATAs throughout the United States, each of which encompasses a specific geographic market. Washington has four LATAs. *See* www.latamaps.com/Telecom_Maps/Regional_LATA_maps/Northwest_LATA_Map_-_Maponics.pdf (last visited 8/22/12). An *interLATA* call is between people in different LATAs. For example, a phone call from Walla Walla to Seattle is interLATA because it originates in LATA 676 and terminates in LATA 674.

AT&T was also responsible for providing operator services for intrastate *intraLATA* calls, *e.g.*, calls within the same LATA, that originated in six DOC facilities which were not subcontracted out.⁶ All of

⁶ References to “intrastate” calls merely reflect the FCC’s exclusive jurisdiction over “interstate” calls, which are not here at issue.

Verizon, US West and PTI are the three LECs that subcontracted with AT&T. They divided up the remaining facilities. Non-AT&T-carried *intraLATA* calls are not at issue here.

these calls were carried by AT&T. AR30-31 (intraLATA calls for Clallam Bay, Washington Women's, Olympic, Pine Lodge, Coyote Ridge, and Larch Corrections Center not subcontracted to any LEC); AR47 (AT&T commissions for intraLATA calls from these facilities).

Each intraLATA call that AT&T carries, and every interLATA call, all of which it carries, are: (a) branded by AT&T audibly identifying itself as the call carrier when the recipient picks up the phone(AR6827-28, ¶36); and (b) billed by AT&T in one of two ways. For call recipients who are its customers, AT&T bills on an AT&T invoice and includes collect charges for calls from DOC facilities. AR6111-14; AR6824, ¶27. For call recipients who are customers of an LEC, AT&T's charges are specifically identified in a separate section of the LEC's invoice. AR5445; AR6824, ¶27; AR6827-28, ¶36. The billing LEC either prepays or reimburses AT&T for its collect charges. AR6824, ¶27. In either case, the bill clearly identifies AT&T's collect charges as originating with AT&T, and advises a customer with questions or complaints to contact AT&T at a specified phone number and address. AR6111-14; AR5445.

* * * * *

In Order 25, the WUTC determined that AT&T was the OSP for all intrastate calls it carried, *e.g.*, all interLATA calls and intraLATA calls it carried which were received by Ms. Judd and Ms. Herivel. AR6837-41.

The precise description and number of calls for which AT&T is the OSP is not here at issue. The question is more fundamental: Is AT&T an OSP as a matter of statutory and regulatory definitions, legislative intent and the industry's (including AT&T's) understanding?

III. SUMMARY OF ARGUMENT

A. **The WUTC's Decision Is Reasonable And Entitled To Deference.**

AT&T concedes that *if* it is an OSP, it is subject to the rate disclosure requirement at issue in this case. It argues, however, that it cannot be an OSP because it does not meet the definition in RCW 80.36.520:

“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.

AT&T argues that a company is not an OSP unless it provides a physical connection between: (a) a caller at a DOC facility; and (b) the next step in completion of the prisoner's call. AT&T argues that it is T-Netix, not AT&T, that provides that “connection.” App. Br., pp. 27-28.

AT&T's interpretation does not comport with the relevant statutory and regulatory language. Moreover, it is inconsistent with: (a) AT&T's own understanding of the term; (b) AT&T's actual conduct as the OSP; (c) legislative intent; and (d) industry norms. At minimum, the WUTC had

sufficient evidence from which to so find. And, as AT&T strongly urged in an earlier iteration of its argument, WUTC findings and conclusions are entitled to great deference.

B. Due Process Was Not Violated.

Neither the statute, the regulations, nor WUTC Order 25 violate the Due Process claims.

First, the definition of OSP is not ambiguous. Even if there is ambiguity, as long as there is a reasonable basis for the WUTC's findings and conclusions, the WUTC is entitled to "great deference."

Second, AT&T has long been on notice of, and has acknowledged, its status as an OSP. It was not misled. Moreover, it has produced no evidence that it relied on the statutory interpretation it now urges.

Third, were AT&T ever in doubt as to whether it is an OSP, it had a right to inquire. More than that, when the regulations were drafted, AT&T had the opportunity – and attempted – to influence whether it was deemed an OSP.

Fourth, AT&T's arguments are not independent. AT&T cannot lose on statutory interpretation but win on due process. To prevail on its due process argument, it must show that the WUTC's definition of OSP is irrational, which is precisely what it must do to prevail on its statutory interpretation argument.

IV. STANDARD OF REVIEW

A. Appellate Review Under The APA.

The APA governs judicial review of agency actions. *Buechel v. Dep't of Ecology*, 125 Wn.2d 196, 201, 884 P.2d 910 (1994). Courts of appeal stand in the shoes of the trial court and “appl[y] the standards of review in RCW 34.05.570(1)(a) directly to the agency record.” *Public Utility Dist. No. 1 of Pend Oreille County v. State, Dept. of Ecology*, 146 Wn.2d 778, 790, 51 P.3d 744 (2002). AT&T bears the burden of proof. *Id.* at 790; RCW 34.05.570(1)(a).

B. An Administrative Agency’s Interpretation Of Its Own Regulations And The Enabling Statute Is Entitled To Great Deference.

As AT&T correctly suggests, an agency misinterpretation of an unambiguous statute is reviewed *de novo*. If there is ambiguity, however, the WUTC’s interpretation of WAC 480-120-021, a regulation it promulgated, is entitled to “great weight.” *Washington State Liquor Control Board v. Washington State Pers. Bd.*, 88 Wn.2d 368, 379, 561 P.2d 195, 201 (1977).

The WUTC’s interpretation of RCW 80.36.520 is also entitled to “great weight” because it is interpreting a statute within its area of expertise. *Postema v. Pollution Control Hearings Bd.*, 142 Wn.2d 68, 77, 11 P.3d 726, 733 (2000). This is “particularly true when, as here, a

‘special law’ field is concerned.” *Kaiser Aluminum & Chemical Corp. v. Dept. of Ecology*, 32 Wn. App. 399, 404, 647 P.2d 551 (1982).

Under the “great weight” standard, any “plausible” agency interpretation consistent with legislative intent will be upheld. *ZDI Gaming, Inc. v. Washington State Gambling Comm’n*, 151 Wn. App. 788, 806, 214 P.3d 938 (2009); *Premera v. Kreidler*, 133 Wn. App. 23, 37, 131 P.3d 930 (2006). The WUTC’s interpretation can only be rejected if it is outside “the bounds of reasoned decision-making.” *Gifford Pinchot Task Force v. Clayton*, 2011 WL 841331, *4 (W.D. Wash. Mar. 7, 2011) (citation omitted).

C. AT&T’s Attack On The WUTC’s Decision Is At Odds With Its Earlier Position.

Early in these proceedings, AT&T moved for an order referring two key liability questions to the WUTC. One of those questions – whether AT&T was an OSP – was the very issue now before this Court.

In AT&T’s Motion to Dismiss [and] to Remand (filed Aug. 25, 2000), AT&T argued that the WUTC should be deferred to on that issue:

The Legislature has expressly recognized *the WUTC’s special competence* in dealing with these issues by delegating to that agency the responsibility to establish and enforce disclosure requirements. RCW 80.36.520. ... *[B]ecause of its years of experience in dealing with telecommunication rates and disclosure of those rates, the WUTC is in a better position than this Court to determine*

whether AT&T is bound by the disclosure requirements....

CP152 (emphasis added).

AT&T noted that the question whether it is bound by rate disclosure requirements “goes to the heart of the WUTC’s technical expertise.” CP150. Moreover:

The WUTC pervasively regulates the telecommunications industry, both generally and specifically in connection with plaintiffs’ claims in this case. The verbal rate disclosure requirement, WAC 480-120-141(2)(b), provides specifically who is obligated to disclose rates, what disclosures are to be made, how those disclosures are to be made, what penalties attach for failure to abide by the requirements, and whether some or all of the requirements should be waived, particularly in the prison context. The WUTC is in the best position to answer these questions....”

CP152 (emphasis added).

The King County court agreed, and referred the matter. Now, after twelve years, and after this matter has bounced between the WUTC and the Superior Court on three different occasions, AT&T attacks the WUTC’s conclusions and reasoning. This, despite the fact that AT&T recognizes the WUTC’s “technical expertise,” “broad authority” and “years of experience.” CP150-52. In light of this, it is difficult to understand AT&T’s current complaint that “the lower court adopted the Commission’s interpretation, giving it deference it did not deserve....” App. Br., p. 19.

Some statutes or regulations that are highly technical in nature may seem ambiguous to the lay reader but become clear to a reader with the requisite technical expertise. The burden, therefore, is on AT&T to demonstrate that: (a) the rate disclosure statute and regulations are clear and unambiguous on their face; and (b) the WUTC's recent ruling is in direct contravention of those clear statutory and regulatory mandates. *ZDI Gaming, Inc.*, 151 Wn. App. at 806; *Kaiser Aluminum & Chemical Corp.*, 32 Wn. App. at 404. This is a burden that AT&T fails to meet.

V. ARGUMENT

A. The WUTC Properly Determined That AT&T Is The OSP.

1. AT&T Was Well Aware That It Was an OSP.

a. *AT&T's early comments confirm its pre-1996 knowledge that it was considered an OSP.*

AT&T knew, before the class period commenced in 1996, that it was an OSP. Before adopting its first set of regulations in 1989, the WUTC asked for comments from the telecommunications industry. AR3087; *see* AR6844. One proposed regulation contained the definition of Alternate Operator Service (now "OSP"). AR6844. In December 1988, AT&T filed its comments. AR3087-91. Those comments addressed "the fundamental question of how to define an AOS provider and, hence, to

whom the proposed rule should apply.” AR3087. That “fundamental question” is precisely what is at issue in this appeal.

AT&T objected that under the proposed regulations, it *would be an AOS [OSP] subject to compliance with rate disclosure obligations.* AR3088. *See* discussion at pp. 1-5, 21-27, *above*. AT&T proposed alternative regulations. Each would have exempted AT&T from the rate and related disclosures required of an OSP. AR3089-90. Thus, it proposed a definition that would exempt companies like AT&T that “market directly to end-user customers.” AR3089. Alternatively, it argued that if the WUTC retained the proposed definition, it should tack on an exemption for companies which, like AT&T, provide services directly to the public pursuant to a uniform published rate list. AR3090.

In 1989, the WUTC expressly rejected all of AT&T’s proposals. *Compare* WAC 480-120-021 (1989 Final Rules) *with* AR3086-91 (the AT&T proposals that were rejected by the WUTC). AT&T’s unavailing requests for modification prove that it knew: (i) it was an OSP; and (ii) it was subject to the rate disclosure regulation that was ultimately adopted.

b. Well before 1996, the WUTC advised that AT&T was an OSP.

The WUTC amended some of its rules in 1991. (Rather than listing the types of facilities at issue, it substituted the defined term “call

aggregators.” AR6850. *See* n.6, *above*.) However, it left the definition of OSP materially unchanged. AR6850. In October 1991, a few months after the 1991 amendments were adopted, the WUTC issued a bulletin to the telecommunications industry, including AT&T. The bulletin reflected a “staff consensus.” The “consensus” was that under the rules, “An AOS Company is any which offers services through aggregators,” and that “[i]n a non-equal access setting [*e.g.*, a DOC facility], *AT&T is an AOS Company....*” AR3094 (emphasis added).⁷

AT&T notes that this “staff consensus” is not a Commission decision. That is correct, but a staff consensus is fair warning of the Commission’s views – fair warning which AT&T now complains it never received. AT&T argues that the staff consensus is “incomprehensible.” The quoted language shows otherwise. Moreover, AT&T was capable of inquiring about any ambiguity. It apparently neglected to do so, even though in late 1991, it was actively negotiating with DOC over what became the 1992 Contract awarding the DOC phone concession to AT&T.

⁷ DOC facilities in Washington are sometimes referred to as “non-equal access settings” because AT&T “held an exclusive contract” to provide services to those facilities. AR287. Prisoners have no choice of carrier.

c. AT&T's status as OSP did not change in 1992.

AT&T suggests that somehow its status radically changed after 1991, when it was advised that it was an OSP. AT&T implies that while it was an OSP in 1991, it could not have “satisfied the AOS definition” at a later date, particularly during the class period. App. Br., p. 47, n.18. AT&T offers no explanation for its assertion. It does not suggest, much less cite the record, for proof of factors that might have changed.

AT&T makes a similar assertion in the text of its brief, at pp. 10-11:

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 responsible for inmate call connection and operator services.

There is no record reference. The only support for this proposition reads, “See I.B., *infra*,” which also contains no such reference.

Of course, AT&T branded the calls as AT&T calls throughout the relevant time period. AR2894; AR6827, ¶36. Nor did AT&T suddenly stop billing consumers for operator services after 1992. The bills examined by the WUTC were emblazoned with the AT&T logo, charged AT&T's rates, and reflected operator service charges that had to be paid to AT&T. AR5445; AR6824, ¶27; AR6827-28, ¶36 and fn. 31.

The year 1992 is significant because it was then that AT&T landed the Contract giving it the right to exploit collect calls from all DOC facilities. AR29. That Contract was based on AT&T's response to the DOC's request for proposal. AT&T delivered that response on November 12, 1991, *at the same time* that AT&T's request for waiver of some of the "AOS rules" that govern "provision of telecommunication services to inmates of correctional institutions...." AR29; AR2894 (AT&T waiver request made on September 17, 1991 and granted on December 5, 1991). Thus, AT&T sought waiver of certain OSP rules as part of and in connection with its efforts to finalize the March 16, 1992 Contract with the DOC. Far from radically changing AT&T's status, that Contract reflected AT&T's ongoing status as an OSP.

AT&T's argument that everything changed in 1992 is not new. AT&T made – and lost – the identical argument before the WUTC. AT&T argued that others became contractually obligated to provide the OSP services in 1992. The WUTC asked AT&T for proof. In Bench Request No. 11, it asked AT&T to produce the DOC proposal and AT&T response, both of which were incorporated by reference in the DOC Contract. AR6453. AT&T was unable to do so. AR6465. Accordingly, the WUTC found that:

[T]he Agreement expressly incorporates the DOC's request for proposal for telephone system and AT&T's responsive proposal, but AT&T failed to provide those documents. *We cannot accept AT&T's argument that the Agreement does not obligate AT&T to provide operator services when the entire Agreement is not before us – particularly when an amendment to the Agreement contemplates that AT&T would be responsible for providing operator services under certain circumstances.*

AR6829, ¶40 (emphasis added). The WUTC went further, noting that “[w]e further observe that AT&T's interpretation of the Agreement conflicts with the undisputed record evidence.” AR6830, ¶41.

Apart from the proposal and response, the Contract made AT&T responsible for interLATA calls, and intraLATA calls from six facilities. AR29 (AT&T is to “provide interLATA long distance service”), AR30 (AT&T “agrees to provide ‘0+’ interLATA and international service...”); AR43 (AT&T “shall arrange for the installation of certain call control features for intraLATA, interLATA and international calls carried by AT&T”); AR233 (“AT&T agrees to carry and pay commissions on all operator-assisted and sent-paid intraLATA calls originating from correction facilities located in PTI territory in the State of Washington.”). Moreover, were AT&T unable to provide automated operators, it was obligated to use live operators. AR45. Those obligations did not change before the end of the class period on December 31, 2000.

AT&T's assertion that its status changed in 1992 is just that: an assertion. It was rejected by the WUTC when AT&T failed to produce the entire agreement upon which it was apparently relying. It should be rejected again. Throughout the relevant time period AT&T – under the Contract – branded, billed, paid commissions on, and was responsible for, all operator assisted calls it carried. The WUTC had a rational basis for concluding that AT&T was the OSP.

d. AT&T acted like and called itself the OSP.

Numerous rules found in WAC 480-120-141, adopted in 1991, lay out the duties of an OSP. AT&T complied with many of these rules.

- The regulations require OSP “branding.” WAC 480-120-141(5)(a) (1991); WAC 480-120-141(4) (1999). Thus, at the start of all interLATA and all intraLATA calls it carried from correctional facilities, AT&T audibly identified itself as the OSP. AR2894 (“the calls [from correctional facilities] are branded by AT&T to both the calling and called party”); AR6827, ¶36.

- As part of the billing process, the regulations also require the OSP to “provide to the local exchange company such information as may be necessary for billing purposes, as well as an address and toll free telephone number for consumer inquiries.” WAC 480-120-141(b) (1991);

WAC 480-120-141(5) (1999). AT&T complied. AR5445; AR6824, ¶27; AR6827-28, ¶36.

- AT&T charged consumers for operator services. The regulation’s definition of OSP specifically “includes as a component any automatic or live assistance to a consumer to arrange for billing or completion, or both, of an intrastate call...” WAC 480-120-021 (1991); WAC 480-120-021 (1999) (same).

These bills ... *show that AT&T billed consumers for operator services* as a component of the intrastate collect toll calls it carried from the Correctional Facilities. AT&T concedes as much in response to Bench Request No. 13, stating “with respect to operator-assisted collect calls placed from the four correctional institutions at issue in this proceeding, for the period between June 20, 1996 and December 31, 2000, AT&T provided operator-assisted (‘0+’) interLATA, intrastate service.

AR6827-28, ¶36 (emphasis added). AT&T was not billing for another entity. The rates AT&T billed consumers for operator services were AT&T’s own rates. AR3017; AR6827, fn. 31.

As the WUTC explained, “to state the obvious, an OSP provides operator services.” AR6820, ¶17. AT&T’s argument that it was not the OSP when *it charged* consumers *its rates* for operator services that *it provided* on calls *it carried* is meritless. AR6830, ¶42 (“AT&T identified itself as the service provider through its branding of, and bills for, the operator-assisted calls. ... AT&T, not T-Netix, had the direct business

relationship with those consumers.”). Ultimately, one only needs to follow the money to determine who charged, and got paid, for providing operator services. That entity is AT&T.

- As the OSP, AT&T also complied – eventually – with the rate and related disclosure requirements. In August of 2000, AT&T directed T-Netix to commence “an implementation schedule” to provide rate quotes for intrastate calls from correctional facilities in Washington State. AT&T agreed to pay T-Netix to do so. It had not previously paid for rate-quote services. AR8123. AT&T also told T-Netix what rate to quote. AR8123; AR2204 (November 2000 email instructing T-Netix on the rate to quote for intrastate calls). In short, AT&T had the power to – and did – direct T-Netix with respect to implementing rate quotes in Washington. The problem, of course, is that as the OSP it should have directed those changes in 1990/91 and through the class period. Instead, it did so for the first time in 2000/01.

AT&T also implicitly acknowledged that it had duties as an OSP when, in 1991, it petitioned the WUTC for waivers as to certain rules governing calls from providers. These rules applied only to OSPs.

On September 17, 1991, AT&T Communications of the Pacific Northwest, Inc. (AT&T) filed a petition requesting waiver of certain administrative rules. *This waiver request concerns the provision of telecommunication services to*

*inmates of correctional institutions, and mental facilities.
AT&T provides interLATA, toll, and operator services....*

The calls are branded to AT&T to both the calling and called party. Due to the restricted and specialized nature of its service, *AT&T requests waiver* of the following payphone and *AOS rules*....

AR2894 (emphasis added). What followed was a list of requirements imposed on OSPs under WAC 480-120-141, including (1) a sticker requirement, (2) emergency call rules and (3) a requirement of access to other call providers. AR2894. The WUTC granted AT&T's petition. In so doing, it expressly noted that AT&T "provides ... operator services" to correctional facilities under "AOS rules." AR2894.

While AT&T sought and obtained waivers of certain regulations governing it in its capacity as an OSP in DOC facilities, it never sought or received exemption from the rate disclosure rules.

* * * * *

Throughout the relevant time period, AT&T: (a) honored OSP regulations by branding each call "AT&T"; (b) charged consumers its rates for operator services; (c) complied with OSP regulations (except as to rate-related disclosure) on the assumption that it was an OSP; (d) sought and received waivers of certain regulatory obligations placed only on OSPs; and (e) was aware that the WUTC considered it an OSP. The WUTC did not irrationally conclude that AT&T was an OSP.

2. The Legislature Never Intended to Exclude AT&T From the Definition of OSP.

AT&T suggests that OSP status and rate disclosure requirements were never meant to apply to it because it has “long ... been obligated to file tariffs disclosing rates that the public is deemed to know as a matter of public notice.” App. Br., p. 30. Although AT&T argued for multiple modifications to the definition of OSP which would exempt it from these disclosures, *all* of those proposals were rejected. AR3087-91

AT&T ignores the primary reason underlying the rate disclosure statute. The Legislature was concerned with a particular form of potential abuse, regardless of the identity of the potential abuser. In enacting RCW 80.36.510, the Legislature declared:

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 Legislature finds that provision of these services without disclosure to consumers is a deceptive trade practice.

The Legislature did not exempt any particular carriers from its finding. Instead, it intended to include, within the ambit of the disclosure statute, all carriers who provide services linking calls made from call aggregators to the ultimate call recipient.

The Legislature thus made clear that it was concerned with *any* company that might be overcharging or not disclosing rates on collect

calls from phone aggregators. The Legislature directed the WUTC 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.

RCW 80.36.520 (emphasis added).

AT&T's suggestion that its disclosure obligations to the public are fully met by filing tariffs is simply not consistent with the Legislature's stated goal of advance and actual rate disclosure to each recipient of a call from an aggregator facility.

Finally, there is no merit to the notion that the Legislature was only aiming the disclosure statute at new companies that had not, in fact, carried calls themselves. This is just another attempt to argue, as it did to the WUTC in 1988, that AT&T should be exempt from the definition of OSP. The WUTC, however, rejected AT&T's several proposed modifications. It maintained the language which even AT&T conceded renders it the OSP. AR3087-91.

The WUTC got it right. The legislative finding quoted by AT&T (App. Br., p. 30) at RCW 80.36.510 does not refer only to newly emergent enterprises. The "growing number of companies" providing services "without disclosing the services provided or the rate, charge or fee"

included AT&T, which signed a major Contract with the DOC in 1992.⁸ The Legislature intended to include AT&T within the scope of its remedial legislation. At minimum, the WUTC was entitled to so conclude.

3. AT&T is “Providing a Connection” to Long-Distance Services.

a. The term “providing a connection” means making a telephonic connection possible. That is what AT&T does.

The statute’s operative phrase is “providing a connection.” While neither statute nor regulation defines this term, the dictionary does.

The verb “provide” includes:

to make preparation to meet a need <*provide* for entertainment>...

to supply or make available (something wanted or needed) <*provided* new uniforms for the band>....

<http://www.merriam-webster.com/dictionary/providing?show=1&t=1317841380> (last visited 8/22/12). See also *Sacred Heart Medical Center v. State, Dept. of Revenue*, 88 Wn. App. 632, 637 n.4, 946 P.2d 409 (1997) (citing Black’s Law Dictionary definition of “provide” as including “procure”). Procure, in turn, means “to instigate, to contrive, bring about,

⁸ That is particularly true given the WUTC’s observation that: “the rates reflected in AT&T bills for operator-assisted toll service ... are significantly higher – in some cases several times higher – than the rates in the Verizon and Qwest bills for comparable calls.” AR6832-33, ¶51.

effect or cause,” including “[t]o persuade, induce, prevail upon, or cause a person to do something.” Black’s Law Dictionary (6th ed.).

To use the entertainment example from Merriam-Webster, informing party-goers that I will “provide the entertainment” does not mean that I am the entertainer. It only refers to the fact that I will arrange, procure, or hire the services of another to provide entertainment. “[P]roviding a connection to intrastate or interstate long-distance services” means that an entity procures and makes possible, through contracts or other arrangements, the connection to the services.

The OSP is the entity that provides or procures the elements necessary to deliver the service to the consumer. AT&T signed the 1992 Contract with DOC. It assembled the components and caused the connection between the inmate caller and the call recipient. It makes no difference whether the “connection” that AT&T is “providing” is direct or indirect, remote or proximate. The statute does not require a “direct” connection. It does not require an “immediate” one. It simply requires that an OSP is the entity “providing” a connection. That is what AT&T does.

b. AT&T ignores the WUTC’s regulations.

Any doubt as to statutory meaning is resolved by the relevant regulations. AT&T ignores them, arguing based only on the language of RCW 80.36.520. That statute defines an OSP as a company that is

“providing a connection to intrastate or interstate long-distance services.” The statute, however, contemplated and required that the WUTC would adopt regulations. RCW 80.36.520. In fact, it is the regulations, not the statute, that require OSPs to make rate disclosures for collect calls from DOC facilities.⁹

WAC 480-120-141 makes it clear that an OSP is identified by certain objective criteria. These criteria, which include branding the call and billing for the call, are readily ascertainable and provide an objective way to determine who is an OSP.

In the glossary section of both the 1991 and 1999 iterations of WAC 480-120-021, the term OSP is defined as “any corporation ... providing a connection to intrastate or interstate long-distance or to local services from locations of call aggregators.” This largely tracks the statute. However, the definition continues:

The term “operator services” in this rule means any intrastate communications service provided to a call aggregator location that includes as a component any automatic or live assistance to a consumer to arrange for

⁹ In *Judd v. AT&T*, 152 Wn.2d 195, 202-203, 95 P.3d 337 (2004) – an earlier engagement in this 12-year conflict – AT&T’s codefendants prevailed on precisely that point. The Supreme Court ruled that the statute, RCW 80.36.510, *et seq.*, does not create a cause of action against the OSP. A cognizable duty is only imposed by the regulations adopted pursuant to the statute. Thus, it is all the more inexplicable that AT&T would not even cite to the regulations that give substance to and elaborate the statute.

billing or completion, or both, of an interstate telephone call....

AT&T admits that at all relevant times, it provided “operator services” on the calls from DOC facilities that it carries:

AT&T billed consumers for operator services as a component of the intrastate collect toll calls it carried from the Correctional Facilities. *AT&T concedes as much in response to Bench Request No. 13, stating “with respect to operator-assisted collect calls placed from the four correctional institutions at issue in this proceeding, for the period between June 20, 1996 and December 31, 2000, AT&T provided operator assisted (“O+”) interLATA, intrastate service.”*

AR6827-28, ¶36 (emphasis added).

AT&T provides “operator ... service.” And, as the WUTC noted, “to state the obvious, an OSP provides operator services.” AR6820, ¶17. Under the governing regulations – regulations that AT&T simply ignores – AT&T, by providing operator services, is the operator service provider or OSP.

c. The WUTC’s definition of AOS/OSP is consistent with industry understanding.

We have already discussed AT&T’s knowledge that it was considered an OSP. Others in the industry agree.

AT&T’s expert and employee, Mark Pollman, admitted that AT&T, as the prime contractor under the DOC Contract, put all the “piece parts” together to provide the telecommunications connection to the

consumer. AR3283, p. 21:3-18; AR287. Moreover, and as the WUTC found:

T-Netix's expert witness, Robert Rae, provided testimony that, based on "common practice," ***the term "connection" in the Commission's rules refers to the service provided to the consumer*** using and paying for that service:

I think the best way I can describe it is in the general sense of the carrier that is the – basically integrating the services of telecommunications, which 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 high order, **providing the face to the consumer in branding the calls, branding the billing, taking responsibility for those elements being pulled together to deliver service to the customer and, therefore, representing to the customer that complex process behind it to make sure that the customer is serviced appropriately.**

AR6821-22, ¶21 (bold in original, bold italics added).

The WUTC's conclusion that AT&T was the OSP is fully consistent with industry understanding. "References to commercial terms [such as 'OSP'] should be given the meaning commonly used in the regulated industry, absent clear legislative intent to the contrary." *Restaurant Development, Inc. v. Cananwill, Inc.*, 150 Wn.2d 674, 685, 80 P.3d 598 (2003).

d. The WUTC's "consumer centric" definition is reasonable.

The WUTC concluded that "the OSP is the entity that has the direct business relationship with the consumer of the operator services,

regardless of which company owns the physical facilities used to provide those services.” AR6819, ¶14.

The question is, to whom is the connection provided? The WUTC answers that question: “OSP is the entity that provides the connection *to the consumers who are the parties to the call*, particularly the called party who accepts and pays for the service or ‘connection’ provided.” AR6819, ¶15 (emphasis added).

The WUTC reasoned that the whole point of the statute and related regulations was to protect consumers. “The Legislature finds that provision of [telecommunications services necessary to collect service] without disclosure [of the services provided or the rate, charge or fee] *to consumers* is a deceptive trade practice.” AR6820, ¶16, *quoting* RCW 80.36.510. It continued:

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.

AR6820, ¶16. The WUTC noted that, “Operator services by definition are provided to consumers, and to state the obvious, an OSP provides operator services.” AR6820, ¶17. It concluded:

An OSP, therefore, is an entity that provides *to consumers* a connection to intrastate or interstate long distance or to local services from locations of call aggregators, and that entity must disclose *to those same consumers* both the

service it is providing and the rates charged for the service and the call.

AR6820, ¶17.

The WUTC also noted that treating AT&T as the OSP for inmate-initiated calls is consistent with regulatory treatment of other telecommunications services. AR6821, ¶¶18-19. “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.” AR6821, ¶19. That is how the Commission treats other telecommunications service providers. “We see no reason to identify OSPs any differently.” AR6821, ¶¶18-19. As the WUTC concluded, “[T]he proper focus is on the entity ‘providing’ the connection to the consumer of the service, regardless of which company supplies the physical facilities used to make that connection.” AR6823, ¶23.

During the class period, AT&T held itself out to consumers as the service provider. AT&T billed consumers for operator services “as a component of the intrastate collect toll calls it carried from the correctional facilities.” AR6830, ¶41. *See* AR6826, ¶33. Moreover, “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.” AR6827, ¶36.

Consumers cannot reasonably have believed that Verizon or Qwest, not AT&T, was the OSP.

AT&T thus cannot reasonably contend that Verizon and Qwest not only provided and billed for operator services as part of the toll service they provided consumers, but [that] those companies provided the operator services – without compensation or attribution – used in connection with AT&T’s operator-assisted toll service. AT&T, moreover, offers no explanation for why it would charge consumers for “operator handled” toll service if AT&T was not also providing operator service as a component of those toll services. AT&T’s position simply is not credible.

AR6830, ¶41 (emphasis added).

Similarly, consumers had no reason to think that T-Netix was the OSP. That is because:

AT&T identified itself as the service provider through its branding of, and bills for, the operator-assisted collect calls. There is no evidence that any consumers knew or had reason to know that T-Netix was involved in those calls. AT&T, not T-Netix, had the direct business relationship with those consumers.

AR6830, ¶42 (emphasis added).

In finding that AT&T was an OSP, the WUTC articulated a commonsense “consumer-centric” approach which gave meaning to the entire phrase “providing a connection to intrastate or interstate long-distance services.” It gave meaning to the regulations, which defined OSP

in the context of providing “operator services.” In so doing, it hewed to the Legislature’s concern that consumers could be harmed by OSP services, and placed disclosure responsibilities directly on those who, like AT&T, profited from providing those services.

e. Ownership of the P-III platform is irrelevant.

By focusing solely on the statutory word “connection” (and ignoring the meaning of the word “provide” and the operative regulations), AT&T argues that the entity that “owns” the P-III platform is the OSP. “Ownership” of the equipment is irrelevant:

A company is no more an OSP solely because it owns and maintains some or all of the equipment used to provision operator services than a company could be considered a local exchange carrier simply because it supplies the switch used to originate and terminate telephone calls. Only the company that has the direct business relationship with the consumers who use operator services is an OSP.

AR6821, ¶20.

In fact, the “ownership” concept is foreign to the telecommunications field, where companies routinely lease and resell services. AR6821, ¶18. The touchstone is the business relationship between the consumer and the company with the legal responsibility to connect the call (and which bills and profits from the connection). The company can fulfill its legal responsibility to connect the call by providing the equipment itself, or it may buy or lease the equipment from a third

party. No matter how it arranges, procures or provides for the connection to be made, however, it profits from the relationship with the consumer and remains responsible for the connection. AR6821, ¶19.

T-Netix's putative ownership of the P-III platform situated at each correctional facility is simply irrelevant. The P-III platform was no more than an instrument – one of many building blocks used to provide a connection from the prison phone bank to the call recipient. Whether T-Netix had sold or leased that tool to the OSP is of no moment. The relevant question is: who was responsible for, and profited from, assembling those tools? The answer is: AT&T.

B. AT&T is Not Entitled to the LEC Exemption When It Was Not Acting as an LEC.

Prior to the 1999 amendment to WAC 480-120-021, the definition of OSP excluded LECs. AT&T argues that it was exempt from the disclosure requirements until the 1999 amendment because it was registered as an LEC in 1997.

AT&T is incorrect. It conceded that *it was not operating as an LEC in any of the DOC facilities at issue*. AR256, ¶12 (AT&T admits that it did not provide LEC services at any time under the DOC Contract to any of the correctional facilities). *See also* AR255, ¶8. Given AT&T's

admission, the WUTC – and the ALJ before it – had no trouble rejecting AT&T’s argument. AR6831-34, ¶¶45-52; AR4195-97, ¶¶118-122.

As the WUTC explained, “Because AT&T was not the provider of local exchange services at any of the Correctional Facilities, AT&T cannot claim the LEC exemption from the Commission rules governing OSPs.” AR6833, ¶51. To hold otherwise would require one to “ignore the historic context of the 1991 rule” which indicated that it was intended to “exclude LECs only to the extent that they were providing the local exchange service as well as the operator service for those calls placed from the call aggregator location.” AR6832-33, ¶¶49-50.

C. The Statute and Regulations Do Not Violate Due Process and Are Not Unconstitutionally Vague.

1. AT&T Does Not Articulate Independent Grounds for Reversal.

The structure of AT&T’s brief suggests that it has two independent bases for reversal. *First*, it alleges that the WUTC has misinterpreted the relevant enabling statute. *Second*, it alleges that it has been denied due process because that statute, as construed by the WUTC, does not give “fair warning” that AT&T is required to make collect-call rate disclosures.

If plaintiffs prevail on the first issue – if the WUTC construed the relevant regulations and statute in a reasonable fashion – the due process/vagueness problem evaporates. By definition, a reasonable

construction of the statute and regulations is reasonably anticipatable. *Maynard v. Cartwright*, 486 U.S. 356, 361, 108 S. Ct. 1853, 1857, 100 L.Ed.2d 372 (1988). This is particularly true in the case of regulated industries. *Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498-99, 102 S.Ct. 1186 (1982).

2. The Lenient Due Process Standard.

A rule or regulation “is unconstitutionally vague only if its meaning is so ambiguous or unclear that an ‘ordinary person exercising ordinary common sense’ must guess at its meaning.” *United States Civil Serv. Comm’n v. National Ass’n of Letter Carriers*, 413 U.S. 548, 579, 93 S.Ct. 2880, 2897, 37 L.Ed.2d 796 (1973). If the rule regulates commercial activity and does not implicate the First Amendment or rights of the accused, the test is exceedingly lenient:

[E]conomic regulation is subject to a less strict vagueness test because its subject matter is often more narrow, and because businesses, which face economic demands to plan behavior carefully, can be expected to consult relevant legislation in advance of action. Indeed, the regulated enterprise may have the ability to clarify the meaning of the regulation by its own inquiry, or by resort to an administrative process.

Village of Hoffman Estates, 455 U.S. at 498 (footnotes omitted).

Under the *Village of Hoffman Estates* standard, a rule regulating commercial or economic activity is unconstitutional only if it is “so vague and indefinite as really to be no rule or standard at all.” *A. B. Small Co. v.*

American Sugar Refining Co., 267 U.S. 233, 239, 45 S.Ct. 295, 297 (1925). See also *Village of Hoffman Estates*, 455 U.S. at 489, n.7; *Silverstreak, Inc. v. Washington State Dept. of Labor & Indus.*, 159 Wn.2d 868, 890, 154 P.3d 891, 903 (2007).

A rule is not incomprehensible simply because it is ambiguous, or because judges or lawyers may come to differing conclusions as to its meaning. To be unconstitutional, the rule must contain *no* coherent standards. *Franklin v. First Money, Inc.*, 427 F. Supp. 66, 69-70 (E.D. La. 1976), *aff'd*, 599 F.2d 615 (5th Cir. 1979). See also *Pest Comm. v. Miller*, 626 F.3d 1097, 1111-12 (9th Cir. 2010) (that courts come to different conclusions regarding interpretation of statute does not render it unconstitutionally vague).

3. The WUTC's Articulated Standards are Grounded in the Language and Purpose of the Statutes and Regulations. AT&T Knew These Standards, and Knew It Was the OSP.

“A statute's announced purpose can provide the clarity necessary to establish what a statute prohibits.” *Seven Gables Corp. v. MGM/UA Entm't Co.*, 106 Wn.2d 1, 11-12, 721 P.2d 1, 7 (1986). WAC 480-120-021 sets forth standards which are grounded in the legislative desire to protect consumers, and on common sense. It places disclosure responsibility on the entity that: (1) has the legal relationship with the consumer, (2) is

responsible for the connection, (3) bills for the services, and (4) profits from connection:

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 telecommunication services, the company that charges, communicates with, and otherwise is identified as the service provider to ... the consumer is obligated to make such disclosures.

AR6821, ¶19. As the WUTC concludes:

[D]efining the OSP as the company that has the direct business relationship with the consumer is clear and unambiguous and avoids the protracted disputes over the nature and ownership of the network facilities used to provide the service that have been litigated so extensively in this proceeding.

AR6823, ¶24.

AT&T cannot claim that WAC 480-120-021 sets forth “no standards” or is “substantially incomprehensible.” AT&T itself had no trouble understanding the plain language when, in 1988, it objected to being defined as an OSP. AR3088. It had no trouble understanding that, as the OSP, it was required to brand the calls. AR2894. It knew that it needed to seek exemptions from WAC 480-120-141(4)(a), (b)(ii) and (iii) and (7) for its work in correctional facilities – all requirements placed exclusively on OPSs. AR2894. The WUTC did not violate due process in deciding what AT&T itself had acknowledged years ago: that AT&T was an OSP.

4. If AT&T was Confused, It Should Have Inquired.

AT&T could have obtained guidance as to the definition of AOS/OSP and whether it was considered one. *Village of Hoffman Estates*, 455 U.S. at 498. AT&T simply had to take advantage of the substantial access it had to the WUTC to make an inquiry. As AT&T itself noted:

The WUTC rate disclosure requirements have developed and changed through a lengthy process in which the telecommunications industry has been closely involved and will continue to be [involved]....

CP153-54. In fact, AT&T not only had the ability to clarify the meaning of OSP before the WUTC, it actually did so and was specifically informed that “AT&T is an AOS company.” AR3094.

Even if AT&T had not been so informed, due process challenges are dead on arrival when a regulated entity could have sought clarification of a rule it later claims is unconstitutionally vague. *See Ford Motor Co. v. Texas Dept. of Transp.*, 264 F.3d 493, 509 (5th Cir. 2001) (“By making an inquiry in this case, Ford could have obtained a pre-enforcement ruling on whether the Showroom complied with Texas law.”); *United States v. Doremus*, 888 F.2d 630, 634 (9th Cir. 1989) (regulation not unconstitutional because the defendant had “the ability to clarify the meaning of the regulation by [their] own inquiry, or by resort to the

administrative process.”); *Brian B. Brown Const. Co. v. St. Tammany Parish*, 17 F. Supp. 2d 586, 591 (E.D. La. 1998) (same).

5. AT&T Produces No Evidence of Good-Faith Reliance on Its Alleged Non-OSP Status.

AT&T asserts that it had a “good faith basis to believe that it had no disclosure duty” under the rate disclosure regulations in force during the class period. Appellant’s Br., p. 20. This is not the proper legal test. *Exxon Corp. v. Busbee*, 644 F.2d 1030, 1033 (5th Cir. 1981) (“To paraphrase, uncertainty ... is not enough for it to be unconstitutionally vague; rather, it must be substantially incomprehensible.”); *Seven Gables Corp.*, 106 Wn.2d at 12.

Moreover, AT&T offers no evidence of a good-faith (much less reasonable) belief. AT&T produced no documents or testimony chronicling its contemporaneous belief as to what the relevant regulations and statute meant, or what duties they (did not) create. Proof of reliance is critical to AT&T’s contention that the WUTC somehow changed the fundamental rules of the game.

AT&T’s failure of proof also casts doubt on its view of the meaning of “providing a connection” – the statutory phrase that AT&T views as key. If AT&T is correct – if the phrase can only refer to the physical connection to the DOC facilities – there should be evidence that

this was AT&T's belief: (a) during the period for comment on the proposed regulation; (b) after the regulation was adopted; and (c) when AT&T was ostensibly monitoring its own compliance with the regulation.

Instead, it appears that AT&T's interpretation of the relevant statute is a litigation-stimulated construct upon which AT&T never relied when determining whether and how to comply with Washington law.

6. AT&T Confuses Rationale With Results.

AT&T argues that it could not anticipate the WUTC's direct business relationship ("consumer centric") rationale. Even were the WUTC's *rationale* new, the *result* of that construction is neither new nor unanticipated.

AT&T knew it was considered an OSP in 1991, when it was negotiating the master Contract with DOC. *See* pp. 1-5, 21-27, *above*. Virtually all of the cases cited by AT&T in support of its due process/vagueness/*ex post facto* argument turn on unanticipatable outcomes, not on new arguments in support of expectable outcomes. Thus, virtually all of AT&T's authority is inapposite.¹⁰

¹⁰ *Christopher v. SmithKline-Beecham Corp.*, __ U.S. __, 132 S.Ct. 2156 (2012), does not support AT&T's position. There, the Department of Labor issued an entirely new definition of "outside salesman" during the pending litigation. Until that litigation, the agency had never enforced based on its new definition or suggested that defendants had acted unlawfully. Moreover, the agency in *Christopher* had defined "outside salesman" in a fashion that on its *(continued)*

Nor does the fact that the WUTC disagreed with the ALJ's reasoning – but not the ultimate result – give rise to a due process claim. If it did, then an agency could never constitutionally reverse an ALJ's interim findings and conclusions. Washington law recognizes that different people may arrive at different interpretations of a law, but “the fact that a statute requires interpretation does not make it void for vagueness.” *Seven Gables Corp.*, 106 Wn.2d at 12.

VI. CONCLUSION

The WUTC's Order 25, which is entitled to “great deference,” was affirmed in pertinent part by the Superior Court. This Court should uphold that Order as well.

RESPECTFULLY SUBMITTED: August 29, 2012.

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(footnote continuation)

face was inconsistent with the new definitions that were challenged. In our case, AT&T was informed years ago (and AT&T acknowledged that warning) that the regulators considered it an OSP. Additionally, unlike the Department of Labor, the WUTC had never adopted a definition of OSP that clearly excluded AT&T.

CERTIFICATE OF SERVICE

I certify, under penalty of perjury pursuant to the laws of the State of Washington, that on August 29, 2012, true copies of the foregoing **BRIEF OF INTERVENORS/RESPONDENTS** were served upon counsel of record as indicated below:

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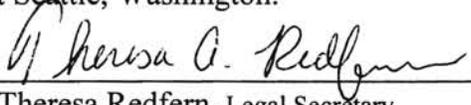
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