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COURT OF APPEALS
DIVISION II

2012 JUL 30 PM 3: 29

STATE OF WASHINGTON

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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.

BRIEF OF RESPONDENT

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

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I. INTRODUCTION

This case, which has spanned more than 12 years in duration before the courts and the Washington Utilities and Transportation Commission (“the Commission”), involves an issue that was referred to the Commission by the King County Superior Court in 2000, under the doctrine of primary jurisdiction. The Commission was asked to determine whether AT&T Communications of the Pacific Northwest (“AT&T”) or T-Netix, Inc. (“T-Netix”) were “operator service providers” (OSP) with regard to operator-assisted, collect calls received from inmates in Washington State correctional facilities. An OSP is obligated, under both RCW 80.36.520 and the Commission’s rules, to provide rate disclosures to consumers for services provided by an OSP, which would include rate disclosures for the collect calls at issue here. The Commission, following extensive proceedings, determined that AT&T, the company having the direct business relationship with the consumers of the collect calls, was the OSP, and, therefore, that AT&T was required to make rate disclosures to the consumers as required by the statute and rules. The Commission’s decision properly interpreted and applied the law, afforded all parties due process, and is supported by substantial evidence in the record. The Commission’s decision was affirmed by the Thurston County Superior

Court. This Court should affirm the decision of the Commission and the Thurston County Superior Court, and dismiss AT&T's appeal.¹

II. ISSUES PRESENTED

RCW 80.36.520 directs the Washington Utilities and Transportation Commission to require by rule, at a minimum, that any telecommunications company operating as an "alternate operator services" company ("AOS" or "OSP")² assure appropriate disclosure to consumers of the rates, charges, or fees of services provided by the company. One form of "alternate operator services" is collect calls made by prison inmates, which are received by and paid for by consumers. The Commission has enacted rules to enforce the statutory mandate.

1. Did the Commission correctly determine, given the language and purpose of the legislation, that AT&T, as the telecommunications company having the direct business relationship with the consumers who

¹ The King County Superior Court, in 2000, also referred to the Commission the question of whether the Commission's OSP rules had been violated. After hearing, the Commission held that AT&T had violated the Commission's OSP rules. On appeal, the Thurston County Superior Court vacated the Commission's order on this issue and remanded the issue back to the Commission to take additional evidence. Subsequently, pursuant to a motion filed by AT&T in February 2012, the King County Superior Court withdrew its grant of primary jurisdiction. Hence, the question of whether the OSP rules were violated is no longer before the Commission, and remains to be decided by the King County Superior Court.

² RCW 80.36.520 and the original Commission rule (i.e., WAC 480-120-021, as written from 1991 to 1999) used the term "alternate operator services company" (AOS). In 1999, the term "operator service provider" (OSP) was substituted for "alternate operator services company" in WAC 480-120-021. The two terms have the same meaning. Docket UT-042022, Order 25, at p. 3 and n. 4. For ease of reference, this brief shall refer to these entities as OSPs for all relevant time periods

receive and pay for the collect calls, and as the telecommunications company who provided the connection for those calls to the consumers, was the OSP and thus, was required to disclose the rates for those calls to the consumers?

2. Did the Commission afford AT&T due process of law, when the record demonstrates that AT&T has known that it falls within the definition of an OSP since the Commission's rules were enacted, when the Commission simply interpreted the relevant statute and rules in a manner consistent with the statutory language and purpose, and when other carriers similarly situated to AT&T sought and received waivers from the OSP rules?

3. Did the Commission properly rejected AT&T's Contention that it was exempt from the definition of an OSP under the local exchange carrier (LEC) exemption, because AT&T was not acting as a LEC in connection with the collect calls at issue in this case?

III. COUNTERSTATEMENT OF THE CASE

Intervenors/Respoondents Sandy Judd and Tara Herivel ("Intervenors") filed a putative class action in King County Superior Court against AT&T and T-Netix (collectively, "the Companies") alleging that they received collect calls from inmates in Washington State correctional facilities between June 20, 1996, and December 31, 2000. Intervenors

further alleged that the Companies provided operator services to those correctional facilities, and that the Companies were operator service providers (OSPs) that violated RCW 80.36.520 by failing to assure that rate disclosures were made for the collect calls received by the Intervenor before they accepted the calls.³

AT&T, together with other telephone company defendants, argued that the Commission should determine in the first instance, under the doctrine of primary jurisdiction, whether AT&T or T-Netix were OSPs, and, if so, whether rate disclosure violations occurred. On August 25, 2000, AT&T filed a motion to the Court, which stated in part:

The WUTC Has Special Competence Over Rate Disclosure Requirements

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. In response to this delegation of responsibility, the WUTC established specific requirements for OSPs. WAC 480-120-141.

This issue goes to the heart of the WUTC's technical expertise. . . . Likewise, because of its years of experience in dealing with telecommunications rates and disclosures of those rates, the WUTC is in a better position than this Court to determine whether AT&T is bound by the disclosure requirements. . . . [.]

³ Intervenor originally also filed suit against Verizon Northwest, Inc., f/k/a GTE Northwest, Inc. (Verizon), Qwest Corporation, f/k/a U S West Communications, Inc. (Qwest), and CenturyTel Telephone Utilities, Inc. The trial court dismissed Verizon, Qwest, and Century Tel, and the appellate courts affirmed those dismissals. *Judd v. American Tel. & Tel. Co.*, 152 Wn.2d 195, 198, 95 P.3d 337 (2004).

(Bold in original).⁴

The King County Superior Court held the class action complaint in abeyance and referred two questions to the Commission under the doctrine of primary jurisdiction:

- 1) Whether AT&T or T-Netix were OSPs under the contracts at issue; and
- 2) If so, if the Commission's regulations were violated.

Intervenors also made claims against AT&T and T-Netix for violations of the Consumer Protection Act (CPA), RCW 19.86. Neither the CPA claims nor the class action claims were referred to the Commission.

On November 17, 2004, Intervenors filed a formal complaint with the Commission pursuant to the superior court's referral. They contended that AT&T and T-Netix are OSPs and that the Companies violated the Commission's rule requiring that OSPs provide rate quote information to consumers. WAC 480-120-141(1991) and (1999).⁵ Both AT&T and T-Netix denied the allegations in the complaint and filed motions and

⁴ CP 141, Declaration of Richard E. Spoonemore in Support of Motion to Dismiss, Exhibit C at 48 (attaching AT&T's Motion to Dismiss, to Remand to the WUTC and to Stay Proceedings, August 25, 2000, at 10).

⁵ The relevant Commission regulations were initially enacted in 1989, and then revised three times, in 1991, 1999, and 2003. The 1991 regulation was the first to require immediate rate disclosure by operator service providers. WAC 480-120-141(5)(iii)(a) (1991). The 1999 regulation required automatic rate disclosure, activated by pressing keys on the telephone keypad. WAC 480-120-141(2)(b) (1999). The 2003 regulation requires either oral rate disclosure or keypad-activated disclosure, depending on whether the rate exceeds a benchmark. WAC 480-120-262(3) (2003).

amended motions for summary determination. AT&T specifically requested that the Commission find that it was not an OSP during the period in question, and that AT&T did not violate the Commission's regulations applicable to OSPs.⁶

On April 21, 2010, following extensive proceedings in both the courts and the Commission, the Administrative Law Judge (ALJ) issued an initial order, Order 23.⁷ AR 3538. That order concluded that AT&T was an OSP during the relevant time period. The ALJ's conclusion was premised on the finding that AT&T was the owner of the P-III Premise software platform that it had purchased from T-Netix, which platform "connected the long-distance and local service providers to the call aggregators and provided the operator services to the four correctional facilities." AR 3584. (Order 23, ¶¶ 117, 143, 144). In other words, the ALJ interpreted the term operator service provider, as used in WAC 480-120-021, to be the entity that owned the infrastructure that made the physical "connection" for the calls in question. The ALJ further concluded that AT&T did not qualify for the exemption for local exchange carriers (LECs) under WAC 480-120-021. AR 3591. (*Id.*, ¶ 146.)

⁶ AR 119, 2725 (AT&T); AR 509, 2947 (T-Netix).

⁷ Order 23, Initial Order Denying in Part AT&T's Amended Motion for Summary Determination and Granting T-Netix's Motion and Amended Motion for Summary Determination.

The ALJ also concluded that T-Netix was not an OSP. AR 3591. (*Id.*, ¶ 145.) Finally, the ALJ concluded that the Commission should schedule a prehearing conference to determine the procedural steps to address the issue of whether AT&T violated Commission rules, based upon the ALJ's interpretation of WAC 480-120-021. AR 3592. (*Id.*, ¶ 148.)

AT&T filed a petition for administrative review of the ALJ's order, and T-Netix and Intervenors opposed the petition. The Commission reopened the record and issued Bench Request Nos. 7-15, to which the parties filed responses.

On March 31, 2011, the Commission entered Order 25, in which it denied AT&T's Amended Motion for Summary Determination and granted T-Netix's Amended Motion for Summary Determination. AR 6841. (Order 25, ¶¶ 80, 81.) In response to the two questions that the King County Superior Court referred to the Commission, the Commission found: (1) AT&T was the OSP for all collect calls from inmates at the correctional facilities at issue for which AT&T provided operator-assisted toll service between June 20, 1996, and December 31, 2000; and (2) AT&T violated the Commission's rate disclosure rules⁸ for each collect call from an inmate at the correctional facilities at issue, by failing to

⁸ WAC 480-120-141(5)(a)(iv) (1991), or WAC 480-120-141(2)(b) (1999), depending upon the time when the collect calls were made.

verbally advise the consumer how to receive a rate quote, or failing to allow the consumers to request or obtain the rates or charges for the call, as is required of OSPs. (*Id.*, ¶ 83, 84.)

The Commission determined that AT&T was an OSP under RCW 80.36.520 and WAC 480-120-021 because AT&T was the entity with the direct business relationship with the consumers who use the operator services (i.e., the consumers who received the collect calls in question), and was the entity that provided the connection for those calls to the consumers. AR 6825. (*Id.*, ¶ 28.) The Commission further determined that AT&T had violated the Commission's rate disclosure rules. AR 6834. (*Id.*, ¶ 53.) The Commission referred further factual inquiry and the ultimate disposition of Judd's and Herivel's claims to the superior court. AR 6842. (*Id.*, ¶ 85.)

AT&T and T-Netix each filed separate petitions for judicial review of the Commission's Order 25 with the Thurston County Superior Court. The superior court affirmed the Commission's ruling on the first question presented, which is the issue that AT&T has appealed to this Court: namely, that AT&T was the OSP, and thus was responsible for providing rate disclosures under both the RCW 80.36.520 and the Commission's implementing rules. The superior court remanded the second issue (whether the Commission's rules were violated) back to the Commission

for the taking of additional evidence; jurisdiction over that issue has since been retaken by the King County Superior Court, and is no longer before the Commission. See footnote 1, *infra*.

IV. ARGUMENT

A. Standard Of Review

When reviewing the decisions of a state agency under the Administrative Procedure Act (APA), RCW 34.05, the Court of Appeals sits in the same position as the superior court, applying the standards of the APA directly to the record before the agency. *Chandler v. Office of the Ins. Comm'r*, 141 Wn. App. 639, 647, 173 P.3d 275 (2007), citing *Tapper v. Employment Sec. Dep't*, 122 Wn.2d 397, 402, 858 P.2d 494 (1993). In other words, “[R]eview by an appellate court is to be on the agency record without consideration of the findings and conclusions of the superior court.” *Herman v. State of Washington Shorelines Hearings Bd.*, 149 Wn. App. 444, 454, 204 P.3d 928 (2009). The record before the court is limited to the administrative record unless one of the limited exceptions in RCW 34.05.562(1) applies.

Furthermore, the appellate court reviews the decision of the agency head, not the underlying decision of the administrative law judge. *Verizon Northwest, Inc. v. Employment Sec. Dep't*, 164 Wn.2d 909, 915, 194 P.3d 255 (2008). This is because:

In adopting RCW 34.05.464(4) [the APA provision governing agency review of initial ALJ orders], the Legislature has made the judgment that the final authority of agency decisionmaking should rest with the agency head rather than [its] subordinates, and that such final authority includes ‘all the decision-making power’ of the hearing officer. RCW 34.05.464(4).

Tapper, 122 Wn.2d at 405.

Thus, contrary to the framing of the assignments of error set forth in the Brief of Appellant, at 3, review here is not of the lower court’s findings and conclusions, but rather, those of the Commission. Furthermore, the appellate court does not accord deference to the decision of the ALJ.

RCW 34.05.570(3) governs review of agency orders in adjudicative proceedings. The provisions applicable to AT&T’s appeal are:

- (3) Review of agency orders in adjudicative proceedings. The court shall grant relief from an agency order in an adjudicative proceeding only if it determines that:
 - (a) The order, or the statute or rule on which the order is based, is in violation of constitutional provisions on its face or as applied;
 - (b) The order is outside the statutory authority or jurisdiction of the agency conferred by any provision of law;
 - (c) The agency has engaged in unlawful procedure or decision-making process, or has failed to follow a prescribed procedure;
 - (d) The agency has erroneously interpreted or applied the law;

(e) The order is not supported by evidence that is substantial when viewed in light of the whole record before the court, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this chapter;

...

(h) The order is inconsistent with a rule of the agency unless the agency explains the inconsistency by stating facts and reasons to demonstrate a rational basis for inconsistency; or

(i) The order is arbitrary or capricious.

The burden of proving the invalidity of agency action is on the person asserting invalidity. *Washington Independent Tel. Ass'n v. Utilities and Transp. Comm'n*, 148 Wn.2d 887, 903, 64 P.3d 606 (2003); RCW 34.05.570(1). The courts afford significant deference to the Commission's interpretation of a statute within an agency's field of expertise when the statute is ambiguous. *US West v. Utilities and Transp. Comm'n*, 134 Wn.2d 74, 86, 949 P.2d 1337 (1997); *ARCO Prods. Co. v. Utilities and Transp. Comm'n*, 125 Wn.2d 810, 888 P.2d 728 (1995). Furthermore, the courts give "great weight" to an agency's interpretation of its own regulations. *Washington State Liquor Control Board v. Washington State Pers. Bd.*, 88 Wn.2d 368, 379, 561 P.2d 195 (1977). Accord, *Alpine Lakes Prot. Soc'y v. Washington State Dep't of Natural Res.*, 102 Wn. App. 1, 14, 979 P.2d 929 (1999) ("Reviewing courts nevertheless give substantial weight and deference to an agency's

interpretation of the statutes and regulations it administers, and the agency's interpretation should be upheld if it reflects a plausible construction of the statute and is not contrary to legislative intent.”)

Finally, as to challenges to agency action under the “substantial evidence” and “arbitrary and capricious” standards, the court stated in *ARCO Prods. Co., supra*, 125 Wn.2d at 812:

Both the “substantial evidence” and the “arbitrary and capricious” standards are highly deferential. As we have stated previously, “[w]e will not set aside a discretionary decision absent a clear showing of abuse.” *Jensen v. Department of Ecology*, 102 Wn.2d 109, 113, 685 P.2d 1068 (1984).

B. The Commission Properly Interpreted Its Own Regulation And The Underlying Statute In Determining That AT&T Was The Operator Service Provider (OSP) For Intrastate Calls Made From Correctional Facilities Between 1996 And 2000.

1. RCW 80.36.520 is intended to assure disclosure to consumers of the rates charged by operator service providers. The Commission's rule, WAC 480-120-021, is consistent with this legislative intent.

RCW 80.36.520 governs the provision of services by “alternate operating service companies,” also known as “operator service providers.”⁹ The statute provides:

⁹ As noted earlier, *see* footnote 2, *supra*, RCW 80.36.520 and the original Commission rule (i.e., WAC 480-120-021 as written from 1991 to 1999) used the term “alternate operator services company” (AOS). In 1999, the term “operator service provider” (OSP) was substituted for “alternate operator services company” in WAC 480-120-021. The two terms have the same meaning. Docket UT-042022, Order 25, at p. 3 and n. 4. For ease of reference, this brief shall refer to these entities as OSPs for all relevant time periods.

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.

Neither the term “provide” nor “provide a connection” are defined in the statute. RCW 80.36.510, however, reiterates that the Legislature’s intent was to protect *consumers* from nondisclosure of rates from companies that provide them with services:

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 Commission, accordingly, enacted rules as authorized by statute to assure that consumers are afforded the rate disclosure required of OSPs. The Commission’s rules defined both OSPs and “operator services.” Specifically, from 1991 to 1999, WAC 480-120-021 stated that an OSP is:

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 location 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.

In 1999, WAC 480-120-021 was modified to no longer include an exemption for local exchange carriers from the definition of an OSP, but the remainder of the language remained essentially unchanged. AR 6850, 6863.

The consistent theme of both the governing statutes and the Commission’s implementing rules is assuring rate disclosure to consumers. Moreover, it is the companies that provide a connection to intrastate or interstate long-distance services—i.e., OSPs—that must make such rate disclosures. However, as the Commission aptly noted in its order,¹⁰ while RCW 80.36.520 specifies that the disclosure requirement applies to a company that provides a connection to long-distance services *from* certain locations (i.e., places including but not limited to, hotels, motels, hospitals and customer-owned pay phones), it does not specify *to*

¹⁰ AR 6819 (Order 25, ¶ 15.).

whom the OSP is providing that connection. Yet the connection to long-distance services must obviously be provided *to someone*. Contrary to the apparent assertion of AT&T here, a connection to telecommunications services does not occur in a vacuum.

Rather, telecommunications services, including operator services, are provided to *consumers*. Here, it was AT&T that branded, billed, and collected a substantial charge for those operator services from its consumers.¹¹ Logically, then, it is AT&T's responsibility to assure that its consumers are provided with the required rate disclosures. The Commission's decision that AT&T must disclose *its* rates to *its* consumers for services that *it* provided to them is entirely consistent with both RCW 80.36.520 and WAC 480-120-021.

The Commission's interpretation of RCW 80.36.520, an ambiguous statute within the Commission's area of expertise, is a straightforward and logical reading of the statute. In light of the statute's context and the clear legislative intent, the Commission properly interpreted both the statute and the implementing rule as establishing the OSP as the entity that provides the connection *to the consumers* who are

¹¹ In Order 25, fn. 51, the Commission observed that "*the rates reflected in AT&T's bills for operator-assisted toll service included in Exhibit A to Complainants' response to Bench Request No. 7 are significantly higher—in some cases several times higher—than the rates in the Verizon and Qwest bills for comparable calls.*" (Emphasis added.) AR 6832-33.

the parties to the call, and in particular, the called party who accepts and pays for the service or “connection” that is “provided.” This construction of the statute, which focuses on the interests of *consumers* in determining which entity is the OSP, carries out the Legislature’s intent in enacting RCW 80.36.520.

2. The Commission’s determination that AT&T provided the connection to operator services to consumers is consistent with the ordinary meaning of the language of RCW 80.36.520.

AT&T devotes much of its brief to the argument that the “plain language” of RCW 80.36.520 precludes the Commission’s interpretation of the statute identifying AT&T as the OSP for calls placed from prison facilities from 1996 to 2000. According to AT&T, *only* the company that owns and operates the physical infrastructure used to supply a connection to operator services can be deemed an OSP. But this argument flows from AT&T’s cramped reading of the statutory language that insists on focusing entirely on the word “connection,” while virtually ignoring the equally important word “provide,” in its flawed interpretation of the statute. When one reads the entire statute, the “plain language” does not support AT&T.

RCW 80.36.520, again, states that an OSP is “a person providing a connection to intrastate or interstate long-distance services” WAC 480-120-021 contains the same language. Neither the word “provide” nor

the phrase “providing a connection” are defined in the statute or the rule. Thus, it is appropriate to refer to dictionary definitions to ascertain the meaning of terms. *Garrison v. Washington State Nursing Bd.*, 87 Wn.2d 195, 196, 550 P.2d 7 (1976) (courts often resort to dictionaries to ascertain the common meaning of statutory language). The word “provide” includes the following meanings: “to make preparation to meet a need <provide for entertainment>,” “to supply or make available (something wanted or needed);” “to make something available to.” (<http://www.meriam-webster.com/dictionary/provide>.)

These meanings are entirely consistent with the Commission’s interpretation of RCW 80.36.520 and WAC 480-120-021. The person who “provides” for entertainment is not the actual entertainer, but rather, the person who makes that entertainment available to others, as by hiring or arranging for an entertainer to perform. Likewise, an entity that “provides a connection to intrastate or interstate long-distance services” is not the entity that performs the physical task of establishing the connection, but rather, the entity that obtains the connection through contracts or other arrangements. Otherwise put, the company that “provides” a connection to services is the company that—consistent with the ordinary dictionary meaning of the term—supplies or makes the connection to operator services available *to* consumers.

Not only does the ordinary meaning of “providing a connection” support the Commission’s interpretation of the statute and its rule, but the common practice of the telecommunications industry itself, as testified to by T-Netix’s witness before the Commission, who also confirmed this interpretation. As the Commission noted in its order:

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 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 the customer, and, therefore, representing to the customer that complex process behind it to make sure that the customer is serviced appropriately.**

AR 6821-22. (Order 25, ¶ 21 (bold in original)). Thus, as the Commission further explained, AT&T provided these functions for the consumers of the operator services that AT&T provided, and thus was the OSP:

T-Netix supplied equipment and services to AT&T; the LECs and AT&T provided the long-distance services of which operator services were a component. As such, under

this Commission's precedent, AT&T was reselling the services it purchased from T-Netix to its end users (call recipients), which makes AT&T and not T-Netix the common carrier for the operator services at issue.

Id. In other words, AT&T “provided the connection” to the operator services—i.e., it supplied them and made them available—to the consumers of those services. “[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.” AR 6823. (Order 25, ¶ 23.) Therefore, as the Commission properly found, AT&T was the OSP under RCW 80.36.520.

3. The Commission's interpretation of RCW 80.36.520 and WAC 480-120-021 is consistent with the Commission's practice and precedent.

The Commission found that the OSP is the entity that has the direct business relationship with the consumers who use the operator services in question. That is, the entity that provides consumers with the “connection” to such services. AT&T contends, without any support, that this is a “new,” improper interpretation of the rule. To the contrary, the Commission's focus on the consumer, and the company having the business relationship with the consumer, is consistent with the Legislature's clear intent, and is consistent with the Commission's practice and precedent.

Since 1991, the Commission's rule has defined "operator services" as "any intrastate telecommunications service provided to a call aggregator location 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," with limited exceptions. (Emphasis added). Likewise, the Commission has, since 1991, consistently defined a "consumer" for purposes of the OSP rules as "the party initiating and/or paying for a call using operator services." AR 6820 (Order 25, ¶17, and n. 12.) Therefore, an OSP is the entity that provides the operator services to the consumer.

As the Commission noted, this result is also consistent with the Commission's treatment of other telecommunications service providers, and their responsibilities to consumers of those services:

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. 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.

We see no reason to identify OSPs any differently.

AR 6821. (Order 25, ¶¶ 18, 19 (part).) (Emphasis added).

In other words, there is nothing “new” or different about the Commission’s common-sense interpretation of the rules. AT&T is the company having the direct business relationship with the consumers to whom it provides the connection to operator services. As the Commission noted, its treatment of OSPs here is similar to its treatment of local exchange carriers (e.g., Verizon, Qwest, CenturyLink) in other contexts. Local exchange carriers (LECs)—not the “middlemen” companies supplying part of the physical infrastructure used to complete a phone call—are the companies that have a direct business relationship with consumers, and thus LECs have the responsibility to comply with applicable Commission rules governing the provision of services to consumers.

A company that supplies the switch used to originate or terminate telephone calls does not thereby become a LEC, any more than a company that owns or operates some or all of the physical equipment used to provision operator services becomes an OSP. Indeed, AT&T’s interpretation of the OSP statute and rules would effectively convert equipment manufacturers into OSPs, and hence, would render them “telecommunications companies” under RCW 80.36.520. Such a strained

and unlikely statutory interpretation must be avoided. *State v. Stannard*, 109 Wn.2d 29, 36, 742 P.2d 1244 (1987).

In summary, there is simply no inconsistency between the Commission's interpretation of RCW 80.36.520 and WAC 480-120-021, on the one hand, and its interpretation of other Commission rules enacted for the protection of consumers. Furthermore, the Commission's interpretation of its rule is consistent with the rule's language, which has remained the same in all relevant aspects since 1991.

4. The Commission did not improperly “invent” a definition of an OSP or “amend” the definition of an OSP in a manner inconsistent with RCW 80.36.520.

AT&T contends that the Commission created an “impermissible amendment” to the definition of OSP by adding “invented language” that is inconsistent with the statute. Brief of Appellant at 31, 33. AT&T further argues, in this vein, that the Commission “attempts to create an ambiguity by posing an irrelevant question, ‘to whom’ the [OSP] is providing the connection.” AT&T's arguments entirely miss the mark.

According to AT&T, the OSP must be the entity that supplies the physical “connection” from the call aggregators to the local or long-distance services. But this is not what either the statute or the regulation states. By focusing in its argument so squarely *only* on the word “connection,”—in effect asking the court to disregard the other equally

important words in the statute—AT&T ignores the word “providing,” and the fact that it relates not only to the word “connection,” but also to the word “services.” However, the Commission rightly determined that it must look to *all* of the language of the statute in determining its meaning.

RCW 80.36.520 defines an OSP as a person “*providing a connection to* intrastate or interstate long-distance *services* from places including, but not limited to . . . [.]” (Emphasis added). The Commission, quite sensibly, asked “to whom” is the OSP “providing [that] connection to . . . services.” The Commission concluded, based upon the purpose and intent of the law, that the consumers are the ones to whom the services are provided, and thus, are the ones to whom the OSP is providing the connection. AT&T has entirely failed to show that this interpretation conflicts with the legislative intent. *See Washington Water Power Co. v. State Human Rights Comm’n*, 91 Wn.2d 62, 68-69, 586 P.2d 1149 (1978) (party challenging agency’s interpretation of statute must show “a compelling indication that such interpretation conflicts with the legislative intent.”)

AT&T asserts that “no explicit language can be found in the [OSP] definition to support [the Commission’s] interpretation.” Brief of Appellant at 32. AT&T’s apparent assertion is that any interpretive rule language that does not mimic the language of the statute amounts to the

Commission improperly amending the statute or “insert[ing] words into [the] statute.” *Id.* But this cramped view of statutory interpretation has never been the law in Washington. AT&T cites no authority stating that an agency, in adopting rules to implement statutes it is authorized to enforce, is essentially obliged to simply repeat the language of the statute itself.

Furthermore, nothing in WAC 480-120-021 is inconsistent with RCW 80.36.520. The language simply gives further meaning to the statutory definition of an OSP as the entity “providing a connection to intrastate or interstate long-distance services.” It defines “operator services” as the services that are being provided, to a consumer who is given either live or automated assistance to arrange for billing or completion, or both, of the call. WAC 480-120-021 properly focuses on the consumer, because the consumer is the party who is “provid[ed] the connection to . . . services.” This is entirely consistent with the Legislature’s intent that consumers be provided with rate disclosures for services provided to them by a collect call. AT&T’s argument to the contrary is without merit and should be rejected.

C. The Commission’s Interpretation Of The OSP Rules Did Not Violate AT&T’s Due Process Rights For Lack Of “Fair Notice,” Nor Are The Rules Unconstitutionally Vague. The Record Demonstrates That AT&T Has Known That It Falls Within The Definition Of An OSP Since The Rules Were First

Enacted, And Other Companies Similarly Situated To AT&T Sought And Received Waivers From The OSP Rules.

AT&T asserts that “the WUTC announced an entirely new standard for determining who is an AOS Company or OSP” through its interpretation of WAC 480-120-021, in this matter. According to AT&T, the Commission “abandoned” what it calls “the longstanding ‘connection’ test,”—a flawed interpretation of the governing statute and rule, which has never been previously applied, nor advocated for, in any Commission docket prior to AT&T’s advocacy here—and all in a manner that has deprived AT&T of its due process rights under the “fair notice” doctrine. AT&T Brief at 28.

This assertion is not only without merit, it is directly contradicted by substantial evidence in the record, demonstrating that AT&T has known, *since before 1991*, that, under WAC 480-120-021, it *is* an OSP. As shown below, AT&T first sought to have the rule language changed, and then sought and received an exemption from several requirements that apply to companies that are OSPs. Moreover, this was pointed out at length in the briefing below, by T-Netix, before the ALJ even entered her initial order in this case. In no way has AT&T been deprived of any “fair notice” in this matter.

In the regulatory context, a regulated entity must have fair notice of what an agency’s interpretation of a regulation expects of it. Notice is

fair when the agency's interpretation is within a reasonable person's understanding of the regulations. *The Fishing Company of Alaska v. United States*, 195 F. Supp. 2d 1239, 1251 (W.D. Wash. 2002), *aff'd*, 333 F.3d 1045 (2003). Put another way, a statute or regulation will be found unconstitutionally vague only if it forbids or requires the doing of an act in terms so vague that persons of common sense must guess as to its meaning. *Silverstreak Inc. v. Washington State Dep't of Labor and Indus.*, 159 Wn.2d 868, 890, 154 P.3d 891 (2007). However, objections to vagueness under the due process clause may be overcome in any specific case where reasonable persons would know that their conduct is at risk. *Maynard v. Cartwright*, 486 U.S. 356, 361, 108 S. Ct. 1853, 100 L. Ed. 2d 372 (1988). Furthermore, a regulation is not unconstitutionally vague where "a regulated enterprise may have the ability to clarify the meaning of the regulation by its own inquiry or by result to an administrative process." *Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489-99, 498, 102 S. Ct. 1186, 71 L. Ed. 2d 362 (1982).

In this case, AT&T knew as early as 1988 that it could be deemed an OSP by the Commission. In December 1988, the Commission sought comments on proposed rules pertaining to alternate operator services.¹² AT&T responded on December 21, 1988, stating that it wished to address

¹² As noted earlier, alternate operator service (AOS) companies are now known as operator service companies (OSPs).

“the fundamental question of how to define an Alternative Operator Service (AOS) provider, and hence, to whom the proposed rules should apply.” AR 3087. AT&T noted that “[t]he incentive for the Washington Legislature to pass Senate Bill 6745 is the ongoing concern that the public, without adequate notice, is often being charged higher rates for operator assisted and card interexchange calls than they have come to expect from their local exchange company and presubscribed interexchange carrier[.]”

AR 3088. Then, notably, AT&T stated:

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

Id. (Emphasis added). Thus, AT&T knew that it would be deemed an OSP as the rules were written. AT&T suggested alternatives and exemptions, but added that “if the Commission is concerned that a facilities-based carrier such as AT&T or U S West Communications would attempt to charge a unique rate to telephone customers of a particular aggregator—beyond the rate offered to the general public—AT&T suggests that the definition now in WAC 480-120-021 and WAC 480-120-141 remain.” AR 3090. As T-Netix pointed out in its Amended Motion for Summary Determination, filed in this proceeding prior to the ALJ’s initial order: “That is just what the WUTC did, left the definition

alone.” AR 2968.¹³ In other words, the Commission *rejected* AT&T’s proposal and retained the definition that includes AT&T as an OSP.

Later, in a clarification notice, dated October 1, 1991, the Commission secretary advised companies that it was a Staff consensus under the Commission’s rules that, among other things: “An AOS company is any company which offers service through aggregators—service as defined in the rule. In a non-equal-access setting, *AT&T is an AOS company* although the person who controls the instrument has no other option for presubscribed service.” AR 3094. Again, as T-Netix pointed out in its Amended Motion for Summary Determination:

In other words, to be an AOS provider one must be an entity that offers a telecommunications service and the entity that contracts with an aggregator. Also, since a state correctional facility is essentially the equivalent of a non-equal access setting because only a single interLATA provider, AT&T, can be accessed, *AT&T is by Staff consensus an AOS provider.*

AT 2968. (Emphasis added).

On September 17, 1991, AT&T had already filed a petition with the Commission requesting a *waiver* of a number of the rules concerning the provision of telecommunications services to inmates of correctional institutions. AT&T provided interLATA toll and operator service at price listed rates. AR 2894. The Commission’s December 2, 1991, order granting the waiver request stated in part:

¹³ T-Netix, Inc.’s Amended Motion for Summary Determination at 15 (August 27, 2009).

All calls from the inmate phones will be collect only . . .
.The calls are branded by 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:*

. . . .

WAC 480-120-141(4)(a); (sticker requirement)
(4)(b)(ii) and (iii); (other providers)
(7); emergency calls

The waiver is requested only for the limited access inmate
phones served by AT&T.

(Emphasis added). AT&T did not request a waiver of the rate disclosure
requirement. *See* WAC 480-120-141(5)(a)(iv) (1991) (AR 6854).

It would make no sense to request a waiver from a rule unless that
rule would otherwise apply to the party seeking the waiver. AT&T's
actions plainly demonstrate that it knew that it qualified as an OSP under
the Commission's rules. Not only is the Commission's interpretation of
the OSP rules entirely reasonable, it comports with AT&T's prior words
and actions. Moreover, this very point had been raised and argued by T-
Netix in the proceedings before the ALJ in this matter, in 2009. AT&T
had clear notice of this fact, and ample opportunity to respond, had it
chosen to do so. AT&T cannot now contend that it was denied "fair
notice" of the Commission's rules.

However, AT&T contends that RCW 80.36.520 could not possibly
have been intended to apply to AT&T, but rather, only those companies

that were seen as “an alternat[ive] to AT&T, the big phone company.” Brief of Appellant, at 16. This flimsy contention is based on only the anecdotal remarks of one “concerned citizen,” and one individual who spoke during the legislative proceedings concerning RCW 80.36.520. *Id.* at 15-17. It is premised on the assumption that AT&T’s rates were known to be lower than those of other companies. This contention, however, is directly contradicted by the record in this case.

In fact, the Commission’s Order 25 expressly referred to the 1991 rule adoption order implementing RCW 80.36.520, and to AT&T’s rates for operator-assisted calls:

The Commission also expressed the concern that OSP rates are often higher than the rates LECs charged for operator services. We observe that the rates reflected in AT&T’s bills for operator-assisted toll service included in Exhibit A to Complainants’ response to Bench Request No. 7 are significantly higher—in some cases several times higher—than the rates in the Verizon and Qwest bills for comparable calls.

AR 6832-33 (¶ 49 and footnote 51). Thus, AT&T’s allegedly different rates—and allegedly lower—rates do not support its due process claim.

AT&T also repeatedly contends that it could not possibly have anticipated that the Commission would find AT&T, the entity that had the direct business relationship with the consumers of the operator services, to be an OSP. But two other telecommunications companies that were

similarly situated to AT&T---namely, Verizon and Qwest---had no such difficulty. These two local exchange companies (LECs) were originally exempted from the rule's requirements in 1991. However, after the LEC exemption was removed, both Verizon and Qwest sought and received temporary waivers from the requirement that OSPs provide rate quotes from automated operator services platforms, specifically including the platforms in use at state correctional facilities.¹⁴ AR 6836 (Order 25, ¶ 56.)

Clearly, Verizon and Qwest would not have sought waivers of the OSP rules if the companies would not have otherwise been subject to their terms. And there is nothing in the record to support the apparent assertion of AT&T that the reason Verizon and Qwest sought these waivers was because those companies had different "responsibilities" for OSP calls. *See* Brief of Appellant, at 10-11. Rather, they, like AT&T, had the direct relationship with the consumers of these calls. Indeed, the Commission's 1991 order granting AT&T's limited waiver from a portion of the OSP rules specifically noted that "the calls [from the inmate phones] are branded by AT&T to both the calling and called party."¹⁵ There is no

¹⁴ All toll providers, including AT&T (as well as Verizon and Qwest) used the same software platform to provide automated operator services in conjunction with collect calls. AR 6835 (Order 25, ¶ 55.)

¹⁵ See page 28 of this brief, *infra*.

basis for AT&T to contend that it was denied due process or that the rules were so “vague” that they could not be seen to apply to AT&T.

Finally, AT&T contends at length that because the administrative law judge interpreted the statute and rules differently than the Commission, that is somehow proof that AT&T was denied due process, or proof that the Commission’s rule is unconstitutionally vague. Brief of Appellant, at 38-45. But this emphatically is not and never has been the law in Washington. If it were, then anytime an administrative agency reversed or modified a legal interpretation of an ALJ, the agency would be unconstitutionally depriving a company of fair notice and due process. That argument clearly has no merit.

In sum, the Commission did not, as AT&T alleges, “struggle” with an interpretation of the OSP rule. It simply disagreed with the ALJ’s erroneous interpretation of the rule. Nor did the Commission reverse any precedent, or impose a “new” interpretation of the OSP rule on AT&T. The Commission simply interpreted the relevant statutes and rules pertaining to operator service providers, and applied them to the facts of this case, as it was asked to do by the King County Superior Court when that court referred to case to the Commission under the doctrine of primary jurisdiction. AT&T is left simply with the argument that its incorrect interpretation of the rule differs from that of the Commission.

AT&T has never been deprived of either due process or “fair notice” in this proceeding.

D. The Commission Properly Rejected AT&T’s Contention That It Was Exempt From The Definition Of An OSP Under The Local Exchange Carrier (LEC) Exemption, Because AT&T Was Not Acting As A LEC In Connection With The Collect Calls At Issue In This Case.

AT&T argues that the Commission erred when it determined that AT&T did not fall within the LEC exemption for OSPs in WAC 480-120-021 between 1997 and 1999. Brief of Appellant, at 48-49. (AT&T’s argument is limited to this time period because AT&T was not registered as a LEC prior to 1997, and the Commission amended the rule in 1999 to remove the LEC exemption. AR 6831 (Order 25, ¶ 45, and n. 44.) The Commission properly rejected AT&T’s argument as without merit.

As the Commission found:

Order 23 concluded that the LEC exemption from the OSP definition in the 1991 rule does not apply to AT&T, a carrier that was registered as *both* an interexchange carrier *and* a LEC beginning in 1997, *because AT&T was not acting as a LEC in connection with the collect calls at issue*. The order observes that in the rule adoption order, the Commission stated that the reason for the LEC exemption in WAC 480-120-121 was that “[c]onsumers often expect that they are using their LEC when they use a pay phone: requirements that apply to [a] non-LEC compan[y] to inform the consumer that it is not the LEC are reasonable. Order 23 concluded, “AT&T was not acting as a LEC in the correctional facilities in question and the consumers would, therefore, have no reason to believe that they were using AT&T’s services absent disclosure.”

AR 6831-21 (Order 25, ¶ 46.) (Emphasis added.) The Commission affirmed this finding, noting:

As discussed above, both the legislature's and the Commission's concern with OSPs is to ensure that consumers know the identity of the company providing the service they are using and the rates they are being charged. The 1991 rule adoption order demonstrates that the Commission initially exempted LECs from the definition of OSPs primarily because consumers assumed or were already aware that the LEC serving that area provided the operator services. *The intent of the rule, therefore, was to exclude LECs only to the extent that they were providing the local exchange service as well as the operator service for calls placed from the call aggregator location.*

AR 6832-33 (*Id.*, ¶ 49.) (Emphasis added.)

AT&T's arguments to the contrary ignore not only the clearly stated intent of the Commission when it adopted the rule, but also the historic context of WAC 480-120-021. Only incumbent LECs (such as U S West) were LECs when the exemption was included in the rule. Thus, there was no need to state in the rule in 1991 that LECs were not OSPs if they also provided the local exchange service used for operator assisted calls, because those were the only circumstances that existed at the time. The Commission revised the rule to remove the exemption after competitive LECs (CLECs), such as AT&T, who might also be registered as interexchange carriers, began entering the local exchange market. AR 6833 (*Id.*, ¶ 50.)

AT&T claims that the Commission violated its due process rights, but this assertion is wholly unsupported by the record. As the Commission noted, AT&T presented no evidence that it was aware of the LEC exemption while it was in effect, or that it relied in any way on its status as a LEC to fulfill its obligations with respect to collect calls from correctional facilities. It entered into the initial contract with the Department of Corrections long before it registered as a LEC, and none of the amendments to that contract reference AT&T's subsequent registration as a LEC in any way. *Id.*, ¶ 51.

There is simply no evidence that the Commission's decision that AT&T was not entitled to the LEC exemption, because it was not acting as a LEC in connection with the collect calls at issue, deprived AT&T of any settled expectations or in any way deprived it of due process. AT&T's claim to the contrary is without merit and should be rejected.

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V. CONCLUSION

For the reasons stated above, the Commission's Final Order in this matter (Order 25) should be affirmed, and AT&T's appeal should be dismissed.

DATED this 30th day of July, 2012.

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CERTIFICATE OF SERVICE

I do hereby certify that on this 30th day of July, 2012, I caused to be served a true and correct copy of the foregoing Response Brief of Washington Utilities and Transportation Commission as follows:

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

EXECUTED at Olympia, Thurston County, Washington, this 30 day of July, 2012.

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