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**IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I**

INDOOR BILLBOARD/WASHINGTON, INC.,
a Washington corporation, individually and on behalf of a
class of persons and/or entities similarly situated,

Appellant/Cross-Respondent,

v.

INTEGRA TELECOM OF WASHINGTON, INC.,
a Washington corporation,

Respondent/Cross-Appellant.

**APPELLANT'S REPLY BRIEF
AND RESPONSE TO CROSS-APPEAL**

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Appellant/Cross-Respondent, Indoor Billboard/Washington, Inc. (“Indoor Billboard”), submits this brief in reply to the arguments advanced by Appellee/Cross-Appellant, Integra Telecom of Washington, Inc. (“Integra”) on Indoor Billboard’s appeal and in response to the single assignment of error raised on Integra’s cross-appeal.

I. ARGUMENTS IN REPLY

A. Integra Committed an Unfair and Deceptive Practice By Assessing a Surcharge Falsely Denominated as a Presubscribed Interexchange Carrier Charge, Because That Label Misrepresents Something of Material Importance to Customers Regarding the *Nature* of the Charge.

Integra’s own Vice-President of Marketing admits that it would be deceptive for Integra to lead its customers to believe that Integra’s “PICC” surcharge is the same thing as what the FCC calls a PICC surcharge, because “they’re different things.” (CP 434). Yet Integra boldly argues in its brief that “there was nothing whatsoever deceptive” about calling its surcharge a Presubscribed Interexchange Carrier Charge or “PICC.” See Brief of Respondent at 15. Although its “PICC” surcharge was just an extra charge for its service having nothing to do with the recovery of local loop costs from its customers’ presubscribed interexchange carriers, and therefore entirely different in nature than a true PICC, Integra’s position is that it was free to call its

surcharge a Presubscribed Interexchange Carrier Charge in the absence of any affirmative regulatory prohibition not to do so. Brief of Respondent at 19 – 28.

Underlying its argument that there was nothing deceptive about calling its extra charge a “PICC” surcharge is Integra’s assertion that “the label ‘PICC’ has no ‘decisive connotation’ as an FCC-regulated tax or fee.” Brief of Respondent at 23. In Integra’s world, apparently, a “PICC” is anything Integra chooses to call a “PICC.” This is the essential premise of Integra’s argument, because it is only by denying that the phrase “Presubscribed Interexchange Carrier Charge” and the acronym “PICC” convey any particular meaning that Integra can hope to defend labeling as a “PICC” a charge that by Integra’s own admission is of an entirely different nature than the PICC created, defined and regulated by the FCC.

Integra’s essential premise fails, however, because in the real world of the telecommunications marketplace, calling a surcharge a “PICC” does connote a charge of a particular nature—to wit, an FCC-regulated surcharge associated with an incumbent local exchange carrier’s recovery of costs associated with providing “local loop” access to its customers’ presubscribed interexchange (long distance) carriers. This meaning of a Presubscribed Interexchange Carrier Charge or PICC is established by the FCC regulation creating the

surcharge by this name. See 47 C.F.R. § 69.153. It is reflected on the Consumer Fact Sheet of the FCC's website (CP 378-79), which Integra inexplicably chose to adopt almost verbatim to describe (inaccurately) its own "PICC" on its website. (CP 392) ("The PICC is a fee charged by incumbent local telephone companies to recover part of the costs of providing the 'local loop'"). It is the meaning that Integra's Director of Product Marketing, Michael Huebsch, acknowledged in the footnote of his internal "PICC*" memo. (CP 420) ("From a technical perspective, the PICC is defined as a fee that long distance companies pay to incumbent local telephone companies to recover part of the local loop costs."). And it is this same meaning that Indoor Billboard's representative, James Shulevitz, understood was meant by the "PICC" surcharge itemized under the "Taxes and Surcharges" section of Integra's invoice. (CP 445).

Integra's protestation that it "never represented to Indoor Billboard that its PICC surcharge was an . . . FCC-regulated tax or fee," see Brief of Respondent at 20, is therefore quite besides the point, because that representation inheres in the denomination of the surcharge as a "Presubscribed Interexchange Carrier Charge" or "PICC" in the first place. Since Integra's "PICC" had nothing whatsoever to do with a customer's presubscription to an interexchange carrier and was

really just an extra charge for its service—instituted as part of a marketing department-driven restructuring of its pricing model, in which “[n]ew, lower line rates plus the PICC . . . replaced a higher line rate without the PICC” (CP 420)—Integra’s labeling of its surcharge as a “PICC” was inherently misleading. Integra accordingly had an affirmative duty to disclose to its customers that its “PICC” was not a true, FCC-regulated PICC surcharge. See Robinson v. Avis Rent A Car System, Inc., 106 Wn. App. 104, 116, 22 P.3d 818 (2001) (“knowing failure to reveal something of material importance is ‘deceptive’ within the CPA”).¹

¹ In its brief, Integra argues that whether a surcharge is governmentally regulated is of no “material importance,” asserting without citation to any authority that the only thing material to a purchaser’s decision is “knowing that a charge will apply and the amount of that charge.” See Brief of Appellant at 27. If this were the law, this Court’s decision in Pickett would have been very different, as the marketing literature and cruise contracts at issue in that case did disclose the fact that “port charges and taxes” would be collected. Pickett v. Holland America Line-Westours, Inc., 101 Wn.App. 901, 906, 6 P.3d 63 (2000), reversed on other grounds, 145 Wn.2d 178, 35 P.3d 351 (2001). But this Court held in Pickett that because the defendant cruise line had “misrepresented the nature of the ‘port charges and taxes,’” a CPA violation had been committed. 101 Wn.App. at 906, 920 (emphasis supplied). Moreover, as a factual matter, the lengths to which Mr. Shulevitz went in attempting (unsuccessfully) to ascertain the nature and appropriateness of Integra’s “PICC” surcharge demonstrate that the nature of the charge—not just the fact of the charge and the amount—certainly was material to Indoor Billboard’s decisionmaking.

As the record reflects, Integra never made this disclosure. Indeed, rather than disclosing the difference in nature between its “PICC” surcharge and a true PICC, Integra reinforced the implication that its surcharge was a true PICC in a number of ways. For example, on its website, Integra described its “PICC” using language virtually identical to the FCC’s explanation of a true PICC. (CP 392; CP 378). And it grouped its “PICC” surcharge with a variety of other taxes and regulated fees under the “Taxes and Surcharges” section of its invoice (CP 385), which Integra advised customers were “levied . . . on behalf of the governmental entities that administer these charges.” (CP 389).

Even in the face of Mr. Shulevitz’s repeated inquiries, Integra’s representatives never revealed that Integra’s “PICC” was something very different than a true, FCC-regulated PICC. To the contrary, Integra’s sales representative, Erin McCune, advised Mr. Shulevitz that the Integra’s surcharges were “monitored,” but “not set,” by the FCC (CP 164), and Integra’s customer care representative left him with the impression that the charge “was associated with the FCC, that it was approved by the FCC [and] sanctioned by the FCC.” (CP 146; 223).

In summary, Integra committed an unfair and deceptive practice by mislabeling its surcharge as a “PICC,” thereby misleading its customers to believe that the nature of the

surcharge was that of a true, FCC-regulated PICC, when in fact the surcharge was just an extra charge for Integra’s service. To paraphrase this Court’s opinion in Pickett,² Integra cannot impose on its customers a surcharge, which is not a Presubscribed Interexchange Carrier Charge, and yet call it a “PICC”—an FCC-defined and regulated charge—when it is not. If the CPA’s prohibition of unfair and deceptive trade practices means anything, surely it must prohibit a business from dishonestly labeling the nature of its charges to customers.

B. On the Record Before the Trial Court, the Causation Element of Indoor Billboard’s CPA Claim Presented a Genuine Factual Issue That Could Not Properly Be Resolved on Summary Judgment.

Under Hangman Ridge, a plaintiff meets the causation element of a CPA claim by proving “a causal link” between the unfair and deceptive acts and the injury suffered. Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co., 105 Wn.2d 778, 793, 791 P.2d 531 (1986). Causation presents a factual issue, and for purposes of a CPA claim can be established in more than one way. For example, this Court has recognized that causation under the CPA is established if the plaintiff shows the trier of fact “that he [or she] relied upon a misrepresentation of fact,” or that the defendant “induced the

² 101 Wn.App. at 920.

plaintiff to act or refrain from acting,” or that “the plaintiff los[t] money because of unlawful conduct.” Robinson, 106 Wn.App. at 113-14 (citing Pickett, 101 Wn.App. at 916) (emphasis supplied). Considered in the light most favorable to Indoor Billboard, the summary judgment record was more than sufficient to permit a reasonable jury to find a “causal link” between Integra’s unfair and deceptive assessment of the mislabeled “PICC” surcharge and Indoor Billboard’s injury (its payment of the surcharge) under any of these three articulations of the causation standard. The trial court’s resolution of the causation issue on summary judgment was therefore improper.

The flaw in Integra’s argument that Indoor Billboard’s proof of causation was lacking is that it erroneously equates investigation with knowledge. The record certainly establishes an effort on the part of Mr. Shulevitz to investigate the appropriateness of Integra’s “PICC” surcharge—thus evidencing the materiality of the nature of the charge (rather than just the fact of the charge and its amount) to Mr. Shulevitz. But the record does not establish that Mr. Shulevitz’s investigation ever resulted in his gaining full knowledge of the true nature of the surcharge (i.e., that it was not a true, FCC-regulated PICC), as Integra repeatedly asserts. Absent undisputed evidence of such knowledge on the part of Mr. Shulevitz before paying the surcharge—which appears

nowhere in this record—his investigation of the surcharge in no way impairs Indoor Billboard’s ability to establish the requisite “causal link” between Integra’s unfair and deceptive billing practice and Indoor Billboard’s injury.³

Mr. Shulevitz’s deposition testimony—which must be taken as true on summary judgment—establishes directly or by reasonable inference that Indoor Billboard paid the “PICC” surcharge because (1) he was misled by Integra to believe that the surcharge was an FCC-regulated PICC, and (2) although he had questions about the charge, Mr. Shulevitz was “wasn’t certain” it was not an appropriate charge when he paid it and was reluctant to start off his two-year contractual relationship with Integra by contesting the charge:

Q: I’d like you to tell me how you feel you’ve been deceived by Integra.

A: **I feel I’ve been deceived by Integra by paying a charge that was mischaracterized as an FCC charge when in fact it was nothing more than a profit center for Integra.**

³ Similarly, absent undisputed evidence of full knowledge, Integra’s voluntary payment doctrine defense cannot be adjudicated on summary judgment. See Speckert v. Bunker Hill Arizona Mining Co., 6 Wn.2d 39, 52, 106 P.2d 602 (1940) (voluntary payment doctrine applicable only when person pays illegal demand “with a full knowledge of all the facts which render the demand illegal”).

Q: How did Integra mischaracterize the PICC as an FCC charge?

A: **By calling it a PICC charge.**

Q: So use of the term—

A: **By putting it in the Surcharges and Taxes section of the bill.**

Q: So calling it a PICC in your mind it was characterizing it as an FCC charge?

A: **Yes.**

* * *

Q: Fair enough. But I just want to make sure I understand what your impression was. When you saw PICC on the bill, you were led to believe that that was the same PICC that's mentioned on the FCC website that Mr. Berkovitch directed you to?

A: **Yes.**

* * *

Q: What else did he [Integra's customer care representative] tell you when he called you back about the PICC charge?

A: **I don't recall specifically what he said. The impression I was left with was that this charge was associated with the FCC, that it was approved by the FCC, sanctioned by the FCC, that it was okay with the FCC and it was a legitimate charge and they had every right to charge it.**

* * *

Q: Why did you pay the entire bill including the PICC if you weren't certain that it was an appropriate charge?

A: **You've answered the question by asking it. I wasn't certain. I wasn't certain that it was not. It wasn't worth cutting my phone service off over a \$39 charge.**

Q: Do you think it would have cut your phone service off if you would have disputed that portion of the bill?

A: **I think at the beginning of relationships, when this was my first bill, they would have expected my first payment. It sets a tone of how you are going to exist with your service provider. So I felt it was important to pay this bill in a timely manner. I went ahead and paid it with the \$99.**

Especially given the fact that I just signed a two-year contract with these people. So I was going to have to live with them for two more years. I generally don't like to start things off on a sour note.

(CP 438-39; 445; 146-47; 226). Under any of the articulations of the causation standard for a CPA claim, this testimony is sufficient to sustain an issue of fact as to whether Indoor Billboard's payment of the "PICC" surcharge was "causally linked" to Integra's misrepresentation of the nature of the

charge. Accordingly, Indoor Billboard was entitled to have the jury make that factual determination.

The sufficiency of this evidence to sustain an issue of fact on causation is even clearer in light of this Court's holding in Pickett. Like Indoor Billboard, the plaintiffs in Pickett alleged that the defendant cruise line had violated the CPA by misrepresenting the nature of a surcharge—in that case, a surcharge denominated as “port charges and taxes” separately assessed in addition to the price of a cruise ticket. 101 Wn.App. at 906. In Pickett, this Court held that when a CPA claim is premised upon the defendant's collection of a charge misrepresented to be something it is not, “causation inheres” in the fact of the plaintiff's purchase, such that proof of individual reliance on the misrepresented nature of the charge is not required to meet the causation element of a CPA claim:

We need not engage in an inquiry whether each plaintiff would have purchased a cruise ticket had they known about the port charges and taxes. We simply hold that Holland America cannot impose on passengers fees, which are not port charges and taxes, and yet call them government charges, taxes, and fees—pass through charges—when they are not.

101 Wn.App. at 920. In so holding, this Court specifically rejected the defendant cruise line's argument—identical to the reliance argument Integra advances here—that the plaintiffs'

ignorance of the “port charges and taxes” in that case precluded a finding of causation because they could not have relied on the alleged deceptive practice. Id. at 906.

That this Court’s decision in Pickett was subsequently reversed on other grounds by the Washington Supreme Court does not in any way render the reasoning of this Court’s opinion in Pickett suspect. Moreover, this Court repeatedly cited Pickett with approval in its subsequent Robinson decision as it recited Pickett’s three articulations of the CPA causation standard. Robinson, 106 Wn.App. at 113-14. Contrary to Integra’s suggestion, there is absolutely nothing in the Robinson opinion indicating a retreat from this Court’s causation analysis in Pickett. Accordingly, notwithstanding the Washington Supreme Court’s reversal of Pickett on other grounds, the causation analysis reflected in Pickett remains sound and should be applied here.

II. RESPONSE TO CROSS-APPEAL

A. Statement of the Issue.

Did the trial court properly deny Integra’s motion to dismiss this CPA action for lack of subject matter jurisdiction, where RCW 19.86.090 expressly vests the Superior Court with original jurisdiction to adjudicate CPA claims, where the Legislature specifically subjected “competitive” telecommunications companies like Integra to the CPA when it

deregulated the industry in 1985, and where the Washington Utilities and Transportation Commission (“WUTC”) does not have the authority to grant relief under the CPA pursuant to the limited administrative refund procedures of RCW 80.04.220-.230?

B. Summary of the Argument.

The trial court properly denied Integra’s motion to dismiss this CPA action for lack of subject matter jurisdiction. The Superior Court’s original subject matter jurisdiction over Indoor Billboard’s claim for relief under the CPA is established by the private cause of action section of the CPA. See RCW 19.86.090. By contrast, nothing in the administrative refund provisions of RCW 80.04.220-.230 vests the WUTC with jurisdiction to adjudicate claims under the CPA or grant relief available under the Act.

Further, unlike incumbent telecommunications companies—whose rates and charges remain highly regulated by the WUTC—Integra has sought and obtained classification by the WUTC as a “competitive” telecommunications company pursuant to RCW 80.36.310-.330. (CP 396). Integra’s classification as a “competitive” telecommunications company has two important consequences pertinent to Integra’s motion: (1) Integra enjoys the freedom to operate under substantially less regulatory oversight by the WUTC (for example, its “price

lists” are neither reviewed nor approved for reasonableness by the WUTC, but simply filed); and (2) correspondingly, Integra is explicitly denied the benefit of the “regulated industries” exemption to the CPA enjoyed by regulated (incumbent) telecommunications companies, and is therefore subject to liability under the CPA for any unfair and deceptive trade practices it may commit. See RCW 80.36.360.

The D. J. Hopkins⁴ case relied upon by Integra is not controlling here, because that case dealt with an incumbent telecommunications company that enjoyed exemption from the CPA under the “regulated industries” exemption of RCW 19.86.170. In that case, the CPA claim was not dismissed under CR 12(b)(1) for lack of subject matter jurisdiction based on the administrative refund jurisdiction of the WUTC (as advocated by Integra here). Rather, the CPA claim in D. J. Hopkins was dismissed under CR 12(b)(6) for failure to state a claim, based on the applicability of the “regulated industries” exemption of RCW 19.86.170 (an exemption which, as noted above, Integra does not enjoy).

⁴ D.J. Hopkins, Inc. v. GTE Northwest, Inc., 89 Wn.App. 1, 947 P.2d 1220 (1997).

C. The Trial Court Properly Denied Integra’s Motion to Dismiss.

1. **Only the Superior Court Has Jurisdiction to Adjudicate Indoor Billboard’s CPA Claim and Grant Indoor Billboard Relief Under the Act.**

RCW 19.86.090 expressly vests the Superior Court with original jurisdiction to adjudicate private causes of action for relief under the CPA:

Any person who is injured in his or her business or property by a violation of [the CPA] . . . may bring a civil action in the superior court . . .”
(emphasis supplied)

By contrast, nothing in the statutes governing the WUTC’s administrative refund procedures, RCW 80.04.220-.230, suggests that the WUTC has authority to adjudicate a CPA claim or to grant the full panoply of relief afforded under the Act, such as treble damages or attorneys’ fees. To the contrary, the WUTC’s authority is clearly limited to granting refunds of the principal amount of the overcharge, plus interest. See RCW 80.04.220 (WUTC may order refund of “the excess amount found to have been charged,” with interest from the date of collection); RCW 80.04.230 (WUTC may order refund of “the amount of the overcharge,” with interest from the date of collection). Accordingly, this is not a situation where both a court and an agency may have jurisdiction and authority to grant the same relief. Rather, if Indoor Billboard is to be

granted relief under the CPA from Integra's unfair and deceptive practice of collecting a falsely denominated surcharge—as the Legislature expressly intended—it can only be granted by the Superior Court.⁵

Further, the standard of liability for unfair and deceptive trade practices under the CPA, as established in Hangman Ridge, is distinctly different than the standards by which the WUTC may deem a charge “unreasonable” or “excessive” under RCW 80.04.220, or an “overcharge” under RCW 80.04.230, under its administrative refund authority. It is certainly possible, for example, that in a deregulated telecommunications marketplace, the \$4.21 per line, per month amount of Integra's “PICC” surcharge could pass muster under the WUTC's standard of reasonableness. And whether Integra's assessment of the “PICC” surcharge was an “overcharge” is simply a question of whether the charge was “in excess of the lawful rate in force at the time such charge was made” as reflected in Integra's price list. RCW 80.04.230. But such determinations by the WUTC under its administrative refund authority could not possibly serve as a substitute for adjudicating the very different question of whether Integra's

⁵ The WUTC itself has acknowledged that the overcharge refund procedures of RCW 80.040.230 - .240 do not limit “other remedies available to customers.” WAC 480-120-163.

misrepresentation of the nature of its “PICC” surcharge constitutes an unfair and deceptive practice under the judicial decisions interpreting and construing the CPA. The WUTC is neither equipped to make such an adjudication nor statutorily authorized to do so. That is the role of the Superior Court pursuant to RCW 19.86.090.⁶

2. The Legislature Clearly Intended that “Competitive” Telecommunications Companies Like Integra Be Subject to the CPA.

As discussed in Indoor Billboard’s opening brief, see Brief of Appellant at 24-27, all telecommunications companies in Washington originally enjoyed immunity from the CPA by virtue of the “regulated industries” exemption to the CPA. See RCW 19.86.170 (“Nothing in this chapter shall apply to actions or transactions otherwise permitted, prohibited or regulated under laws administered by . . . the Washington utilities and transportation commission. . .”). This immunity was a product

⁶ Interpreting RCW 80.04.220-.230 as vesting the WUTC with exclusive jurisdiction over Indoor Billboard’s CPA claim would also arguably violate Article 4, Section 6 of the Washington State Constitution. The judicial power under that Article is plenary, vesting in the Superior Courts “original jurisdiction in all cases and of all proceedings in which jurisdiction shall not have been by law vested exclusively in some other court . . .” See Moore v. Pacific Northwest Bell, 34 Wn.App. 448, 451, 662 P.2d 398 (1983) (citing Blanchard v. Golden Age Brewing Co., 188 Wash. 396, 63 P.2d 397 (1936)).

of the pervasive regulation of the industry by the WUTC in the public interest.

The regulatory landscape changed significantly in 1985, however, with the passage of Substitute Senate Bill 3305, under which telecommunications companies like Integra can seek classification by the WUTC as a “competitive” telecommunications company pursuant to certain specified criteria. See RCW 80.36.310-.330; see also Final Legislative Report SSB 3305 (C. 450, L. 85) (attached Appendix C to Brief of Appellant). Telecommunications companies classified as “competitive” by the WUTC under SSB 3305 are subject to “minimal regulation:”

Minimal regulation means that competitive telecommunications companies may file, instead of tariffs, price lists. The commission may also waive other regulatory requirements under this title for competitive telecommunications companies when it determines that competition will serve the same purposes as public interest regulation

RCW 80.36.320. So, for example, a “competitive” telecommunications company like Integra may establish rates and charges for its services pursuant to a price list, which “is not a tariff and is not reviewed or approved by the commission.” See WAC 480-80-202.

Because they are permitted to operate largely free from WUTC regulation, the Washington Legislature included in SSB 3305 a provision expressly excluding “competitive” telecommunications companies from the scope of the “regulated industries” exemption to the CPA set forth in RCW 19.86.170:

For the purposes of RCW 19.86.170, actions or transactions of competitive telecommunications companies, or associated with competitive telecommunications services, shall not be deemed otherwise permitted, prohibited or regulated by the commission.

RCW 80.36.360 (emphasis added). The Legislature’s intent is stated explicitly in the Final Legislative Report of SSB 3305: “Competitive telecommunications companies and services are subject to the Consumer Protection Act.” See Final Legislative Report SSB 3305 (C. 450, L. 85) (Appendix C to Brief of Appellant).⁷

⁷ The Legislature’s passage of SSB 3305 post-dates the last amendment of the WUTC administrative refund statutes upon which Integra relies in support of its motion to dismiss by some 24 years. That is, the Legislature’s last word on these issues was the specific extension of CPA liability to “competitive” telecommunications companies like Integra in 1985. Under general rules of statutory construction, any perceived conflict between RCW 80.36.360 and RCW 19.86.090, on the one hand, and the administrative refund procedures of RCW 80.04.220-.230, on the other, should be resolved in favor of the more specific and recent legislation. See, e.g., Tunstall v. Bergeson, 141 Wn.2d 201, 211, 5 P.3d 691 (2000); Morris v. Blaker, 118 Wn.2d 133, 147, 821 P.2d 482 (1992).

3. The *D.J. Hopkins* Decision is Not Controlling Here Because It Does Not Speak to the Jurisdictional Issue Presented by Integra’s Motion.

In the D. J. Hopkins case, a customer brought an action against GTE, asserting a claim for deceptive billing practices under the CPA as well as common law claims for breach of contract, negligent misrepresentation and injunctive relief. As one of the original incumbent telecoms, GTE was not a “competitive” telecommunications company, and therefore remained subject to extensive regulation by the WUTC.⁸ The trial court dismissed the CPA claim pursuant to CR 12(b)(6) for failure to state a claim, on the ground that GTE’s billing practices were regulated by the WUTC and therefore exempt from the CPA under the “regulated industries” exemption set forth in RCW 19.86.170. D. J. Hopkins, 89 Wn.App. at 4. The trial court then declined to exercise jurisdiction over the customer’s remaining common law claims (but not the CPA claim) under the discretionary doctrine of primary jurisdiction.

This Court affirmed the trial court’s decision in both regards. With respect to the dismissal of the CPA claim under CR 12(b)(6) for failure to state a claim, the Court concurred

⁸ Although the opinion does not explicitly identify GTE as an incumbent carrier, nothing in the D. J. Hopkins opinion suggests that GTE was classified as a “competitive” telecommunications company by the WUTC and the opinion makes no mention of RCW 80.36.360.

with the trial court that because GTE's billing practices were regulated by the WUTC, those practices fell within the statutory "regulated industries" exemption of RCW 19.86.170. D. J. Hopkins, 89 Wn. App. at 4-6. In support of this conclusion, the Court noted the WUTC's regulation of telecommunication companies' bills, under then-WAC 480-120-106, and further referenced the WUTC's administrative refund procedures in RCW 80.04.220-.230 as "indicat[ing] and complement[ing] the WUTC's regulation of GTE's billing practices." 89 Wn. App. at 5. It was in this context that the Court rejected "as fiction" the customer's attempt to "distinguish its claim as damages for deceptive billing as opposed to seeking recovery of 'overcharges.'" Id. at 6. This language of the opinion (so heavily relied upon by Integra) simply reflects this Court's rejection of a semantic distinction between a claim for damages for deceptive billing and a claim for refund of overcharges as a basis for placing the claim outside the "regulated industries" exemption to the CPA:

Here, even though the complaint is couched in terms of deceptive practices, what actually is presented is a claim for overcharges, or an unreasonable charge for something not received. Billing practices are regulated by the WUTC and the trial court did not err in dismissing the CPA claim.

Id. (emphasis supplied).

Having affirmed the dismissal of the CPA claim under CR 12(b)(6), based on the “regulated industries” exemption, the Court then proceeded to affirm the trial court’s decision to decline jurisdiction over the customer’s common law claims under the doctrine of primary jurisdiction. Central to its decision to do so was the Court’s determination that the customer’s common law claims “were little more than a demand for overpayments” which the WUTC had jurisdiction and authority to redress in full through the administrative refund procedures of RCW 80.04.220-.230. Id. at 6-9.

The foregoing summary of the D. J. Hopkins case illustrates that the Court did not reach or address in that case the distinctly different issue presented by Integra’s motion to dismiss this case: whether the administrative refund procedures of RCW 80.04.220-.230 divest the Superior Court of its original subject matter jurisdiction over legally sufficient CPA claims for unfair and deceptive practices of “competitive” telecommunications companies, which the Legislature has explicitly subjected to CPA liability. Neither the D. J. Hopkins decision nor any other authority in Washington so holds.

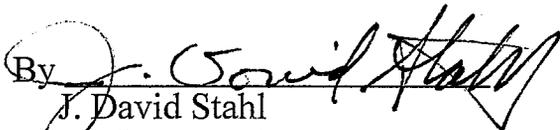
In summary, only the Superior Court—and not the WUTC—has jurisdiction to adjudicate this CPA claim for unfair and deceptive practices by a “competitive” telecommunications carrier.

III. CONCLUSION

The trial court erred in granting summary judgment in Integra's favor, dismissing Indoor Billboard's CPA claim. The trial court did not err, however, in denying Integra's motion to dismiss this action for lack of subject matter jurisdiction. Indoor Billboard respectfully requests that this Court reverse the trial court's summary judgment decision, vacate the Judgment entered in favor of Integra, and remand this action for trial.

RESPECTFULLY SUBMITTED this 18~~th~~ day of
December, 2006.

MUNDT MacGREGOR L.L.P.

By 
J. David Stahl
WSB No. 14113

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PROOF OF SERVICE

Cheryl A. Phillips states as follows:

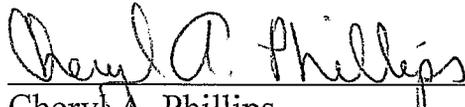
I am over the age of eighteen (18) years and not a party to this action.

I am employed by Mundt MacGregor L.L.P. and my business address is 999 Third Avenue, Suite 4200, Seattle, Washington 98104.

On December 18, 2006, I caused a copy of the above Appellant's Reply Brief and Response to Cross-Appeal to be served on counsel of record, via overnight FedEx delivery, addressed to the following:

Sarah J. Crooks
Lawrence H. Reichman, *pro hac vice*
Perkins Coie LLP
1120 Couch Street, 10th Floor
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DATED at Seattle, Washington this 18th day of December, 2006.


Cheryl A. Phillips

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