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No. 58490-1-I

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

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

Appellant/Cross-Respondent,

v.

INTEGRA TELECOM OF WASHINGTON, INC.,

Respondent/Cross-Appellant.

REPLY BRIEF OF CROSS-APPELLANT

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2007 JAN 18 PM 4:09

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I. INTRODUCTION

As discussed in its opening brief, the cross review of Integra Telecom of Washington Inc. ("Integra") contends that the exclusive original jurisdiction of the Washington Utilities and Transportation Commission ("WUTC") is an alternative basis supporting the judgment of dismissal. If the Court affirms the trial court's summary judgment, Integra's cross review is moot. If this Court were inclined to vacate or reverse that judgment, however, it should address Integra's assignment of error on cross review and affirm the trial court's judgment of dismissal on this alternative basis.

This action is, in essence, a telephone customer's claim that Integra's surcharge labeled "PICC" was an unlawful or unreasonable rate. Such claims against any telecommunications company are within the exclusive original jurisdiction of the WUTC, and the trial court should have granted Integra's motion to dismiss.

In its response brief, Indoor Billboard/Washington, Inc. ("Indoor Billboard") contends the following: (1) the legislature did not vest the WUTC with jurisdiction to adjudicate claims alleged under the Consumer Protection Act ("CPA"); (2) Integra is a competitive telecommunications company that does not enjoy the benefit of the "regulated industries" exemption from the CPA; and (3) this Court's decision in *D.J. Hopkins*,

Inc. v. GTE Northwest, 89 Wn. App. 1, 947 P.2d 1220 (1997), is not controlling. None of these contentions, however, addresses whether the trial court should have dismissed Indoor Billboard's CPA claim pursuant to RCW 80.04.220-.240, which grants the WUTC exclusive jurisdiction over such challenges to a public service company's rates.

II. DISCUSSION

A. **The WUTC Has Exclusive Jurisdiction Over Claims Within RCW 80.04.220-.240.**

In its opening brief, Integra discussed the Washington Supreme Court case law establishing that customers must bring their disputes regarding the rates charged by a public service company to the WUTC, before pursuing any other remedies in a trial court. As the Supreme Court explained, the legislature established in RCW 80.04.220-.240 the exclusive procedures and remedies for a customer to resolve a dispute with a public service company regarding the rates it charges. *State v. Metaline Falls Light & Water Co.*, 80 Wash. 652, 654, 141 P. 1142 (1914) (The WUTC "is authorized to examine in the first instance and pass upon these problems."); *see also Hewitt Logging Co. v. Northern Pac. Ry. Co.*, 97 Wash. 597, 166 P. 1153 (1917) (dismissing action because customer required to submit rate challenge to WUTC); *Belcher v. Tacoma Eastern R. Co.*, 99 Wash. 34, 168 P. 782 (1917) (same). Indoor Billboard simply ignores these cases in which the Supreme Court analyzed the question of

the WUTC's exclusive original jurisdiction to resolve customer claims challenging the lawfulness or reasonableness of rates.

The Supreme Court addressed the issue of exclusive original jurisdiction under the prior version of RCW 80.04.220-.240 before state laws regarding competitive telecommunications companies were enacted. The question of exclusive jurisdiction under these provisions has not been addressed again since these laws were enacted. Nonetheless, the current version of RCW 80.04.220-.240 continues to regulate all public service companies equally, without regard to whether the regulated entity is a competitive telecommunications company or an incumbent telecommunications company. Integra is subject to the same regulation by the WUTC under RCW 80.04.220-.240 as all other telecommunications companies. The statute expressly states: "The procedure provided in this section is exclusive, and neither the supreme court nor any superior court shall have jurisdiction save in the manner hereinbefore provided." RCW 80.04.240. This specific sentence was not originally included in its predecessor statute, 1911 Wash. Session Laws, ch. 117, sec. 91, construed by the Supreme Court in *State v. Metaline Falls Light & Water Co.*, 80 Wash. 652, 141 P. 1142 (1914) and the other Supreme Court cases cited above. Thus, the WUTC has exclusive original jurisdiction over claims

like Indoor Billboard's challenging the lawfulness or reasonableness of a competitive telecommunications company's rates.

B. Indoor Billboard's Challenge to the Lawfulness or Reasonableness of Integra's Rates Falls Within RCW 80.04.220-.240.

Indoor Billboard's claim falls within RCW 80.04.220-.240. Indoor Billboard claims that Integra's surcharge labeled "PICC" charge is not lawful and seeks, among other things, to recover the amount of the PICC charges that it has paid. Although couched in terms of "deceptive" charges, Indoor Billboard is simply challenging the lawfulness or reasonableness of the rates charged by Integra. Indoor Billboard is seeking a refund of the disputed charges. Such a claim is squarely within the exclusive jurisdiction of the WUTC pursuant to RCW 80.04.220-.240.

Indoor Billboard does not deny that it is challenging the lawfulness or reasonableness of the rates charged by Integra. Nor does Indoor Billboard deny that RCW 80.04.220-.240 establish procedures for customers like Indoor Billboard to challenge the lawfulness or reasonableness of the rates charged by public service companies, including Integra. Indoor Billboard does not deny that the WUTC has jurisdiction to resolve a complaint filed by a customer challenging the rates charged by a competitive telecommunications company. Indoor Billboard does not dispute that the WUTC has jurisdiction to order a competitive

telecommunications company, like Integra, to refund an unlawful or unreasonable rate, plus interest. Indoor Billboard, therefore, cannot dispute that the express language of RCW 80.04.220-.240 authorizes the WUTC to investigate and resolve customer complaints concerning the lawfulness or reasonableness of the rates charged by Integra, a public service company.

C. Integra Is Not Seeking an Exemption from the CPA Under RCW 19.86.170.

In its response brief, Indoor Billboard ignores the Supreme Court precedents and the express language of RCW 80.04.220-.240. Instead, Indoor Billboard focuses on the statutory exemption to the CPA for certain regulated activities, RCW 19.86.170, and the competitive telecommunications company exception to that exemption, RCW 80.36.360. These provisions, however, are irrelevant to the issue that Integra has raised on cross review.

Indoor Billboard repeatedly contends that Integra does not enjoy the benefit of the "regulated industries" exemption to the CPA because Integra is a competitive, rather than an incumbent, telecommunications company. Integra does not deny that RCW 80.36.360 excludes competitive telecommunications companies, like Integra, from the "regulated industries" exemption of RCW 19.86.170. This does not

answer the issue raised in Integra's motion to dismiss—does the WUTC have exclusive original jurisdiction under RCW 80.04.220-.240 to resolve a dispute regarding whether a competitive telecommunications company has charged its customer an unlawful or unreasonable rate. The answer is clear from the language of the statute: "The procedure provided in this section is exclusive, and neither the supreme court nor any superior court shall have jurisdiction save in the manner hereinbefore provided."

RCW 80.04.240.

The legislature specifically granted the WUTC exclusive original jurisdiction to resolve customer disputes regarding allegedly unlawful or unreasonable rates charged by a public service company when it enacted RCW 80.04.220-.240, and its predecessor statute, 1911 Wash. Session Laws, ch. 117, sec. 91. This is a specific grant of exclusive original jurisdiction, as opposed to the general "regulated industries" exemption upon which Indoor Billboard focuses. With RCW 80.04.220-.240, the legislature created specific procedures and remedies for addressing a customer's contention that a public service company, like Integra, charged it an unlawful or unreasonable rate.

The statutes relied on by Indoor Billboard, RCW 19.86.170 and RCW 80.36.360, are not in conflict with RCW 80.04.240 (*see* Appellant's Reply and Resp. 19 n. 17), and can be harmonized. The legislature's grant

of exclusive original jurisdiction to the WUTC pursuant to RCW 80.04.220-.240 is quite narrow, and it focuses on customer challenges to the lawfulness or reasonableness of the rates charged by a public service company, including competitive telecommunications companies. The legislature did not alter that narrow grant of exclusive jurisdiction to exclude competitive telecommunications companies by the subsequent enactments of RCW 19.86.170, the "regulated industries" exemption, or RCW 80.36.360, the competitive telecommunications company exception to that exemption. Indoor Billboard, in effect, urges the Court to read into RCW 80.04.220-.240 an exception—not enacted by the legislature—to WUTC's exclusive jurisdiction for claims challenging rates of competitive telecommunications companies. The scope of RCW 80.04.220-.240 plainly includes claims against competitive telecommunications companies and nothing in RCW 19.86.170 or RCW 80.36.360 alters that.

D. Neither the "CPA" Label Nor the Availability of Discretionary Relief Under the CPA Defeats the WUTC's Exclusive Jurisdiction

Indoor Billboard also focuses on the types of discretionary relief that a trial court may award to a successful plaintiff under the CPA—treble damages and attorney fees. Indoor Billboard argues that because the WUTC does not have the authority to award treble damages or

attorney fees under RCW 80.04.220-.240, the legislature did not vest the WUTC with jurisdiction to adjudicate claims under the CPA. Although the legislature did not grant the WUTC jurisdiction to resolve a claim labeled as a CPA claim, the legislature did grant the WUTC exclusive original jurisdiction to resolve customer challenges to the lawfulness or reasonableness of the rates charged by Integra. Consequently, it is important for the Court to consider the nature of the allegations raised in Indoor Billboard's claim, rather than simply the "CPA" label placed on it by Indoor Billboard.

This Court has held previously that the nature of the allegations, not the label attached to a party's claim, determines whether the claim falls within the jurisdiction of the WUTC under RCW 80.04.220-.240. *D.J. Hopkins, Inc. v. GTE Northwest*, 89 Wn. App. 1, 947 P.2d 1220 (1997). Indoor Billboard urges this Court to disregard its analysis in *D.J. Hopkins*, attempting to distinguish the decision on the grounds that Indoor Billboard's CPA claim, which challenges the lawfulness of Integra's rates, is a claim against a competitive telephone company as opposed to an incumbent telephone company. Integra does not contend that *D.J. Hopkins* is dispositive, rather instructive.

In *D.J. Hopkins*, this Court analyzed the nature of the plaintiff's claims to determine whether they were within the regulated practices

exemption from the CPA and within the primary jurisdiction of the WUTC. This Court's analysis in *D.J. Hopkins* of the nature of the allegations of a CPA claim for purposes of applying the regulated practices exemption and the doctrine of primary jurisdiction is useful in determining the nature of Indoor Billboard's allegations for purposes of applying the WUTC's exclusive original jurisdiction under RCW 80.04.220-.240.¹ In *D.J. Hopkins*, the Court pierced the labels the plaintiff applied to its claims and broadly interpreted the scope of WUTC regulation, including its authority under RCW 80.04.220-.240, to find that the trial court should not resolve the plaintiff's complaint. The Court must examine the nature of Indoor Billboard's allegations supporting its CPA claim, and not just the label Indoor Billboard applied, to determine whether the claim, a challenge to the lawfulness or reasonableness of Integra's rates, falls within the exclusive jurisdiction of the WUTC under RCW 80.04.220-.240.

Indoor Billboard also argues that the WUTC cannot have jurisdiction to resolve its dispute because the WUTC may not award treble damages or attorney fees. The remedies available under the CPA and

¹ In addition, the following statement in *D.J. Hopkins* is very instructive in resolving Integra's cross review: "The statute [RCW 80.04.240] mandates that all complaints concerning overcharges resulting from the collection of *unreasonable rates and charges* or collection of amounts in excess of lawful rates shall be filed with the WUTC." 89 Wn. App. at 6 (emphasis in original) .

RCW 80.04.220-.240 are both statutory remedies authorized by the legislature. Indoor Billboard cites no authority for its proposition that the unavailability of an identical statutory remedy deprives an agency of its legislatively granted exclusive jurisdiction to resolve a claim. Under the provisions of RCW 80.04.220-.240, Indoor Billboard can avail itself of the applicable statutory remedy, *i.e.*, a refund of overcharges plus interest.

Indoor Billboard also suggests, in a footnote, that it would violate Article 4, § 6 of the Washington State Constitution if the WUTC has exclusive original jurisdiction over this CPA claim. That constitutional provision vests jurisdiction in the superior courts to resolve cases and proceedings "in which jurisdiction shall not have been by law vested exclusively in some other court" *Id.* Washington courts have rejected the theory that vesting an agency with exclusive original jurisdiction to decide a statutory claim violates the Washington Constitution. *See Ledgerwood v. Landsdowne*, 120 Wn. App. 414, 419-20, 85 P.3d 950 (2004); *Abraham v. Dep't of Labor & Indus.*, 178 Wash. 160, 34 P.2d 457 (1934) (holding that the legislature may grant an administrative agency exclusive original jurisdiction to hear certain disputes, and when it does so, the trial court is without original jurisdiction and dismiss any claim filed there). Here, the legislature vested exclusive original jurisdiction in the WUTC to address customer challenges to the

rates charged by public service companies. This does not violate the Washington State Constitution. Indeed, the Supreme Court has repeatedly upheld the grant of exclusive original jurisdiction to the WUTC and its predecessor agency to hear and resolve customer challenges to the rates charged by a public service company. Accordingly, this Court should reject Indoor Billboard's constitutional argument.

III. CONCLUSION

The WUTC has exclusive original jurisdiction over Indoor Billboard's claim pursuant to the express language of RCW 80.04.220-.240 and Washington Supreme Court precedent. The Washington appellate courts have not previously addressed the narrow question presented on cross review regarding the WUTC's exclusive original jurisdiction under RCW 80.04.240 to resolve customer challenges to the rates charged by a competitive telecommunications company when the customer labels its claim as a CPA claim. The legislature's grant of exclusive jurisdiction in RCW 80.04.220-.240, however, is express and includes claims against competitive telecommunications companies. Nothing in the language of RCW 19.86.170 and RCW 80.36.360 revoked or limited that grant of exclusive jurisdiction to the WUTC to decide customer challenges to the lawfulness or reasonableness of rates charged

by a public service company, including Integra. The trial court should have granted Integra's motion to dismiss.

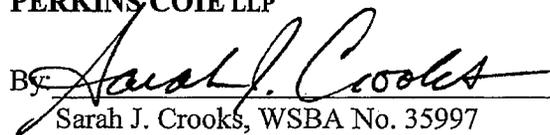
For the reasons set forth above and in Integra's response/cross-appeal brief, this Court should affirm the trial court's summary judgment decision and denial of reconsideration, or in the alternative, affirm the judgment by reversing the trial court's order denying Integra's motion to dismiss. In any event, this Court should affirm the trial court's judgment of dismissal.

DATED: January 18, 2007

Respectfully submitted,

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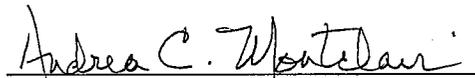
I certify that on January 18, 2007 I caused a true and correct copy of the foregoing *REPLY BRIEF OF CROSS-APPELLANT* to be served on counsel of record listed below by Hand Delivery:

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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.

DATED at Seattle, Washington this 18th day of January, 2007.


Andrea C. Montclair

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2007 JAN 18 PM 4:09