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SUPREME COURT OF THE STATE OF WASHINGTON

QUALCOMM INCORPORATED,

Appellant,

v.

STATE OF WASHINGTON, DEPARTMENT OF REVENUE,

Respondent.

DEPARTMENT OF REVENUE'S ANSWER
TO AMICUS CURIAE BRIEFS

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TABLE OF CONTENTS

I. INTRODUCTION.....1

II. ARGUMENT2

 A. For Retail Sales Tax Purposes, The OmniTRACS
 Messaging Service Is Sold In Monthly Transactions
 Distinct And Separate From Sale Of Hardware, Software,
 And Optional Systems2

 B. Because The Function Of The OmniTRACS Messaging
 Service Is To Transmit Messages Via Satellite Between
 A Customer’s Trucks And The Customer’s Dispatch
 Center, It Was A “Network Telephone Service” Under
 Former RCW 82.04.065(2).....5

 C. The 2007 Amendments Implementing The Streamlined
 Sales And Use Tax Agreement Support The
 Department’s Application Of Former RCW 82.04.065.....15

III. CONCLUSION19

TABLE OF AUTHORITIES

Cases

Community Telecable of Seattle, Inc. v. City of Seattle,
164 Wn.2d 35, 186 P.3d 1032 (2008)..... 6, 7, 8, 9

Qualcomm, Inc. v. Dep't of Revenue,
151 Wn. App. 892, 213 P.3d 948 (2009)..... 2, 3, 4, 7, 14, 17

Sprint Int'l Commc'ns Corp. v. Dep't of Revenue,
154 Wn. App. 926, 226 P.3d 253, review denied, ___ Wn.2d ___
(Sept. 7, 2010)..... 7, 15, 16, 17

Western Telepage, Inc. v. City of Tacoma Dep't of Financing,
140 Wn.2d 599, 998 P.2d 884 (2000)..... 6, 7, 18

Statutes

Laws of 1983, 2nd Ex. Sess. ch. 3, § 24 6, 7

Laws of 1983, 2nd Ex. Sess., ch. 3, § 25(5)..... 7

Laws of 1997, ch. 304..... 8

Laws of 1997, ch. 304, §§ 1, 4, 5..... 8

Laws of 1997, ch. 304, § 5..... 6

Laws of 2002, ch. 67, § 2..... 6

Laws of 2007, ch. 6, §§ 1002, 1003..... 12

Laws of 2007, ch. 6, §§ 1002(2), 1003(2) 17

Laws of 2007, ch. 6, § 1002(8) 16

Laws of 2007, ch. 6, §§ 1002(8), 1003(8) 17

Laws of 2007, ch. 6, § 1004(5)..... 17

RCW 35.21.717	8
RCW 82.02.210	16
RCW 82.04.050(5).....	7, 17
RCW 82.04.065	6, 7, 15, 17
RCW 82.04.065(2).....	2, 5, 8, 9, 11, 12, 15, 17, 19
RCW 82.04.065(27).....	17
RCW 82.04.297(3).....	8
RCW 82.08.020	5, 17
RCW 82.16.010	6

Other Authorities

Final Bill Report on SSB 5089, 60th Leg., Reg. Sess. (Wash. 2007).....	16
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The Washington Department of Revenue (Department) files this answer to the amicus brief filed by the Intelligent Transportation Society of America (ITSA) and the amicus brief filed jointly by the Washington Trucking Associations and American Trucking Associations, Inc. (WTA/ATA).

I. INTRODUCTION

Beginning in the 1980s, Qualcomm has marketed the OmniTRACS System for use by commercial trucking companies. The OmniTRACS System is advertised and sold as a "Satellite Mobile Communications System" consisting of three basic parts: hardware and software mounted on each truck (a "Mobile Communications Terminal" or "Mobile Communications Unit"), software installed at the trucking company's dispatch center ("QTRACS Host Software"), and a messaging service that transmits data between the customer's trucks and the customer's dispatch center ("OmniTRACS Messaging Service") via satellite. CP 73-92, 238-58. The parts are sold as discrete components, which are separately invoiced and which may be purchased individually. CP 94-95, 184-85.

The Court of Appeals upheld the Department's determination that retail sales tax liability for the messaging service should be analyzed separately from the other parts of the OmniTRACS System, and the

Department's determination that the messaging service was a "network telephone service" as defined in former RCW 82.04.065(2) during the relevant audit period, 1998-2001. This Court should affirm.

II. ARGUMENT

A. **For Retail Sales Tax Purposes, The OmniTRACS Messaging Service Is Sold In Monthly Transactions Distinct And Separate From Sale Of Hardware, Software, And Optional Systems**

The Court of Appeals upheld the Department's determination that retail sales tax liability for the messaging system should be analyzed separately from the other parts of the System. *Qualcomm, Inc. v. Dep't of Revenue*, 151 Wn. App. 892, 895, 907, 213 P.3d 948 (2009). The amici curiae supporting Qualcomm argue that trucking companies purchase the OmniTRACS System to monitor the performance of their trucks and drivers to improve operational efficiency, and that the System is functionally integrated and all parts therefore must be considered as a unit for taxation purposes as well. WTA/ATA Amicus Br. at 3-5, 6; ITSA Amicus Br. at 3.

However, the taxability of the OmniTRACS System is not at issue in this appeal, and amici curiae's arguments about the OmniTRACS System are not relevant to the question before the Court. Because Qualcomm has separated that system into components, which are separately itemized—and, in the case of the messaging service, billed and

paid in discrete monthly transactions—Qualcomm’s business model requires the taxability of the individual components must be analyzed separately. Qualcomm collected retail sales tax on the other two components of the OmniTRACS system (hardware and software), and the taxability of those components is not challenged here. *Qualcomm*, 151 Wn. App. at 895. Only the retail sales tax on the messaging service is at issue here.

Qualcomm separately invoices and bills each part of its System. CP 94-95, 184-85. While the three basic components of the System may be purchased by entering into a contract with Qualcomm, the System is not purchased in a single indivisible transaction. In the contract, the customer pays specified prices to purchase the hardware and the software to be installed on its trucks and at its dispatch center, after which the customer owns the equipment; indeed the customer’s ownership is such that it may resell the equipment. CP 186-87. The contractual terms addressing the messaging system stand in sharp contrast; the customer enters into a contract for a monthly service, to be paid in response to monthly invoices for that service. CP 185, 189, 204-11. The charge for transmitting automatically generated position data is fixed. *Qualcomm*, 151 Wn. App. at 895. Depending on which messaging plan the customer selects, some or all of the other messages transmitted between its trucks

and its dispatch center are billed both per message and per character. *Id.*; CP 204-11.

While it may be true, as WTA/ATA assert, that the three components of the OmniTRACS “Mobile Communications System” operate as an integrated system, the record shows that the equipment and software need not be purchased from Qualcomm for customers to use the separately purchased messaging service. A customer could purchase and install used equipment on its trucks; such equipment could be available from another trucking company. *See* CP 186-87 (contractual provisions acknowledging transfers of equipment). Some customers have written their own software for use with the OmniTRACS messaging service. CP 109. Accordingly, it is possible for a customer to purchase the OmniTRACS messaging service without purchasing the hardware and software from Qualcomm.

Moreover, Qualcomm sells several hardware and software options for use with the OmniTRACS System, which can be purchased in separate taxable transactions, lending further support to the proposition that the messaging service truly is a series of separate monthly transactions for purposes of determining taxability. *See, e.g.*, CP 69, 109. Among these options are SensorTRACS and TrailerTRACS, discussed below, and other “complementary products” allowing for various types of asset

management, automation, reporting and notification, hours of service, security, and vehicle command and control. CP 102, 105.

Only the taxability of the messaging service is at issue in this appeal. The Department correctly imposed retail sales tax on the messaging service as a distinct service that is itemized and billed separately from the other standard and optional components of the OmniTRACS System. The Department properly followed the general rule that a retail sales tax is imposed on each sale of a good or service, RCW 82.08.020, and it properly determined the appropriate tax based on the nature of the messaging service being sold, rather than on the character of System components for which retail sales tax already had been collected and paid without contest.

B. Because The Function Of The OmniTRACS Messaging Service Is To Transmit Messages Via Satellite Between A Customer's Trucks And The Customer's Dispatch Center, It Was A "Network Telephone Service" Under Former RCW 82.04.065(2)

As enacted in 1983, former RCW 82.04.065(2) defined "network telephone service" in relevant part to include "the providing of telephonic, video, data, or similar communication or transmission for hire, via a local telephone network, toll line or channel, cable, microwave, or similar

communication or transmission system.”¹ That broad definition was adopted to accommodate rapid changes occurring in the telecommunications industry in the 1980s.

Until 1981, the Legislature imposed a public utility tax on traditional telephone services. *Western Telepage, Inc. v. City of Tacoma Dep’t of Financing*, 140 Wn.2d 599, 602, 998 P.2d 884 (2000). Recognizing the “impending revolution” in telecommunication services that would follow the forced breakup of the AT&T telephone system monopoly, and wishing to “level the playing field” between regulated telephone businesses and emerging nonregulated telecommunications businesses, the Legislature broadened the definition of businesses subject to the state public utility tax by amending former RCW 82.16.010, the predecessor to former RCW 82.04.065. *Western Telepage*, 140 Wn.2d at 602-03. The Legislature adopted a broad definition of “network telephone service” in former RCW 82.04.065, but it also included specific exemptions for certain types of telecommunications services (competitive

¹ Laws of 1983, 2nd Ex. Sess. ch. 3, § 24. The definition was amended in 1997 to exclude the provision of “internet service.” Laws of 1997, ch. 304, § 5. The definition was amended again in 2002 to ensure that state and local excise taxes on mobile telecommunications are “sourced” consistent with uniform nationwide rules enacted by Congress. Laws of 2002, ch. 67, § 2. “Sourcing” refers to the process of determining where a transaction is taxable. Neither of these amendments affected the application of the definition of “network telephone service” as it applied to the OmniTRACS messaging service (although, as explained below, the internet service exclusion added in the 1997 amendment was at issue in *Community Telecable of Seattle, Inc. v. City of Seattle*, 164 Wn.2d 35, 186 P.3d 1032 (2008)).

telephone service, cable television service, radio and television broadcast services, and eventually internet service).² *Western Telepage*, 140 Wn.2d at 603-04. Giving effect to this statutory language, this Court held the broad statutory definition of “network telephone service” governs except where the Legislature has granted a specific statutory exemption. *Id.* at 610-11.³

It is for that reason that this case is consistent with the decision in *Community Telecable of Seattle, Inc. v. City of Seattle*, 164 Wn.2d 35, 186 P.3d 1032 (2008).⁴ That decision rested on a specific statutory exemption for internet service when the Court held that an internet service was not a

² Exclusion from the definition of “network telephone service” did not mean that these services necessarily were exempt from retail sales tax. “Competitive telephone service,” for example, was subject to retail sales tax under former RCW 82.04.050(5) (1983) (Laws of 1983, 2nd Ex. Sess., ch. 3, § 25(5)), cross-referencing definitions in former RCW 82.04.065 (1983) (Laws of 1983, 2nd Ex. Sess., ch. 3, § 24).

³ Because the Legislature had defined the specific exemptions to be applied, the Court refused to add language to the statute that would act to exempt the paging service at issue in *Western Telepage* from the definition of “network telephone service.” 140 Wn.2d at 610. Relying on *Western Telepage*, the Court of Appeals recently held that a “frame relay network” was a “network telephone system”; the network did not fall within one of the specific exemptions in former RCW 82.04.065 and the Court refused to add language to the statute that would create an exemption. *Sprint Int’l Commc’ns Corp. v. Dep’t of Revenue*, 154 Wn. App. 926, 935-37, 226 P.3d 253, review denied, ___ Wn.2d ___ (Sept. 7, 2010).

⁴ At page 9 of their amicus brief, WTA/ATA argue that the Court of Appeals decision conflicts with *Community Telecable*. Relying on *Community Telecable*, they also argue that the use of telephonic-like facilities to provide a service does not render the service taxable as a telephonic or data transmission service. As explained below, they erroneously assume the entire OmniTRACS System is at issue in this appeal. It is not. Qualcomm collected retail sales tax on the hardware and software (Mobile Communications Terminals and QTRACS Hosting Software) it sold to trucking companies. *Qualcomm*, 151 Wn. App. at 895. Only the taxability of the messaging service is at issue here.

“network telephone service” under former RCW 82.04.065(2) and was not subject to a local telephone utility tax. The Court explained that the 1997 Legislature had taken action specifically to “prohibit the taxation of Internet service providers as network telephone providers.” *Community Telecable*, 164 Wn.2d at 43, citing Laws of 1997, ch. 304.⁵ Former RCW 35.21.717 prohibited the imposition of any local business and occupation (B&O) tax at a rate exceeding that of the general service classification on an “internet service,” as defined in former RCW 82.04.297(3). *Community Telecable*, 164 Wn.2d at 42. The petitioner, Comcast, was selling an “internet service” within that definition. *Id.* Comcast therefore was not selling a “network telephone service” under former RCW 82.04.065(2), because the third sentence of that subsection explicitly excluded “internet service” from the definition of “network telephone service,” and the language of former RCW 82.04.297(3) did not allow a transmission component of an internet service to be separated from the actual service being sold to customers when determining taxability. *Community Telecable*, 164 Wn.2d at 43-44.

During the period at issue in this appeal, there were no statutory provisions parallel to those addressed in *Community Telecable* that applied

⁵ Each of the statutes the Court applied was added or amended in the bill. See Laws of 1997, ch. 304, §§ 1, 4, 5.

to a communications system like the OmniTRACS System. There was no specific statute that exempted such a system from the definition of "network telephone service" in former RCW 82.04.065(2) or that prohibited any tax beyond the general service classification B&O tax. There was no statute that required hardware, software, and a messaging service to be considered as an inseparable unit for tax purposes, even though those components of the system are itemized and billed separately. *Community Telecable* does not control the result here.

The primary function of the OmniTRACS messaging service is to transmit messages between a customer's trucks and the customer's dispatch center via satellite. Two types of messages are most commonly transmitted: messages containing location data generated by the Mobile Communications Terminal installed on a customer's trucks, and text messages between truck drivers and the customer's dispatch center. CP 30-31. Text messages may be "freeform" messages, resembling email, or they may be fill-in-the-blank messages called "macro" messages that use forms created by customers. CP 30-31.

Both types of messages are generated by customers using equipment they have purchased and own. Location data is generated by the Mobile Communications Terminal on each truck, using satellite signals to measure the truck's position; that location data is transmitted to

the customer's dispatch center via satellite using the OmniTRACS messaging service. CP 241-42. While the location data may be processed for retransmission at Qualcomm's Network Monitoring Facility, it is the software at the customer's dispatch center that receives the location data and displays it in a form usable by the customer. CP 109-12. The messaging service transmits the customer's location data (generated by equipment the customer owns) to the customer's dispatch center (received by the customer's computers running software the customer owns).

Text messages are generated either by the truck driver or by a person at the customer's dispatch center and are transmitted via satellite using the messaging service. The customer may use "macro" text messaging to expedite routine messages, but the fill-in-the-blank form is created by the customer and blanks are filled in by the customer. CP 30. Again, the satellite messaging service is used to transmit the customer's data between the customer's trucks and the customer's dispatch center.

WTA/ATA maintain that their members purchase the OmniTRACS System to "monitor truck driver performance, engine information, and other trucking activities to improve operational efficiency." WTA/ATA Amicus Br. at 1. They refer to the "vital information" the System provides about "tractor fuel consumption and intake, the speed at which the driver is driving . . . and the time a driver is

idling” and “trailer connects/disconnects, temperature updates on refrigerated cargo, mileage traveled, RPM and MPH data, and any hard braking by the driver.” WTA/ATA Amicus Br. at 5. These statements are misleading. A customer wanting these types of information must purchase optional systems, such as SensorTRACS or TrailorTRACS, that are sold separately and are not at issue in this appeal.⁶ Data generated by SensorTRACS or TrailorTRACS hardware is transmitted as “regular messages” to the customer’s dispatch center using the OmniTRACS messaging service—messages that are billed and paid for separately from the purchase of the optional hardware and software. CP 196, 208, 211-17. The function of the messaging service is not to generate the data collected by SensorTRACS or TrailorTRACS but to transmit the data between the customer’s trucks and the customer’s dispatch center, with monthly invoicing and payments in transactions that are taxable as a “network telephone service” under former RCW 82.04.065(2).

⁶ For example, to obtain information about fuel consumption, truck speed, engine speed, and other measures of truck and driver performance, a customer must purchase and install the SensorTRACS option, which includes hardware that connects the engine and other mechanical components in the customer’s truck to the Mobile Communications Terminal already installed in the truck and software for use in the customer’s dispatch center. CP 69, 196-98, 298-99. To obtain data about trailer connects/disconnects, refrigerated trailer temperature, and similar information, a customer must purchase and install the TrailorTRACS option, which includes hardware that transmits data from the trailer to the Mobile Communications Terminal installed in the truck and software for use in the customer’s dispatch center. CP 199-202.

Referring to the terminology in the 2007 statute amending RCW 82.04.065(2) (Laws of 2007, ch. 6, §§ 1002, 1003), ITSA argues that “intelligent transportation services” are not “telecommunications services” because they provide “significant aggregation, supplementation, processing, manipulation, and storage of data.” ITSA Amicus Br. at 1. ITSA’s argument focuses almost completely on its characterizations of the OmniTRACS System, not the messaging service.⁷

In only one sentence, on page 3 of its amicus brief, does ITSA address the messaging service itself. However, its summary characterization of the messaging service is not supported by the record it cites. According to ITSA, the messaging service determines vehicle location, adds descriptive information, and formats the location information. Yet Qualcomm’s own literature explains that it is the Mobile Communication Terminal installed in the truck that measures the satellite signals, calculates their difference, and transmits that position data via satellite using the messaging service for delivery to the customer’s dispatch center. CP 241-42. That same literature explains that it is the OmniTRACS System (not the messaging service) that provides the

⁷ Most of ITSA’s amicus brief addresses the social value of intelligent transportation systems in general, with emphasis on systems designed to relieve traffic congestion. The Department does not dispute the social value of such systems, but such considerations may be weighed by the Legislature when it determines tax classifications, exemptions, and rates. They are not relevant here.

customer's dispatcher with vehicle location and position history information. CP 242. Even if the position data is recoded or reformatted in some way by the messaging system as it transmits the message,⁸ that incidental processing should not obscure the fact that a device owned by the customer generates position data for use by the customer on equipment owned by the customer at the customer's dispatch center—the function of the OmniTRACS messaging service is to transmit the customer's position data from the truck to the customer's dispatch center. Moreover, whatever descriptive information is available to the customer appears to be determined not by the messaging service, but by the software Qualcomm sells for use at the customer's dispatch center. CP 109-12.

The transmission function of the messaging service is shown most clearly, of course, by the transmission of text messages. The record contains a sample monthly bill for OmniTRACS messaging showing that the company transmitted at least 2,746 text messages during the period, incurring significant charges for that service:

⁸ Apparently, the position data from the truck is processed to make it available to the software at the customer's dispatch center. CP 112.

Base charge for 48 trucks (including all automatic position data transmissions)	\$35.00 each	\$1,680.00
Charges for regular text messages	\$0.05/message plus \$0.002/character	\$538.19
Charges for SensorTRACS messages	\$0.05/message plus \$0.002/character	\$103.38
Other message charges		\$44.15
Total messaging service charges for the month		\$2,365.72

CP 205.⁹

As the Court of Appeals accurately observed, the messaging service

provides a communications link between the truck and its mobile communication terminal, owned by the customer, and the dispatch center's computers and tracking software, also owned by the customer. All of the data sent from the customer's truck to Qualcomm's network management center and retrieved by a customer's dispatch center is created by the customer's shipping activity, not by Qualcomm.

Qualcomm, 151 Wn. App. at 907. The Department correctly concluded that the messaging service offered by Qualcomm was a separate and distinct component of its OmniTRACS Mobile Communication System,

⁹ Interestingly, in light of WTA/ATA's assertion that trucking companies purchase the OmniTRACS system to obtain "vital information" about truck and driver performance, at page 5 of its amicus brief, the company represented in the record transmitted only 194 SensorTRACS messages, CP 205, even though at least 34 of its trucks were equipped with SensorTRACS. CP 210-17. It transmitted 14 times as many text messages, casting doubt on WTA/ATA's assertion.

that the messaging service's primary function was to transmit messages between customers' trucks and their dispatch centers via satellite, and that the messaging service was subject to retail sales tax as a "network telephone service" as defined in former RCW 82.04.065(2). The Court of Appeals properly affirmed the Department's determinations.

C. The 2007 Amendments Implementing The Streamlined Sales And Use Tax Agreement Support The Department's Application Of Former RCW 82.04.065

WTA/ATA argue that the 2007 amendment to RCW 82.04.065 defined "telecommunications service" as including only transmission services. WTA/ATA Amicus Br. at 5-6 n.4, 10 n.7 (echoing Qualcomm's argument at pages 8-9 of its supplemental brief). *See also* ITSA Amicus Br. at 4 n.1. The Court of Appeals flatly rejected the same argument earlier this year in *Sprint International Communications Corporation v. Department of Revenue*, 154 Wn. App. 926, 935-37, 226 P.3d 253, *review denied*, ___ Wn.2d ___ (Sept. 7, 2010). The appellant in that case sought to apply the Federal Trade Commission's distinction between "basic telecommunications services" that involve only "pure transmission services" and "enhanced services" that "employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information." *Id.* at 936-37. The Court of Appeals held that "former RCW 82.04.065 did not distinguish

between basic and enhanced transmission services,” and noted that when the Legislature eventually adopted a definition of “telecommunications service” in 2007, the Legislature specifically stated that a transmission service qualifies as a telecommunications service “without regard to whether such service is . . . classified by the federal communications commission as enhanced or value added.” *Id.* at 937, citing Laws of 2007, ch. 6, § 1002(8).¹⁰

Moreover, both WTA/ATA and ITSA omit references to key provisions in the 2007 legislation, under which sale of the OmniTRACS messaging service remains subject to retail sales tax. The 2007 legislation adopted several telecommunication definitions that recently had been incorporated into the Streamlined Sales and Use Tax Agreement, which the Legislature had approved in 2003. *See* RCW 82.02.210. The changes to terminology were not intended to change the existing law regarding taxability and exemptions. *See* Final Bill Report on SSB 5089, 60th Leg., Reg. Sess. (Wash. 2007) at 3 (“Several telecommunication definitions

¹⁰ Laws of 2007, ch. 6, § 1002(8), provides in pertinent part:

“Telecommunications service” includes such transmission, conveyance, or routing in which computer processing applications are used to act on the form, code, or protocol of the content for purposes of transmission, conveyance, or routing *without regard to whether such service . . . is classified by the federal communications commission as enhanced or value added.*

(Emphasis added.)

recently incorporated into the SSUTA are adopted. These are changes to terminology in current law, *but do not change current law regarding taxability and exemptions.*) (emphasis added) (quoted in *Sprint Int'l*, 154 Wn. App. at 934-35). *Accord Qualcomm*, 151 Wn. App. at 898-99.

RCW 82.08.020 imposes retail sales tax on each retail sale in Washington. “Retail sale” is defined to include both “telecommunications service” and “ancillary services” as defined in RCW 82.04.065. Laws of 2007, ch. 6, § 1004(5) (codified in RCW 82.04.050(5)). “Telecommunications service” includes services that transmit data from one location to another, and only where the “primary purpose” of the service is to obtain information or processed data (Westlaw is a primary example) does the service fall outside the definition of “telecommunications service.” Laws of 2007, ch. 6, §§ 1002(8), 1003(8) (codified in RCW 82.04.065(27)). “Ancillary services” are services associated with or incidental to the provision of “telecommunications services,” including, but not limited to, services such as directory assistance, caller ID, and voice mail that provide information or processed data to the customer. Laws of 2007, ch. 6, §§ 1002(2), 1003(2) (codified in RCW 82.04.065(2)).

The OmniTRACS messaging service is subject to retail sales tax under the 2007 legislation. As explained herein, the specific function of

the messaging service is to provide satellite transmission of a customer's data between the customer's trucks and the customer's dispatch center. The fact that the OmniTRACS System appends position data and time and date stamps to messages, CP 30, is incidental to the message service's transmission of the messages themselves.¹¹ This appended information is ancillary to the messaging service, similar to adding a "caller ID" feature to a cell phone service or a time stamp to a text message. In all of these situations, the provision of incidental or associated information would be subject to retail sales tax as part of the underlying "telecommunications service" or as an "ancillary service."

The Legislature adopted a broad definition of "network telephone service" in 1983, for purposes of taxation, in anticipation of expected changes in the telecommunications industry. *Western Telepage*, 140 Wn.2d at 602-03. The development of the OmniTRACS messaging service is an example of the change that has occurred. The 2007 amendments confirm the breadth of the 1983 definition, by specifically recognizing that "telecommunications service" includes substantive data processing for transmission, conveyance, or routing of information, and that the presence of associated or incidental services ("ancillary services")

¹¹ The record does not reflect whether this information is added by the customer's equipment or software or by Qualcomm.

does not change the taxation of the “telecommunications service” with which they are associated. The 2007 amendments confirm the Department’s application of former RCW 82.04.065(2) to determine that each separate monthly transaction involving the sale of the OmniTRACS messaging service is the sale of “network telephone service,” on which retail sales tax must be paid.

III. CONCLUSION

This Court should affirm the decision of the Court of Appeals.

RESPECTFULLY SUBMITTED this 9th day of September,
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