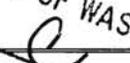


No. 42966-7

FILED
COURT OF APPEALS
DIVISION II
2012 SEP 28 PM 1:27
STATE OF WASHINGTON
BY 
DEPUTY

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.

REPLY BRIEF OF APPELLANT

David W. Carpenter
(*Pro Hac Vice Pending*)
SIDLEY AUSTIN LLP
One South Dearborn Street
Chicago, IL 60603
(312) 853-7000 (tel.)

Bradford J. Axel (WSBA # 29269)
Kelly Twiss Noonan (WSBS #19096)
STOKES LAWRENCE, P.S.
1420 Fifth Avenue, Suite 3000
Seattle, WA 98101-2393
(206) 626-6000 (tel.)

Joseph R. Guerra
(*Pro Hac Vice Pending*)
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, DC 20005
(202) 736-8000 (tel.)

Attorneys for AT&T
Communications of the Pacific
Northwest, Inc.

FILED
COURT OF APPEALS
DIVISION II
2012 SEP 28 PM 1:27
STATE OF WASHINGTON
BY 
DEPUTY

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES	ii
INTRODUCTION	1
ARGUMENT	4
I. THE COMMISSION’S INTERPRETATION IS FLATLY INCONSISTENT WITH THE PLAIN LANGUAGE OF THE STATUTE AND ITS IMPLEMENTING REGULATION.....	4
A. The Commission’s “Direct Business Relationship” Test Violates Plain Terms Of The Statute And Rule.....	6
1. The Statute Is Not Ambiguous.....	7
2. Even If The Statute Was Ambiguous, The WUTC’s Interpretation Is Impermissible.	9
B. AT&T’s Statements And Actions Do Not Show That The WUTC’s Unprecedented Interpretation Is Legitimate Or Foreseeable.....	14
C. The Commission’s Application of RCW 80.36.520 And WAC 480-120-021 To AT&T Violates Due Process	18
II. AT&T FALLS WITHIN THE LEC EXEMPTION.	23
CONCLUSION.....	25

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>Aviation W. Corp. v. Wash. Dep't of Labor & Indus.</i> , 138 Wn.2d 413, 980 P.2d 801 (1999).....	8
<i>Christensen v. Harris Cnty.</i> , 529 U.S. 576, 120 S. Ct. 1655, 146 L. Ed. 2d 621 (2000).....	5
<i>Christopher v. SmithKline Beecham Corp.</i> , 132 S. Ct. 2156, 183 L. Ed. 2d 153 (2012).....	23
<i>Clark v. Payne</i> , 61 Wn. App. 189, 810 P.2d 931 (1991).....	24
<i>Fed. Commc'ns Comm'n v. Fox Television Stations, Inc.</i> , 132 S. Ct. 2307, 183 L. Ed. 2d 234 (2012).....	21
<i>G-P Gypsum Corp. v. State</i> , 169 Wn.2d 304, 237 P.3d 256 (2010).....	10, 13
<i>Gen. Elec. Co. v. Env'tl. Prot. Agency</i> , 53 F.3d 1324 (D.C. Cir. 1995).....	18, 20, 21, 23
<i>In re George</i> , 90 Wn.2d 90, 579 P.2d 354 (1978).....	9
<i>Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.</i> , 463 U.S. 29, 103 S. Ct. 2856, 77 L. Ed. 2d 443 (1983).....	8
<i>Silverstreak Inc. v. Wash. State Dep't of Labor & Indus.</i> , 159 Wn.2d 868, 154 P.3d 891 (2007).....	23
<i>Somer v. Woodhouse</i> , 28 Wn. App. 262, 623 P.2d 1164 (1981).....	8
<i>Tingey v. Haisch</i> , 159 Wn.2d 652, 152 P.3d (2007).....	10
<i>United States v. AMC Entm't, Inc.</i> , 549 F.3d 760 (9th Cir. 2008)	20

Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.,
455 U.S. 489, 102 S. Ct. 1186, 71 L. Ed. 2d 362 (1982).....22

Waste Mgmt. of Seattle, Inc. v. Util. & Transp. Comm'n,
123 Wn.2d 621, 869 P.2d 1034 (1994).....6

STATUTES AND REGULATION

RCW 34.05.0015

RCW 34.05.2309

RCW 80.36.51012

RCW 80.36.5201, 11

WAC 480-120-021..... *passim*

INTRODUCTION

In its opening brief, AT&T demonstrated that the Washington Utilities and Transportation Commission (“WUTC” or “Commission”) not only ignored, but in fact rewrote, the definition of an “alternate operator services company” (“AOS” or “OSP”). Both the statute and its implementing rule plainly state that an AOS is the entity “providing a connection to intrastate or interstate long-distance” services from call aggregator locations. RCW 80.36.520; WAC 480-120-021.¹ The WUTC’s ruling that an AOS is instead the entity with the “direct business relationship with consumers” who receive such calls effectively reads the words “a connection to” out of the definition, and makes an AOS the entity that “provid[es] long-distance service.” Indeed, the WUTC’s “direct business relationship” standard is so divorced from the statutory and regulatory text that no party advocated this definition in 10 years of litigation before the agency. Applying this new definition to calls made over a decade before the WUTC first announced it would plainly violate AT&T’s due process rights.

The WUTC and its supporters—T-Netix and plaintiffs—have failed to refute these showings. To the contrary, the WUTC’s efforts to

¹ Unless otherwise specified, references to “WAC 480-120-021” are to the versions of the rule applicable during the relevant time period. *See* AT&T Br. at 17; WAC 480-120-021 (1991); WAC 480-120-021 (1999).

defend its interpretation serve only to illustrate how completely it has rewritten the language of the statute and rule. It now claims that the phrase ““providing a connection *to intrastate or interstate long-distance services*”” means “suppl[y]ing] or mak[ing] the connection *to operator services*.” Br. at 14, 17 (emphases added). Thus, the WUTC has altered the definition of an AOS from an entity that provides “a connection to” one type of service (long-distance) to an entity that provides a connection to a different type of service (operator). This renders the definition entirely circular—*i.e.*, an operator services provider provides a connection to operator services. Even if the text were ambiguous—and it is not—no amount of deference can save an interpretation that simultaneously rewrites a statute and renders it nonsensical.

Nor does the statute’s consumer-centric focus justify the WUTC’s revision. The WUTC portrays T-Netix as a mere “middleman” equipment provider. Br. at 21. That is false: As T-Netix told the Federal Communications Commission, it is “a provider of inmate telecommunications services,” including “operator service.” T-Netix, Inc. Pet. for Clarification and Waiver, *In the Matter of Billed Party Preference for InterLATA O+ Calls*, CC Docket No. 92-77, at 2 (Feb. 22, 2002) (“T-Netix FCC Pet.”). Indeed, as of 2002, T-Netix served over 51,000 access lines around the country and had annual revenues of over \$110 million.

Id. at 10. Washington consumers would have been just as protected if T-Netix—which owned and operated the platform that provided “a connection to [AT&T’s] . . . interstate long-distance” service—had disclosed rate information to call recipients. Because applying the statute and rule in accordance with their plain terms would fully satisfy the Legislature’s intent to protect consumers, that intent cannot justify the WUTC’s clear revision of those terms.

Evidently recognizing this, the WUTC and its supporters resort to misdirection, taking AT&T’s statements and actions out of context in an effort to show that AT&T recognized all along that it was an AOS. Placed in its proper context, however, this evidence demonstrates only that AT&T understood that it *could* be an AOS when it provided the necessary “connection to” long-distance services. It does not show that AT&T understood it was an AOS even when it did not provide that connection.

And because AT&T had no reason to believe it was an AOS when it did not make the “connection,” applying the Commission’s new “direct business relationship” test to calls handled more than a decade ago would violate AT&T’s due process rights. In arguing to the contrary, the WUTC and its supporters do not even mention, much less address, the legal authority AT&T cited and instead offer a series of straw man responses.

Finally, the WUTC has failed to justify its refusal to apply the Local Exchange Carrier (“LEC”) exemption in accordance with its plain terms. The Commission relies on the intent underlying the exemption. But that intent was based on the Legislature’s understanding that traditional carriers were not the source of the problem it was trying to address through the new disclosure requirements—an understanding fully applicable to AT&T. Thus, even if it were proper to override the plain language based on “the intent of the rule,” that intent undermines, rather than supports, the Commission’s refusal to accord AT&T the benefit of the LEC exemption.

ARGUMENT

I. THE COMMISSION’S INTERPRETATION IS FLATLY INCONSISTENT WITH THE PLAIN LANGUAGE OF THE STATUTE AND ITS IMPLEMENTING REGULATION.

RCW 80.36.520 and WAC 480-120-021 state that an AOS is an entity “providing a connection to intrastate or interstate long-distance” services from locations of call aggregators. This language plainly and unambiguously identifies the AOS as the entity that provides the “connection,” or point in the telecommunications pathway, between call aggregator locations and specific services (long-distance services). The statute and rule say absolutely nothing about “direct business relationship[s] with” consumers. AR006825 ¶28. In adopting its “direct

business relationship” test, therefore, the WUTC did not “interpret” the statutory and regulatory text; it rewrote that text, excising certain words and inserting new ones into the definition. *See Christensen v. Harris Cnty.*, 529 U.S. 576, 588, 120 S. Ct. 1655, 146 L. Ed. 2d 621 (2000) (agency may not, “under the guise of interpreting a regulation, ... create *de facto* a new regulation”).²

Indeed, in over a decade of administrative litigation, no party argued that “providing a connection” meant “having a direct business relationship with consumers.” Instead, the parties recognized that the AOS is the entity that provides the physical “connection” to long-distance services. For example:

- T-Netix argued that the question of who was the AOS “is answered in the manner in which the phone companies serving the relevant facilities *handled the calls*.” AR004130 ¶12 (emphasis added).
- T-Netix recognized that the critical inquiry was “the point at which an interLATA call from the prisons was ‘*connected*’ to long-distance services,” and argued, unsuccessfully, that either “the LEC (by “*connecting*” to AT&T’s switched access services) or AT&T (by “*connecting*” to its long-distance network) *connected* such calls to “long-distance services.”” AR002962 (emphasis added).
- And plaintiffs used to acknowledge that “the PIII platform made the necessary ‘connection,’” which is why the parties argued extensively over who owned and controlled it. AR004102 ¶18.

² Courts should interpret the Administrative Procedure Act “consistently with decisions of other courts interpreting similar provisions” of the federal statute. RCW 34.05.001.

These arguments correctly led the ALJ to find, “based on . . . the plain meaning of the regulation,” that the “P-III Premise platform provided the *connection* between the intrastate or interstate long-distance . . . services and the correctional facilities.” AR003591 ¶¶142-143 (emphasis added).

Plaintiffs and T-Netix now claim that an “interpretation” of “providing a connection” that apparently never occurred to them is reasonable, and was in fact well understood. Along with the WUTC, they invoke principles of agency deference and legislative intent to shield the WUTC’s interpretation from serious scrutiny, and quote AT&T statements out of context in a misleading effort to show that AT&T has long known it was an AOS. None of these tactics can save that interpretation.

A. The Commission’s “Direct Business Relationship” Test Violates Plain Terms Of The Statute And Rule.

When a statute speaks clearly, that is the end of the inquiry, and an agency’s contrary interpretation warrants no deference. *E.g., Waste Mgmt. of Seattle, Inc. v. Util. & Transp. Comm’n*, 123 Wn.2d 621, 627-28, 869 P.2d 1034,1038 (1994). Recognizing this, the WUTC and its defenders are forced to argue that RCW 80.36.520 is ambiguous. Even if this were true—and it is not—the Commission’s “direct business relationship” test impermissibly rewrites the statute. Neither deference principles nor the law’s consumer-protection aims can justify this transparent revision.

1. The Statute Is Not Ambiguous.

RCW 80.36.520 clearly defines an AOS as the entity that “provid[es] a connection to intrastate or interstate long-distance services.” As noted, for years, plaintiffs and T-Netix understood the plain meaning of this text, and litigated over which entity physically connected the calls at issue to long-distance services. *See supra* at 5. These facts refute their current—and entirely expedient—claims that the statute is so ambiguous that this Court should defer to the WUTC’s novel interpretation.

Indeed, the baseless nature of their current claims is confirmed by their inability even to agree on where the “ambiguity” lies. Plaintiffs and Commission counsel deem the term “providing” ambiguous, Comm’n Br. at 16-17; Pls. Br. at 33-34; T-Netix claims “connection” is ambiguous, T-Netix Br. at 15-19. Tellingly, however, the Commission itself saw no ambiguity in either term, and did not rely on the definitions its counsel and the other parties now cite. Instead, it claimed that the statute does not specify “*to whom* the OSP is providing” the necessary “connection.” AR006819 ¶15. The WUTC reasoned that the “connection” is provided “to consumers,” and that this justified its “consumer-centric approach to determining which company is responsible for complying with our rules governing” AOSs. AR006820-21 ¶¶16-19.

The “ambiguity” that served as the linchpin of the WUTC’s interpretation, however, is completely manufactured. There is no reason to ask “to whom” the connection is provided because the statute already specifies the object of the preposition “to”—the connection is “to intrastate and interstate long-distance services.” Identifying what people may or may not use those services does not fill any gap in the statute’s text. And counsel’s post-hoc efforts to identify other “ambiguities” cannot sustain the WUTC’s ruling. *See Somer v. Woodhouse*, 28 Wn. App. 262, 272, 623 P.2d 1164, 1170 (1981) (“agency action cannot be sustained on post hoc rationalizations supplied during judicial review”); *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50, 103 S. Ct. 2856, 77 L. Ed. 2d 443 (1983) (same); *cf. Aviation W. Corp. v. Wash. Dep’t of Labor & Indus.*, 138 Wn.2d 413, 980 P.2d 701 (1999) (formal rulemaking record could be supplemented with sworn testimony of agency officials).³ There is thus no basis for deferring to the agency’s interpretation of unambiguous text.⁴

³ AT&T’s due process argument also does not demonstrate that the statute or rule is ambiguous. T-Netix Br. at 14. Rather, AT&T argued that it lacked notice of the “direct business relationship” test because that test is so divorced from the statutory “connection” test. AT&T Br. at 42-44.

⁴ The fact that AT&T cited the WUTC’s “technical expertise” in arguing for a primary jurisdiction referral, *see* Comm’n Br. at 4, does not show otherwise. Because the “providing a connection” language is unambiguous, AT&T expected the WUTC to use its expertise to apply that test to the facts of this case by analyzing how the connection was provided (*i.e.*, through the P-III platform). The agency, however, declined to

2. Even If The Statute Was Ambiguous, The WUTC's Interpretation Is Impermissible.

Even if the Court relied on agency counsel's post hoc arguments and deemed the term "providing" ambiguous, the WUTC's resolution of that asserted ambiguity was impermissible. "[A]n administrative agency may not, by interpretation, amend or alter the statutes under which it functions." *In re George*, 90 Wn.2d 90, 97, 579 P.2d 354, 358 (1978).⁵ Yet that is precisely what the WUTC has done here.

The agency's brief (though not the order under review) claims that "provide" can mean "'to make preparation to meet a need <provide for entertainment;>'" or "'to make something available to.'" Comm'n Br. at 17 (quoting <http://www.meriam.webster.com/dictionary/provide>). Based on this definition, agency counsel argue that an AOS need not be the entity "that performs the physical task of establishing the connection, but rather, the entity that obtains the connection through contracts or other arrangements." *Id.* According to counsel, this dictionary definition supports the WUTC's conclusion that an AOS is the entity with the "direct business relationship with consumers," because that is the entity that

undertake that analysis. Indeed, it now seeks to justify its "interpretation" based not on its technical expertise but by relying on online dictionaries and analogizing the provision of a telecommunications "connection" to booking entertainment for a party. *Id.* at 17.

⁵ Washington also has an express preference that its agencies promulgate rules rather than rely on administrative interpretation. RCW 34.05.230.

“pull[s] together” all of the various elements needed “to deliver service to the customer” and “make[s] sure that the customer is serviced appropriately.” *Id.* at 18 (quoting AR6821-22 ¶21).

The flaw in this reasoning is that use of this “regular dictionary” definition to construe “a technical term . . . used in its technical field” leads to “absurd results.” *Tingey v. Haisch*, 159 Wn.2d 652, 657-58, 664, 152 P.3d, 1020, 1023, 1026 (2007). Because, under the WUTC’s logic, carriers providing end-to-end services have the “direct business relationship” with consumers, the WUTC’s definition reads the words “a connection to” out of the phrase “providing a connection to . . . long-distance services.” Had the Legislature intended to impose the disclosure obligation on the entity with the direct business relationship, it could have easily said the entity “providing long-distance services,” and said nothing at all about “providing a connection” to those services.⁶ Because “all the language used [must be] given effect, with no portion rendered meaningless or superfluous,” *G-P Gypsum Corp. v. State*, 169 Wn.2d 304,

⁶ This is confirmed by the WUTC’s argument that its “direct business relationship” test is “consistent with [its] treatment of other telecommunications service providers, and their responsibilities to consumers.” *Comm’n Br.* at 20. Those other providers are defined in a materially different way, as entities providing *the services* that consumers buy directly. LECs and Interexchange Carriers (IXCs) are defined as companies “providing local exchange telecommunications service” or “provid[ing] long distance (toll) service,” respectively. WAC 480-120-021 (2012). Far from supporting the WUTC’s interpretation, these definitions highlight its problem: they show that, had they wanted to do so, lawmakers could have easily defined AOSs as the entities providing long-distance services.

309, 237 P.3d 256, 258 (2010) (internal quotation marks omitted), the Commission's proposed rewrite is impermissible.

Nor is this the only way in which the agency has rewritten the statutory text. That text requires an AOS to provide a connection "to intrastate or interstate long-distance services." RCW 80.36.520. Yet, the WUTC's reliance on its "make available" definition requires it to argue that AT&T is the AOS because it "provided the connection' to the *operator services*." Comm'n Br. at 19 (emphasis added); *see also id.* at 17 (AOS "supplies or makes the connection to operator services available"). Thus, the agency's "interpretation" changes the object of the word "to" from "long-distance services" to "operator services." By so revising the text, the WUTC has rendered the definition nonsensically circular: an alternate operator services provider provides a connection to itself.⁷

In an effort to explain away these absurdities, the Commission contends that its rules "expressly contemplate that the [AOS] and the local or toll service provider may be one and the same" because "operator services" are defined as a component of telecommunications service.

AR006824 at ¶25. This is a non-sequitur. The fact that a local or long-

⁷ The supposed ambiguities of the term "connection," T-Netix Br. at 15-19, likewise cannot justify the WUTC's nonsensical revision. T-Netix notes that "connection" has four different technical meanings, but fails to link any of them to the "direct business relationship" test. And the phrase "in connection with" is used in the various federal statutes T-Netix cites as a synonym for "relating to," which has no conceivable bearing on the meaning of term "connection" when used as a telecommunications term.

distance provider can sometimes also be an AOS does not mean that it always is. Indeed, the Legislature’s finding that “a growing number of companies provide . . . telecommunications services *necessary to* long distance service,” RCW 80.36.510 (emphasis added), reflects its understanding that an AOS can be a distinct service provider.

Nor does application of the statute and rule in accordance with their plain terms lead to the comparable absurdity of “effectively convert[ing] equipment manufacturers into” AOSs. Comm’n Br. at 21-22; *see also* T-Netix Br. at 36-40. T-Netix was more than a mere equipment maker. It owned and autonomously operated the P-III platform, which, among other things, provided the necessary “connection to” long distance services and automated billing assistance; made “rate quote announcements”; “screened the . . . number” for pre-approval; “advise[d] the called party . . . of the procedure to accept the call”; and “connected the call to the local exchange service or LEC.” AT&T Br. at 11-12. Indeed, as noted, T-Netix has described itself as a “provider of inmate telecommunications services,” including “operator service,” T-Netix FCC Pet. at 2, and signed a national contract with AT&T that included among its responsibilities “*provid[ing] complete automated operator services for Inmate Calling,*” AT&T Resp. to T-Netix’s Am. Mot. for Summ. Determ., at 26 (Sept. 10, 2009) (WUTC Ex. No. A-22HC) (emphasis

added). Recognizing that T-Netix was the AOS for the calls at issue here, therefore, would not render an entity that does nothing more than sell equipment an AOS. Comm'n Br. at 21.⁸

Lacking any support in the statute's text for the "direct business relationship" standard, the Commission and its supporters argue that placing the rate disclosure responsibility on the company with a business relationship with consumers is appropriate because the relevant laws seek to help consumers. Comm'n Br. at 12-16; T-Netix Br. at 22-25. It is axiomatic, however, that the plain meaning of the text governs, and the Commission's test cannot be squared with that plain meaning. *E.g.*, *G-P Gypsum*, 169 Wn.2d at 309, 237 P.3d at 258. More fundamentally, the plain meaning of RCW 80.36.520 is no less protective of consumers than the Commission's newly minted definition. If an entity meets the statutory definition of an AOS, it can and must provide the required rate disclosure. As a "provider of inmate telecommunications services," including "operator service," T-Netix FCC Pet. at 2, T-Netix was fully able to provide the consumer protections the Legislature intended.

⁸ Nor does such treatment ignore the second sentence of the rule. T-Netix Br. at 33-36. That sentence states that "operator services" "means any intrastate telecommunications service provided to a call aggregator location that includes as a component any automatic . . . assistance to a consumer to arrange for billing or completion, or both, of an intrastate telephone call through a method other than" the two methods specified in the rule. WAC 480-120-021. Here, T-Netix provided precisely this component of operator services through the P-III platform. *See, e.g.*, AT&T Br. at 11-14; AR003576-77 ¶¶95-97.

At bottom, the meaning of RCW 80.36.520 is clear, and the WUTC has provided no justification for its effort to contort the statutory language into a different rule. T-Netix was the AOS because it provided the requisite connection to long-distance services and billing assistance for the inmate collect calls at issue. AT&T Br. at 27-29.

B. AT&T's Statements And Actions Do Not Show That The WUTC's Unprecedented Interpretation Is Legitimate Or Foreseeable.

Betraying a well-founded lack of confidence in the WUTC's "direct business relationship" test, plaintiffs attempt to defend this "interpretation" not on the basis of the actual language of the statute and rule, but primarily on the basis of various AT&T statements and actions. This effort (in which the WUTC and T-Netix join) is entirely misleading. AT&T acknowledged that it could meet the definition of an AOS when it actually provided the necessary "connection" to long-distance services. Those acknowledgments are not concessions that AT&T is always an AOS, even when it does *not* provide that "connection." Nor are they evidence that AT&T or anyone else thought that "providing a connection" means "having a direct business relationship with consumers."

When RCW 80.36.520 was enacted, AT&T was "providing a connection to intrastate or interstate long-distance" services from call aggregators such as prisons. AT&T Br. at 10 & n.4; *id.* at 17 & n.7.

AT&T, for example, provided operator services for customers using calling or credit cards to place calls from hotels and payphones and also used live operators for inmate collect calls before T-Netix provided automated operator services for such calls. *E.g.*, AR002894; AR000254-55; CP-000001395-96. During these early years, when the WUTC proposed the rule that became WAC 480-120-021, it included the “provid[e] a connection” language. WAC 480-120-021 (1989). Thus, in those circumstances where AT&T provided the necessary “connection,” it would be an AOS under the plain terms of the proposed rule. Because the legislative history made clear that AT&T and LECs were not the source of the problem that RCW 80.36.520 sought to address, AT&T Br. at 14-18, AT&T urged, unsuccessfully, that the proposed rule be modified so that it would never apply to AT&T, even when it did provide the requisite “connection.”

Contrary to plaintiffs’ misleading claims, Pls. Br. at 21-22, AT&T’s comments on the proposed rule simply show that AT&T knew that it was an AOS when it provided the necessary “connection.” Those comments do not show that AT&T “knew, before the class period commenced in 1996, that it was an [AOS],” even when it did *not* provide that connection. Plaintiffs concede that “[t]he terms [AOS and OSP] are defined *functionally*”—not as a matter of intrinsic status. *Id.* at 11

(emphasis added). Thus, this regulatory history does not demonstrate AT&T knew, or could have known, that it would be deemed an AOS at the four correctional facilities at issue 24 years after WAC 480-120-021 was promulgated, based only on AT&T's "direct business relationship with" consumers of collect calls from those prisons.

Plaintiffs' reliance on AT&T's 1991 waiver request and the 1991 staff bulletin, Pls. Br. at 23, 29-30, is misplaced and misleading for the same reason. The fact that AT&T needed a waiver when it provided the necessary "connection" and billing assistance is not evidence that it was an AOS when it did not do so. Similarly, the 1991 bulletin, which is not binding, AT&T Br. at 47 n.18, simply reflected the staff's view that WAC 480-120-021 applied to AT&T when it "offer[ed] service through aggregators—*service as defined in the rule.*" AR003094 (emphasis added). Because the "service" defined in the rule required an AOS to provide the necessary "connection" and billing assistance, the bulletin shows only that staff considered AT&T an AOS when it provided these functions, not that a "direct business relationship" with consumers would render AT&T an AOS at all times.

Plaintiffs' contention that AT&T's status as an AOS did not change after 1991, Pls. Br. at 24, is disingenuous. What changed in 1992 is that, for the calls at issue, AT&T ceased to provide the crucial

“connection” to long-distance services, which was instead provided by T-Netix through its P-III platform. Contrary to plaintiffs’ claim, *id.*, AT&T has offered a fulsome explanation and cited ample record evidence in support of this assertion. AT&T Br. at 13-14. The WUTC did not address and reject “the identical argument,” Pls. Br. at 25-26, but ruled only that AT&T was the AOS under the new “direct business relationship” test, regardless of which entity was providing the physical connection to long-distance services. *See* AR006829 ¶40 (“the business relationship with the consumer, not a contract between a service provider and the call aggregator, determines whether a company is an OSP”).

Finally, plaintiffs make much of the facts that AT&T branded the calls at issue and that consumers received bills in which AT&T charged for operator services. Pls. Br. at 27-30. This is not evidence that the phrase “providing a connection to . . . long-distance services” means “having a direct business relationship” with consumers. In reciting these facts, plaintiffs are simply making an undisguised policy argument for why, in their view, AT&T should be deemed an AOS even when it does not provide the necessary “connection.” That policy argument does not justify a clear deviation from the text of the statute and rule.

Indeed, such a deviation would be particularly improper in light of the statute’s legislative history, which shows that the Legislature did not

seek to protect consumers from AT&T and the LECs, but from *alternate* operator services companies whose rates were not regulated in the same manner. *See, e.g.*, AT&T Br. at 14-16. In promulgating WAC 480-120-021, the WUTC chose to dismiss or ignore this policy argument, which had an actual footing in the legislative history, and to adhere to the statute's plain language, which tied AOS status to the provision of the critical "connection." Neither plaintiffs nor the Commission can now rely on policy arguments that have no grounding in the legislative history to override the plain language of the statute and rule that it drafted.

C. The Commission's Application of RCW 80.36.520 and WAC 480-120-021 To AT&T Violates Due Process.

Even if the Commission's tortured reading could be deemed permissible, it cannot be applied retroactively. For over twenty years, no one understood the statute or regulations to incorporate a "direct business relationship" standard, until its sudden emergence in the context of this dispute. As AT&T explained, the Commission's decision to apply its new interpretation to AT&T "offends any concept of basic fairness." *Id.* at 37. In this context, courts must "ask whether the regulated party received, or should have received, notice of the agency's interpretation in the most obvious way of all: by reading the regulations." *Gen. Elec. Co. v. Envtl. Prot. Agency*, 53 F.3d 1324, 1329 (D.C. Cir. 1995). When a party "acting

in good faith [cannot] identify, with ‘ascertainable certainty,’ the standards with which the agency expects parties to conform,” it lacks the requisite notice. Because the direct business relationship test was anything but “ascertainably certain” from the language of RCW 80.36.520 and WAC 480-120-021, *see supra* Part I.A., it cannot be applied to AT&T here.

The Commission and its supporters have no persuasive answer to this showing. They never cite *General Electric*, or make any effort to engage the particular strand of due process doctrine that it embodies. Nor do they cite any evidence that the Commission or its staff had ever previously indicated that “providing a connection to long distance services” means “having a direct business relationship with consumers.” Instead, these parties offer make-weight responses.

They claim, for example, that AT&T’s own actions, as well as the actions of others in the industry, show that AT&T understood itself to be an AOS for years. *See* Comm’n Br. at 25-32 (pointing to statutory and regulatory history, AT&T’s branding of calls, and the LECs’ waiver requests); T-Netix Br. at 41-45; Pls. Br. at 46. In a variation of this argument, plaintiffs assert that AT&T can mount no due process claim because it “knew it was considered an OSP in 1991,” and the WUTC’s determination that it remained one was thus an “expectable outcome[]” or “result,” even if the rationale for that result is new. Pls. Br. at 49-50. But

as AT&T has just shown, the fact that it knew it was an AOS when it provided the statutorily defined “connection” to long-distance services does not mean it understood or had “fair notice” that it was also the AOS when it did not provide that connection. Indeed, while plaintiffs claim that AT&T is confusing “rationale with results,” *id.* at 49 (capitalization altered), plaintiffs are simply playing a word game, conflating one “result” (deeming a company an AOS *because it provides a connection to long-distance services*) with a different result (deeming a company an AOS *because it has the direct business relationship with recipients of operator-assisted calls*). Because the latter “result” was not ascertainably certain from the regulations, its application to AT&T years after the conduct at issue violates its due process rights. *See, e.g., Gen. Elec.*, 53 F.3d at 1328-29 (party must be able to identify “the standards with which the agency expects parties to conform”); *United States v. AMC Entm’t, Inc.*, 549 F.3d 760, 762 (9th Cir. 2008) (requiring “fair notice of [agency] interpretation” of regulation).⁹

⁹ *General Electric* likewise belies plaintiffs “rationale versus results” argument. GE knew it could be liable for failing to dispose of certain hazardous wastes in a prescribed way, but reasonably believed that the regulation imposed this obligation only in certain circumstances (final disposal) and not others (pre-disposal processing). The D.C. Circuit upheld the agency’s determination that the regulations applied in the latter circumstance, but ruled that this interpretation could apply only prospectively, because GE could not have anticipated this outcome. So too here, AT&T understood the AOS rule to impose obligations in certain circumstances (when AT&T provided the necessary “connection”) but not others (when AT&T merely had a direct business relationship). Even if the

The Commission and T-Netix also argue that AT&T had fair notice of the “direct business relationship” test because T-Netix briefed such an argument to the Commission beginning in 2009. *See* AR006829 ¶39; T-Netix Br. at 41-45. This is not an accurate description of T-Netix’s briefing before the agency.¹⁰ But even if it were, it fundamentally misunderstands the relevant due process protections. The “fair notice” doctrine requires that a regulated party be apprised of an agency interpretation *at the time* of the conduct for which it is being held liable. *See, e.g., Fed. Commc’ns Comm’n v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2318, 183 L. Ed. 2d 234 (2012). What may or may not have been briefed ten-plus years later is entirely irrelevant to that inquiry.

The Commission also mischaracterizes AT&T’s argument about the import of the ALJ’s initial decision. As AT&T explained, and as cases interpreting the federal constitution have held, an agency’s inability to read its own regulation consistently is “strong evidence that a regulated party would not receive adequate notice by simply reading the rule.”

WUTC’s new interpretation is permissible, AT&T could not have anticipated this outcome, and its due process rights would be violated if that interpretation governs conduct that occurred years ago. 53 F.3d at 1328-34.

¹⁰ In fact, as noted earlier, *supra* at 5, T-Netix argued in 2009 that the phrase “providing a connection” referred to the point “when the LEC delivered the call to AT&T,” which (according to T-Netix) meant that either AT&T or the LEC was the AOS. AR002962. T-Netix tried to bolster that claim by arguing (as it does here) that AT&T had behaved like the AOS by branding the calls and billing for them. *See* AR002969 (cited in T-Netix Br. at 42). T-Netix nowhere argued that “providing a connection to long distance services” meant “having a direct business relationship with consumers.”

AT&T Br. at 40. This does not mean, as the Commission now contends, that “anytime an administrative agency reverse[s] or modifie[s] a legal interpretation of an ALJ, the agency [is] unconstitutionally depriving a company of fair notice and due process.” Comm’n Br. at 32. Rather, a finding of unconstitutionality only follows when, as here, the agency’s interpretation is so far afield of how everyone (including its own ALJ) read the rule that it was not “ascertainably certain” from the regulation; it is first announced long after promulgation of the rule itself; and it would impose massive liability.¹¹

Nor is there any merit to the contention that AT&T’s due process claim is coterminous with its statutory claim, such that success or failure on the latter dictates the outcome of the former. Pls. Br. at 43-44. As *General Electric* squarely establishes, a court may find an agency’s interpretation to be permissible in the abstract, but nevertheless find that it is far enough removed from the most natural or widely held interpretation that regulated entities cannot be said to have been fairly apprised of the

¹¹ Respondents also overreach when they argue that AT&T’s due process argument is foreclosed by the fact that it could have sought clarification before the Commission. See Comm’n Br. at 26; Pls. Br. at 47. None of the cases that they cite stand for such a sweeping proposition. They merely hold that “economic regulation is subject to a less strict vagueness test” because clarification can be sought, not that such regulations are automatically “not unconstitutionally vague” and subject to no test at all. See *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498-99, 102 S. Ct. 1186, 71 L. Ed. 2d 362 (1982); Comm’n Br. at 26. This argument, moreover, ignores the fact that AT&T had no reason to seek clarification, since it and others (like T-Netix and plaintiffs) did not understand the rule’s plain language to be ambiguous or unclear.

agency's view. 53 F.3d 1328-34. This is perfectly logical: Even when courts are willing to defer to an interpretation that is at the fringe of an agency's interpretative authority, they are generally unwilling to tolerate the application of such an interpretation retroactively because it smacks of unfairness. *Id.*; *cf. also Silverstreak Inc. v. Wash. State Dep't of Labor & Indus.*, 159 Wn.2d 868, 886-91, 154 P.3d 891, 901-03 (2007) (upholding agency's new interpretation of regulation but refusing to allow its retroactive application).¹² The same principle should control here. Even if the Court finds that the Commission's "direct business relationship" test warrants judicial deference, due process requires that it be applied prospectively only.

II. AT&T FALLS WITHIN THE LEC EXEMPTION.

Finally, even if AT&T could properly be deemed an AOS under the "providing a connection" test, it was entitled to the LEC exemption for the period of time between its registration as a local exchange carrier in 1997 until the WUTC repealed the LEC exemption in 1999. During this period, WAC 480-120-021 provided that an AOS was "any corporation, company, partnership, or person *other than a local exchange company*"

¹² See also *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2168, 183 L. Ed. 2d 153 (2012) ("It is one thing to expect regulated parties to conform their conduct to an agency's interpretations once the agency announces them; it is quite another to require regulated parties to divine the agency's interpretations in advance or else be held liable when the agency announces its interpretations for the first time in an enforcement proceeding and demands deference.").

that provided the key “connection.” WAC 480-120-021 (1991). As AT&T has explained, AT&T Br. at 48-49, this language is unconditional, and includes no requirement that an entity that is a registered LEC must actually be “providing the local exchange service as well as the operator service,” AR006832-33 ¶49. Once again, therefore, the WUTC’s interpretation alters text by adding requirements not found in the rule.

The Commission denied AT&T the benefit of the exemption based on the “intent of the rule,” which reflected the Legislature’s intent to protect consumers who did not understand that their calls were being handled by alternate providers rather than the carriers they expected. AR006832-33 ¶49. But as AT&T has shown, the Legislature’s lack of concern when operator-assisted calls were carried by LECs applied equally to AT&T, and the legislative history includes direct evidence that AT&T was not the source of the problem the law was designed to address. *Supra* at 14-18. Legislative intent, therefore, directly contradicts, rather than supports, the WUTC’s refusal to apply the LEC exemption to AT&T.

In all events, the “intent of the rule” cannot override its plain language. *E.g., Clark v. Payne*, 61 Wn. App. 189, 193, 810 P.2d 931, 933 (1991). The LEC exemption appeared in the introductory clause of the rule that identified entities by their status (“any corporation, company, partnership, or person other than a local exchange company”), not by their

actions. Indeed, it is only the next clause that introduces actions into the definition of an AOS—*i.e.*, “**providing a connection** to intrastate or interstate long-distance or local services.” WAC 480-120-021 (1991). The Commission’s decision to read yet another action requirement (“acting as a LEC”) into the initial status clause thus impermissibly alters the rule’s plain language and would have it effectively state that an AOS is “any corporation, company, partnership, or person other than a local exchange company **providing local exchange service** providing a connection to intrastate or interstate long-distance or local services.” It is doubly improper to add new words to the text in order to deny AT&T the benefit of an exemption based on the intent of a Legislature that did not view AT&T as the source of the problem the rule was intended to address.

CONCLUSION

For all of the foregoing reasons, and those set forth in AT&T’s opening brief, the superior court’s decision upholding the Commission’s erroneous order should be reversed.

Dated: September 27, 2012

Respectfully Submitted,



David W. Carpenter
(Pro Hac Vice Pending)
SIDLEY AUSTIN LLP
One South Dearborn Street
Chicago, IL 60603
(312) 853-7000 (tel.)

Bradford J. Axel (WSBA # 29269)
Kelly Twiss Noonan (WSBS #19096)
STOKES LAWRENCE, P.S.
1420 Fifth Avenue, Suite 3000
Seattle, WA 98101-2393
(206) 626-6000 (tel.)

Joseph R. Guerra
(Pro Hac Vice Pending)
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, DC 20005
(202) 736-8000 (tel.)

Attorneys for AT&T
Communications of the Pacific
Northwest, Inc.

FILED
COURT OF APPEALS
DIVISION II
2012 SEP 28 PM 1:27
STATE OF WASHINGTON
BY  DEPUTY

CERTIFICATE OF SERVICE

I do hereby certify that on this 27th day of September, 2012, caused to be served a true and correct copy of the foregoing Reply Brief of Appellant as follows:

Via Email and U.S. Mail
Chris Youtz
Richard E. Spoonemore
Sirianni Youtz Meier &
Spoonemore
999 Third Avenue, Suite 3650
Seattle, Washington 98104
chris@sylaw.com
rspoonemore@sylaw.com

*Attorneys for Sandy Judd and
Tara Herivel*

Via Email and U.S. Mail
Gregory J. Trautman
Office of the Attorney General
Utilities & Transportation
Division
1400 S. Evergreen Park Dr. SW
PO Box 40128
Olympia, WA 98504-0128
gtrautma@utc.wa.gov

*Attorneys for Washington State
Utilities & Transportation
Commission*

Via Email and U.S. Mail
Arthur A. Butler
Ater Wynne LLP
601 Union Street, Suite 1501
Seattle, Washington 98101-2341
aab@aterwynne.com

Attorneys for T-Netix, Inc.

Via Email and U.S. Mail
Donald H Mullins
Duncan Turner
Badgley-Mullins Law Group PLLC
701-Fifth Avenue, Suite 4750
Seattle, WA 98104
donmullins@badgleymullins.com
duncanturner@badgleymullins.com

Attorneys for T-Netix, Inc.

2012 SEP 27 AM 9:48
STATE OF WASHINGTON
COURT OF APPEALS
DIVISION II

Via Email and U.S. Mail
Stephanie A. Joyce
Arent Fox LLP
1050 Connecticut Avenue NW
Washington, D.C. 20036
joyce.stephanie@arentfox.com

Attorneys for T-Netix, Inc.

Via Email and U.S. Mail
Charles R. Peters
David C. Scott
Brian Josias
SCHIFF HARDIN LLP
233 S. Wacker Dr. Suite 6600
Chicago, Illinois 60606
cpeters@schiffhardin.com
dscott@schiffhardin.com
bjosias@schiffhardin.com
Attorneys for AT&T

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

EXECUTED at Seattle, King County, Washington, this 27th day of September, 2012.



Bradford J. Axel