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IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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QUALCOMM INCORPORATED,

*Appellant,*

v.

STATE OF WASHINGTON,  
DEPARTMENT OF REVENUE,

*Respondent.*

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PETITIONER'S  
APPELLANT'S SUPPLEMENTAL BRIEF

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## TABLE OF CONTENTS

TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES .....	ii
INTRODUCTION .....	1
STATEMENT OF THE CASE.....	2
ARGUMENT.....	5
I.    The OmniTRACS Service Is Not a “Network Telephone Service.”.....	5
A.  A “Network Telephone Service” Excludes Services That Process, Manipulate, Store, or Generate Information. ....	5
B.  The OmniTRACS Service Formats, Stores, Processes, and Generates Information and Is Thus Clearly Not a Network Telephone Service.....	9
C.  Customers Purchase the OmniTRACS Service for Its Information Service Functions.....	17
CONCLUSION.....	20

**TABLE OF AUTHORITIES**

	<b>Page(s)</b>
<b>CASES</b>	
<i>City of Spokane v. State Dep't of Revenue</i> , 145 Wn.2d 445, 38 P.3d 1010 (2002).....	6
<i>Community Telecable v. City of Seattle</i> , 164 Wn.2d 35, 186 P.3d 1032 (2008).....	<i>passim</i>
<i>Nat'l Cable &amp; Telecomms. Ass'n v. Brand X Internet Servs.</i> , 545 U.S. 967, 125 S. Ct. 2688, 162 L. Ed. 2d 820 (2005).....	7
<i>Qualcomm, Inc. v. Chumley</i> , No. M2006-01398, 2007 WL 2827513 (Tenn. Ct. App. Sept. 26, 2007) (unpub.).....	16
<i>Qualcomm, Inc. v. State Dep't of Revenue</i> , 151 Wn. App. 892, 213 P.3d 948 (2009).....	4, 5, 14, 16, 18
<i>United States v. Am. Tel. &amp; Tel. Co.</i> , 552 F. Supp. 131 (D.D.C. 1982).....	7
<i>United States v. W. Elec. Co.</i> , 714 F. Supp. 1 (D.D.C. 1988).....	7
<i>W. Telepage, Inc. v. City of Tacoma</i> , 140 Wn.2d 599, 998 P.2d 884 (2000).....	17
<b>ADMINISTRATIVE DECISIONS</b>	
2004 Wash. UTC LEXIS 440 (DOCKET NO. UT-031472; ORDER NO. 08, June, 11 2004).....	8, 14
2008 Wash. UTC LEXIS 515 (July 16, 2008) (DOCKET UT-063038; ORDER 10; DOCKET UT-063055; ORDER 03, July 16, 2008) .....	8
2009 Wash. UTC LEXIS 613 (DOCKET UT-083055; ORDER 05, July 20, 2009) .....	8

**STATUTES AND CODES**

47 U.S.C. § 153(20).....7, 12, 14, 15  
47 U.S.C. § 153(43).....8, 14  
47 U.S.C. § 153(46).....8  
RCW 82.04.065 (2000).....5, 14, 17  
RCW 82.04.065 (2007).....8, 9, 14, 15, 17  
WAC 458-20-155.....6

**LEGISLATIVE HISTORY**

Final Bill Rep., SSB 5089, C 6 L 07 (July 1, 2008) .....8

## INTRODUCTION

This case concerns the proper classification of certain services for tax purposes under RCW 82.04.065(2) (2000). Under this provision, “network telephone services” that merely transmit information are subject to retail sales tax, but “information services” that process, format, store, or generate new information are not subject to this tax. A Qualcomm service, OmniTRACS, gives trucking companies the ability to track fleet vehicles and integrate detailed tracking information generated by the service into their office systems and communications. For the 1998-2001 audit period, the Department of Revenue (“Department”) contends, and the Court of Appeals agreed, that the OmniTRACS Service is a “network telephone service” and thus subject to sales tax.

The lower court’s analysis was flawed in two important respects. Contrary to this Court’s construction of RCW 82.04.065(2), the Court of Appeals isolated and separately analyzed the OmniTRACS Service. The OmniTRACS Service, however, is purchased as part of and integrated with the OmniTRACS System, which in turn is indisputably an information service. In addition, in further disregard of this Court’s direction, the Court of Appeals discounted the processing, storage, and content-generation features of the OmniTRACS Service itself—each of which separately establishes that the OmniTRACS Service is an information service. These errors led the Court of Appeals to define “network telephone service” and “information service” inconsistently with state and federal

determinations and the established industry understanding of those terms.

This Court should reverse the judgment below.

#### STATEMENT OF THE CASE

The Petition and briefs before the Court of Appeals provide a detailed description of the nature of the OmniTRACS System and OmniTRACS Service, together with the procedural history of this case.

Qualcomm's OmniTRACS System provides its trucking customers with detailed information regarding key aspects of the state of their fleets, including the location of the truck, driving habits of the driver, and delivery status of freight. CP 29, 77. The System contains three parts: (1) the Mobile Unit, consisting of a computer terminal with a two-way satellite antenna that is installed on the truck, CP 78; (2) the Software, used at the customer's dispatch center to allow the customer to integrate operations data generated by the OmniTRACS Service into the customer's own back-office systems, CP 81-84; and (3) the OmniTRACS Service, the monthly subscription service that is the subject of this appeal. Customers purchase the entire System through a single contract, CP 184-90, and the OmniTRACS Service cannot be used independently of the other System components, which in turn can be used only with the OmniTRACS Service. CP 30, 76-77.

The OmniTRACS Service component of the OmniTRACS System provides and adds information regarding the location of trucks, both as a basic position-reporting service and through additional optional "messaging" services used in conjunction with the location information. As dis-

cussed below, *see infra* pp. 9-15, customers are able to increase the efficiency of their fleets because of the managed information services provided by the OmniTRACS Service. Customers pay many thousands of dollars more than they would for merely a two-way transmission capability. CP 184-90.

Only by purchasing the OmniTRACS Service do customers have access to Qualcomm's Network Management Center ("NMC"). The NMC adds positioning information to the data generated by the trucks, manipulates the resulting data, and stores it for access in a format made meaningful to the dispatch center. For instance, the NMC will add commonly understood landmark references that are related to the truck's position. CP 30, 112, 188, 241. As described in greater detail below and in the briefs in this case, the NMC—not the customers' trucks or the dispatch center—performs the principal information generation, manipulation, and storage functions provided by the OmniTRACS Service (and thus the OmniTRACS System as a whole). These are essential to the utility of the communications accessed from the NMC by the truck or dispatch center. *See infra* pp. 9-16; Pet. 4-7; Appellant Br., Ct. App., 3-8. The NMC is thus vital to the core positioning and information processing functions that prompt customers to purchase the System. *See infra* pp. 16-20.

On October 25, 2002, the Department issued an audit report concerning Qualcomm's tax adjustments from January 1, 1998 through September 30, 2001. CP 53. With no mention of the Service's calculation of position, addition of landmark information, and preparation of detailed reports,

the Department concluded that Qualcomm provided a mere two-way transmission service and issued an assessment of \$900,573, plus interest and penalties, for underpayment of retailing business and occupation tax and retail sales tax. CP 53-64, 117. Qualcomm paid this amount under protest and petitioned for a refund, arguing that the OmniTRACS Service was an information service not subject to the retail sales tax, rather than a “network telephone service” under RCW 82.04.065 (2000).

The Department denied Qualcomm’s refund request, noting that, in providing the core positioning function, “[t]axpayer clearly provide[s] significant information services that enhanced the communications services,” but nonetheless concluded that the “positioning information is merely incidental to the communication service being rendered.” CP 122-23. The Department thereafter denied Qualcomm’s petition for reconsideration, CP 17, and the Superior Court later granted summary judgment to the Department with only a conclusory opinion. CP 304.

On appeal, the Court of Appeals affirmed. *Qualcomm, Inc. v. State Dep’t of Revenue*, 151 Wn. App. 892, 213 P.3d 948 (2009). The court rejected Qualcomm’s argument that this Court’s decision in *Community Telecable v. City of Seattle*, 164 Wn.2d 35, 186 P.3d 1032 (2008), requires examination of the OmniTRACS Service in the context of the broader OmniTRACS System. Instead, the Court of Appeals examined the Service in isolation and, indeed, examined only the transmission element of the Service apart from its information generation and data manipulation components. It noted that the Department acknowledged that the Service

involves “*some* processing of data” related to the production of position poll reports, 151 Wn. App. at 902, and recognized that “the position poll reports . . . motivate the customer to subscribe to the service,” *id.* at 908. Nonetheless, the court below concluded that the processing underlying those reports did not motivate customers to purchase the Service, and thus held that the service was a “network telephone service” rather than an information service. *Id.*

## ARGUMENT

### I. THE OMNITRACS SERVICE IS NOT A “NETWORK TELEPHONE SERVICE.”

#### A. A “Network Telephone Service” Excludes Services That Process, Manipulate, Store, or Generate Information.

The plain language of the statute indicates that “network telephone service” is limited to transmission services, and excludes services, such as the OmniTRACS Service, that process, manipulate, store, or generate new information. For the relevant period, Qualcomm was required to collect retail tax for the OmniTRACS Service only if that service was a “network telephone service,” defined as:

the providing by any person of access to a local telephone network, local telephone network switching service, toll service, or coin telephone services, or 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.

RCW 82.04.065(2) (2000) (emphasis added). A regulation carves out from this definition activities that constitute “information services,” defined as “every business activity, process, or function by which a person

transfers, transmits, or conveys data, facts, knowledge, procedures, and the like to any user of such information through any tangible or intangible medium.” WAC 458-20-155.

Authoritative judicial construction of RCW 82.04.065(2) confirms that when a service performs even a limited information processing, storage, manipulation or generation function, it is no longer a transmission service and is thus not a “network telephone service.” In *Community Telecable*, this Court was asked to apply RCW 82.04.065(2) to a service (there, Internet access) that involved information processing but also provided a transmission capability. This Court held that because the service “‘transforms’ and ‘manipulates’ data as it passes through the . . . network” and is an “integral and necessary part of the provision of . . . services,” the particular service at issue cannot be “the mere ‘provision of transmission’ under RCW 82.04.065(2)” and was thus “plainly excluded from the statutory definition of ‘network telephone service.’” 164 Wn.2d at 44. The Court also held that the transmission element of the service could not be isolated from consideration of the overall service and that construction of RCW 82.04.065(2) should be consistent with relevant federal law that distinguishes between telecommunications and information services. *Id.*

“Technical language should be given its technical meaning when used in its technical field,” *City of Spokane v. State Dep't of Revenue*, 145 Wn.2d 445, 452, 38 P.3d 1010 (2002), and the long-held industry understanding of the relevant terms reveals that even limited processing, storage, or addition of new content defines a service as an “information ser-

vice” rather than a telecommunication or “network telephone service.” Indeed, the category of “information services” has long included an array of services that are far more similar to traditional telephonic communications and have far less processing capabilities than does the OmniTRACS Service. The underlying framework was confirmed when the Regional Bell Companies were barred from providing “information services,” which were separate from network telephone services and included advance calling and call answering services; telephone-operated burglar alarm systems; office management systems providing functions such as inventory control and inter-office data communications; and services providing time-of-day information over telephone lines. *See, e.g., United States v. W. Elec. Co.*, 714 F. Supp. 1, 13 (D.D.C. 1988); *United States v. Am. Tel. & Tel. Co.*, 552 F. Supp. 131, 179 & n.200 (D.D.C. 1982).

Similarly, in 1996, Congress confirmed the longstanding industry distinction between services that *transmit* information (like traditional telephone service) and services that *manipulate, store, or create* new information—even if they also provide a transmission function to the customer. *See Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 975-76, 125 S. Ct. 2688, 2696, 162 L. Ed. 2d 820 (2005). An “information service” is “the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications.” 47 U.S.C. § 153(20). “Telecommunications service” means “the offering of telecommunications for a fee directly to the public, and “telecommunications” means “the

transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." *Id.* § 153(43), (46). This same understanding, based on the federal statutory structure, is also applied in proceedings before the Washington Utility and Transportation Commission. *See, e.g.*, 2009 Wash. UTC LEXIS 613, at \*19 (DOCKET UT-083055; ORDER 05, July 20, 2009); 2008 Wash. UTC LEXIS 515, at \*92-93 (DOCKET UT-063038; ORDER 10; DOCKET UT-063055; ORDER 03, July 16, 2008); 2004 Wash. UTC LEXIS 440, at \*33-34 (DOCKET NO. UT-031472; ORDER NO. 08, June, 11 2004).

These well-established descriptions of telecommunications, telephone, and information services also provide the backdrop for understanding the 2007 statutory revisions to RCW 82.04.065, which are not directly at issue here but generally retain the scope of the pre-existing section. *See* Final Bill Rep. SSB 5089, C 6 L 07, at 3 (July 1, 2008). In 2007, RCW 82.04.065 was revised to change the term "network telephone service" to "telecommunications service," which is now defined as "the electronic *transmission, conveyance, or routing* of voice, data, audio, video, or any other information or signals to a point, or between or among points." RCW 82.04.065(27) (2007) (emphasis added). Specifically excluded from this category are "[d]ata processing and information services that allow data to be *generated, acquired, stored, processed, or retrieved and delivered* by an electronic transmission to a purchaser where such purchaser's

primary purpose for the underlying transaction is the processed data or information.” RCW 82.04.065(27)(a) (emphasis added).<sup>1</sup>

**B. The OmniTRACS Service Formats, Stores, Processes, and Generates Information and Is Thus Clearly Not a Network Telephone Service.**

The plain language of RCW 82.04.065, the authoritative construction of that language in *Community Telecable*, and the industry understanding of telephone and information services set out above all establish that the OmniTRACS Service is clearly not a “network telephone service.” As described further below, the Service performs many functions, including transmitting data, but clearly does not involve the “mere ‘provision of transmission.’” *Cnty. Telecable*, 164 Wn.2d at 44. More than many other information services, it performs significant data processing, formatting, storage, and generation of new information—including the generation of significant new content to be added to each message sent under the Service. And, it does so in the course of providing the position location and message-enhancing capabilities that lead customers to purchase the OmniTRACS Service and the System as a whole.

1. Independent Analysis of the OmniTRACS Service. Even if the OmniTRACS Service is analyzed in isolation from the broader Omni-

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<sup>1</sup> RCW 82.04.065(27) (2007) provides that the definition of a telecommunications service does not turn on interpretations by the Federal Communications Commission (“FCC”) and includes voice over Internet Protocol, or VoIP, service. Those provisions confirm that the “primary purpose” language simply sought to encompass telephone-equivalent services that relied on minimal processing (the FCC has yet to determine whether VoIP is an information service on this basis) but do not undermine the importance of settled industry meaning, including that reflected in decades-old federal statutes, when construing RCW 82.04.065.

TRACS System, contrary to this Court's direction in *Community Tele-cable*, *see infra* pp. 15-16, the Service itself performs the information processing, storage, and generation functions that clearly place it beyond the scope of "network telephone service." The Court of Appeals' focus on the transmission function of the satellites used in the Service disregarded the much more extensive functionalities performed by the Service that customers actually value in deciding to purchase the Service. *See infra* pp. 16-20.

Even though the Department itself concluded that, through the Service, "[t]axpayer clearly provided significant information services that enhanced the communications services," Det. No. 05-0377, at 8, CP 123, the Department has since suggested that the OmniTRACS Service is a mere conduit for data passed between the devices mounted on trucks and the dispatch center. *See Resp. Br., Ct. App.*, at 8. This latter assertion is clearly incorrect. Signals passing to and from the truck and the dispatch center are routed through, manipulated, added to, and stored at the NMC. The NMC takes this raw data and performs a series of processing, storage, and calculating functions to them, and then adds new information in a manner that is essential to the System's overall operation and to the value the System provides to customers. Only by ignoring all of these NMC functions—any one of which renders the Service an information service—can the Department argue that the OmniTRACS Service is a "network telephone service."

The NMC performs classic information service functions in providing the two key aspects of the OmniTRACS Service: "location reporting" and "messaging." To accomplish location reporting, the NMC performs hourly position polling, CP 30, which is included in every subscription level (and is the only service included in the basic service package). CP 185. The NMC broadcasts a satellite signal using two satellites to the Mobile Unit. The NMC uses the Mobile Unit's return signal to determine the Mobile Unit's location, CP 30.<sup>2</sup> Thus, the NMC combines the two-satellite calculations and other information not transmitted by the Mobile Unit to calculate the vehicle's latitude and longitude. CP 242. The NMC then creates a time-stamped report for the customer that includes the vehicle's latitude and longitude and, more importantly, additional information regarding the vehicle's driving distance and direction from landmarks, such as its proximity to the nearest town or city. CP 241. This report is formatted at the NMC to be usable with the Software at the customer's dispatch center and is stored on the NMC's servers for later download by the customer (using a customer-supplied communications service that is

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<sup>2</sup> The NMC also works with, and provides substantially the same services with respect to, GPS receivers integrated into the Mobile Unit to generate latitude and longitude information. (Fewer than ten percent of vehicles are so outfitted. CP 112.) On GPS-equipped vehicles, the Mobile Unit transmits selected latitude and longitude coordinates and related information from the GPS receiver to the NMC via the Data Satellite, CP 255, where the NMC processes the GPS data into usable location information. The Service maintains the GPS records and associated processed information in storage, CP 247. The NMC (not the customer) appends landmark data (nearest town or city) to the content, CP 241, 255, and then generates detailed customer reports using a combination of the transmitted driver input, sent or received time-stamped acknowledgements, location landmark information, and the continuously synchronized customer-defined template files at the NMC. *See infra* pp. 12-13.

not part of the OmniTRACS System). CP 30, 112. Information storage, and the delayed or repeated acquisition it enables, is itself a hallmark of an information service. *See* 47 U.S.C. § 153(20) (“information service” includes “acquiring, storing . . . or making available information”). In other words, the OmniTRACS System is designed for customers to “pull” information from the NMC as opposed to telecommunications services that “push” information continuously to the end user.

Through position reporting, storage, and otherwise, the NMC also provides important information service with respect to “messaging.” CP 186. The NMC coordinates the data exchange between a truck’s Mobile Unit and the customer’s Software to perform “macro messaging,” a form of messaging through “fill-in-the-blank” templates. CP 30. Through the OmniTRACS Service, the NMC manages the blank templates on the Mobile Unit to ensure consistency with the customer-configured templates in the Software. *See* CP 30-31, 86. The NMC manages at the Mobile Unit all subsequent macro updates so they are synchronized with the Software. *See id.* When the NMC receives packets of raw data from the Mobile Unit via satellite, the NMC combines (i) the driver’s individual keystrokes sent through the data satellite, CP 30; (ii) the continuously updated and synchronized copy of the macro templates stored at the NMC, *id.*; and (iii) an NMC-generated position location report (time-stamped) containing additional landmark information (nearest town or city) into a complete report that is stored at the NMC so that the customer can download it later. CP 30, 112, 241. In addition, each time a message is sent to or received from

the Mobile Unit, the NMC generates an acknowledgment noting when the message was sent or received and appends an updated position location report to the acknowledgment of the message. CP 241-42. This additional information added by the NMC is what provides meaning to the recipient: if the truck operator punches into the keyboard of the Mobile Unit the number that the NMC recognizes as a customer-specified macro message (such as “broken down” or “at delivery point”), it is only the additional location landmark information calculated and added to the message by the NMC that allows the dispatcher to understand *where* the truck operator has broken down or made the delivery; and it is only the time-stamp and message acknowledgment added by the NMC that allows the dispatcher to know *when* the message was sent from that location. CP 88.

Other optional capabilities of the System are also integrated with the location polling provided through the NMC. Such capabilities include SensorTRACS, which reports on the condition of the truck and driving behavior of the driver, CP 198, and TrailerTRACS, which reports on the connection between the trailer and the truck, as well as the condition of climate controlled trailers, CP 199-202. In both cases, the NMC creates and stores these reports for later access by the customer. CP 198-202.

These functions performed by the NMC clearly place the Omni-TRACS Service itself far beyond the “mere ‘provision of transmission’ under RCW 82.04.065(2).” *Cnty. Telecable*, 164 Wn.2d at 44. Instead, the NMC functions are the mechanism by which information is, through use of the OmniTRACS Service, “generated, acquired, stored, processed,

or retrieved and delivered”—the hallmarks of an information service. *See, e.g.*, RCW 82.04.065(27)(a) (2007); *see also* 47 U.S.C. § 153(20).<sup>3</sup> In short, the NMC is not a mere point along the transmission path. Indeed, if the NMC merely “transmi[tted], convey[ed], or rout[ed]” the signal emitted by each vehicle, RCW 82.04.065(27) (2007)—or “communicat[ed] or transmi[tted]” it, RCW 82.04.065(2) (2000)—the customer would receive neither the positioning information nor the storage and processing capabilities that make the transmission commercially useful. Instead, it is the NMC—made available to Qualcomm’s customers only through their subscription to the OmniTRACS Service—that generates, renders usable, and stores the crucial information that ultimately motivates trucking companies to contract with Qualcomm.<sup>4</sup> The positioning information Qualcomm provides its customers is not “information of the user’s choosing,” 47

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<sup>3</sup> For these reasons and those in the following discussion, the Court of Appeals’ argument that all telecommunications services provide format changes, 151 Wn. App. at 906-07, mistakes what is at issue. The relevant question is whether there is a *net* change in format from the end-user’s perspective. *See* 2004 Wash. UTC LEXIS 440, at \*39-42. For example, a telecommunication service can use different signaling system formats and even computer functions to provide traditional phone-like service (thus, the statute includes VoIP as a telecommunications service, RCW 82.04.065(27) (2007)), but the information transmitted both begins and ends as voice. Here, in contrast, the NMC is providing “store and forward” services combined with information processing which changes the transmitted data’s format and content. Specifically, by processing calculations (such as determining position location and the nearest city landmark) and adding other new information (such as time-stamps and sent and received acknowledgments), the NMC changes the content and the presentation of what the customer receives and when it can be accessed—quite unlike mere protocol conversion or packet switching used in typical synchronous telecommunications.

<sup>4</sup> For example, without this information, OmniTRACS would not be able to “help[ ] fleet managers identify drivers that make unplanned stops, accrue excessive idle time, or accumulate out-of-route mileage.” CP 105. Likewise, without the NMC’s integration with back-office systems, OmniTRACS would not be able to “automate[ ] the data flow, turning it into information useful throughout [the customer’s] entire organization.” CP 81.

U.S.C. § 153(43), because Qualcomm, not the driver or the vehicle being tracked, generates the information, often without the vehicle driver's election or input. CP 30, 185. Likewise, the information Qualcomm provides the customer's dispatch differs in both "form" and "content" from the data sent from the vehicle. *Id.*; *see supra* pp. 10-13. And, the fact that Qualcomm makes this information available "via telecommunications" is of no consequence because most information services are accessed in this manner. *See Cmty. Telecable*, 164 Wn.2d at 42-45; 47 U.S.C. § 153(20).

2. Integrated, System-Based Analysis. The Court of Appeals' decision also rested on an additional, equally fundamental legal error. Contrary to the lower court's approach, the OmniTRACS Service's functions must be examined in light of the operation of the OmniTRACS System as a whole, which includes the Service, the Mobile Units mounted in trucks, and the Software at the customer's dispatch center. *Community Telecable* requires that the entire service provided to the customer—rather than any isolated component that also provides transmission—be examined to determine whether the offering is a "network telephone service," 164 Wn.2d at 43-44; *see also* RCW 82.04.064(27)(a) (2007) (focus on the "purchaser's primary purpose for the underlying *transaction*") (emphasis added). Here, the customer signs a single contract for the OmniTRACS System, including the OmniTRACS Service. CP 184-90. The OmniTRACS Service cannot be purchased alone or used independently of the Mobile Units and Software, nor can the Software or Mobile Units function without the OmniTRACS Service. CP 30, 76-77. The System is an inte-

grated whole that forms the basis for the customer's "underlying transaction" and clearly is an information service, as the Department concedes, Resp. Br., Ct. App., 27, and the Court of Appeals implicitly recognized, see 151 Wn. App. at 903-04. See also *infra* pp. 17-20.

In this respect, the Court of Appeals clearly erred in declining to follow the Tennessee Court of Appeals' analysis of the OmniTRACS Service in *Qualcomm, Inc. v. Chumley*, No. M2006-01398, 2007 WL 2827513 (Tenn. Ct. App. Sept. 26, 2007) (unpub.), CP 169-79. See 151 Wn. App. at 904. Because the OmniTRACS Service performs much of the information processing, storage, and generation for the customer, and cannot be purchased or operated independently of the OmniTRACS System, the parties naturally stipulated that the "primary purpose of Qualcomm's OmniTRACS service . . . is to collect data and then make it available to Qualcomm's customers." *Chumley*, 2007 WL 2827513 at \*8, CP 178. The portion of *Chumley* examined by the Court of Appeals succinctly explains why the Service is an information service, based on its capabilities, relation to the OmniTRACS System, and utility to customers. 151 Wn. App. at 903-04. And, *Community Telecable* itself provides a further reason, related to the need for uniformity among jurisdictions, for a ruling consistent with the Tennessee court's determination. Cf. *Cnty. Telecable*, 164 Wn.2d at 44-45.

**C. Customers Purchase the OmniTRACS Service for Its Information Service Functions.**

The proper classification of the OmniTRACS Service is clear not just from the nature of the service, but from the value it provides to its customers. Customers purchase the OmniTRACS Service, and the OmniTRACS System as a whole, to secure the positioning-related functions and information content added by the Service. These reflect the “formatting,” “storage,” addition of information, and other processing performed by the NMC—the functions that make the Service an information service rather than a “network telephone service.” *See* RCW 82.04.065(2) (2000); *see also* RCW 82.04.065(27)(a) (2007). Under the “primary purpose” test or otherwise, customers are clearly purchasing this as an information service rather than a telephone-like service: that is the entire point of the transaction. Were there any doubt on this point, the Court should “construe the facts and the inferences from the facts in a light most favorable to” Qualcomm, as summary judgment was entered against it. *See W. Telepage, Inc. v. City of Tacoma*, 140 Wn.2d 599, 607, 998 P.2d 884 (2000).

Customers can contract only for the OmniTRACS System as a whole, and the associated marketing materials and contract make clear that the positioning, reports, storage, message formatting and related functionalities associated with the NMC are the key elements of what the customer seeks and purchases. CP 77, 86 (usefulness of the report data generated through the Service); CP 188 § 3.6 (providing for customer ownership of location data and report information), *id.* § 3.1 (defining the Service as the

provision of reports through messaging, and location polling). Position reporting is linked to the tracking of vehicle arrivals and departures (without action by the truck operator), automatic security alerts, and broader fleet management capabilities. CP 88, 91, 104-06. The “messaging” is distinguished from traditional telephone and e-mail communications through features including NMC-generated location and landmark information, pre-formatted “macros,” “extensive data entry validation,” “[m]essag[ing] priority options,” and certain alerts that require no driver action—again all enhanced features that cannot be characterized as “mere transmission.” CP 82, 90, 91. The Washington Trucking Association (“WTA”) confirms that its members “are not buying a ‘data transmission’ service when they purchase Qualcomm’s service; they are buying processed data or information,” and they do so to secure the fleet management benefits that the enhanced service facilitates. WTA Amicus Mem. at 1.

The Court of Appeals largely recognized this key point, when it acknowledged that “the position poll reports . . . motivate the customer to subscribe to the service.” 151 Wn. App. at 908. This should have ended the matter in Qualcomm’s favor even under the “primary purpose” test, which looks to the primary reason the customer “undertakes the transaction.” However, the court rejected this conclusion because, it reasoned, customers did not base their purchasing decision on “the data manipulation required to create the reports.” *Id.* In light of the significant information processing, storage, and generation undertaken by the NMC to create the customer reports that have time and location context, *see supra* pp. 9-

16, the court's distinction is illusory. Customers do not—and cannot—distinguish between the two, as is the case for all information services. And, the court's further characterization of the Service's use of GPS signals in a small minority of vehicles does not support this conclusion: the suggestion that the NMC performs significantly fewer services for GPS-outfitted vehicles is without record support (and erroneous). The NMC undertakes much of the same extensive processing of GPS-originated data as it does for non-GPS data—both in creating the position report and in adding NMC-generated time-stamps, acknowledgments and landmark location information to the messages created, processed, and stored before they are retrieved by the dispatch center. CP 30, 122-23, 241-42; *see also supra* p.11 n.2.

In addition, there is no merit to the State's argument that the traditional telephone function supposedly associated with "messaging" predominates over the processing associated with the Service's positioning report component. First, the basic OmniTRACS Service does not provide the "messaging" function, which in any event costs less than the position reporting service (an additional \$15 versus \$35 for the basic service). More important, the "messaging" component of the Service itself relies on the positioning report, time-stamp and landmark information that the NMC generates for each message, *see supra* pp. 12-13—and thus is itself an information service. Especially given that the NMC stores the newly generated information before the customer retrieves it, using the System for traditional communications is not even practical. CP 32.

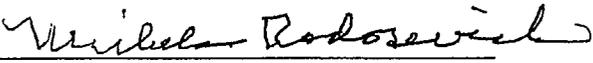
The Department's argument comparing the relative expense of the Mobile Unit and Software to the OmniTRACS Service, Resp. Br., Ct. App., at 26-27, concedes that the entire OmniTRACS System is an information service and has the pricing implication backwards: the high cost of the entire OmniTRACS System, the components of which all depend on the NMC's information generation and data processing, shows that the customers value the OmniTRACS Service as an information service, valuing its enhanced functions, rather than the transmission function. As the WTA summarized: "Messaging in that industry can easily be handled with other forms of communications like CB radios, or cell phones with texting capacity. Trucking firms would not need such an expensive system as Qualcomm's Omni TRACS if messaging was the functionality required by such firms." WTA Amicus Mem. at 2; *see also* CP 32 (OmniTRACS System is not practically designed for conversational exchange).

#### **CONCLUSION**

For the foregoing reasons, the judgment of the Court of Appeals should be reversed.

RESPECTFULLY SUBMITTED this 16th day of April, 2010.

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I declare under penalty of perjury that on this day I caused a copy of the foregoing Appellant's Supplemental Brief to be served upon the following counsel of record in the manner noted below:

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