TAB 35

I certify under penalty of perjury under the laws of the State of Washington that on September 22, 2000, I served a copy of this document on all counsel of record in the manner shown at the addresses listed on the attached ***Service List.***

Signed: Stacy A Hoffman

HON. J. KATHLEEN LEARNED
Noted for Hearing: October 6, 2000, 9:45 a.m.
With Oral Argument

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

SANDY JUDD, TARA HERIVEL and ZURAYA WRIGHT, for themselves, and on behalf of all similarly situated persons,

Plaintiffs,

v.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY; GTE NORTHWEST INC.; CENTURYTEL TELEPHONE UTILITIES, INC.; NORTH-WEST TELECOMMUNICATIONS, INC., d/b/a PTI COMMUNICATIONS, INC.; U.S. WEST COMMUNICATIONS, INC.; T-NETIX, INC.,

Defendants.

NO. 00-2-17565-5 SEA

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS

SIRIANNI & YOUTZ
701 FIFTH AVENUE, SUITE 3410
SEATTLE, WASHINGTON 98104-7032
(206) 223-0303

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(206) 223-0303

I. INTRODUCTION

This memorandum is submitted in opposition to the five motions to dismiss filed by defendants. Because many issues are common to all motions, the plaintiffs have filed this single memorandum to respond to all of the motions.

II. BACKGROUND AND CLAIMS

When Washington prison inmates and family members want to call each other, they may do so only by having the inmate place a certain type of collect call on a prison payphone. This telephone service is provided through contracts between the Washington Department of Corrections and "operator service providers," also known as "alternate operator services companies."

Throughout the period covered by this case, family members, attorneys and other persons have been unable to speak to inmates by telephone, except as recipients of these "operator-assisted" collect calls. Recipients are billed for these calls by the operator service provider assigned by contract to the prison from which the call originates.

Since at least 1988, telecommunications companies acting as or contracting with operator service providers have been required by state law to assure appropriate disclosure of rates when connecting intrastate and interstate long-distance telephone calls:

> The legislature finds that a growing number of companies provide, in a nonresidential setting, telecommunications services necessary to long distance service without disclosing the services provided or the rate, charge or fee. The legislature finds that provision of these services without disclosure to consumers is a deceptive trade practice.

RCW 80.36.510.

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These disclosure requirements are specifically imposed on alternate operator service companies:

> The utilities and transportation commission shall by rule require, at a minimum, that any telecommunications company, operating as or contracting with an alternate operator services company, assure appropriate disclosure to consumers of the provision and the rate, charge or fee of services provided by an alternate operator services company.

RCW 80.36.520.

Violation of these provisions is a *per se* violation of the Washington Consumer Protection Act ("CPA"):

> In addition to the penalties provided in this title, a violation of RCW 80.36.510, RCW 80.36.520, or RCW 80.36.524 constitutes an unfair or deceptive act in trade or commerce in violation of chapter 19.86 RCW, the consumer protection act. Acts in violation of RCW 80.36.510, RCW 80.36.520, or RCW 80.36.524 are not reasonable in relation to the development and preservation of business, and constitute matters vitally affecting the public interest for the purpose of applying the consumer protection act, chapter 19.86 RCW. It shall be presumed that damages to the consumer are equal to the cost of the service provided plus two hundred dollars. Additional damages must be proved.

RCW 80.36.530.

These statutes will be referred to collectively as the "Disclosure Statutes."

The WUTC also issued regulations that provided additional, specific disclosure requirements. From the beginning of the class period through January, 1999, the WUTC required alternate operator services companies to "immediately" disclose rates charged to consumers upon request. WAC 480-120-141(5)(iv)(a). Effective in January, 1999, a new regulation was adopted that requires providers to notify a recipient that rate information can be obtained by pressing no more than two keys on the telephone key pad. WAC 480-120-141(2)(b) (the "January, 1999 Rule").

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Thus, the defendants were obligated to assure that appropriate disclosure of rates were made to the plaintiffs and other recipients of inmate-initiated collect calls. The defendants failed to do so, and this action was brought.

III. OVERVIEW

A. Standard for Motions To Dismiss.

A dismissal under CR 12(b)(6)

> is appropriate only if it appears beyond doubt that the plaintiff cannot prove any set of facts which would justify recovery. In such a case, a plaintiff's allegations are presumed to be true and a court may consider hypothetical facts not included in the record. CR 12(b)(6) motions should be granted "sparingly and with care" and "only in the unusual case in which plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief."

Tenore v. AT&T Wireless Services, 136 Wn.2d 322, 329-30 (1998) (footnotes deleted).

B. Summary of Argument.

The defendants variously contend that the Disclosure Statutes actually impose no duties on them, but only on the WUTC. It is further argued that even if such obligations existed, a defendant was not obligated to provide the disclosures required because it was not an "operator service provider" (claiming that one or more of the other defendants were the providers) or it has a special exemption or waiver that precludes it from having to comply with the Disclosure Statutes. Some defendants then contend that the claims afforded by the Disclosure Statutes may not be pursued at all on the grounds of preemption, the filed rate doctrine, or the regulatory exemption of the CPA. All defendants contend that any claim arising under the Disclosure Statues must be decided by the WUTC, rather than the court.

As shown below, the Disclosure Statutes (1) require that consumers receive disclosures regarding the charges for the collect calls, (2) require the defendants

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(206) 223-0303

to make these disclosures, and (3) do not allow the defendants to contract away or obtain a waiver of those statutes. Further, this Court should decide the CPA claim, and not defer to the WUTC under the primary jurisdiction doctrine. The defendants' remaining contentions—that even though the legislature provided a cause of action for violation of the Disclosure Statutes those claims are barred by federal preemption, the filed rate doctrine, or the regulatory exemption of the CPA—should also be rejected.

The motions to dismiss should be denied.

IV. THE DEFENDANTS' MOTIONS SHOULD BE DENIED

A. The Legislature Required Disclosure And Created a CPA Cause Of Action For Failure To Disclose.

1. Read Together, RCW 80.36.510, .520, And .530 Demonstrate The Legislature's Intent To Require Disclosure And Provide A CPA Cause Of Action For Consumers.

Defendants AT&T and Verizon argue that RCW 80.36.520 is merely an "enabling statute" that "imposes no obligations" on the telecommunications company defendants.[1] Verizon Mem., pp. 2, 7-8; AT&T Mem., pp. 5-6. According to these defendants, the only duty created by the statutory scheme is a duty falling on the WUTC. This technical and strained interpretation must be rejected because it conflicts with the obvious intent of the Legislature to create a CPA cause of action replete with statutory damages, available to consumers, for failure to disclose.

RCW 80.36.510, .520 and .530 were passed unanimously by the House and Senate in 1988 as Senate Bill 6745. *See* Final Bill Report, SB 6745 (attached as *Exhibit A*). They should be read together "in order to determine the legislative intent underlying

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[1] Qwest avoids this argument and states that "[t]he issue raised by plaintiffs in their Complaint is whether the defendants provided rate disclosures required of them under the regulations that were promulgated pursuant to RCW 80.36.520." Although Qwest does not appear to recognize that the statutes themselves impose an independent obligation to disclose rates, it does recognize that a CPA action may be maintained for failure to disclose pursuant to regulations promulgated pursuant to RCW 80.36.520.

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the entire statutory scheme." *State v. Chapman*, 140 Wn.2d 436, 448, 998 P.2d 282 (2000). Each provision must be viewed in relation to the other provisions and harmonized if at all possible. *In re Estate of Kerr*, 134 Wn.2d 328, 335, 949 P.2d 810 (1998).

RCW 80.36.510 is a "legislative finding." The Legislature made two observations in RCW 80.36.510: (1) a "growing number" of companies that provide the services at issue in this case do so "without disclosing the services provided or the rate, charge, or fee," and (2) a failure to disclose rates to consumers "is a deceptive trade practice." The obvious thrust of these findings is that the Legislature was concerned about rate disclosure and concluded that failure to disclose is a deceptive trade practice under the state Consumer Protection Act. While such declarations of policy typically have no operative force in and of themselves, they serve as an important guide in determining the intended effect of related statutes that do contain operative language. *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 128, 580 P.2d 246 (1978).

RCW 80.36.520 and .530 contain the operative language. In directing the WUTC to "require, at a minimum," that telecommunications companies "assure appropriate disclosure to consumers" of rates provided by alternate operator services companies, the Legislature clearly required ***some*** disclosure on the part of the defendants. The Legislature directed the WUTC to issue rules to ensure adequate disclosure. The Legislature did not, however, intend to permit telecommunications companies to continue to provide services without ***any*** disclosure, as the next statutory section makes clear.

RCW 80.36.530 states that a "violation" of RCW 80.36.510 and .520 "constitutes an unfair or deceptive act in trade or commerce in violation of chapter 19.86 RCW, the consumer protection act . . ." The substantive provision of section .510 that may be violated is the statement that the provision of long-distance services "without disclosure to consumers" is a deceptive trade practice. One might quibble

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about whether it is possible to violate a "legislative finding," but there can be no doubt about the Legislature's intent: a complete failure to disclose information relating to rates is an unfair or deceptive act and actionable under the CPA. That section also refers to a "violation" of section .520. Section .520 provides a minimal floor of disclosure and requires the WUTC to flesh out disclosure requirements in more detail. What is clear is that no disclosure cannot be "appropriate disclosure" under section .520.

The WUTC itself appears to have recognized that the statutes impose an independent obligation upon defendants to disclose rates. WAC 480-120-142 (in effect until the 1999 regulations became effective) provided that alternate operator service companies must comply with the minimum requirements of RCW 80.36.510, .520 and .530. *See also* WAC 480-120-016 (the WUTC's adoption of rules "shall in no way relieve any utility of its duties under the laws of the state of Washington").

Under RCW 80.36.530, a complete failure to disclose is actionable under the CPA. A CPA claim can also arise out of a company's failure to disclose rates in the manner set forth in regulations imposing disclosure requirements. Plaintiffs' complaint, fairly read, encompasses both types of violations. When read together, the three statutes passed as a part of the same enactment in 1988 create a coherent scheme of disclosure and enforcement.

2. Defendants' Interpretation Would Gut The Statutes And Produce Absurd Results.

The flaw in the "enabling statute" argument advanced by AT&T and Verizon is that it cannot be squared with the legislative purpose that is manifest in reading the statutory scheme as a whole. Defendants contend that section .520 does not impose independent disclosure obligations on operator services companies (or those contracting with them)—only that the WUTC issue a rule requiring such disclosure.

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But RCW 80.36.530 makes a "violation" of .520 actionable under the CPA. Moreover, section .530 sets forth the damages for such a violation: "It shall be presumed that damages ***to the consumer*** are equal to the cost ***of the service provided*** plus two hundred dollars." RCW 80.36.530 (emphasis added). Under defendants' construction, the only "violation" of RCW 80.36.530 that can occur is the failure of the WUTC to issue a rule. That is obviously not what the Legislature intended or it would not have provided that damages to "consumers" are equal to the "cost of the service provided," a provision clearly aimed at telecommunications companies that offer or contract with operator services companies.

Defendants' construction leads to one of two equally repugnant results: either RCW 80.36.530 is a nullity because it refers to "violations" of statutes that impose no duties on telecommunications companies (and provides statutory damages for consumers of those companies), or it authorizes ***a CPA cause of action directly against the WUTC*** for failure to issue a regulation. The first result renders RCW 80.36.530 meaningless; the second renders it absurd. Statutes should be construed so that all the language used is given effect, with no portion rendered meaningless or superfluous. *Davis v. State*, 137 Wn.2d 957, 963, 977 P.2d 554 (1999). Defendants' contention that RCW 80.36.520 imposes no duties on them renders the remedial provisions of RCW 80.36.530 meaningless. Statutes should also be construed to effect their purpose, and unlikely or absurd consequences should be avoided. *See State v. Stannard*, 109 Wn.2d 29, 36, 742 P.2d 1244 (1987). *See also Alderwood Water Dist. v. Pope & Talbot, Inc. et al.*, 62 Wn.2d 319, 321, 382 P.2d 639 (1963) (statutes should be construed "as a whole in order to ascertain legislative purpose, and thus avoid unlikely, strained or absurd consequences which could result from a literal reading.") Defendants' argument that RCW 80.36.520 imposes a duty only upon the WUTC must fail because it is unthinkable

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that the Legislature intended to expose a taxpayer-funded state agency to such penalties under the CPA.

Plaintiffs' interpretation harmonizes the provisions of the three related statutes and gives teeth to the Legislature's declaration in RCW 80.36.510 that the provision of long-distance alternate operator services "without disclosure to consumers is a deceptive trade practice."

3. **Legislative History Supports Plaintiffs' Interpretation.**

The legislative history of these statutes demonstrates that the Legislature intended to provide a consumer remedy under the CPA whenever telecommunications companies failed to disclose rates. The Final Bill Report identifies the root of the problem: "Although some companies may charge several dollars to connect a caller to long distance from these phones, the customer is often unaware of the charge until it appears on the monthly bill from a local phone company." Final Bill Report, SB 6475 (*Exhibit A*).

The House Bill Report described testimony in favor of the bill as follows:

> Some arrangements and charges [for long distance calls from call aggregator locations] were very expensive compared to routine long distance calling of the same distance and duration and the expense was not evident in any way to the caller beforehand.

House Bill Report, SB 6745 (attached as *Exhibit B*). An amendment to the bill demonstrates the legislative intent to require full disclosure to consumers: "It is clarified that required disclosure to customers provides information about the rate, charge or fee of alternate operator services." Senate Bill Report, SB 6745.

The Final Bill Report states unequivocally:

> The [WUTC] is to require that the provision and the charge, fee, or rate of alternate operator services are disclosed appropriately to consumers. ***Failure to disclose constitutes a***

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> ***violation of chapter 19.86 RCW, the consumer protection act.*** Damages are presumed equal to the cost of the service provided plus two hundred dollars. Additional damages must be proved.

Final Bill Report, SB 6745 (*Exhibit A*).

In light of the declaration of policy in RCW 80.36.510, the remedy provided in RCW 80.36.530, and the legislative history described above, it is worth asking: Would the drafters of these laws have imagined that, 12 years later, telecommunications companies would argue that *no* law (be it statute or regulation) required even minimal rate disclosure during the prior 12 years? We think not. The spirit or purpose of the legislation should prevail over imperfect wording. *Alderwood Water Dist.*, 62 Wn.2d at 321. Based on both the overall statutory scheme, and on uncontroverted evidence of legislative intent, the 1988 statutes provide a cause of action under the CPA for failure to disclose rates charged for operator services.

4. Defendants Mischaracterize RCW 80.36.520 As An "Enabling Statute."

RCW 80.36.520 is not an "enabling" statute. As defined by Black's, an enabling statute is a term

> applied to any statute enabling persons or corporations to do ***what before they could not.*** It is applied to statutes which confer ***new*** powers.

Black's Law Dictionary (5th ed. 1979) (emphasis added). RCW 80.36.520 does not confer a new power on the WUTC. The Legislature conferred the power to regulate rates, services and practices of telecommunications companies—including the power to issue disclosure regulations governing defendants—long before RCW 80.36.520 was enacted. *See* RCW 80.01.040 (conferring on WUTC the power to regulate rates, services, and practices of telecommunications companies and to make rules and regulations to carry out these duties). *See also American Network, Inc. v. Utilities & Transp. Comm'n*, 113

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Wn.2d 59, 70, 776 P.2d 950 (1989) (noting that WUTC has power to regulate telecommunications and to make rules under enabling authority of RCW 80.01.040).

RCW 80.36.520 and .530 are remedial statutes. "Remedial statutes, in general, afford a remedy . . . for the enforcement of rights and the redress of injuries." *Haddenham v. State*, 87 Wn.2d 145, 148, 550 P.2d 9 (1976) (citing 3 Sutherland, *Statutory Construction* § 60.02 (4th rev. ed. 1974)). RCW 80.36.530, in conjunction with the CPA, affords a remedy to redress the problem of non-disclosure identified in RCW 80.36.510. Remedial statutes are entitled to a liberal construction to effect their purpose. *Nucleonics Alliance, Local Union No. 1-369 v. WPPSS*, 101 Wn.2d 24, 29, 677 P.2d 108 (1984). Defendant's construction would undermine the express statutory purpose of providing consumers with a means of redress for defendants' failure to disclose rates.

B. Regardless Of Which Defendants Actually Provided The Operator Services, All Of The Defendants Are Liable Under The Language Of RCW §80.36.520 Because They Are All In Privity Of Contract.

1. AT&T's Contention That It Does Not Provide Operator Services Cannot Serve As A Basis To Dismiss Plaintiffs' Complaint.

Defendant AT&T claims that it does not provide operator services. *See* AT&T Mem., p. 3. This argument must be rejected because plaintiffs have—notwithstanding AT&T's claim to the contrary—properly alleged that AT&T provides operator services. *See* First Amended Complaint, ¶6 ("The defendants, all telecommunications companies and operator service providers..."). That allegation must be accepted as true for purposes of this motion. *See* CR 12(b)(6).

Second, the issue is factual in nature. AT&T's conclusory argument that operator services are provided exclusively by its subcontractors is disputed by two of those subcontractors. T-Netix and Centurytel point to AT&T as the operator service provider. *See* T-Netix Mem., p. 3, n. 4 ("T-Netix only supplies AT&T with software and

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equipment ... T-Netix does not provide any telephone services to inmates..."); Centurytel Mem., p. 2 (claiming it provides "only local - not long distance - telephone service" at its locations). Unlike AT&T, T-Netix and Centurytel avoid raising the factual issue of their operator status as a basis for dismissal under Rule 12(b)(6). *See, e.g.*, T-Netix Mem., p. 3 n.4 (recognizing factual nature of issue).

2. All Defendants Are Subject To The Statutory Liability Because They Have "Contracted With" An Operator Service Company.

Regardless of which defendants provide operator services and which might not, ***all*** of the defendants are obligated to assure rate disclosure to consumers as a matter of law because they are all in privity of contract. RCW 80.36.530 provides:

> The utilities and transportation commission shall by rule require, at a minimum, that any telecommunications company, ***operating as or contracting with*** an alternate operator services company, assure appropriate disclosure...

Although no defendant acknowledges the italicized language, it is unambiguous and must be given its plain meaning.[2] Accordingly, every telecommunications company that is party to a contract involving the provision of operator services shares legal responsibility for assuring appropriate rate disclosure.

3. The Regulation Did Not Immunize Telecommunications Companies That "Contracted With" An Alternate Operator Services Company.

AT&T, T-Netix, and Centurytel all argue that the regulation in effect from 1996 to 1999, WAC 480-120-141, imposed disclosure requirements only on alternate

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[2] AT&T appears to tacitly acknowledge that it may be found liable on the basis of its contractual relationship with its subcontractors when it observes that the WUTC's "ultimate rulings on the waiver petitions have a direct effect on AT&T's potential liability because both GTE and US West have acted and continue to act as the OSP in a number of correctional facilities where AT&T is the long-distance provider." AT&T Mem., p. 12 n.11; *see id.* at 2. If AT&T is not an OSP, as it asserts, then the only basis for liability would be its contractual relationship with its OSPs.

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operator service companies, thus implying that telecommunications companies that did not provide operator services but contracted with alternate operator service companies cannot be liable. In other words, defendants imply that the WUTC "removed" contracting companies from mandatory disclosure requirements by failing to explicitly state that "contracting" companies are liable for violations of the disclosure regulations. Verizon also hints at such an argument when it claims that the Legislature "deferred" to the WUTC to "define by rule which telecommunications companies were operating as or contracting with" alternate operator service companies. Verizon Mem., p. 3.

While RCW 80.36.520 delegates to the WUTC the power to impose specific disclosure requirements, the statute does not delegate to the WUTC the power to redefine *who* is subject to the disclosure requirements. That task is accomplished by the statute itself: the term "alternate operator services company" is explicitly defined and the phrase "contracting with" is plain and unambiguous. RCW 80.36.520.

The regulation cannot narrow the scope of the statute. As a matter of basic administrative law, a regulation cannot narrow the class of entities to which a statute applies without an exception or express authorization in the statute. *See Nucleonics Alliance, Local Union No. 1-369 v. WPPSS*, 101 Wn.2d 24, 29, 677 P.2d 108 (1984) (whether statute applies to particular class of persons is question of law reserved for judiciary; court's interpretation will trump contrary agency interpretation). The only way to harmonize the statute and regulation is to read them together and conclude that an operator services provide that violates the regulation also subjects parties that have contracted with that provider to liability under the statute. To the extent the Court perceives any conflict in the scope of the statute and the scope of WAC 480-120-141, the statutory language must control.

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C. The Disclosure Requirements In WAC 480-120-141 Were Applicable To All Of The Defendants From 1991-1999—Including Those Who Happen To Be Local Exchange Companies.

Between 1991 and 1999, WAC 480-120-141(5)(iv)(a) required alternate operator services companies to "immediately" disclose rates charged to consumers upon request. Defendants Verizon (formerly GTE Northwest) and Qwest (formerly US West) claim that, because they also act as local exchange companies ("LECs") in many areas of the state, they were immune from these disclosure requirements under the following regulatory definition:

> Alternate operator services company - any corporation, company, partnership or person ***other than a local exchange company*** providing a connection to intrastate or interstate long-distance or to local services from locations of call aggregators. The term "operator services" in this rule means any intrastate telecommunications service provided to a call aggregator location that includes as a component any automatic or live assistance to a consumer to arrange for billing or completion...

WAC 480-120-021 (1994) (emphasis added).

An "LEC" is a company that owns and operates the physical equipment necessary to the provision of local exchange telephone service, primarily the wires and switches that connect its customers to each other and to other switches in other neighborhoods.[3] *See generally* Charles H. Kennedy, *An Introduction to U.S. Telecommunications Law*, pp. 1-48 (1994). In this context, the purpose of the claimed "LEC exemption" is apparent: an LEC, ***when acting solely in its role as an LEC***, is not subject to the rules applicable to alternate operator service companies.

Although Qwest and Verizon may operate various local exchanges throughout the state, ***they do not merely act as LECs but also as operator service***

[3] A local exchange is usually just the size of a neighborhood. There are well over a hundred exchanges in the state of Washington. *See Washington Indep. Tel. Ass'n v. TRACER*, 75 Wn. App at 361, n. 7 (noting that US West alone serves over 100 exchanges).

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providers with respect to the collect calls placed by inmates. *See* AT&T Mem., Exh. A, p. 3. They are subcontractors to a competitive contract for business that the Department of Corrections could award to other providers instead. In their 1992 contract with AT&T (and subsequent amendments), they agreed to provide, not just basic LEC access to a local exchange customer base, but software, special monitoring equipment, and "local and intraLATA [interexchange] telephone service ***and operator service***". *See* AT&T Mem., Exh. A, p. 3 (emphasis added). Based on the contract, Qwest and Verizon are at least providing operator services for interexchange intraLATA telephone calls, and may also provide the operator services for AT&T's interLATA business. The provision of interexchange operator services to a call aggregator location pursuant to competitive contract is exactly what is meant by an "alternate operator services" activity, and has been regulated as such by the WUTC pursuant to statute since at least 1991. *See* RCW 80.36.530 (defining "alternate operator services company" as a "person providing a connection to intrastate or interstate long-distance services from places including, but not limited to, hotels, motels, hospitals, and customer owned pay telephones").[4]

Further, Qwest's claim that the disclosure requirements do not apply to it is dispelled by its prior requests for waivers of some of the provisions of WAC 480-120-141 in 1991. *See Exhibit C* (Qwest's Petition for a waiver of WAC 480-120-141(1)(a) (posting requirement), WAC 480-120-141(1)(b)(ii) and (iii) (competing service providers), and WAC 480-120-141(4) (emergency calls) as applied to its prison operator services). The WUTC confirmed that WAC 480-120-141 applied to the LEC's competitive contract-based provision of prison interexchange operator services when it granted Qwest's waiver request. *See* Order Granting Waiver of Rules, Docket

[4] Prisons have been considered call aggregators for disclosure purposes under Washington law throughout the relevant time period. *See* WAC 480-120-141(3) (1996).

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No. UT-910193. In granting the request, the WUTC never suggested that the regulation did not apply to Qwest's prison operator services.[5] *See id.*

D. The WUTC May Not Alter The Scope Of The Statute Or Excuse Particular Defendants From Its Disclosure Requirements.

1. The WUTC May Not "Waive" The Minimum Statutory Disclosure Obligations Or Abdicate Responsibility For Imposing Statutory Disclosure Requirements.

Verizon claims that the waiver it obtained from the WUTC for compliance with the verbal disclosure requirements of the January, 1999, Rule effectively "exempted and relieved" it from *any* disclosure obligations dating back to January 29, 1999. *See* Verizon Mem., pp. 5, 6-7. Verizon's argument goes like this: (1) there is no statutory obligation to disclose, only a statutory directive to issue a regulation; (2) the only regulation requiring disclosure after January 29, 1999 is WAC 480-120-141(2)(b) (the January, 1999, Rule); (3) Verizon obtained a waiver of those disclosure requirements until September 1, 2000; therefore (4) there was no duty whatsoever (by either statute or regulation) on Verizon to disclose rates in most of 1999 and 2000. This argument assumes that the WUTC intended to and in fact did exempt Verizon from all rate disclosure obligations during this time period. It is highly unlikely that this is what the WUTC intended. In any event, the WUTC could not exempt Verizon from required disclosure obligations without abdicating its duties under the statute.

RCW 80.36.520 imposes a mandatory obligation on the WUTC: it "shall" promulgate regulations that, ***"at a minimum,"*** assure appropriate disclosure of rate information to consumers. The intent is obvious: there is to be a minimum floor of rate

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[5] The Court can take judicial notice of these administrative materials. *See* ER 201(b); *State v. Hoffman*, 116 Wn.2d 51, 67 & n.7, 804 P.2d 577 (1991) (judicial notice taken of proclamation that was a matter of public record in Governor's office); *see generally* 5 Karl Tegland, *Washington Practice, Evidence* §§ 45-50 (1989). The administrative documents fall into the category of "legislative facts—the sort of background information a judge takes into account when determining the constitutionality or proper interpretation of a statute . . ." *Id.*, § 49 at 123 (1989). *See also* Verizon Mem., p. 5 n.3.

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disclosure that all companies operating as or contracting with alternate operator service companies must meet. Further, from 1996 to early 1999, WAC 480-120-141(5)(iv)(a) also required "immediate" disclosure of rate information, "upon request."

In 1999, the WUTC strengthened its regulation with the adoption of the January, 1999, Rule. As stated by the WUTC in its Order adopting the new requirements: "The verbal rate disclosure option is necessary to better inform consumers, fosters a more competitive environment, and it serves the public interest." WUTC Order No. R-452, Docket No. UT-970301, p. 9. In requesting a waiver of these requirements, Verizon's only argument was that it needed more time to acquire and implement the technology that would permit it to comply with the new "two-key" disclosure requirements. *See* Verizon Mem., Exh. A, p. 1.

This waiver, however, does not excuse Verizon from all disclosure requirements, including the floor set by the Disclosure Statutes and the WUTC regulation in force from 1996 to early 1999. And, it should not excuse Verizon from making proper disclosures after January, 1999.

When an agency enacts a rule pursuant to an express statutory directive, it must comply strictly with the statutory terms. 1 Norman J. Singer, *Sutherland Statutory Construction* § 4.18 (5th ed. 1994) ("If the directions of a statute are mandatory, then strict compliance with the statutory terms is essential to the validity of administrative action."). An agency cannot nullify a statute under the guise of interpretation. *Id.* § 31.06 (statutes that delegate rule-making power to an agency are "to be construed with the presumption that the legislature never intends that the functions committed to the agency should be exercised in futility"); *State v. Dodd*, 56 Wn. App. 257, 260-61, 783 P.2d 106 (1989).

The Disclosure Statutes do not permit exceptions. To the contrary, they expressly direct the WUTC to issue regulations that, "at a minimum," assure

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SEATTLE, WASHINGTON 98104-7032
(206) 223-0303

appropriate disclosure. The fact that the WUTC might be able to grant waivers of regulations it has enacted pursuant to its *general* rule-making powers under broad enabling statutes does not give it license to grant waivers of disclosure obligations that are expressly required by a specific, mandatory statutory directive. To hold otherwise would be to permit the WUTC power to define the scope of its own authority, a power it clearly does not have. *See In re Elec. Lightwave*, 123 Wn.2d 530, 540, 869 P.2d 1045 (1994). If the WUTC "relieved" Verizon of its statutory obligation, it would be undermining legislative intent and abdicating its responsibilities to define and impose a minimum standard of disclosure on each and every provider of alternate operator services.

An agency cannot waive an express statutory requirement. *See AK-WA, Inc. v. Dear*, 66 Wn. App. 484, 490, 832 P.2d 877 (1992) (agency could not waive express statutory requirement that employer pay prevailing wage rates); *State v. Munson*, 23 Wn. App. 522, 597 P.2d 440 (1979) (invalidating regulation that eliminated a fishing season required by statute; the "suspension of a statute" is a legislative act that may not be accomplished by administrative action). The WUTC cannot legislate the CPA remedy provided by RCW 80.36.530 out of existence for Verizon customers.

Verizon's (and Qwest's) arguments regarding waiver are unsound and should be rejected.

2. The WUTC May Not Exempt Interstate Service Providers From Statutory Liability.

AT&T, Verizon, and Qwest all contend that the WUTC exempted interstate calls by "restricting the reach" of statutorily mandated disclosure obligations to intrastate calls in 1991. The 1991 regulations appear to restrict the scope of the regulatory disclosure requirements to intrastate calls by defining "operator services" as "any ***intra***state telecommunications service provided to a call aggregator location . . ."

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WAC 480-120-021 (emphasis added).[6] The issue is whether the WUTC is statutorily empowered to "restrict the reach" of the disclosure obligations.

RCW 80.36.520 directs the WUTC to issue rules that require any "alternate operator services company" (or any telecommunications company that contracts with that provider) to disclose rate information regarding the "services provided by an alternate operator services company." To determine whether this statutorily mandated disclosure obligation applies to interstate or intrastate calls, one must ascertain what "services" are provided by alternate operator services companies. The answer to that question is found in the second paragraph of the statute, which defines an alternate operator services company:

> For the purposes of this chapter, "alternate operator services company" means a person providing a connection to ***intrastate or interstate*** long-distance services from places including, but not limited to, hotels, motels, hospitals, and customer-owned pay telephones.

WAC 80.36.520 (emphasis added). Thus, the services provided by an alternate operator services company are statutorily defined to include both interstate and intrastate long-distance services. Accordingly, the disclosure obligations required by the statute necessarily include interstate long-distance services.

It is axiomatic that an agency may not amend unambiguous statutory language. *Caritas Serv., Inc. v. Department of Social & Health Serv.*, 123 Wn.2d 391, 415, 869 P.2d 28 (1994). It is equally fundamental that the statutory definition of a term "controls its interpretation," *Senate Republican Campaign Comm. v. Public Disclosure Comm'n*, 133 Wn.2d 229, 239, 943 P.2d 1358 (1997), and that an agency must adhere to

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[6] Interestingly, the WUTC's first regulation outlining disclosure requirements did not exempt interstate calls. *See* WAC 480-120-021 (1989) (attached as Appendix 1, p. 1 to AT&T Mem.).

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(206) 223-0303

statutory language that controls the scope of statutorily-imposed duties. *See State v. Miles*, 5 Wn.2d 322, 105 P.2d 51 (1940).

There is nothing ambiguous here. The statute directs the WUTC to issue rules mandating disclosure of rate information for services provided by alternate operator services companies. It then defines an alternate operator services company as an entity that provides both interstate and intrastate long-distance services. The "exemption" in WAC 480-120-021 for interstate services cannot be reconciled with this statutory definition. Where an agency rule or interpretation conflicts with a statute, deference is inappropriate and the agency rule must yield to the statute. *See Senate Republican Campaign Comm.*, 133 Wn.2d at 241 ("it is the ultimate prerogative of the courts to settle the purpose and meaning of statutes"; deference is inappropriate where agency interpretation conflicts with statute); *State v. Dodd*, 56 Wn. App. 257, 260-61, 783 P.2d 106 (1989) ("It is a cardinal rule of administrative law that an agency by its rulemaking authority may not amend or nullify a statute under the guise of interpretation.").

The statute does not delegate to the WUTC the power to define the scope of the services to which the disclosure obligations apply. That is accomplished by the statute and courts will not defer to an agency the power to determine the scope of its own authority. *See In re Elec. Lightwave*, 123 Wn.2d 530, 540, 869 P.2d 1045 (1994).

Thus, the Disclosure Statutes apply to interstate calls.

3. The WUTC May Not Alter The Scope Of The Statute By Exempting LECs Who Provide Operator Services.

As discussed above, Qwest and Verizon claim that they had no duty to disclose from 1996 to early 1999 because they are "local exchange companies" (LECs). The plaintiffs demonstrated in section C above that their arguments had no merit. Their

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argument should also be rejected because the WUTC does not have the authority to "exempt" LECs from disclosure obligations.

The starting point is again the ***statutory*** definition of an alternate operator services company. That definition does not exempt LECs. The statute directs the WUTC to issue disclosure rules that apply to all alternate operator services companies — and if an alternate operator services company happens to also be an LEC, it makes no difference under the statutory definition. Under defendants' construction of the regulation, the regulatory definition of alternate operator services company directly conflicts with the statutory definition. *Compare* WAC 480-120-021 (1994) *with* RCW 80.36.520.

The Legislature never delegated to the WUTC the power to exempt LECs by redefining a statutorily-defined term. For all the reasons cited in the preceding argument, the claim of Qwest and Verizon that they were completely immune from disclosure obligations from 1996 to early 1999 must be rejected.

E. Dismissal Is Not Appropriate Under The "Primary Jurisdiction" Doctrine.

All of the defendants argue that this case should either be dismissed or stayed under the primary jurisdiction doctrine. They are wrong.

The primary jurisdiction doctrine allows a court to defer to the expertise of an administrative agency *if* three conditions (described below) are met. If these conditions are met, then the court has the discretion—but not the obligation—to defer to the agency. "The doctrine does not strip the courts of their power, being merely discretionary and premised on an attitude of judicial self-restraint." *Moore v. Pacific Northwest Bell*, 34 Wn. App. 448, 452 (1983). As was recently held:

> The application of the doctrine of primary jurisdiction is "not mandatory in any given case, but rather is within the sound

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(206) 223-0303

> discretion of the court"; it is "predicated on an attitude of judicial self-restraint."

Chaney v. Fetterly, 100 Wn. App. 140, 149 (2000).

The three requirements to be met before a court may apply its discretion are: (1) The administrative agency must have the authority to resolve the issues that would be referred to it by the court; (2) the agency must have special competence over all or some part of the controversy which renders the agency better able than the court to resolve the issues; and (3) the claim before the court must involve issues that fall within the scope of a pervasive regulatory scheme, thus creating a danger that judicial action would conflict with a regulatory scheme. *Tenore v. AT&T Wireless Services*, 136 Wn.2d 322, 345 (1998); *In Re Real Estate Litigation*, 95 Wn.2d 297, 302-03 (1980). These requirements have not been met.

First, the WUTC does not have authority to resolve the issues in this case. RCW 80.36.530 expressly provides a Consumer Protection Act claim with prescribed damages to recipients of collect telephone calls when they are not provided adequate information regarding the charges for those calls. The statute provides that these consumers are entitled to receive the actual costs of the telephone call, $200 in presumed damages, and such other further damages as they can prove.

The WUTC, however, cannot adjudicate a CPA claim or provide the relief that the plaintiffs are entitled to receive. The WUTC has no authority to award damages under the CPA or, apparently, provide any relief directly to individual consumers other than refunds of certain charges. The WUTC has no authorization to award the statutory damages, the additional damages permitted, costs, treble damages, or attorneys' fees permitted by the CPA. For this reason alone, the primary jurisdiction doctrine should not be applied:

> Moreover, an administrative agency should not be accorded primary jurisdiction if the agency is powerless to grant the

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> relief requested. The Department of Licensing does not have the authority to grant either civil damages or an injunction.

In Re Real Estate Litigation, 95 Wn.2d 297, 304 (1980). And,

> Even if endowed with special expertise, an agency should not be accorded primary jurisdiction if it is powerless to grant the relief requested. ... Application of the doctrine of primary jurisdiction is inappropriate here because the WUTC has neither the power to grant the relief Moore requested nor special competence over the subject of his claim.

Moore, 34 Wn. App. at 452.[7]

Second, the WUTC does not have special competence regarding the plaintiff's claims that would render it better able than the Court to resolve the issues in this case.

The Washington Supreme Court, in *Tenore*, examined whether a wireless phone company's failure to disclose that it was rounding charges up to the nearest full minute was an issue that should be deferred under the primary jurisdiction doctrine. The court concluded that a determination of whether proper disclosure was made, and whether the plaintiffs had a fraudulent misrepresentation claim, were "within the conventional competence of the courts, and the judgment of a technically expert body [was] not likely to be helpful ..." *Tenore*, 136 Wn.2d at 346.

Here, no special expertise is required in determining whether disclosures mandated by statute were provided to the class members. From the beginning of the

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[7] Defendant T-Netix claims "the Court has accorded [WUTC] primary jurisdiction over all court claims falling within its purview," citing *Moore*. In fact, *Moore* held that the trial court's decision to defer to the WUTC in that case on the basis of primary jurisdiction was not appropriate, and noted:

> Any interpretation of RCW 80.36.140 vesting exclusive jurisdiction in the WUTC would violate Article 4, Section 6, of the Washington State Constitution. The judicial power under this Article was plenary, vesting in the Superior Court's "original jurisdiction in all cases and of all proceedings in which jurisdiction shall not have been by law vested exclusively in some other court; ..."

Moore, 34 Wn. App. at 451.

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class period through January, 1999, the defendants were required to make available information regarding their charges to recipients of collect telephone calls before those calls were accepted. The Court is simply being asked to determine whether the defendants met those requirements. Courts are continually called upon to determine whether sufficient information has been disclosed to consumers, including disclosure requirements under Franchise Investors Protection Act, the Washington Securities Act, and similar statutes.

In addition, it is the courts—not the WUTC—that have expertise applying the CPA, including exercising the discretion permitted by the CPA to award exemplary damages up to three times the damages suffered by consumers.

Third, plaintiffs' claims do not involve issues that fall within the scope of a "pervasive regulatory scheme creating a danger that judicial action would conflict with the regulatory scheme." The defendants make broad claims that the Court's evaluation of the plaintiffs' CPA claims will virtually destroy the regulatory process over telephone rates and services. Other than these generalizations, the plaintiffs provide no persuasive arguments on how the claims in this lawsuit will endanger the regulatory process.

This Court is not being asked to determine the reasonableness of the rates charged, a matter within the province of the WUTC. Instead, the Court is asked to enforce a CPA claim expressly provided by the legislature against any defendant that fails to comply with the requirements of the statute and any rules that may be issued under that statute. This is similar to the role of the court in *Chaney v. Fetterly*, 100 Wn. App. 140 (2000), where it was noted that "[t]here is little danger that superior court action would conflict with the County's regulatory scheme, because the superior court action would simply enforce the county's regulatory scheme." 100 Wn. App. at 150.

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The appropriateness of pursuing this damage claim in court is further shown by RCW 80.04.440, which provides:

> In case any public service company shall do, cause to be done or permit to be done any act, matter or thing prohibited, forbidden or declared to be unlawful, or shall omit to do any act, matter or thing required to be done, ***either by any law of this state, by this title or by any order or rule of the commission***, such public service company shall be liable to the persons or corporations affected thereby for all loss, damage or injury caused thereby or resulting therefrom, and in case of recovery if ***the court*** shall find that such act or omission was willful, it may, in its discretion, fix a reasonable counsel or attorney's fee, which shall be taxed and collected as part of the costs in the case. ***An action to recover for such loss, damage or injury may be brought in any court of competent jurisdiction by any person or corporation.***

RCW 80.04.440 (emphasis added).[8] Contrary to defendants' arguments that the "pervasive scheme of regulation" under Title 80 requires all claims to be handled by the WUTC, this provision shows that the Legislature expects damages claims arising from violations of statutes and rules to be decided by the courts. *See, Tanner Elec. Co-op. v. Puget Sound Power & Light Co.*, 128 Wn.2d 656, 683 (1996) (addressing concern that monetary damages cannot be granted by WUTC).

Defendants rely on an unpublished Court of Appeals decision, *United & Informed Citizens Advocates Network,* to make their argument that virtually any issue arising within RCW Title 80 would fall under the WUTC's "pervasive regulatory scheme."[9] Not once throughout the many pages devoted by the six defendants to argue the applicability of the primary jurisdiction argument do they mention that our case

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[8] Telecommunications companies, such as the defendants, are deemed "public service companies" for purposes of this statute. RCW 80.04.10.

[9] Unreported decisions do not have precedential value. RCW 2.06.040. Further, they may not be cited as authority in the Court of Appeals, RAP 10.4(h), and could not be used to support a trial court's decision on appeal.

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arises from a statute in Title 80 that expressly grants consumers a CPA claim—and, hence, a right to be in court.

Not only is bringing the CPA claim in court consistent with the statutory scheme, it is mandated by it. If the Legislature had intended to have the WUTC determine the merits and appropriate relief for nondisclosure, it would not have expressly provided a CPA claim. Instead, it would have either provided that the WUTC could provide such relief to consumers or not said anything at all and left it to the WUTC to determine an appropriate remedy.

By contrast, the applicable provisions of Title 80 involved in *Hopkins v. GTE Northwest, Inc.*, 89 Wn. App. 1 (1997), expressly provided that the WUTC would first determine whether a customer had been overcharged (RCW 80.04.230), then allowed the customer to go court if the public service company refused to refund money in accordance with the Commission's order (RCW 80.04.240).

The defendants then go outside the pleadings to argue that it is appropriate to defer this matter to the WUTC because one of the defendants received a retroactive waiver from complying with the January, 1999, rule. As discussed more fully above, the WUTC has no authority to exempt any defendant from the requirements of RCW 80.36.510-30. The defendants participated in the rule-making process that resulted in the January, 1999 rule. That was the time to argue that the additional requirements should be delayed. Once the new rule took effect, the additional disclosure requirements were in effect and the defendants were obligated to comply with those requirements under RCW 80.36.510-20. Thus, defendants' waiver argument does not support deferral to the WUTC. The plaintiffs claims should not be dismissed under the primary jurisdiction doctrine.[10]

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[10] For these same reasons, it would not be appropriate to stay this action and defer any issue to the WUTC for resolution.

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(206) 223-0303

F. Plaintiffs May Assert A Claim Under The CPA.

Defendant T-Netix, Inc. claims the plaintiffs have no cause of action because the CPA exempts "actions or transactions otherwise permitted, prohibited or regulated [by the] Washington utilities and transportation commission". RCW 19.86.170. However, more recent legislation made rate disclosure claims an "exception" to the "exemption" provided by the CPA.

In 1988, eleven years after the CPA itself was last amended, the Legislature passed the statute that expressly provides the CPA claim made by plaintiffs. *See* Laws of 1998, c. 91; RCW 80.36.530. Obviously, the Legislature did not intend to pass a law that it knew would have no effect. It is clear that the legislature did not intend to prohibit CPA claims for improper disclosure of rates since it passed a specific statute affording such claims.

Further, if two statutes are in conflict, the more specific statute supercedes the more general statute. *See General Tel. Co. v. Washington Util. & Transp. Comm'n.*, 104 Wn.2d 460, 464, 706 P.2d 625 (1985). Here, the Legislature crafted a specific statute allowing CPA claims arising out of non-disclosures of rates charged by providers of operator services. The T-Netix argument has no merit.

G. Federal Law Does Not Preempt Plaintiffs' Interstate Claims.

The Disclosure Statutes apply to telecommunications companies providing a connection to both "intrastate or interstate long distance services." RCW 80.36.520. T-Netix argues that federal law preempts the plaintiffs' claims as they relate to interstate calls. *See* T-Netix Mem., pp. 11-12. However, federal telecommunications law has always explicitly allowed for supplementary state regulation, as long as that regulation does not frustrate the purposes of federal law. The Federal Communications Act ("FCA") provides:

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(206) 223-0303

> Nothing in this chapter ... shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies.

47 U.S.C. §414. In 1996, Congress revamped federal telecommunications law and expressly preserved state consumer protection laws. *See* 47 U.S.C. §253 ("Nothing in this section shall affect the ability of a State to impose ... requirements necessary to ... safeguard the rights of consumers.").

T-Netix ignores these "reverse preemption" statutes and claims that the Telephone Operator Consumer Services Improvement Act of 1990 ("TOCSIA") somehow preempts Washington disclosure requirements. There is no conflict between this statute and Washington's disclosure requirements—TOSCIA does not prohibit disclosure of rates charged for operator services if the caller is in prison. Rather, as T-Netix acknowledges, the FCC held that TOCSIA did not apply to calls made from prisons because prisons were not considered "call aggregator" locations as that term is used in federal law. *See FCC Operator Service Order*, 6 FCC Rcd. at 2752. In the absence of any federal law that speaks directly to the issue of disclosure on inmate telephone calls during the relevant time period covered by the complaint, Washington's disclosure requirements remain intact and enforceable.

H. The Federal "Filed Rate Doctrine" Does Not Bar The Plaintiffs' Claims As They Apply To Interstate Telephone Calls.

Telecommunications companies that provide interstate service are required by federal law to file their interstate rates, or "tariffs", with the FCC. AT&T argues that plaintiffs' state law claims, as to interstate calls, are barred by the federal "filed rate doctrine." However, the filed rate doctrine is not implicated by plaintiffs' claims because their claims, unlike the claims of plaintiffs in cases cited by AT&T, do not require this Court to pass on the reasonableness of rates charged *or* engage in any rate-making itself.

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(206) 223-0303

The filed rate doctrine is a judge-made doctrine serving two basic policy goals: "(1) to preserve the agency's primary jurisdiction to determine the reasonableness of rates, and (2) to ensure that regulated entities charge only those rates approved by the agency." *Tenore v. AT&T Wireless Serv.*, 136 Wn.2d 322, 331-32, 962 P.2d 104 (1998). The doctrine is appropriately applied when the relief sought requires the court to determine the appropriateness of a filed rate or to make a rate calculation. *See H.J. Inc. v. Northwestern Bell Telephone Co.*, 954 F.2d 485, 489 (8th Cir. 1992) ("[T]he underlying conduct does not control whether the filed rate doctrine applies. Rather, [it] is the impact the court's decision will have on agency procedures and rate determinations.")

The plaintiffs in *Hardy v. Claircom* alleged that the defendant's failure to disclose its method of calculating its filed rates, rounding up to the nearest whole minute, was an unfair or deceptive practice under the CPA. *Hardy v. Claircom Communications Grp., Inc.*, 86 Wn. App. 488, 490, 937 P.2d 1128 (1997). The court properly dismissed the claim because the remedy sought—the difference between the amounts actually charged and the amounts that would have been due had the defendant not used a rounding method to calculate its rates—***necessarily*** required the Court to speculate on what an alternate set of rates would have, or should have, been. *See id.* at 494 ("Hardy's ... allegations are such that a court would necessarily have to consider the reasonableness of the rates charged").

Here, plaintiffs do not challenge the rates charged by defendants, or the method by which those rates are calculated. The Court need not imagine what a reasonable rate might be in order to determine liability or provide a remedy. The rates actually charged are completely irrelevant to the sole issue before the court—whether defendants made appropriate disclosures required by statute and regulation.

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(206) 223-0303

The case poses no threat of disharmony between judicial and regulatory ratemaking because no substantive change in rates (or their calculation) will follow as a matter of law from the plaintiffs' success. *Cf. H.J. Inc. v. Northwestern Bell Tel. Co.*, 954 F.2d 485, 488 (8th Cir. 1992) (filed-rate doctrine invoked when "the measure of damages is determined by comparing the approved rate and the rate that allegedly would have been approved absent the wrongful conduct"). Rather, the Disclosure Statutes require a simple refund of all amounts charged, plus exemplary damages of $200 per violation. RCW 80.36.530.

Simple refunds are not barred by the filed rate doctrine because they do not require courts to calculate an alternate rate. For example, in *Litton Systems, Inc. v. Southwestern Bell Tel. Co.*, 700 F.2d 785 (2nd Cir. 1983), the court held the filed tariff doctrine inapplicable where a simple refund was the measure of damages:

> [T]he filed rate doctrine [is inapplicable] because the issue here is not the reasonableness of the interface tariff rate as compared to some other rate that might have been charged, but instead whether the PCA requirement itself was reasonable, i.e, whether there should have been any charge at all. ... [T]he concerns expressed in *Keogh* involving the possible inconsistency [with a] regulatory scheme designed to fix reasonable rates under a statute are not implicated here.

Id. at 820-21.

In sum, plaintiffs do not seek any determination of an alternate rate for services provided by the defendants—the measure of damages under RCW 80.36.530 does not require any such determination. Rather, plaintiffs seek a statutorily defined remedy pursuant to a cause of action created specifically for failure to disclose. Plaintiffs' interstate claims are not barred by the filed rate doctrine.

SIRIANNI & YOUTZ
701 FIFTH AVENUE, SUITE 3410
SEATTLE, WASHINGTON 98104-7032
(206) 223-0303

V. CONCLUSION

The Court should deny all motions to dismiss.

DATED: September 22, 2000.

SIRIANNI & YOUTZ

Chris R. Youtz (WSBA #7786)
Jonathan P. Meier (WSBA #19991)
Marie E. Gryphon (WSBA #29242)
Attorneys for Plaintiffs

SIRIANNI & YOUTZ
701 FIFTH AVENUE, SUITE 3410
SEATTLE, WASHINGTON 98104-7032
(206) 223-0303

SERVICE LIST

Judd, et al. v. American Telephone and Telegraph Company, et al.
King County Superior Court Cause No. 00-2-17565-5 SEA

Kelly Twiss Noonan STOKES LAWRENCE, P.S. 800 Fifth Ave., Suite 4000 Seattle, WA 98104-3179 Attorneys for Defendant American Telephone and Telegraph Company	[ ] By United States Mail [x] By Legal Messenger [ ] By Federal Express [ ] By Facsimile Fax: (206) 464-1496 Phone: (206) 626-6000
Timothy J. O'Connell STOEL RIVES LLP 600 University Street, Suite 3600 Seattle, WA 98101-4109 Attorneys for Defendant GTE Northwest, Inc.	[ ] By United States Mail [x] By Legal Messenger [ ] By Federal Express [ ] By Facsimile Fax: (206) 386-7500 Phone: (206) 624-0900
Robert B. Mitchell Carol S. Arnold Athan E. Tramountanas PRESTON GATES & ELLIS LLP 701 Fifth Ave., Suite 5000 Seattle, WA 98104-7078 Attorneys for Defendants CenturyTel Telephone Utilities, Inc. and Northwest Telecommunications, Inc.	[ ] By United States Mail [x] By Legal Messenger [ ] By Federal Express [ ] By Facsimile Fax: (206) 623-7022 Phone: (206) 623-7580
Julia L. Parsons PERKINS COIE LLP 1201 Third Ave., Suite 4800 Seattle, WA 98101-3099 Attorneys for Defendant U.S. WEST Communications, Inc.	[ ] By United States Mail [x] By Legal Messenger [ ] By Federal Express [ ] By Facsimile Fax: (206) 583-8500 Phone: (206) 583-8888
Teresa Williams Gillespie U S WEST COMMUNICATIONS, INC. 1600 Seventh Ave., Room 3208 Seattle, WA 98191 Attorneys for Defendant U.S. WEST Communications, Inc.	[x] By United States Mail [ ] By Legal Messenger [ ] By Federal Express [ ] By Facsimile Fax: Phone: (206) 398-2503
Donald H. Mullins Diana P. Danzberger BADGLEY-MULLINS LAW GROUP 1201 Third Ave., Suite 5100 Seattle, WA 98101 Attorneys for Defendant T-Netix, Inc.	[ ] By United States Mail [x] By Legal Messenger [ ] By Federal Express [ ] By Facsimile Fax: (206) 621-9686 Phone: (206) 621-6566