TAB 38

NO. 48075-8-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

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

Plaintiffs/Appellants,

v.

GTE NORTHWEST INC.;
CENTURYTEL TELEPHONE UTILITIES, INC.;
NORTHWEST TELECOMMUNICATIONS, INC.,
d/b/a PTI COMMUNICATIONS, INC.; and
U.S. WEST COMMUNICATIONS, INC.,

Defendants/Respondents.

REPLY BRIEF OF APPELLANTS

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A. Introduction And Summary Of The Argument.

The important issues in this appeal can be resolved by answering two questions: (1) What was the level of disclosure contemplated by the Legislature when it enacted the Disclosure Statutes?; and (2) When the Legislature created a mandatory duty to disclose, who was required to comply with that duty? More specifically, the relevant questions are: (1) Could defendants comply with their disclosure obligations by filing tariffs?; and (2) If not, could the WUTC exempt defendants from any and all disclosure obligations, despite the Legislature's use of a defined term ("alternate operator services company") that plainly includes these defendants?

The critical fact relating to the first question is that the Legislature knew that ***all*** providers of alternate operator services—not just local exchange companies (LECs)—were required to and did file tariffs prior to enactment of the Disclosure Statutes. Thus, when the Legislature identified the problem as the failure of companies to disclose their rates, it had already concluded that disclosure by tariff was insufficient. "Appropriate disclosure" under the statute means something more than disclosure by tariff. If it did not, the Legislature was wasting its time in requiring disclosure that was already mandated by law.

This conclusion is buttressed by the common-sense proposition that meaningful disclosure under the statute means disclosure at a time when the consumer can actually make use of the information—and that means ready access to information when the consumer is receiving a collect telephone call. Plaintiffs allege that they received no rate

information when they received collect calls. That is sufficient to state a claim under the Consumer Protection Act where the statute requires more than disclosure by tariff.

With respect to the second question, the basic issue is whether the Washington statute means what it says. The Legislature said that the disclosure obligations apply to "any" company "operating as or contracting with" an "alternate operator services company." RCW 80.36.520. That last phrase is expressly defined in a way that plainly includes the LEC defendants.

The Legislature not only wrote the statute in plain language, it twice declined to amend the statute to specifically exclude LECs. Regardless of the analytical tool used by the court—the plain meaning of the statute, grammatical construction of the statute, legislative history, or historical context—the answer is the same: the Legislature intended its disclosure obligations to apply to all companies providing alternate operator services.

In sum, the trial court erred by failing to recognize that the Legislature required the WUTC to impose new and more practical disclosure requirements on AOS companies and that it required these disclosure obligations to apply to both LECs and non-LECs.

B. The Disclosure Statutes Set A Minimum Floor Of Disclosure That Is Actionable In This Case; Disclosure By Tariff Is Not Consistent With Legislative Intent.

Each defendant contends that it has complied with its disclosure obligations by filing tariffs that disclose rates to the public. For example, Qwest acknowledges that the Legislature was concerned about "companies

that were not disclosing their rates," Qwest Bf. at 26, but maintains that by filing tariffs, it satisfied the Legislature's intent that it disclose rates to consumers. Qwest also recognizes that the Disclosure Statutes do not permit the WUTC to exempt a provider of operator services from making any disclosure, but argues that the Commission can require different types of disclosure from different types of companies. *Id.* at 33. Implicit in these arguments is an acknowledgment that the Disclosure Statutes imposed ***some*** type of disclosure obligation on defendants, even if it was merely a preexisting obligation to file tariffs.

The fatal flaw in this argument is that ***all*** companies providing AOS services, including ***non***-LEC telecommunications companies, were required to and did file tariffs prior to the passage of the Disclosure Statutes. *See* Opening Bf. at 36-37 (citing RCW 80.36.100, which requires all telecommunications companies to file tariffs). Obviously, if every provider of AOS services was disclosing rates pursuant to tariffs at the time the Legislature identified a problem with disclosure, disclosure by tariff cannot have been what the Legislature had in mind when it required "appropriate disclosure."

Public documents confirm that all providers of AOS were required to file tariffs.[1] As one AOS company observed in arguing that the WUTC could not exempt LECs from its disclosure requirements on the basis that they were required to file tariffs, all providers of AOS services (LEC and non-LEC) were required to disclose rate information through tariffs:

> The fact that LECs and interexchange carriers ("IXCs") file tariffs and price lists respectively does not support their exemption from the proposed requirements. AOS providers also file tariffs/price lists with the Commission.

Reply Appx. at 002; *see id.* at 0010 (noting that non-LEC providers of long-distance operator services "have tariffs on file with the Commission, in the same manner as the LECs"); *id.* at 0013 (WUTC Order noting the existence of "initial tariffs" filed by AOS companies prior to 1990, when statute authorized WUTC to review AOS company rates under "public convenience and advantage" standard).

In theory, then, a consumer could determine what rate any AOS provider might charge by taking on the onerous task of tracking down a

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[1] Plaintiffs have provided the court with a number of publicly available materials from the WUTC in the Appendix to this reply brief (an index to the Appendix appears as the first page of the Appendix). These materials consist of published WUTC orders and comments submitted by interested parties in the rulemaking docket that resulted in the 1991 regulation. In addition, the Appendix contains legislative history materials and statutory source materials procured from the Washington State Archives and Records Center in Olympia. *See* RCW 40.14.100 (requiring state to maintain legislative history files). All of these materials are relevant to the question of legislative intent and are subject to judicial notice. *See, e.g., Seattle Times v. Benton County*, 99 Wn.2d 251, 255 and n.1, 661 P.2d 964 (1983) (letters and memoranda in legislative history files suggesting legislative intent); *State v. Hoffman*, 116 Wn.2d 51, 67 and n.7, 804 P.2d 577 (1991) (proclamation that was a matter of public record in Governor's office); *Knack v. Department of Retirement Sys.*, 54 Wn. App. 654, 664-65, 776 P.2d 687 (1989) (legislative history file materials); *see generally* 5 Karl Tegland, Washington Practice, Evidence §§ 45-50 (1989). The documents may serve the convenience of the court. *See* RAP 10.4(c).

tariff at the WUTC or by pressing the issue with various providers of AOS services. The Legislature was not concerned with theory, however; it was concerned with the practical dissemination of information to consumers that would allow them to make informed choices. If disclosure by tariff had been deemed a sufficient consumer protection by the Legislature, there would have been no need to pass any legislation because such disclosure was already mandated by law.

The structure of the Disclosure Statutes supports the conclusion that the Legislature intended a minimal floor of disclosure that would allow consumers to obtain rate information more quickly and more easily than by entering the arcane world of telecommunications tariffs. First, the Legislature identified a problem—companies were providing AOS services "without disclosing the services provided or the rate, charge or fee." RCW 80.36.510. The Final Bill Report pinpoints the problem: "the customer is often unaware of the charge until it appears on the monthly bill." Senate Bill Report, SB 6475, Opening Appx., 6-1. Under defendants' reading of legislative intent, however, every customer is presumed to know a rate disclosed in a tariff.

Rather than import legal presumptions that ordinary consumers know nothing about, it is far more likely that the Legislature intended to require AOS companies to provide a form of disclosure that would arm consumers with information they could use at the critical point in time that they need it: when they are making (or receiving) a call.

Because all providers of AOS services were "disclosing" their rates pursuant to tariffs when the Legislature described the problem, the

Legislature must have concluded that disclosure by tariff was not an acceptable solution to the problem. This makes sense. No one who has ever attempted to get their hands on a tariff, much less understand one, knows that it is not a workable means of communicating information to the general public. Accordingly, the "appropriate disclosure" required by RCW 80.36.520 is a type of disclosure that is more accessible, more immediate, and more practical than disclosure by tariff. In sum, the Legislature permitted the WUTC to set the precise level of disclosure, but it did not permit the WUTC to conclude that the statutory "minimum" required by RCW 80.36.520 was a form of disclosure that the Legislature had already found to be deficient.

Defendants contend that RCW 80.36.510 is a mere legislative finding that does not give rise to enforceable rights. But this does not prevent a court from looking to the legislative finding to determine what the Legislature required when it directed the WUTC to, "at a minimum," assure appropriate disclosure to consumers. Nor does it prevent the court from examining whether the WUTC exceeded the bounds of its discretion when it exempted LECs from its disclosure requirements:

> As a general rule policy statements in an ordinance or statute do not give rise to enforceable rights and duties. However, where legislation, despite being couched in words of policy, creates a mandatory duty but leaves to the discretion of the agency the specifics of implementation, the general rule is not always applicable. The question becomes one of the propriety of discretion exercised by the agency.

Roberts v. King County, 107 Wn. App. 806, 27 P.3d 1267, 1268 (2001).

The upshot of all this is that the Legislature contemplated and required a more practical, immediate, and effective form of disclosure than existed when it saw the need to enact a consumer-friendly statute. Disclosure by tariff is no disclosure at all under the statute. Yet that was the only disclosure provided by defendants. The argument that courts would be forced to speculate on the meaning of "appropriate" disclosure without direction from the WUTC, *see* Verizon Bf. at 28, does not arise in this case. That is because: (a) the only disclosure by defendants has been by tariff; (b) the only reasonable interpretation of the statute is that the Legislature deemed disclosure by tariff insufficient; and (c) the statute does not create an exemption for any sub-class of AOS company. Under these circumstances, one need not consult the regulation to determine that a CPA violation has occurred.

C. The LEC Exemption In The 1991 Regulations Is Void To The Extent It Conflicts With The Disclosure Statutes.

Ultimately, the WUTC required a form of disclosure in its 1991 regulation that was consistent with the statutory mandate: "immediate" disclosure, upon request, of a "quote of the rates or charges for the call." WAC 480-120-141(5)(iv)(A) (1991). The WUTC, however, failed to comply with the Disclosure Statutes in one critical respect. By exempting LECs, the largest group of AOS providers, it altered a statutorily defined term and impermissibly narrowed the scope of the law.

Before addressing the merits of the LEC exemption in the 1991 regulation, it should be pointed out that plaintiffs' challenge to the validity of the regulation is narrow. The Disclosure Statutes are concerned with

two forms of consumer protections—rate disclosure and identification of the company providing AOS services ("branding")—while the 1991 regulation instituted a host of other protections for consumers of AOS services. *See* RCW 80.36.520 (requiring disclosure of the "provision" of AOS services and the rate charged). Plaintiffs' challenge is therefore limited to subsection (5)(a) of the 1991 regulation, which requires "branding" (identification) of the AOS company and disclosure of rate information.[2] *See* Reply Appx. at 0038-39.

1. The Statutory Definition Of "Alternate Operator Services Company" Controls.

Plaintiffs have alleged, and it must be assumed to be true for purposes of this appeal, that each defendant is: (a) a telecommunications company, that (b) provided a "connection to intrastate or interstate long-distance services from places including, but not limited to, hotels, motels, hospitals, and customer-owned pay telephones." RCW 80.36.520. That definition plainly includes local exchange carriers—like the three defendants on appeal—who choose to provide "a connection to intrastate or interstate long-distance services" from prisons. There is no LEC exemption in the statute and no defendant has argued to the contrary.

Not only do the defendants fail to offer any resistance regarding the applicability of the statutory definition, they fail to offer any resistance to the established body of law that holds that a statutory definition of a

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[2] The defendants' reliance on disclosure by tariffs falls short for another reason—the statutory requirement that a provider of AOS services identify itself to the consumer cannot be accomplished through tariff filings. That type of disclosure can take place only at the time a specific call is made using a specific AOS company.

term "controls its interpretation." *Senate Republican Campaign Comm. v. Public Disclosure Comm'n*, 133 Wn.2d 229, 239, 943 P.2d 1358 (1997). Because the statutory definition prevails over a contrary administrative definition, the exemption for LECs carved out of the 1991 regulatory definition was never effective, at least with respect to the rate disclosure and branding requirements of the Disclosure Statutes.

Defendants repeatedly stress that the WUTC was given discretion to determine what constitutes "appropriate disclosure." For example, Qwest relies on the phrase "appropriate disclosure" to argue that the statute gives the WUTC discretion "to determine whether a different manner of disclosure is warranted for different types of companies." Qwest Bf. at 33.

This argument confuses the issue of who must provide disclosure with the issue of what level of disclosure is required. The former issue was answered directly by the Legislature when it took pains to define "alternate operator services company." Had the Legislature intended to permit discretion with respect to the type of company subject to disclosure requirements, it could have written a more flexible definition of AOS or said so directly.

As argued in plaintiffs' Opening Brief, support for this interpretation is found in the grammatical construction of the statute. The adjective "appropriate" modifies the noun "disclosure," and therefore provides the WUTC with some measure of discretion (but not unlimited discretion) in determining the ***method*** or ***level*** of disclosure. It does not, however, modify the statutory definition of AOS company. Rather, the

statute directs the WUTC to develop disclosure requirements for "***any*** telecommunications company, operating as or contracting with an alternate operator services company." RCW 80.36.520. Use of the word "any" indicates that the Legislature contemplated disclosure requirements that would apply uniformly to all providers of operator services, and that sub-classes of AOS companies could not be carved out of the statutory definition.

Additionally, the statute imposes disclosure obligations not only on companies "operating as" an alternate operator services company (as all defendants were), but also companies "contracting with" AOS companies. RCW 80.36.520. In this case, a non-LEC provider of AOS services, T-Netix, is both a defendant and a subcontractor to the same contract that other defendants signed.

Rather than acknowledge the facial conflict between the statutory definition and the regulatory definition, defendants argue that the WUTC did not really exempt them from disclosure requirements because it recognized that they continued to file tariffs. Not only does this argument conflict with the legislative finding of RCW 80.36.510 and the minimal floor of disclosure contemplated by RCW 80.36.520, it is not consistent with the rationale the WUTC eventually put forth to justify its exemption of LECs. It also fails to acknowledge that the Legislature twice declined to pass legislation that would have amended the statutory definition of AOS company.

2. The LECs' Attempts To Amend The Statutory Definition Of AOS Company Were Rejected.

a. SSB 6770.

Apparently unhappy with their inclusion in the definition of AOS company in the 1988 Disclosure Statutes, the LECs sought to amend the statutory definition in 1990. Senate Bill 6770 was introduced in 1990 by three senators. *See* Reply Appx. at 0042. The bill sought to amend RCW 80.36.520 by redefining the term "alternate operator services company" as follows:

> For the purposes of this chapter, "alternate operator services company" means a person, other than a local exchange company, 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.

Id. (emphasis in original to show proposed amendment). One week later, SSB 6770 was introduced. *Id.* at 0043. It contained an even greater exemption from the AOS definition, exempting LECs and their "affiliates, or a facility based carrier operating between service areas and its affiliates." *Id.* SSB 6770 passed the Senate Energy and Utilities Committee but died in the Rules Committee. Reply Appx. at 0045. The bill generated opposition, as reflected in testimony prepared by a lobbyist for a trade association of businesses ("TRACER") who were large users of AOS services:

> Turning now to SSB 6770, TRACER has four major concerns with the proposed legislation . . . .
>
> Second, the bill would exempt local exchange companies and facilities based interexchange carriers, and their respective affiliates, from all of the requirements relating to operator services providers. ***They represent***

> ***over 95% of the operator services market. There is simply no legitimate rationale for exempting these companies.*** Such a proposal is discriminatory and anticompetitive, and not in the public interest.

Reply Appx. at 0047-48 (emphasis added).

b. HB 2526

About a week before SB 6770 was introduced in the Senate, four Representatives introduced HB 2526, at the request of the WUTC. Reply Appx. at 0052. The bill was similar to SB 6770, but did not attempt to amend the statutory definition of AOS company. *Id.* at 0053-54. It passed the House on a unanimous vote. *Id.* at 0052. The Senate Energy and Utilities Committee then considered the bill. Undeterred by its failed attempt to amend the statutory definition of AOS company via SB 6770, US West (now Qwest) lobbied for an amendment that would have exempted LECs from the statutory definition in RCW 80.36.520. *See id.* at 0059 (draft bill considered by committee); 0061-63 (comments from AOS company detailing attempt to amend statute). The amendment was identical to that contained in SSB 6770. Like SSB 6770, it was rejected. *See id.*

Instead, the Senate unanimously passed a version of HB 2526 that relied on the existing statutory definition of AOS company. *Id.* at 0053. The Final Bill Report explicitly relies on the definition of AOS company in the 1988 Disclosure Statutes:

> An alternative operator services company is defined by statute as a company offering connections to intrastate or interstate telecommunications services from hotels, motels, hospitals, and customer-owned pay telephones. In 1988, the Legislature directed the Utilities and Transportation Commission to adopt rules requiring

> telecommunications companies operating as or contracting with an alternate operator services company to disclose to customers the provision of and rate for services provided by the alternate operator service.

Id. at 0065. HB 2526 was signed by the Governor and became effective June 7, 1990. *Id.* at 0066. It is now codified at RCW 80.36.522 and .524.

c. Significance Of This Legislative History.

It is unnecessary to delve into legislative history where, as here, statutory language is clear and unambiguous. *See In re Marriage of Caven*, 136 Wn.2d 800, 807-08, 966 P.2d 1247 (1998). To the extent the court considers this history, its significance lies in the fact that it demonstrates an awareness (on the part of both the Legislature and LECs) that LECs were included in the existing statutory definition and that formal amendment of the statute was the appropriate method of creating an exemption.

3. Regulatory History Of The 1991 Regulation.

Just a few months after the Legislature had rejected attempts to amend the statutory definition in 1990, the WUTC issued a proposed rule amending various portions of its 1989 Regulation. The first iteration of the draft rule, however, departed from the statutory definition of AOS and contained an exemption for LECs.

The proposed exemption generated a heavy volume of comments, mostly negative. The comments addressed both the authority of the WUTC to alter a statutorily-defined term and the public policy implications of exempting a large segment of the AOS industry from the

consumer protections of the proposed regulation. Representative of the former were comments by International Telecharge:

> The amendment is contrary to Washington law because it places into the Commission's rules an exception not approved by the Washington legislature. In fact, the exemption for local exchange companies was considered, and rejected by the Washington Legislature this past session. The Commission is a creature of statute, and cannot rewrite statutes.

Reply Appx. at 0062 (emphasis in original).

After reviewing these comments, the WUTC staff recommended renoticing the rule with multiple changes, one of which eliminated the exemption for LECs. *See id.* at 0068-76; 0081. Staff explained its rationale: "Staff is generally persuaded that the exclusion should not be allowed, ***in order to assure that the public informational requirements for AOSs and aggregators are standard throughout the state."*** *Id.* at 0079 (emphasis added). Soon thereafter, the WUTC circulated a draft in which the LEC exemption was deleted. *Id.* at 0081.

The LECs complained loudly. For example, Qwest contended that the exemption was "absolutely necessary" because LECs are "pervasively regulated" and file tariffs. *Id.* at 0085-86. It also contended that passage of the 1990 statutes demonstrated that the Legislature did not intend to include LECs within the statutory definition of AOS company, failing to acknowledge that it had failed to secure a legislative amendment to effect that very change. *Id.* at 0092-93.

After a second round of comments were received on the renoticed regulation, WUTC staff continued to recommend a version of the

regulation that tracked the statutory definition and did not exempt LECs. *Id.* at 0107; 0098. Staff noted that LECs provide alternate operator services and that non-LEC companies had argued that the statute mandated a level playing field for all providers of AOS. *Id.* In sticking with its recommendation that LECs be included in the definition, WUTC staff reasoned: "The chief benefit from including LECs in this definition would make performance more consistent among all providers—particularly regarding branding—and thus less confusing to consumers." *Id.* Although arguments regarding whether the WUTC could deviate from the statutory definition were raised, the issue was not addressed in written comments by staff.

One week later, on May 15, 1990, the WUTC reversed course and put the exemption back in its final regulation. *Id.* at 0123 and 0125. The order accompanying the issuance of the regulation attempted to justify the exemption. *Id.* at 0027-28. As shown below, that rationale does not eliminate the conflict with the statute and is not reasonable on its face.

4. The WUTC Exceeded Its Authority In Exempting LECs.

a. The Court Need Not Examine The WUTC's Rationale For Exempting LECs In Light Of The Direct Conflict Between The Statute And Regulation.

Each defendant relies heavily on the following attempt by the WUTC to justify its exemption of LECs:

> Local exchange companies, LECs, are removed from the definition of alternate operator services company, consistent with the draft initially noticed in this docket. ... Unlike LECs, AOS companies can be seen as entering and

> exiting markets at will. AOS companies were the subject of specific legislative enactment. AOS companies often charge higher rates that LECs, leading to consumer complaints. Consumers often expect that they are using their LEC when the use a pay phone; requirements that apply to non-LEC companies to inform the consumer that it is not the LEC are reasonable.

Reply Appx. at 0027-28. Notably absent from this justification are the post-hoc reasons now advanced by defendants to support their exemption: that they already disclosed rates by filing tariffs and that their consumers were not in need of protection because LECs were pervasively regulated.

Of the four proffered justifications in the WUTC order, only one addresses legislative intent ("AOS companies were the subject of specific legislative enactment."). The statute, however, affords no basis for distinguishing between "AOS companies" and LECs that provide alternate operator services. This aspect of the WUTC's rationale is simply wrong.

The other reasons offered by the WUTC concern policy issues that are not addressed in the statute and cannot provide a basis for overriding a statutory definition. Because the regulatory definition can be measured against a specific statutory provision, deference is inappropriate. Where the statutory definition is clear, that is the end of the matter. *See Chevron, Inc. v. Natural Resources Def. Council*, 467 U.S. 837, 842-43 (1984).

b. The WUTC's Policy Rationale Is Not Reasonable.

Even if the statutory definition were ambiguous, the WUTC's policy rationale for exempting LECs would not be a reasonable implementation of the statute. First, when LECs function as providers of alternate operator services, they may very well enter and exit markets at

will. This case provides a good example. Defendants were each subcontractors to a contract that was offered pursuant to a competitive bidding process. *See* CP 339. In voluntarily choosing to bid on a competitive contract, their conduct cannot be distinguished from any other non-LEC provider of AOS services that seeks to win a contract with a hotel, hospital, or prison. *See* Reply Appx. at 0152 (noting that LECs compete with other AOS companies and provide operator services for other LECs and payphones); 0161 (noting that US West and GTE sold AOS services to independent LECs and AT&T). Even where LECs are the "default" provider of operator services, that does not translate into a finding that consumers should be denied basic rate information. Certainly nothing in the statute supports such an exemption.

Second, the Commission's conclusion that LECs did not charge as much as some non-LECs is likewise unsupported by the statute and fails to justify a blanket exemption for LECs, by far the largest providers of operator services.

Third, the WUTC's rationale that it is reasonable to exempt LECs from branding requirements because consumers "often expect" that an LEC will provide operator services at pay phones fails to address the huge number of consumers who do not use public pay phones when using and paying for operator services (e.g., customers of hotels, hospitals, and families and friends of inmates). This rationale also undermines the statutory purpose of providing consumers with rate information. Moreover, if one of the statutory and regulatory goals is to prevent confusion among consumers as to who is providing operator services, then

the adoption of a branding requirement that applies to all AOS providers is the option that best effectuates statutory intent. The WUTC staff recognized as much when it concluded that the "chief benefit from including LECs in this definition would make performance more consistent among all providers—particularly regarding branding—and thus less confusing to consumers." *Id.* at 0098.

Finally, the WUTC's rationale fails to address a host of arguments made by non-LECs. These companies pointed out that federal law, upon which the disclosure requirements of the state regulation were based,[3] covered ***all*** providers of operator services (despite the best attempts of LECs to obtain an exception). *See* 47 U.S.C. § 226(a)(7) and (9). The WUTC's exemption for LECs is particularly ironic given its statement that "[t]he definition of operator services is changed to more closely reflect federal definitions, and to emphasize that the alternative operator services (AOS) rules apply only to operator services, as defined." Reply Appx. at 0027. Thus, the exemption of LECs by the WUTC created a situation in which a consumer was protected by disclosure requirements for all interstate calls under federal law, but the identical protection for intrastate calls depended on whether he or she happened to make a call from a telephone where operator services were provided by a non-LEC.

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[3] The federal Telephone Operator Consumer Services Improvement Act of 1990 (TOSCIA) was enacted to "protect consumers from unfair and deceptive practices relating to their use of operator services to place interstate telephone calls and to ensure that consumers have the opportunity to make informed choices in making such calls." It required every provider of operator services—including LECs—to, "at a minimum ... disclose immediately to the consumer – a quote of its rates or charges for the call ... ." 47 U.S.C. § 226(b)(1)(C)(i).

The non-LECs also pointed out that the combination of the dominance of LECs in the AOS marketplace and the exemption of LECs from the consumer protection requirements of the regulation would undermine the purpose of the statute and regulation:

> [The argument of the LECs in favor of exemption] does not address the real issue. The intent and purpose of the proposed rules is to provide proper information and protection for all consumers, not just the customers of certain companies. In fact, the customer of a non-LEC pay telephone has not greater right to posted information than the customer of a LEC pay telephone.

Id. at 0166-67.

The LEC exemption also created an economic playing field tilted decidedly in favor of the LECs:

> [T]he exemption of these companies from the Commission's rules would result in their gaining an unfair economic advantage and thus, unreasonable discrimination, as they would not have to incur the expense associated with compliance. To impose these costs on some OSPs, but not all is unreasonable, particularly as all OSP's are providing identical services to the same transient market.

Id. at 004.

Although this Court need not reach the issue of the reasonableness of the LEC exemption in light of the facial conflict with the statute, the exemption cannot be defended as a reasonable exercise of the agency's authority.

5. Defendants' Attempt To Distinguish LECs From Other Providers Of AOS Services Is Not Supported By The Statute.

Defendants rely on two phrases in the statute to argue that the Legislature intended to require disclosure only of non-LECs,

notwithstanding the plain language of the statutory definition. First, defendants argue that the word "alternate" in the statutory definition must refer to companies that were an alternative to the heavily regulated LECs. *See, e.g.*, Qwest Bf. at 22. This argument finds no support in the definition itself, which plainly includes all companies, like LECs, that provide a "connection to intrastate or interstate long-distance services from places including, but not limited to, hotels, motels, hospitals, and customer-owned pay telephones." RCW 80.36.520.

While that analysis can and should end the matter, defendants' attempt to redefine "alternate" is contradicted by the description of AOS companies in WUTC orders. As explained in a variety of these orders, "alternate" does not mean "alternate to an LEC provider of operator services," it means "alternate to the consumer's own presubscribed long-distance provider":

> An AOS company provides "alternate operator services," an alternate for the consumer's own presubscribed service. At a location such as a pay phone, a consumer has no direct connection to his own presubscribed toll carrier. An operator-assisted call from such a public phone is connected to an AOS company that is chosen by the person providing the telephone, unless the consumer redirects the call.

Reply Appx. at 0024-25. Defendants fit the above description. A family member of a prison inmate who receives a collect call likely has a different long-distance provider than Qwest or Verizon, but she is forced to use that LEC provider of AOS services if it is the company chosen by the Department of Corrections to serve a particular prison. In this

situation, Qwest or Verizon is the "alternate" to the consumer's presubscribed service.

As pointed out in comments received by the WUTC, it is often the case that a consumer must use an "alternate" to their presubscribed long-distance carrier, even if that "alternate" is heavily regulated as a "competitive telecommunications company":

> All OSPs, including MCI and other "competitive telecommunications companies" [such as the LECs at issue in this case], serving transient locations often provide service to end users who have presubscribed their home or office telephones to a different IXC [interexchange carrier such as AT&T]. For example, an end user presubscribed to MCI at home would, upon dialing "0" from a hotel presubscribed to AT&T have his or her call routed to AT&T for completion. Thus, there is no factual basis for distinguishing between the services provided by various OSPs.

Id. at 003.

Defendants also contend that the Legislature's reference to a "growing number of companies" in RCW 80.36.510 could not include "previously existing," "already-regulated" companies like Verizon and Qwest. Verizon Bf. at 22; Qwest Bf. at 21-22. Defendants are wrong. Prior to the break-up of AT&T, AT&T was the ***exclusive*** provider of long-distance operator services. S. Rep. No. 439, 101st Cong., 2nd Sess., 1990 U.S.C.C.A.N. 1577, 1578. Companies like Qwest and Verizon were ***created*** after the break-up and became part of the "growing number of companies" providing AOS to the public. As noted by one court, "[t]hree types of companies provide AOS: interexchange carriers [MCI, Sprint, AT&T], local exchange companies, and other companies that have been

formed solely to provide AOS." *In re Applications for Authority to Provide Alternative Operator Services in Minnesota*, 490 N.W.2d 920, 922 (Minn. App. 1992). Defendants would rewrite the statutory definition to apply only to the latter category.

The fact that LECs were "already-regulated" does not negate the fact that they were part of the "growing number of companies" that entered the competitive market to provide AOS services. Defendants' attempt to use "historical context" to infer statutory intent is supported by neither history nor the plain language of the statute.

6. Heavy Regulation Of LECs Cannot Justify Their Exemption From A Statutory Definition.

Departing from any reliance on the statute itself, defendants argue that the Legislature must not have intended to subject LECs to disclosure requirements because LECs were subject to "pervasive regulation." This heavy regulation of all aspects of LEC services, defendants contend, rendered the disclosure requirements unnecessary to protect the public. *See* Verizon Bf. at 17 (CPA remedy would be "wholly superfluous" because Verizon's actions "are already monitored" by WUTC).

Defendants neglect to mention that the myriad laws and regulations governing LECs failed to address the only subject that matters in this lawsuit: effective disclosure of AOS rate and service information to consumers as required by the Disclosure Statutes. If the Legislature had intended to exempt LECs because they were "heavily regulated" or because they filed tariffs, it could have excluded them in the statutory definition.

Notably, the Legislature's definition of AOS company includes another type of heavily regulated telecommunications company providing AOS services: interexchange carriers like MCI, Sprint and AT&T. It is undisputed these large carriers provide "alternate operator services" as defined in the statute. They are among the most heavily regulated companies in the telecommunications world and, like LECs, have always filed tariffs that are subject to intense regulatory scrutiny. Indeed, MCI initially argued that it should be exempted from the WUTC's AOS definition precisely because it was heavily regulated and filed tariffs. Reply Appx. at 0175-77. It proposed a revised definition of AOS company that would have exempted interexchange companies. *See id.* When it became apparent that the WUTC would not exempt interexchange companies like MCI, but might exempt LECs (even though both were making the same arguments regarding "pervasive regulation"), MCI took the WUTC to task for uneven application of its consumer protection rules. *Id.* at 0166-67.

Defendants' "heavy regulation" argument was also rejected at the federal level, where LECs argued that they "should not be required to file reports [required by the federal AOS disclosure law, TOSCIA] because the LECs' rates are regulated and the LECs already file cost reports." *Id.* at 0180. The FCC rejected this argument, reasoning that because the federal disclosure law "applies to all providers of interstate operator services, no exemptions from the filing requirements are warranted." *Id.* at 0181.

Verizon's attempt to draw inferences from the passage in 1990 of stricter regulatory requirements for AOS companies is also flawed. The

primary flaw is that the 1990 statute (HB 2526) incorporates the same statutory definition of AOS company that appears in RCW 80.36.520—despite attempts by LECs to amend that definition when the bill was being considered. *See supra*, pp. 11-13. The 1990 statute ***reconfirms*** that LECs are subject to disclosure obligations.

Moreover, Verizon's premise does not support its conclusion. It argues that only after passage of RCW 80.36.522 in 1990 was it "clear" that the WUTC could require AOS companies to register and to regulate rates of AOS companies under public convenience and advantage standard.[4] Verizon Bf. at 23. However, its conclusion—that the 1988 Legislature implicitly exempted LECs from the statutory definition of AOS company—does not necessarily follow from the fact that the Legislature chose to subject AOS companies to greater rate regulation in 1990. This is particularly true when the statutory definition is plain on its face and the 1990 Legislature refused to amend that same definition.

Fortunately, this court need not look for strained inferences of intent based on later statutes, nor need it look for hidden meaning in the phrase "growing number of companies" or "alternate." The Legislature answered the question of who must comply with disclosure obligations when it chose to define AOS company in a manner that plainly included LECs. The WUTC's deviation from that definition should be held invalid.

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[4] Verizon's statement regarding the WUTC's ability to stringently regulate AOS rates after passage of the 1990 statute is accurate and refutes CenturyTel's argument that the "lack of WUTC supervision and regulation of non-LECs" justified the WUTC's exemption of LECs from the 1991 Regulation. CenturyTel Bf. at 34.

D. Plaintiffs' Challenge To The WUTC's Exemption Of LECs May Properly Be Heard By This Court.

1. In The Course Of Determining Whether Plaintiffs Have Stated A Claim Under The CPA, This Court May Construe The Statute And, If Necessary, Conclude That The Regulation Is In Conflict With The Statute.

Defendants have no response to plaintiffs' argument that it is the court's prerogative and duty to consider the interplay between the Disclosure Statutes and the regulations in determining whether plaintiffs have stated a claim under the CPA. The issues raised are pure questions of law that require the court to engage in statutory interpretation.

Defendants instead operate under the mistaken assumption that any challenge to a regulation must first be instituted as an APA review proceeding where the agency is joined as a party. This is not even the case with respect to authorities defendants have cited. For example, *Manor v. Nestle Food Co.*, 131 Wn.2d 439, 932 P.2d 628 (1997), a case cited by CenturyTel at p. 27 of its response, is a personal injury case for negligence in which the dispositive issue centered on the validity of a regulation issued by the Department of Labor and Industries. The court's analysis of the regulation's validity was an incidental but necessary step in determining the merits of plaintiff's negligence claim. The case was not an APA review proceeding, nor did the administrative agency appear as a party.

The *Manor* case is like this case: plaintiff brought a civil action for damages that required the court to interpret a statute and determine the validity of a regulation. The court relied on the analytical framework of

the APA to determine whether the regulation was valid, posing some of the same questions that plaintiffs pose here: Did the rule exceed the statutory authority of the agency? Was the rule arbitrary and capricious (i.e., did the agency use the appropriate statutory framework and is the regulation reasonably consistent with the implementing statute)? *See id.* at 453-54. The fact that the court employed APA standards did not transform the proceeding into an APA review proceeding or necessitate the joinder of the agency.

Similarly, Qwest's reliance on *City of Bremerton v. Spears*, 134 Wn.2d 141, 949 P.2d 347 (1998) (Qwest Bf. at 30) is misplaced. The section of the opinion relied on by Qwest affirmed the superior court's decision to decline "to decide whether the regulation implementing the helmet statute was properly promulgated under the rulemaking procedures" of the APA because the State Patrol had not been made a party to the proceeding. *Id.* at 358. That holding, however, did not stop the court from considering whether the same motorcycle helmet regulation was constitutional. *Id.* at 356-58. In other words, the court differentiated between a challenge to the substantive validity of the regulation and a challenge to the procedures employed when the regulation was promulgated.

Our case does not challenge agency procedures. It does challenge the substantive merits of the WUTC's exemption of LECs, but only because that issue must be decided in reviewing whether plaintiffs have stated a claim for damages under the CPA. A challenge to an agency rule

may always be heard when necessary to decide the merits of an independent claim.[5]

2. Alternatively, The Trial Court Erred In Dismissing The Complaint With Prejudice On A Pleading Technicality.

Defendants' APA argument should also be rejected because the trial court erred in failing to recognize that this case fits the exception contained in RCW 34.05.410(1). Defendants do not dispute that if plaintiffs' complaint did not contain a claim for injunctive relief, RCW 34.05.410 would not bar plaintiffs' challenge to the 1991 regulation. Plaintiffs indicated their willingness to abandon their claim for injunctive relief in the trial court. CP 216. The trial court's refusal to reach the merits of plaintiffs' challenge to the 1991 regulation is contrary to the policy that claims should not be dismissed on pleading technicalities:

> A dismissal under Rule 12(b)(6) generally is not final or on the merits and the court normally will give plaintiff leave to file an amended complaint. The federal rule policy of deciding cases on the basis of substantive rights involved rather than on technicalities requires that plaintiff be given every opportunity to cure a formal defect in his pleading.

5A Charles A. Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1357, p. 360-64 (2d ed. 1990) [hereinafter Wright & Miller]. It is also contrary to Washington law, where a motion to dismiss "should be denied if the plaintiff can assert any hypothetical factual scenario that gives rise to

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[5] Defendants would apparently have plaintiffs bring a separate declaratory judgment action under the APA addressing only the validity of the regulation before suing under the CPA. Surely the Legislature did not intend such a cumbersome and lengthy process when it granted consumers a right to sue for non-disclosure under the CPA.

a valid claim, even if the facts are alleged informally for the first time on appeal." *Fondren v. Klickitat County*, 79 Wn. App. 850, 854 (1995). Independent of any suggestion or motion from plaintiffs, the trial court has a duty to determine whether the complaint can be saved through amendment. *See* Wright & Miller at 339 (dismissal is inappropriate where court can ascertain that some relief may be granted despite fact certain claims may not survive). The fact that plaintiffs did not file a separate motion to amend the complaint is not dispositive. *See Seattle Professional Photographers Ass'n v. Sears Roebuck Co.*, 9 Wn. App. 656, 661, 513 P.2d 840 (1973) (trial court erred in failing to allow amendment to delete claims where request made in trial brief; appellate court deemed complaint to have been amended when reviewing dismissal for failure to state a claim).

Affirmance of the trial court's dismissal would create enormous judicial inefficiency. There would be nothing to prevent another putative class member from bringing an identical lawsuit (minus the claim for injunctive relief), requiring a court to again assess the validity of the LEC exemption. That issue should be addressed now.

E. Defendants Cannot Avoid Damages By Asserting Reliance On A Regulation That Conflicted With The Statute.

Defendants argue, primarily by footnote and aside, that even if the 1991 regulation improperly exempted LECs, they cannot be held liable for damages because they reasonably relied on the regulation. To the extent this argument is even considered (it was not raised by defendants below or adjudicated by the trial court), it should be rejected.

The defendants' so-called "reasonable" reliance is, as a matter of law, unreasonable. The regulatory exemption for LECs directly conflicted with the statutory definition of AOS in RCW 80.36.520. Defendants were aware of this conflict before the regulation was even promulgated, as evidenced by their failed attempts to rewrite the statutory definition in the Legislature. This issue was also raised and briefed in comments to the 1991 rulemaking. A regulation cannot supplant a clear statutory definition, and defendants took a calculated risk in ignoring the statute. *See Central States, Southeast & Southwest Areas Pension Fund v. Century Motor Freight, Inc.*, 1996 WL 48529, * 2 (N.D. Ill. 1996).

Further, as between consumers who are entitled to rely upon a clear statutory definition, and defendants, who successfully lobbied the agency for an exemption the Legislature did not give them, who occupies the higher ground? The Disclosure Statutes create mandatory disclosure obligations that go beyond the publication of tariffs; a failure to disclose constitutes a CPA violation and statutory damages are expressly defined. To allow defendants to escape statutory liability would discourage consumers from attacking unlawful practices prohibited by state statute and remove important financial incentives to compliance. Innocent consumers should not be forced to forego remedies expressly given to them by the Legislature.

In sum, defendants should not be immunized from statutory damages because they were able to procure a regulation that directly conflicted with statutory law. But even if defendants could claim that their reliance on the regulation was reasonable, that argument raises an issue of

fact that must take into account their historical awareness of the conflict between the regulation and statute. Issues of fact must be resolved in plaintiffs' favor at this stage of the proceedings.

F. The WUTC Exceeded The Statutory Scope Of Its Authority In Granting Waivers.

The waiver issue can be boiled down to the same two questions that are dispositive of the issues addressed above: (1) Is disclosure by tariff consistent with the Disclosure Statutes? (2) Can the WUTC exempt certain companies from disclosure requirements where the statute applies to all companies providing alternate operator services?

Qwest and Verizon concede that the statute mandates that the WUTC require some form of disclosure. At the same time, they contend that the WUTC properly waived all requirements of the 1999 regulation, and that the WUTC did not require them to provide any rate information through live operators, as argued in Plaintiffs' Opening Brief at 32-35. In other words, they rely on the same argument advanced to justify compliance with the statute before 1999: disclosure by tariff is sufficient to comply with the statute.

For the reasons discussed above, this argument must be rejected. If disclosure by tariff is no disclosure at all under the statute, then plaintiffs have stated a claim and the trial court's judgment must be reversed.

Qwest quotes from a portion of the WUTC's waiver order that concludes that Qwest's rates "compare favorably" to rates charged by other carriers. Qwest Bf. at 35. To the extent the WUTC relied on such a finding to justify its waiver, it erred. There is no room for case-by-case

exceptions in the mandatory language of RCW 80.36.520. It is worth repeating that language: the agency "shall by rule require, at a minimum," that "any" company "operating as or contracting with" an AOS company "assure appropriate disclosure to consumers." *Id.* Deference to agency expertise is not an issue where the agency has failed to comply with a mandatory duty that on its face admits of no exceptions.

In the final analysis, the only defense Qwest and Verizon have with respect to the waiver issue is that disclosure by tariff was sufficient. To conclude that it was would make a mockery of the Legislature's efforts to provide consumers with a viable remedy for non-disclosure.

G. Issues Raised Only By CenturyTel.

1. The Trial Court Did Not Grant Summary Judgment.

CenturyTel stands alone in claiming that the trial court decided factual issues on summary judgment. *See* Verizon Bf. at 13 n.4; Qwest Bf. at 15. CenturyTel attempts to support this argument by listing "factual" materials that were submitted by defendants in connection with their motions to dismiss. *See* CenturyTel Bf. at 14-15. It fails, however, to recognize that these materials were subject to judicial notice and were not used to challenge the factual allegations in plaintiffs' complaint. In any event, none of these materials really matter as the only issue relevant to the standard of review is whether the trial court properly found, as a factual matter, that CenturyTel did not provide long-distance service.

On ***that*** issue, no party submitted affidavits or declarations to the court before it rendered its decision dismissing plaintiffs' claims. *See* CP

248-49 (trial court's order dismissing CenturyTel dated Nov. 9, 2000). Only ***after*** the Court had already dismissed CenturyTel (pursuant to its motion to dismiss, not summary judgment, *see* CP 248-49), did CenturyTel file the Grigar Declaration. The declaration was filed as part of CenturyTel's motion for entry of judgment—over one month after the trial court had granted CenturyTel's motion to dismiss. CP 302.

2. The Trial Court Erred In Including Factual Findings In Its Order Dismissing CenturyTel.

Procedurally, it was improper for the trial court to consider any evidentiary material that went to the merits of plaintiffs' claims after it had already dismissed those claims under Rule 12. A defendant does not get one bite at the apple by moving to dismiss and then another bite at the apple by submitting evidentiary material in connection with a motion for entry of judgment. By definition, a Rule 12 dismissal is based solely on plaintiffs' pleadings. There was no evidentiary hearing in connection with CenturyTel's motion for entry of judgment, and it was improper for the trial court to consider any evidence after it had already dismissed plaintiffs' case under Rule 12. Even the authority relied on by CenturyTel to support its argument that its motion to dismiss was converted into a summary judgment motion recognizes that a trial court must "ask all parties if they wish to present materials" in order to provide reasonable notice and an opportunity to respond with evidentiary materials. *Blenheim v. Dawson & Hall Ltd.*, 35 Wn. App. 435, 438, 667 P.2d 125 (1983). Here, CenturyTel moved to dismiss under Rule 12 without filing declarations, secured an order dismissing plaintiffs' complaint under Rule

12, and only then attempted to "convert" its prior motion into a contested factual proceeding. In effect, CenturyTel wants this court to treat its motion for entry of judgment—a motion that was supposed to reflect what had already taken place on its motion to dismiss—into a summary judgment proceeding where only it was allowed to introduce evidence.

The authority cited by CenturyTel for the proposition that plaintiffs were required to move to strike the Grigar declaration is not on point. *See Lamon v. McDonnell Douglas Corp.*, 91 Wn.2d 345, 352, 588 P.2d 1346 (1979); 10B Wright & Miller § 2738, at 372. These authorities stand only for the straightforward proposition that—in a *summary judgment* proceeding—parties must preserve their rights by moving to strike.

CenturyTel next argues that plaintiffs' complaint "never alleged that CenturyTel provided long-distance services." CenturyTel is wrong. The complaint clearly alleges that "defendants, all telecommunications companies and operator service providers, have failed to assure appropriate disclosure of rates to the plaintiffs and other similarly situated, and continue to fail to do so ***for intrastate long-distance telephone calls***." CP 2, ¶ 6 (emphasis added); *see* CP 3, ¶ 10; CP 5, ¶ 16.

CenturyTel's last argument is that the contract it signed to provide service to prisons demonstrates, beyond dispute, that it never provided long-distance operator services.[6] However, the first page of the contract states that the defendants will provide "inmate telephone stations and

[6] Plaintiffs did not object to use of the contract in the context of defendants' motions to dismiss as the contract was referenced in plaintiffs' complaint.

enclosures, recording and monitoring equipment and local and intraLATA telephone service." CP 339. IntraLATA service may be purely local service, but it may also be long-distance service when a call is placed between two different exchanges. *See Washington Independent Tel. Ass'n v. TRACER*, 75 Wn. App. 356, 358-59, 880 P.2d 50 (1994). Here, the contract distinguishes between "local" and "intraLATA" service and indicates that defendants will provide both. This suggests that all defendants were required to provide long-distance intraLATA service. At the very least, this language creates an issue of fact to be construed in plaintiffs' favor.

3. Plaintiffs' Challenge To The 1991 Regulation Is Not Moot.

If the only claim in this lawsuit were one for injunctive relief, plaintiffs would agree that their argument regarding the validity of the 1991 regulation is moot. Plaintiffs, however, have asserted a claim for damages under the CPA, and the question of whether defendants are liable for failing to disclose rates in the 1996-99 time period necessarily requires this court to determine whether the WUTC could alter a statutorily-defined term when it issued the 1991 regulation. The issue is very much alive because this is not a direct challenge to a rule that has been superseded, it is a collateral challenge to a rule that may be determinative of plaintiffs' rights under the Consumer Protection Act. At bottom, this is a question of statutory interpretation that requires the court to determine legislative intent. CenturyTel's argument has no merit.

H. Conclusion.

Appellants Sandy Judd, Tara Herivel, and Zuraya Wright respectfully request that the judgments dismissing all claims against defendants Verizon, Qwest, and CenturyTel be reversed and remanded.

Respectfully submitted: October 24, 2001.

SIRIANNI & YOUTZ

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Certificate of Service

I certify, under penalty of perjury pursuant to the laws of the State of Washington, that on October 24, 2001, a true copy of the within REPLY BRIEF OF APPELLANTS was served upon counsel of record as indicated below:

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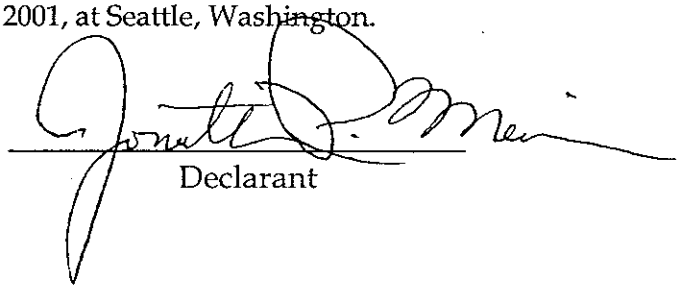

Declarant

APPENDIX

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