

EXHIBIT 1

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 Hoffme

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,

NO. 00-2-17565-5 SEA

Plaintiffs,

**PLAINTIFFS' MEMORANDUM IN
OPPOSITION TO DEFENDANTS'
MOTIONS TO DISMISS**

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.

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I. INTRODUCTION

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

5

II. BACKGROUND AND CLAIMS

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

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

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

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

26 RCW 80.36.510.

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

3 The utilities and transportation commission shall by rule
4 require, at a minimum, that any telecommunications
5 company, operating as or contracting with an alternate
6 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.

7 RCW 80.36.520.

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

10 In addition to the penalties provided in this title, a violation of
11 RCW 80.36.510, RCW 80.36.520, or RCW 80.36.524 constitutes
12 an unfair or deceptive act in trade or commerce in violation of
13 chapter 19.86 RCW, the consumer protection act. Acts in
14 violation of RCW 80.36.510, RCW 80.36.520, or RCW 80.36.524
15 are not reasonable in relation to the development and
16 preservation of business, and constitute matters vitally
17 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.

18 RCW 80.36.530.

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

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

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

4 III. OVERVIEW

5 A. Standard for Motions To Dismiss.

6 A dismissal under CR 12(b)(6)

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

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

16 B. Summary of Argument.

17 The defendants variously contend that the Disclosure Statutes actually
18 impose no duties on them, but only on the WUTC. It is further argued that even if such
19 obligations existed, a defendant was not obligated to provide the disclosures required
20 because it was not an "operator service provider" (claiming that one or more of the
21 other defendants were the providers) or it has a special exemption or waiver that
22 precludes it from having to comply with the Disclosure Statutes. Some defendants then
23 contend that the claims afforded by the Disclosure Statutes may not be pursued at all on
24 the grounds of preemption, the filed rate doctrine, or the regulatory exemption of the
25 CPA. All defendants contend that any claim arising under the Disclosure Statutes must
26 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

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

7 The motions to dismiss should be denied.

8 IV. THE DEFENDANTS' MOTIONS SHOULD BE DENIED

9 A. The Legislature Required Disclosure And Created a CPA Cause Of 10 Action For Failure To Disclose.

11 1. Read Together, RCW 80.36.510, .520, And .530 Demonstrate 12 The Legislature's Intent To Require Disclosure And 13 Provide A CPA Cause Of Action For Consumers.

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

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

24 ¹ Qwest avoids this argument and states that "[t]he issue raised by plaintiffs in their Complaint is
25 whether the defendants provided rate disclosures required of them under the regulations that were
26 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.

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

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

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

22 RCW 80.36.530 states that a "violation" of RCW 80.36.510 and .520
23 "constitutes an unfair or deceptive act in trade or commerce in violation of chapter
24 19.86 RCW, the consumer protection act . . ." The substantive provision of section .510
25 that may be violated is the statement that the provision of long-distance services
26 "without disclosure to consumers" is a deceptive trade practice. One might quibble

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

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

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

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

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

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

10 Defendants' construction leads to one of two equally repugnant results:
11 either RCW 80.36.530 is a nullity because it refers to "violations" of statutes that impose
12 no duties on telecommunications companies (and provides statutory damages for
13 consumers of those companies), or it authorizes a CPA cause of action directly against
14 the WUTC for failure to issue a regulation. The first result renders RCW 80.36.530
15 meaningless; the second renders it absurd. Statutes should be construed so that all the
16 language used is given effect, with no portion rendered meaningless or superfluous.
17 *Davis v. State*, 137 Wn.2d 957, 963, 977 P.2d 554 (1999). Defendants' contention that
18 RCW 80.36.520 imposes no duties on them renders the remedial provisions of RCW
19 80.36.530 meaningless. Statutes should also be construed to effect their purpose, and
20 unlikely or absurd consequences should be avoided. See *State v. Stannard*, 109 Wn.2d
21 29, 36, 742 P.2d 1244 (1987). See also *Alderwood Water Dist. v. Pope & Talbot, Inc. et al.*, 62
22 Wn.2d 319, 321, 382 P.2d 639 (1963) (statutes should be construed "as a whole in order
23 to ascertain legislative purpose, and thus avoid unlikely, strained or absurd
24 consequences which could result from a literal reading.") Defendants' argument that
25 RCW 80.36.520 imposes a duty only upon the WUTC must fail because it is unthinkable
26

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

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

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

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

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

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

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

25 The Final Bill Report states unequivocally:

26 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*

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

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

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

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

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

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

21 Black's Law Dictionary (5th ed. 1979) (emphasis added). RCW 80.36.520 does not confer
22 a new power on the WUTC. The Legislature conferred the power to regulate rates,
23 services and practices of telecommunications companies—including the power to issue
24 disclosure regulations governing defendants—long before RCW 80.36.520 was enacted.
25 See RCW 80.01.040 (conferring on WUTC the power to regulate rates, services, and
26 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

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

3 RCW 80.36.520 and .530 are remedial statutes. "Remedial statutes, in
4 general, afford a remedy . . . for the enforcement of rights and the redress of injuries."
5 *Haddenham v. State*, 87 Wn.2d 145, 148, 550 P.2d 9 (1976) (citing 3 Sutherland, *Statutory*
6 *Construction* § 60.02 (4th rev. ed. 1974)). RCW 80.36.530, in conjunction with the CPA,
7 affords a remedy to redress the problem of non-disclosure identified in RCW 80.36.510.
8 Remedial statutes are entitled to a liberal construction to effect their purpose.
9 *Nucleonics Alliance, Local Union No. 1-369 v. WPPSS*, 101 Wn.2d 24, 29, 677 P.2d 108
10 (1984). Defendant's construction would undermine the express statutory purpose of
11 providing consumers with a means of redress for defendants' failure to disclose rates.

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

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

18 Defendant AT&T claims that it does not provide operator services. See
19 AT&T Mem., p. 3. This argument must be rejected because plaintiffs have—
20 notwithstanding AT&T's claim to the contrary—properly alleged that AT&T provides
21 operator services. See First Amended Complaint, ¶16 ("The defendants, all
22 telecommunications companies and operator service providers..."). That allegation
23 must be accepted as true for purposes of this motion. See CR 12(b)(6).

24 Second, the issue is factual in nature. AT&T's conclusory argument that
25 operator services are provided exclusively by its subcontractors is disputed by two of
26 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

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

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

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

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

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

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

23 AT&T, T-Netix, and Centurytel all argue that the regulation in effect from
24 1996 to 1999, WAC 480-120-141, imposed disclosure requirements only on alternate

25 ² AT&T appears to tacitly acknowledge that it may be found liable on the basis of its contractual
26 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.

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

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

14 The regulation cannot narrow the scope of the statute. As a matter of
15 basic administrative law, a regulation cannot narrow the class of entities to which a
16 statute applies without an exception or express authorization in the statute. See
17 *Nucleonics Alliance, Local Union No. 1-369 v. WPPSS*, 101 Wn.2d 24, 29, 677 P.2d 108
18 (1984) (whether statute applies to particular class of persons is question of law reserved
19 for judiciary; court's interpretation will trump contrary agency interpretation). The
20 only way to harmonize the statute and regulation is to read them together and conclude
21 that an operator services provider that violates the regulation also subjects parties that
22 have contracted with that provider to liability under the statute. To the extent the
23 Court perceives any conflict in the scope of the statute and the scope of
24 WAC 480-120-141, the statutory language must control.

1 **C. The Disclosure Requirements in WAC 480-120-141 Were Applicable**
2 **To All Of The Defendants From 1991-1999—including Those Who**
3 **Happen To Be Local Exchange Companies.**

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

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

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

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

27 Although Qwest and Verizon may operate various local exchanges
28 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).

1 *providers with respect to the collect calls placed by inmates. See AT&T Mem., Exh. A,*
2 *p. 3. They are subcontractors to a competitive contract for business that the Department*
3 *of Corrections could award to other providers instead. In their 1992 contract with*
4 *AT&T (and subsequent amendments), they agreed to provide, not just basic LEC access*
5 *to a local exchange customer base, but software, special monitoring equipment, and*
6 *"local and intraLATA [interexchange] telephone service and operator service". See*
7 *AT&T Mem., Exh. A, p. 3 (emphasis added). Based on the contract, Qwest and Verizon*
8 *are at least providing operator services for interexchange intraLATA telephone calls,*
9 *and may also provide the operator services for AT&T's interLATA business. The*
10 *provision of interexchange operator services to a call aggregator location pursuant to*
11 *competitive contract is exactly what is meant by an "alternate operator services"*
12 *activity, and has been regulated as such by the WUTC pursuant to statute since at least*
13 *1991. See RCW 80.36.530 (defining "alternate operator services company" as a "person*
14 *providing a connection to intrastate or interstate long-distance services from places*
15 *including, but not limited to, hotels, motels, hospitals, and customer owned pay*
16 *telephones").⁴*

17 Further, Qwest's claim that the disclosure requirements do not apply to it
18 is dispelled by its prior requests for waivers of some of the provisions of WAC 480-120-
19 141 in 1991. See Exhibit C (Qwest's Petition for a waiver of WAC 480-120-141(1)(a)
20 (posting requirement), WAC 480-120-141(1)(b)(ii) and (iii) (competing service
21 providers), and WAC 480-120-141(4) (emergency calls) as applied to its prison operator
22 services). The WUTC confirmed that WAC 480-120-141 applied to the LEC's
23 competitive contract-based provision of prison interexchange operator services when it
24 granted Qwest's waiver request. See Order Granting Waiver of Rules, Docket
25

26 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).

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

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

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

8 Verizon claims that the waiver it obtained from the WUTC for compliance
9 with the verbal disclosure requirements of the January, 1999, Rule effectively
10 "exempted and relieved" it from *any* disclosure obligations dating back to January 29,
11 1999. *See Verizon Mem.*, pp. 5, 6-7. Verizon's argument goes like this: (1) there is no
12 statutory obligation to disclose, only a statutory directive to issue a regulation; (2) the
13 only regulation requiring disclosure after January 29, 1999 is WAC 480-120-141(2)(b)
14 (the January, 1999, Rule); (3) Verizon obtained a waiver of those disclosure
15 requirements until September 1, 2000; therefore (4) there was no duty whatsoever (by
16 either statute or regulation) on Verizon to disclose rates in most of 1999 and 2000. This
17 argument assumes that the WUTC intended to and in fact did exempt Verizon from all
18 rate disclosure obligations during this time period. It is highly unlikely that this is what
19 the WUTC intended. In any event, the WUTC could not exempt Verizon from required
20 disclosure obligations without abdicating its duties under the statute.

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

24 ⁵ The Court can take judicial notice of these administrative materials. *See* ER 201(b); *State v. Hoffman*,
25 116 Wn.2d 51, 67 & n.7, 804 P.2d 577 (1991) (judicial notice taken of proclamation that was a matter of
26 public record in Governor's office); *see generally* 5 Karl Teglund, *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.

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

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

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

16 When an agency enacts a rule pursuant to an express statutory directive, it
17 must comply strictly with the statutory terms. 1 Norman J. Singer, *Sutherland Statutory*
18 *Construction* § 4.18 (5th ed. 1994) ("If the directions of a statute are mandatory, then strict
19 compliance with the statutory terms is essential to the validity of administrative
20 action."). An agency cannot nullify a statute under the guise of interpretation. *Id.* §
21 31.06 (statutes that delegate rule-making power to an agency are "to be construed with
22 the presumption that the legislature never intends that the functions committed to the
23 agency should be exercised in futility"); *State v. Dodd*, 56 Wn. App. 257, 260-61, 783 P.2d
24 106 (1989).

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

1 appropriate disclosure. The fact that the WUTC might be able to grant waivers of
2 regulations it has enacted pursuant to its *general* rule-making powers under broad
3 enabling statutes does not give it license to grant waivers of disclosure obligations that
4 are expressly required by a specific, mandatory statutory directive. To hold otherwise
5 would be to permit the WUTC power to define the scope of its own authority, a power
6 it clearly does not have. See *In re Elec. Lightwave*, 123 Wn.2d 530, 540, 869 P.2d 1045
7 (1994). If the WUTC "relieved" Verizon of its statutory obligation, it would be
8 undermining legislative intent and abdicating its responsibilities to define and impose a
9 minimum standard of disclosure on each and every provider of alternate operator
10 services.

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

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

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

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

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

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

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

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

19 It is axiomatic that an agency may not amend unambiguous statutory
20 language. *Caritas Serv., Inc. v. Department of Social & Health Serv.*, 123 Wn.2d 391, 415,
21 869 P.2d 28 (1994). It is equally fundamental that the statutory definition of a term
22 "controls its interpretation," *Senate Republican Campaign Comm. v. Public Disclosure*
23 *Comm'n*, 133 Wn.2d 229, 239, 943 P.2d 1358 (1997), and that an agency must adhere to
24

25
26 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.).

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

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

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

20 Thus, the Disclosure Statutes apply to interstate calls.

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

23 As discussed above, Qwest and Verizon claim that they had no duty to
24 disclose from 1996 to early 1999 because they are "local exchange companies" (LECs).
25 The plaintiffs demonstrated in section C above that their arguments had no merit. Their
26

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

3 The starting point is again the *statutory* definition of an alternate operator
4 services company. That definition does not exempt LECs. The statute directs the
5 WUTC to issue disclosure rules that apply to all alternate operator services
6 companies -- and if an alternate operator services company happens to also be an LEC, it
7 makes no difference under the statutory definition. Under defendants' construction of
8 the regulation, the regulatory definition of alternate operator services company directly
9 conflicts with the statutory definition. *Compare* WAC 480-120-021 (1994) *with* RCW
10 80.36.520.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

10 *Moore*, 34 Wn. App. at 452.⁷

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

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

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

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

26 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.

PLAINTIFFS' MEMORANDUM IN OPPOSITION
TO DEFENDANTS' MOTIONS TO DISMISS - 22

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

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

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

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

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

3 In case any public service company shall do, cause to be
4 done or permit to be done any act, matter or thing prohibited,
5 forbidden or declared to be unlawful, or shall omit to do any
6 act, matter or thing required to be done, *either by any law of
7 this state, by this title or by any order or rule of the
8 commission*, such public service company shall be liable to the
9 persons or corporations affected thereby for all loss, damage
10 or injury caused thereby or resulting therefrom, and in case of
11 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.*

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

18 Defendants rely on an unpublished Court of Appeals decision, *United &*
19 *Informed Citizens Advocates Network*, to make their argument that virtually any issue
20 arising within RCW Title 80 would fall under the WUTC's "pervasive regulatory
21 scheme."⁹ Not once throughout the many pages devoted by the six defendants to argue
22 the applicability of the primary jurisdiction argument do they mention that our case
23

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

26 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.

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

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

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

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

25
26 ¹⁰ For these same reasons, it would not be appropriate to stay this action and defer any issue to the WUTC for resolution.

1 **F. Plaintiffs May Assert A Claim Under The CPA.**

2 Defendant T-Netix, Inc. claims the plaintiffs have no cause of action
3 because the CPA exempts "actions or transactions otherwise permitted, prohibited or
4 regulated [by the] Washington utilities and transportation commission". RCW
5 19.86.170. However, more recent legislation made rate disclosure claims an "exception"
6 to the "exemption" provided by the CPA.

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

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

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

19 The Disclosure Statutes apply to telecommunications companies
20 providing a connection to both "intrastate or interstate long distance services." RCW
21 80.36.520. T-Netix argues that federal law preempts the plaintiffs' claims as they relate
22 to interstate calls. See T-Netix Mem., pp. 11-12. However, federal telecommunications
23 law has always explicitly allowed for supplementary state regulation, as long as that
24 regulation does not frustrate the purposes of federal law. The Federal Communications
25 Act ("FCA") provides:

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

4 47 U.S.C. §414. In 1996, Congress revamped federal telecommunications law and
5 expressly preserved state consumer protection laws. See 47 U.S.C. §253 ("Nothing in
6 this section shall affect the ability of a State to impose ... requirements necessary to ...
7 safeguard the rights of consumers.").

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

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

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

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

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

21 Here, plaintiffs do not challenge the rates charged by defendants, or the
22 method by which those rates are calculated. The Court need not imagine what a
23 reasonable rate might be in order to determine liability or provide a remedy. The rates
24 actually charged are completely irrelevant to the sole issue before the court—whether
25 defendants made appropriate disclosures required by statute and regulation.
26

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

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

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

22 *Id.* at 820-21.

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

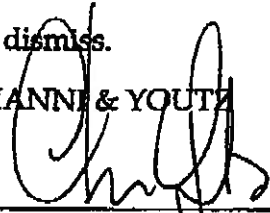
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V. CONCLUSION

The Court should deny all motions to dismiss.

DATED: September 22, 2000.

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SERVICE LIST

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

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FINAL BILL REPORT**SB 6745****BY Senators Williams and Benitz****Requiring disclosure of services provided by alternate operator services companies.****Senate Committee on Energy & Utilities****House Committee on Energy & Utilities****AS PASSED LEGISLATURE****BACKGROUND:**

As a result of the Bell System divestiture, a number of companies are providing "alternate operator services" in order to connect callers to long distance service from customer-owned pay phones or phones in hotel rooms and hospitals. 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.

SUMMARY:

The Utilities and Transportation Commission 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 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.

VOTES ON FINAL PASSAGE:

Senate	48	0	
House	93	0	(House amended)
Senate	43	0	(Senate concurred)

EFFECTIVE: 90 days after adjournment of 1988 Regular Session

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HOUSE BILL REPORT

SB 6745

BY Senators Williams and Benitz

Requiring disclosure of services provided by alternate operator services companies.

House Committee on Energy & Utilities

Majority Report: Do pass. (13)

Signed by Representatives Nelson, Chair; Todd, Vice Chair; Armstrong, Barnes, Brooks, Gallagher, Hankins, Jacobsen, Jesernig, May, Meyers, Unsoeld and S. Wilson.

House Staff: Fred Adair (786-7113)AS REPORTED BY COMMITTEE ON ENERGY & UTILITIES FEBRUARY 19, 1988

BACKGROUND:

As a result of the Bell System divestiture, a number of companies are providing "alternate operator services" in order to connect callers to long distance service from customer-owned pay phones or phones in hotel rooms and hospitals. 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.

SUMMARY:

The Utilities and Transportation Commission is to require that the provision and cost of alternate operator services are disclosed appropriately to consumers. Failure to disclose constitutes a 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.

Fiscal Note: Not Requested.

House Committee - Testified For Original Measure in Committee: Dick Barrett, Lodging Association of Washington (not pro or con; explained how alternate operator services work and came into being); Steve McLellan, Utilities and Transportation Commission (not pro or con; asked by Chairman to answer questions); Senator Al Williams, sponsor.

House Committee - Testified Against Original Measure in Committee:
None Presented.

Exh B

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House Committee - Testimony For: Lodging places became burdened with excessive guest calling, requiring great expense for elaborate telephone service capability. Costs were set by lodging places both to limit excessive calling and to pay for extra telephone capability. Some arrangements and charges 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 Committee - Testimony Against: None Presented.

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BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Petition) DOCKET NO.
of U S WEST Communications,)
Inc. for Waiver of)
Administrative Rules)

COMES NOW the petitioner, U S WEST Communications, Inc. (hereinafter "USWC"), and for petition to the Washington Utilities and Transportation Commission (hereinafter "WUTC") for waiver of administrative rules states as follows:

- 1. Petitioner, USWC, is located at 1600 Bell Plaza, Seattle, Washington 98191.
- 2. Pursuant to WAC 480-120-011, USWC requests a waiver of the following rules in Washington Administrative Code (hereinafter "WAC") regarding the provision of operator and payphone services:

WAC 480-120-137 (2): The caller will be able to access the operator and 911 where available without the use of a coin.

WAC 480-120-138 (3): The caller must be able to access the operator and 911 where available without the use of a coin.

WAC 480-120-138 (5): Emergency numbers (e.g., operator assistance and 911) must be clearly posted on each pay telephone.

WAC 480-120-138 (6): Information consisting of the name, address and telephone number of the owner, or the name of the owner and a toll-free telephone number where a caller can obtain assistance in the event the pay

PETITION OF USWC FOR WAIVER OF ADMINISTRATIVE RULES - 1 - MDR00298

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Exh C

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telephone malfunctions in any way, and procedures for obtaining a refund from the subscriber, must be displayed on the front of the pay telephone. . .

WAC 480-120-138(7): The telephone number of the pay telephone must be displayed on each instrument.

WAC 480-120-138 (10): All pay telephones must be capable of providing access to all interexchange carriers where such access is available. . .

WAC 480-120-138 (11): Except for service provided to hospitals, libraries, or similar public facilities in which a telephone ring might cause undue disturbance, or upon written request of a law enforcement agency, coin-operated pay telephones must provide two-way service, and there shall be no charge imposed by the subscriber for incoming calls. This subsection will not apply to pay telephones arranged for one-way service and in service on May 1, 1990. Should an existing one-way service be disconnected, change telephone number, or change financial responsibility, the requirements of this subsection shall apply. All pay telephones confined to one-way service shall be clearly marked on the front of the instrument.

WAC 480-120-141 (1) (a): An alternate operator services company shall require, as part of the contract with its customer, that the customer:

Post on the telephone instrument in plain view of anyone using the telephone, in eight point Stymie Bold type, the following notice:

SERVICES ON THIS INSTRUMENT MAY BE PROVIDED AT RATES THAT ARE HIGHER THAN NORMAL. YOU HAVE THE RIGHT TO CONTACT THE OPERATOR FOR INFORMATION REGARDING CHARGES BEFORE PLACING YOUR CALL. INSTRUCTIONS FOR DIALING THROUGH

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THE LOCAL TELEPHONE COMPANY ARE
ALSO AVAILABLE FROM THE OPERATOR.

WAC 480-120-141 (1) (b) (ii) and (iii):
Post and maintain in legible condition on or
near the telephone:

Dialing directions so that a consumer may
reach the AOS operator so as to receive
specific rate information; and

Dialing directions to allow the consumer to
dial through the local telephone company and
to make it clear that the consumer has
access to the other providers.

WAC 480-120-141 (4): For purposes of
emergency calls, every alternate operator
services company shall have the following
capabilities . . .

3. As part of the provision of service as a local
exchange telecommunications company, USWC provides services to
the limited and unique customer base of inmates in correctional
and mental facilities (hereinafter "Institutions"). Due to the
limited customer base and the nature of the facilities it
serves, many of the operator and payphone service rules set
forth in the WUTC rules are inappropriate for USWC's inmate
service application.

USWC currently provides live operator services and
could possibly at some future date provide automated operator
services as well to Institutions. In either case, USWC limits
these services to collect calling only. This telecommunications
service provides the Institutions with the type of calling
control they require in the most economical way possible.
Institutions which select a collect only system specifically
desire to discourage fraud and, therefore, only called parties
who desire to accept the charges are billed. Rates charged by
USWC to the called party are billed at the tariff rate.

Call screening and blocking is essential for an
Institution to maximize the degree of control over the

1 telecommunications service and help to minimize fraud.
2 Screening and blocking services can be used to eliminate
3 harassing, threatening or prank telephone calls to judges,
4 sheriffs, witnesses, jury members, emergency agencies (including
5 "911") or other sensitive parties. They also allow the
6 Institutions to enforce telephone curfews without manual
7 intervention.

8 Notices or stickers are not provided on the telephone sets
9 of Institutions. USWC's experience at Institutions is that due
10 to vandalism this is an unreliable way of posting information.
11 Therefore, oral branding is used to identify the carrier to the
12 caller and the called party accepting the charges. In addition,
13 since the rates charged by USWC are those currently under tariff
14 with the WUTC, notice that USWC's service may be provided "at
15 rates that are higher than normal" is unnecessary. Such posting
16 is also unnecessary since the inmates are not able to route toll
17 calls to carriers other than the presubscribed carrier.

18 USWC provides Institutions' management with all the
19 information necessary to report service troubles, make inquiries
20 regarding service or rate requests. This information is not
21 generally available to the inmate population. A specifically
22 defined line of contact increases an institutions' control over
23 the telecommunications system and reduces the number of
24 fraudulent complaints or harassing calls to customer service
25 personnel.

26 4. Following is a listing of the particular
27 administrative code sections for which a waiver is requested and
28 the reason:

29 WAC 480-120-137 (2): USWC service does
30 provide access to live operators but blocks
31 access to 911 from institutions for the
32 reasons stated above.

33 WAC 480-120-138 (3): USWC service will
34 provide access to live operators but blocks

PETITION OF USWC FOR WAIVER
OF ADMINISTRATIVE RULES - 4 -
MDR00298

U S WEST COMMUNICATIONS

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Institutions, therefore, these emergency call requirements are inappropriate.

5. The safeguards put in place through the WUTC's rules are intended for operator service and payphone providers serving the general public. The general public may benefit from having access to other carriers or services, being provided rate quotes and reviewing specific information posted on telephone sets. However, the needs of correctional, penal and mental institutions and the provision of telecommunications service to inmates of these Institutions varies tremendously from telecommunications services provided to the general public.

Based upon the foregoing reasons, USWC respectfully petitions for waiver of the WUTC's requirements as set forth in the following rules: WAC 480-120-137; WAC 480-120-138(3)(5)(6)(7)(10)(11); and WAC 480-120-41(1), (a)(1), (b)(ii) and (iii), (4).

DATED this 20th day of February, 1991.


MARK ROELLIG, of Attorneys
for U S WEST Communications, Inc.

SERVICE DATE

JUN - 5 1991

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Petition of)
U S WEST Communications, Inc.,)
for Waiver of Administrative Rules)
.)

DOCKET NO. UT-910193

ORDER GRANTING
WAIVER OF RULES

On February 21, 1991 U S WEST Communications, Inc., (USWC) filed a petition with the Commission for an order requesting waiver of the requirements of the following Commission rules:

- WAC 480-120-137(2); (911 and emergency access)
480-120-138(3), (emergency access)
(5), (emergency numbers posted).
(6), (service assistance and refunds)
(7), (number of telephone displayed)
(10), (access to all IXCs)
(11); (two-way service)
480-120-141(1)(a), (sticker requirement)
(1)(b)(ii) and (iii), (other providers)
(4). (emergency calls)

The waiver will only apply to USWC's limited access inmate phones served by the Inmate Service, currently located on original sheet 22-3 of USWC's WN U-24 tariff on file at the Commission. USWC will provide this service to prisons, correctional facilities and other penal institutions. The service allows inmates to place semi-automated collect calls only, using coin-less pay telephones in limited access areas of the facility. USWC will provide local, intralata toll, and operator service at the USWC tariffed rates.

All calls from the inmate phones will be collect only, with no authorization for credit card calls, third number billings or direct dials. USWC will block all 800, 900, and 976 calls, as well as 911 access and directory assistance. Due to the restricted and specialized nature of its service USWC requested the above listed waivers.

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