☐ EXPEDITE
(if filing within 5 court days of hearing)

☑ Hearing is set:
Date: December 9, 2011
Time: 1:30 pm
Judge/Calendar: Hon. Paula Casey

IN THE SUPERIOR COURT OF WASHINGTON
FOR THURSTON COUNTY

AT&T COMMUNICATIONS OF THE PACIFIC NORTHWEST, INC.,

Petitioner,

v.

WASHINGTON STATE UTILITIES AND TRANSPORTATION COMMISSION,

Respondent,

and

SANDY JUDD and TARA HERIVEL

Intervenors,

and

T-NETIX, INC.,

Interested Party.

T-NETIX, INC., a Delaware corporation,

Petitioner,

v.

WASHINGTON STATE UTILITIES AND TRANSPORTATION COMMISSION,

Respondent.

NO. 11-2-00992-8
and
NO. 11-2-00998-7

INTERVENORS' RESPONSE TO AT&T'S PETITION FOR APA REVIEW

SIRIANNI YOUTZ SPOONEMORE
999 THIRD AVENUE, SUITE 3650
SEATTLE, WASHINGTON 98104
TEL. (206) 223-0303 FAX (206) 223-0246

Table of Contents

SIRIANNI YOUTZ SPOONEMORE
999 THIRD AVENUE, SUITE 3650
SEATTLE, WASHINGTON 98104
TEL. (206) 223-0303 FAX (206) 223-0246

I. INTRODUCTION

The WUTC articulated a commonsense "consumer-centric" approach which gave meaning to the entire phrase "providing a connection to intrastate or interstate long-distance services" in finding that AT&T was an AOS/OSP.[1] RCW 80.36.520; WAC 480-120-021 (1989); WAC 480-120-021 (1991); WAC 480-120-021 (1999). As a result, the AOS/OSP is the entity that provides or procures the elements necessary to deliver the service to the consumer, even if it does not actually own the elements itself. R006821, ¶21. As the WUTC appropriately concluded, "the proper focus is on the entity 'providing' the connection to the consumer of the service, regardless of which company supplies the physical facilities used to make that connection." R006823, ¶23. It is, after all***, AT&T rates*** that ***AT&T charges its consumers*** for operator services ***from AT&T***. R006827, ¶36; R003017, lns. 7-22.

Throughout its brief, AT&T argues that its fundamental due process rights were violated when the WUTC concluded that it was the AOS/OSP from June 20, 1996 through December 31, 2000 (the "relevant period"). It goes so far as to accuse the WUTC of "surreptitiously" crafting "its own definition and arguing that this changes the statutory definition." AT&T Mem., pp. 21.

AT&T's attacks on the WUTC are misplaced. AT&T knew full well – and often acknowledged – that it was an AOS/OSP for the intrastate calls originating from Washington Department of Correction ("DOC") sites during the relevant period:

- ***AT&T acknowledged that it was an AOS when the term was first defined in 1988***.[2] R003088 (AT&T's 1988 comments on "the fundamental question of how to define an Alternative Operator Service (AOS) provider and, hence, to whom the proposed rules should apply": "[T]he current definition

---

[1] The terms Alternate Operator Service Provider ("AOS") and Operator Service Provider ("OSP") are used interchangeably given that the 1991 definition was relabeled, with no change in substance, in 1999.

2 The definition of an AOS arose from RCW 80.36.520, a statute passed in 1988. In 1989, the WUTC first promulgated rules under the statute. Those rules were amended in 1991 and 1999, but as AT&T admits, ***"Each of these versions of the rules [1989, 1991 and 1999] followed the Legislature's enacted definition of an AOS Company***." AT&T Mem., p. 4. Although the regulatory language was modified slightly with each amendment, the substance of the definition, as AT&T admits, did not change. *See, e.g.*, R000151 (some language from 1989 to 1991 was "changed to more closely reflect federal definitions, and to emphasize that the alternative operator services, AOS, rules apply only to operator services, as defined."); R00166 (1999 amendment relabeled AOS as OSP).

SIRIANNI YOUTZ SPOONEMORE
999 THIRD AVENUE, SUITE 3650
SEATTLE, WASHINGTON 98104
TEL. (206) 223-0303 FAX (206) 223-0246

of AOS provider in the revised rules (WAC 480-120-021, WAC 480-120-141) has just this result [the inclusion of AT&T as an AOS company].")

- ***AT&T was specifically informed by the WUTC staff in 1991 that it was an AOS***. R003094 (Memoranda to industry reflecting "staff consensus": "AT&T is an AOS company").

- ***AT&T complied with the AOS requirement that its calls be branded "AT&T."*** R002894 (1991 WUTC Order noting that AT&T brands its calls "AT&T" as required of AOS providers under WAC 480-120-141(5)(a)[3]).

- Since at least 1991, ***AT&T identified itself*** as this AOS company on the prison calls at issue in this case. *See* R002894.

- ***AT&T sought and received waivers in 1991 from certain AOS regulations relating to correctional facilities***. R002894 (1991 WUTC Order granting AT&T's request for an exemption from certain AOS rules at prisons).

- ***The 1991 Order granting AT&T waivers from certain AOS requirements at Washington correctional facilities indicates that AT&T is providing "operator services" to those facilities, and is seeking an exemption from "AOS" rules***. R002894 ("AT&T provides interLATA toll, and operator service" and, as a result, "AT&T requests waiver of the following payphone and AOS rules ….").

- ***AT&T's operator services was used, in the 1989 regulations, as a benchmark for other AOS companies***. R000062 (1988 regulation provides that "[f]or services, public convenience and advantage means at a minimum that the provider of alternative operator services offers operator services …. In the absence of other persuasive evidence, a demonstration that operator service equals or exceeds that provided by … AT&T for interLATA services will be accepted as demonstrating public convenience and advantage.").

AT&T ignores this evidence, instead feigning indignation that the WUTC would decide, just as AT&T itself concluded in 1988 and 1991, that AT&T was an AOS/OSP.

AT&T also complains that it was not given "fair notice" that the question whether AT&T violated the WUTC rules would be decided in connection with its motion for summary determination. AT&T Mem., p. 32. ***AT&T itself*** put this question at issue in both its original

---

[3] This regulation required that "[t]he alternative operator services company shall ... [i]dentify the AOS company providing the service audibly and distinctly at the beginning of every call, and again before the call is connected, including an announcement to the called party on calls placed collect."

SIRIANNI YOUTZ SPOONEMORE
999 THIRD AVENUE, SUITE 3650
SEATTLE, WASHINGTON 98104
TEL. (206) 223-0303 FAX (206) 223-0246

and amended motion for summary determination. In a section prominently labeled "RELIEF REQUESTED," AT&T specifically asked that the WUTC not only rule that it was not the AOS/OSP, but also that it had not violated any of the regulations:

> 3. AT&T requests that the Commission make a summary determination finding that
>
> a. AT&T has not served as an OSP or AOS company to any state prison or correctional facility since June 20, 1996, ***and***
>
> b. ***AT&T has not violated any of the Commission's regulations applicable to an OSP or AOS company at those prison and correctional facilities since June 20, 1996***.

R000121 (AT&T Motion for Summary Determination) (emphasis added). *See also* R002728 (AT&T's amended motion seeking, *inter alia*, "that the Commission make a summary determination finding that ... AT&T did not violate any of the Commission's regulations applicable to an OSP or AOS company ...."). The initial decision from the ALJ, in fact, recognized the violation issue was raised by AT&T:

> AT&T filed an answer to the formal complaint and a Motion for Summary Determination (AT&T's Motion), requesting that the Commission find that AT&T was not an OSP during the period in question ***and that AT&T had not violated the Commission's regulations applicable to OSPs.***

R003540, ¶ 5 (emphasis added).

AT&T's problem is that the evidence that came out in discovery established that AT&T was not providing ***intra***state rate disclosures between June 20, 1996 and December 31, 2000. AT&T's own witness testified that AT&T did not even become aware that intrastate rate quotes were not being given until late 2000. R008139-40. At that point, AT&T instructed T-Netix to implement rate quotes, but T-Netix refused to "implement rate quote for intrastate calls from correctional facilities in Washington State" unless AT&T paid it "$2.50 per line, approximately $6,000." R008123. AT&T, in an August 25, 2000 letter, reluctantly agreed to pay to implement rate quoting on intrastate calls: "Because of the urgency of implementing rate quote,

SIRIANNI YOUTZ SPOONEMORE
999 THIRD AVENUE, SUITE 3650
SEATTLE, WASHINGTON 98104
TEL. (206) 223-0303 FAX (206) 223-0246

AT&T is willing to advance this amount." R008123. AT&T also asked T-Netix to contact it "to discuss an implementation schedule." R008123.

AT&T's documents and witnesses confirm what every witness who actually received calls during the relevant time period has stated: no rate quotes were provided for intrastate calls from Washington prisons during the time period at issue. R000959; R000913; R000915. This is consistent with the technical evaluation performed by the WUTC of the call flow. R006835, ¶56 ("The record includes a detailed call flow of an inmate-initiated operator-assisted collect call from the Correctional Facilities, and at no time during that call flow is there any indication that either the inmate or the party receiving the call was notified of the ability to obtain a quote of the rates or charges for that call.").

AT&T put its compliance with the regulations at issue. The evidence shows that no intrastate rate quotes were made available. The WUTC did not err in concluding that AT&T violated the regulation.

II. STATEMENT OF FACTS

From at least 1996 through 2000, inmates in Washington correctional facilities could only call families, friends, attorneys and others by calling collect. R000014-15, ¶15. Inmates could only place these calls through AT&T, which had an exclusive contract with the DOC. R000287 ("AT&T admits that at all times pertinent to this lawsuit, AT&T held an exclusive contract to provide long distance services to Washington State prisons…."). The WUTC "observe[d] that the rates reflected in AT&T's bills for operator assisted toll service ... are significantly higher – in some cases several times higher – than the rates in the Verizon and Qwest bills for comparable calls." R006832-33, ¶51. These exorbitant rates were charged to the recipients without providing the required rate disclosure or the opportunity to obtain information about cost. R006837, ¶59. Under RCW 80.36.510, 80.36.520, WAC 480-120-141 (1991) and WAC 480-120-141 (1999), a telecommunications company operating as an

SIRIANNI YOUTZ SPOONEMORE
999 THIRD AVENUE, SUITE 3650
SEATTLE, WASHINGTON 98104
TEL. (206) 223-0303 FAX (206) 223-0246

AOS/OSP was required to provide consumers with rate disclosures for collect calls.[4] Failure to comply is a *per se* violation of the CPA. RCW 80.36.530. Intervenors filed an action on June 6, 2000, alleging that AT&T, T-Netix and others had violated the Washington Consumer Protection Act by failing to disclose rates on collect calls placed from Washington state prisons. R000011-16.

AT&T moved to dismiss. It asked, alternatively, that the court to refer the key liability issues to the WUTC under the doctrine of primary jurisdiction. *See Tenore v. AT&T Wireless Services*, 136 Wn.2d 322, 345, 962 P.2d 104, 115 (1998) (under primary jurisdiction doctrine the trial court defers to an agency's special expertise). Given the WUTC's expertise, AT&T maintained that "the WUTC is in a better position than this Court to determine whether AT&T is bound by the disclosure requirements…." R006957, lns. 12-14. The court agreed and referred two questions to the WUTC:

> (1) whether T-Netix or AT&T were operator service providers (OSPs); and
>
> (2) if so, whether they violated WUTC regulations requiring OSPs to disclose rates to consumers.

R000072, R000074.

Plaintiffs filed a formal complaint against AT&T and T-Netix with the WUTC pursuant to the primary jurisdiction referral. R000004-09. Extensive discovery and motion practice followed. Finally, on April 21, 2010, the administrative law judge issued an initial order (Order

---

[4] RCW 80.36.510 provides that:

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

RCW 80.36.520 directs the WUTC to promulgate specific disclosure regulations:

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

Those regulations are set forth in WAC 480-120-141.

SIRIANNI YOUTZ SPOONEMORE
999 THIRD AVENUE, SUITE 3650
SEATTLE, WASHINGTON 98104
TEL. (206) 223-0303 FAX (206) 223-0246

23) concluding that AT&T was the OSP during the relevant time period. R004149-204. This order reserved ruling on whether AT&T violated WUTC regulations. R004164, ¶40.

AT&T petitioned for review by the full Commission. The Commission reopened the record to receive additional evidence. On March 31, 2011, the WUTC issued Order 25, a final order answering both questions referred by the Superior Court. R006813-73. The order concluded that AT&T was an OSP during the relevant time period and that it violated the WUTC regulations by failing to provide required rate disclosures. R006841-42, ¶¶83-84. It found that T-Netix was not the OSP for the specific calls under review, but expressly allowed the Superior Court to find T-Netix liable under the analytic framework contained in Order 25 if justified by additional evidence. R006831, fn. 43. AT&T and T-Netix both appealed the Final Order. Their respective appeals have been consolidated for adjudication.

III. AUTHORITY

A. General Standards Under the APA.

The APA governs judicial review of agency actions. *Buechel v. Dep't of Ecology*, 125 Wn.2d 196, 201, 884 P.2d 910 (1994). Under the APA, the superior court reviews agency orders in a limited appellate capacity. *Herman v. State of Washington Shorelines Hearings Board*, 149 Wn. App. 444, 455, 204 P.3d 928, 933 (2009). Unless one of the limited exceptions in RCW 34.05.562(1) applies, the record before this Court is limited to the administrative record. RCW 34.05.558. And, like other appeals, AT&T may not raise arguments that were not first presented to the WUTC. *Alpha Kappa Lambda Fraternity v. Washington State University*, 152 Wn. App. 401, 420, 216 P.3d 451, 461 (2009). RCW 34.05.570(3) governs assertions of invalidity of an agency order resulting from an adjudicative proceeding.

SIRIANNI YOUTZ SPOONEMORE
999 THIRD AVENUE, SUITE 3650
SEATTLE, WASHINGTON 98104
TEL. (206) 223-0303 FAX (206) 223-0246

B. The WUTC Properly Interpreted its Own Regulation, and the Statute, in Identifying AT&T as an AOS/OSP.

1. The WUTC's Interpretation of its Regulation and the Statute Are Entitled to "Great Weight."

The WUTC's interpretation of WAC 480-120-021, a regulation it promulgated, is entitled to "great weight." *Washington State Liquor Control Board v. Washington State Pers. Bd*., 88 Wn.2d 368, 379, 561 P.2d 195, 201 (1977). AT&T argues that because the WUTC's regulation is partly based on a statute, no deference should be afforded. *See* AT&T Mem., p. 12, fn. 4. AT&T ignores controlling Washington law. An agency is also entitled to "great weight" when interpreting statutes within its area of expertise. *Postema v. Pollution Control Hearings Bd.*, 142 Wn. 2d 68, 77, 11 P.3d 726, 733 (2000) ("Where a statute is within the agency's special expertise, the agency's interpretation is accorded great weight, provided that the statute is ambiguous."). This is "particularly true when, as here, a 'special law' field is concerned." *Kaiser Aluminum & Chemical Corp. v. Dept. of Ecology*, 32 Wn. App. 399, 404, 647 P.2d 551 (1982).

Under the "great weight" standard, any "plausible" agency interpretation consistent with legislative intent will be upheld. *ZDI Gaming, Inc. v. Washington State Gambling Com'n*, 151 Wn. App. 788 806, 214 P.3d 938 (2009); *Premera v. Kreidler*, 133 Wn. App. 23, 37, 131 P.3d 930 (2006) ("An agency's interpretation of the statues it administers should be upheld if it reflects a plausible construction of the statue's language and is not contrary to legislative intent."). The WUTC's interpretation can only be rejected is it is outside "the bounds of reasoned decision-making." *Gifford Pinchot Task Force v. Clayton*, 2011 WL 841331, *4 (W.D. Wash. Mar. 7, 2011) (*quoting Balt. Gas & Elec. Co. v. Natural Res. Def. Council*, 462 U.S. 87, 105, 103 S.Ct. 2246, 76 L.Ed.2d 437 (1983)).

2. The Phrase "Providing a Connection" Refers to Procuring the Connection for the Consumer of the Service.

AT&T argues that the WUTC's Final Order should be rejected because the WUTC improperly interpreted its own regulation. Specifically, it claims that T-Netix, rather than it, is

SIRIANNI YOUTZ SPOONEMORE
999 THIRD AVENUE, SUITE 3650
SEATTLE, WASHINGTON 98104
TEL. (206) 223-0303 FAX (206) 223-0246

the AOS/OSP. AT&T Petition, ¶¶21-22. AT&T assumes that the "plain language" of WAC 480-120-021 defines the AOS/OSP as the entity that ***physically*** provides the connection between the caller and the recipient of the call. *Id*., ¶¶17, 19. Under AT&T's view, the owner of the P-III Platform is the AOS/OSP. *Id*., ¶21.

By arguing that the physical connection – the telecommunications switching – determines the identity of the AOS/OSP, AT&T improperly focuses on the word "connection" rather than on the operative phrase "***providing*** a connection." The word "providing" is the verb and "a connection" is the object. Neither the word "provide" nor the phrase "providing a connection" is defined in the statute or regulation. Therefore, we refer to the dictionary. *See State v. Watson*, 146 Wn. 2d 947, 954, 51 P.3d 66, 69 (2002) ("in the absence of a statutory definition this court will give the term its plain and ordinary meaning ascertained from a standard dictionary").

The verb "provide" means:

> [1] to make preparation to meet a need <*provide* for entertainment>,
>
> [2] to supply or make available (something wanted or needed) <*provided* new uniforms for the band> and
>
> [3] to make something available to <*provide* the children with free balloons>.

http://www.merriam-webster.com/dictionary/providing?show=1&t=1317841380 (last visited 10/5/11). *See also Sacred Heart Medical Center v. State, Dept. of Revenue*, 88 Wn. App. 632, 637 n. 4 (1997) (citing BLACK'S LAW DICTIONARY definition of "provide" as including "procure"). Procure, in turn, means "to instigate, to contrive, bring about, effect or cause," including "[t]o persuade, induce, prevail upon, or cause a person to do something." BLACK'S LAW DICTIONARY (6th Ed.).

An entity "providing a connection to intrastate or interstate long-distance services" means the entity that procures, through contracts or other arrangements, the connection to the services. To use the entertainment example from Merriam-Webster, informing party-goers that I will "provide the entertainment" does not mean that I am the entertainer. It only refers to the

SIRIANNI YOUTZ SPOONEMORE
999 THIRD AVENUE, SUITE 3650
SEATTLE, WASHINGTON 98104
TEL. (206) 223-0303 FAX (206) 223-0246

fact that I will arrange, procure, or hire the services of another to provide entertainment.

Likewise, the OSP is the entity that provides or procures the elements necessary to deliver the service to the consumer, even if it does not actually "own" each of the component elements:

> T-Netix's expert witness, Robert Rae, provided testimony that, based on "common practice," the term "connection" in the Commission's rules refers to the ***service provided to the consumer*** using and paying for that service:
>
> > *I think the best way I can describe it is in the general sense of the carrier that is the – basically integrating the services of telecommunications, which could mean anything from purchasing hardware, purchasing software, procuring network connectivity and more importantly, even if they aren't doing ant of those things, at a high order,* ***providing the face to the consumer in branding the calls, branding the billing, taking responsibility for the those elements being pulled together to deliver service to the customer and, therefore, representing to the customer that complex process behind it to make sure that the customer is serviced appropriately***.

R006821-22, ¶21 (bold in original, bold italics added). As the WUTC concluded, "[T]he proper focus is on the entity 'providing' the connection to the consumer of the service, regardless of which company supplies the physical facilities used to make that connection." R006823, ¶23.

By focusing solely on the word "connection" (and ignoring the meaning of the word "provide"), AT&T argues that the entity who "owns" the P-III platform is the AOS/OSP. "Ownership" of the electronic equipment is irrelevant:

> A company is no more an OSP solely because it owns and maintains some or all of the equipment used to provision operator services than a company could be considered a local exchange carrier simply because it supplies the switch used to originate and terminate telephone calls. Only the company that has the direct business relationship with the consumers who use operator services is an OSP.

R006821, ¶20. Indeed, the "ownership" concept is anathema to the telecommunications field, where companies routinely lease and resell services. The touchstone is the business relationship between the consumer and the company with the legal responsibility to connect the call (and

SIRIANNI YOUTZ SPOONEMORE
999 THIRD AVENUE, SUITE 3650
SEATTLE, WASHINGTON 98104
TEL. (206) 223-0303 FAX (206) 223-0246

which bills and profits from the connection). The company can fulfill its legal responsibly to connect the call by providing the equipment itself, or it may buy or lease the equipment from a third party. No matter how it arranges, procures or provides for the connection to be made, however, it remains responsible for the connection and profits from the relationship with the consumer:

> Resellers of local or long distance services, for example, are the service providers for the consumers of that service, even though the underlying facilities – or the entire service itself – are physically provided by another company. As the service provider, the reseller, not the company that owns and operates the physical infrastructure used to provide the service, has the direct business relationship with its consumers and is responsible for all billing of, notifications to, and other communications with, the end users of that service, as well as for complying with all Commission rules governing the provision of those services to consumers.

R006821, ¶18. Placing responsibility upon the entity that provides the service to the consumer, has the direct business relationship with the consumer, and is responsible for billing and collecting payment for those services is a reasonable "consumer-centric approach to determining which company is responsible for complying with our rules governing OSPs …." *Id.*

3. Legislative Intent Supports the WUTC's Interpretation.

The WUTC's construction flows not only from the plain language of the rule and statute, but from legislative intent. Interpreting the language to be "consumer-centric" appropriately recognizes that "[t]he legislature was expressly concerned ***with companies that provide services to consumers*** without disclosing to those consumers ***the services the companies are providing*** and the rates ***those companies*** are charging." R006820, ¶16 (emphasis added). The legislature, in fact, explicitly declared that its concern was with disclosure to consumers:

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

RCW 80.36.510 (emphasis added). *See also* R006820, ¶16.

SIRIANNI YOUTZ SPOONEMORE
999 THIRD AVENUE, SUITE 3650
SEATTLE, WASHINGTON 98104
TEL. (206) 223-0303 FAX (206) 223-0246

Here, the service "to consumers" was being provided by AT&T, who branded, billed and collected a hefty charge for those operator services. R003017, lns. 7-22; R002894; R006832-33, fn. 51. It was therefore AT&T's responsibility to ensure that its consumers were provided with the required rate disclosures. R006832, ¶49. The fact that AT&T purchased or leased equipment from T-Netix does not change the relationship between AT&T and its consumers. R006821, ¶20. AT&T was legally responsible for the connection to the consumers. It "pulled together" the "elements" to deliver "services to the consumer" and then charged consumers for using it. R006821-22, ¶21.[5] It was, after all, ***AT&T's rates*** that were being charged to that consumer for the connection. R006827, ¶36 ("AT&T billed consumers for operator services as a component of the intrastate collect toll calls it carried from the Correctional Facilities …. AT&T concedes as much in response to Bench Request No. 13 ...."). The WUTC's conclusion that AT&T must disclose ***its rates*** to ***its consumers*** for services ***it provided*** to them is a logical and straightforward reading of the statute and regulation which fulfills the legislature's demand that telecommunication companies provide rate disclosure upon demand. RCW 80.36.510.

4. AT&T Has Not Proven that the WUTC's Interpretation is "Outside the Bounds of Reasoned Decision-Making."

AT&T advances four arguments in support of its claim that the WUTC's interpretation of the statute and regulation is improper. AT&T Mem., pp. 19-23. None is persuasive.

a. The Entity that Provides a Connection to Services for a Consumer is the AOS/OSP.

AT&T first argues that the WUTC "contrived" a "to whom" question "by claiming that the AOS/OSP definition 'does not specify *to whom* the OSP is providing [the requisite]

[5] AT&T's expert and employee, Mark Pollman, admitted that AT&T was involved in ensuring that each "piece part" within the network was in place to allow for service to be provided to AT&T consumers. R003283, p. 21:3-18. AT&T, as the prime contractor under the DOC contract, was the company that put all the "piece parts" together and actually "provided" the telecommunications connection to the consumer. R000287 ("AT&T admits that at all times pertinent to this lawsuit, AT&T held an exclusive contract to provide certain long distance services to Washington State prisons ....").

SIRIANNI YOUTZ SPOONEMORE
999 THIRD AVENUE, SUITE 3650
SEATTLE, WASHINGTON 98104
TEL. (206) 223-0303 FAX (206) 223-0246

connection.'" AT&T Mem., p. 19. It then claims that the OSP must be the entity providing the physical "connection" "from" the call aggregators "to" the local or long-distance services. AT&T Mem., p. 19. But this is not what the regulation (or the statute) says. AT&T ignores the word "services" by arguing that the word "providing" is only related to the "connection." Rather, the word "providing" modifies the word "services": "alternate operator services company" means a person ***providing a connection to*** intrastate or interstate long-distance ***services*** from places including, but not limited to, hotels [etc.]." RCW 80.36.520. The regulation is even more explicit, defining "operator services" as "***any intrastate telecommunications service*** ... that includes as a component any automatic or live assistance ***to a consumer*** to arrange for billing or completion, or both, of an intrastate call ...." WAC 480-120-021 (1991); WAC 480-120-021 (1999) (same).

The rules reflect the statutory definition of "alternative operator services company" in RCW 80.36.520. Under the statute, an AOS is defined as "a person ***providing a connection to*** intrastate or interstate long-distance ***services*** from places including, but not limited to, hotels, motels, hospitals, and customer-owned pay telephones." RCW 80.36.520. As the WUTC notes, this language does not specify ***to whom*** the AOS is "providing" that connection to services. R006819, ¶15. The WUTC, however, has interpreted this language to mean that the "OSP is the entity that provides the connection *to the consumers* who are the parties to the call, particularly the called party who accepts and pays for the service or 'connection' provided." *Id*. (emphasis in original). As a result, "the proper focus is on the entity 'providing' the connection to the consumer of the service, regardless of which company supplies the physical facilities used to make that connection." R006823, ¶23. The relevant question is therefore who provided or procured the connection for the consumer.

Because the very purpose of the law was to protect consumers, the WUTC properly construed the definition as consumer-centric. The intrastate or interstate long-distance services were being provided ***to the consumers of those services***, and those are the individuals that the

SIRIANNI YOUTZ SPOONEMORE
999 THIRD AVENUE, SUITE 3650
SEATTLE, WASHINGTON 98104
TEL. (206) 223-0303 FAX (206) 223-0246

legislature sought to protect by requiring disclosure. RCW 80.36.510. Requiring AT&T, which had the direct business relationship with those consumers and provided those services to the consumer for a fee, to also disclosure that fee to those same consumers is entirely consistent with both the language and intent of the law. For a plausible interpretation to be rejected, AT&T must show "a compelling indication that such interpretation conflicts with the legislative intent." *Washington Water Power Co. v. Washington State Human Rights Comm'n*, 91 Wn. 2d 62, 68-69, 586 P.2d 1149, 1153 (1978). It has failed to do so here.

b. The Regulations are Consistent with the Statute.

AT&T next claims that the WUTC's regulations are somehow inconsistent with the statute. AT&T Mem., p. 21. Specifically, it claims that the WUTC "surreptitiously" crafted "its own definition" which "changes the statutory definition." *Id.* The regulation and the statute, however, are entirely consistent. The WUTC's interpretation closely hews to both.

The statute provides that the AOS/OSP is the entity "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." RCW 80.36.520. The 1989, 1991 and 1999 regulations all track this language.[6] WAC 480-120-021 (1989), (1991), (1999). Both the statute and the regulations turn on the question of who "provides" or procures the connection to the services for the consumer. *See* Section B, 2, *above* (AT&T is the provider and procurer).

AT&T argues that the regulation contains added language which defines "operator services" as "any intrastate telecommunications service provided to a call aggregator location that includes as a component any automatic or live assistance to a consumer to arrange for billing or completion, or both, of an intrastate telephone call…." WAC 480-120-021. That

[6] The regulations apply to entities providing a connection to services from "locations of call aggregators." A "call aggregator" is a "person who, in the ordinary course of its operations, makes telephones available for intrastate service to the public or to users of its premises, including but not limited to hotels, motels, hospitals, campuses, and pay telephones." WAC 480-120-021(1991). This includes a "correctional facility/prison." R006822-23, n. 17 (citing WAC 480-120-141(1)(c)(1999) and WAC 480-120-141(3) (1991)).

SIRIANNI YOUTZ SPOONEMORE
999 THIRD AVENUE, SUITE 3650
SEATTLE, WASHINGTON 98104
TEL. (206) 223-0303 FAX (206) 223-0246

language is consistent with the statute. In fact, it simply demonstrates that who provides the "services," not who owns the physical connection, is what counts. It also highlights the importance of who is on the receiving end of the service. The "consumer" is the one who is provided with assistance, connected to the call, and billed for the service. As the WUTC noted, "Operator services by definition are provided to consumers, and to state the obvious, an OSP provides operator services." R006820, ¶17. This is entirely consistent with the legislature's desire to protect consumers, who were not being provided with rate disclosures for the services provided to them.

c. The WUTC's Interpretation Has Not Been Inconsistent.

AT&T argues that the WUTC's consumer-centric approach is somehow inconsistent with other regulations applicable during the relevant period. Yet there is no prior regulatory definition. In fact, the WUTC never cited any regulatory definition of "service provider." It simply explained that the consumer-centric approach is "fully consistent" with the WUTC's general treatment of other telecommunications service providers. R006821, ¶18. It then concluded that the approach was required by the statute, regulation and legislative intent:

> We see no reason to identify OSPs any differently. The objective of the statute and Commission rules governing OSPs is to ensure that consumers are aware that they are using operator services and know or can request the rates they are paying for calls using those services. As with other telecommunications services, the company that charges, communicates with, and otherwise is identified as the service provider to, the consumer is obligated to make such disclosures.

R006821, ¶19.

This is exactly the type of background and expertise that AT&T itself argued the WUTC should bring to bear in interpreting the requirements of the statute and regulation. As AT&T argued when moving to have the two issues referred to the agency, the WUTC "is in a better position than this Court to determine" these types of questions:

> Likewise, because of its years of experience in dealing with telecommunications rates and disclosure of those rates, the WUTC is in a

SIRIANNI YOUTZ SPOONEMORE
999 THIRD AVENUE, SUITE 3650
SEATTLE, WASHINGTON 98104
TEL. (206) 223-0303 FAX (206) 223-0246

> better position than this Court to determine whether AT&T is bound by the disclosure requirements….

R006957, lns. 11-14. (emphasis added). *See also* R006955, lns. 19-20 ("The legislature has conveyed to the WUTC broad authority to address telecommunications issues, including the specific rate disclosure issues raised in this case…."); R006957, ln. 8 ("This issue goes to the heart of the WUTC's technical expertise."). *See also D.J. Hopkins, Inc. v. GTE Northwest, Inc.*, 89 Wn. App. 1, 7-8, 947 P.2d 1220 (1997) (affirming referral to the WUTC because primary jurisdiction is appropriate "where a uniform determination is desirable" from the agency).

d. The WUTC's Policy Conclusion Is Entitled to Deference.

Finally, AT&T questions the WUTC's policy statement that its interpretation best serves the objective of the statute because it provides a standard which will avoid "protracted disputes over the nature and ownership of the network facilities" requiring complex proof on highly technical issues. AT&T Mem., p. 22. This case, over 10 years and counting, is a compelling example of the type of interminable dispute the WUTC is trying to avoid. R006823, ¶24. The Order itself explains in great detail how the WUTC's interpretation leads to defined standards which can be applied by a fact finder without any specialized technological expertise in telecommunications switching. R006819-23, ¶¶15-24. The WUTC's interpretation is both consistent with the plain language of the law and best promotes the WUTC's policy goals.

C. The WUTC's Interpretation Does Not Lead to "Absurd" Results.

1. As the Prime Contractor, AT&T Had the Power to, and Did, Direct its Subcontractor, T-Netix.

AT&T argues that it was helpless to institute rate disclosures because T-Netix owned and controlled the P-III platform. AT&T Mem., pp. 23-24. The ALJ concluded otherwise, finding, as a matter of fact, that "AT&T possessed the ability to direct T-Netix to modify the P-III platform." R004201, ¶137. The WUTC did not disturb this finding. R006837-39.

The administrative record indicates that AT&T, as the prime contractor under the DOC contract, had the right to give orders and instructions to T-Netix, a subcontractor, for the maintenance and installation of the P-III Platform. The AT&T/T-Netix contract allowed AT&T

SIRIANNI YOUTZ SPOONEMORE
999 THIRD AVENUE, SUITE 3650
SEATTLE, WASHINGTON 98104
TEL. (206) 223-0303 FAX (206) 223-0246

to "evaluate the SOFTWARE" of the Platform under "AT&T's standard of performance." R004138. AT&T could request corrections from T-Netix. AT&T had 45 days "after the resubmission of the corrected SOFTWARE to accept or reject the SOFTWARE." *Id*. The contract allowed AT&T to place or cancel "ORDERS for MAINTENANCE SERVICES." R003864. AT&T directed T-Netix by use of a "maintenance order" specifying "[t]he location at which the Equipment/Services is to be installed and used," and the "[d]esignation of a point of contact from whom T-Netix, Inc.'s maintenance representative shall receive notification of the Equipment/Services becoming inoperative." *Id*.

In fact, when the intrastate rate disclosures were finally implemented in 2001, ***they were done at AT&T's direction***. In August of 2000, AT&T directed and agreed to pay T-Netix to commence "an implementation schedule" to provide rate quotes for intrastate calls from correctional facilities in Washington State. R008123 ("I am writing to follow up on T-NETIX's recent demand that AT&T agree to pay $2.50 per line, approximately $6,000 before T-Netix will implement rate quote for intrastate calls from correctional facilities in Washington State. Because of the urgency of implementing rate quote, ***AT&T is willing to advance this amount***.") (emphasis added).[7] AT&T also directed T-Netix what rate to quote. *Id*.; R002204 (November 2000 email instructing T-Netix on the rate to quote for intrastate calls). In short, AT&T had the power to – ***and did*** – direct T-Netix with respect to implementing rate quotes in Washington. The problem, of course, is that it should have directed the changes in 1990/91, not 2000/01.

2. The Rule Concerning Physical Posting of Rates Supports the Conclusion the AT&T Was the AOS/OSP.

AT&T argues that it cannot be the AOS/OSP because it had no physical access to prisons and could not post sticker notices on the telephones. AT&T Mem., p. 25. This

[7] Earlier, AT&T had provided instructions to T-Netix on implementing ***inter***state rate quotes as required by federal law. R002202 ("Below is a request to change the phraseology on AT&T's inmate calls ... AT&T expects that the changes would be completed by 10/31, however, in an earlier conversation I understand this to be a significant change, unlike a rate update. Please acknowledge receipt of this message let me know when we can expect all premise, adjunct and pop sites updated to reflect these changes.").

SIRIANNI YOUTZ SPOONEMORE
999 THIRD AVENUE, SUITE 3650
SEATTLE, WASHINGTON 98104
TEL. (206) 223-0303 FAX (206) 223-0246

argument fails for three reasons. ***First***, AT&T already acknowledged that it was the AOS/OSP when it sought, and received, an exemption from the WUTC from posting those same notices at prisons. R002894 ("AT&T requests waiver of the following payphone and AOS rules ... WAC 480-120-141(4)(a) (sticker requirement)").[8] ***Second***, under its contract with the DOC, AT&T had a right of access to DOC facilities. R000033 ("The Department shall ... [s]ubject to the Department's security requirements, provide access as needed to Contractor [AT&T] ….").
Third, even if it did not have access, an AOS/OSP does not need to have physical presence in order to ensure compliance with the regulations. As prime contractor, it can contract with and pay subcontractors to fulfill its AOS/OSP obligations. R000033 (T-Netix also had access to prison facilities as subcontractor to AT&T under DOC contract).

3. Imposing Disclosure Requirements on AT&T is Consistent with the Language and Intent of the Statute.

AT&T argues that the legislature never intended that the rate disclosure requirements would be applied to it because its rates were "well known" and reasonable. AT&T, p. 26. Neither assertion is correct. The WUTC, after reviewing AT&T's charges to Columbia Legal Services, went out of its way to "observe that the rates reflected in AT&T's bills for operator-assisted toll service ... are significantly higher – ***in some cases several times higher*** – than the rates in the Verizon and Qwest bills for comparable calls." R006832-33, n. 51 (emphasis added). AT&T does not challenge this conclusion.

AT&T fails to cite any evidence that its rates were "well-known." Even if true, that claim is irrelevant. The WUTC concluded that filed tariffs were insufficient to alert consumers to the potential high costs of toll calls from aggregators. That is why it required immediate,

[8] AT&T erroneously cites to WAC 480-120-141(2)(a). AT&T Mem., p. 25. The posting requirement is actually contained in (4)(a).

SIRIANNI YOUTZ SPOONEMORE
999 THIRD AVENUE, SUITE 3650
SEATTLE, WASHINGTON 98104
TEL. (206) 223-0303 FAX (206) 223-0246

real-time rate disclosures. WAC 480-120-141(5)(iv) (1991); WAC 480-120-141(2)(b).[9] Although AT&T argued for multiple modifications to the definition of AOS which would exempt it from these disclosures, ***all*** of those proposals were rejected. R003087-91.

4. AT&T Did Not Operate as a LEC at the DOC Facilities, and Was Not Covered by the "LEC Exemption."

In a footnote, AT&T argues that it came within the "LEC exemption" from 1997 to 1999. AT&T Mem., p. 28, n. 10.[10] However, AT&T conceded that it was not operating as a LEC in any of the DOC facilities at issue. R000256, ¶12 (AT&T admits that it did not provide LEC services at any time under the DOC contract to any of the correctional faculties). *See also* R000255, ¶8 (same). Given AT&T's admission, the WUTC — and the ALJ before it— had no trouble rejecting AT&T's argument. R006831-34, ¶¶45-52; R004195-97, ¶¶118-122. As the WUTC explained, "Because AT&T was not the provider of local exchange services at any of the Correctional Facilities, AT&T cannot claim the LEC exemption from the Commission rules governing OSPs." R006833, ¶51. To hold otherwise would require one to "ignore the historic context of the 1991 rule" which indicated that it was intended to "exclude LECs only to the extent that they were providing the local exchange service as well as the operator service for those calls placed from the call aggregator location." R006832-33, ¶49-50.

D. The WUTC's Decision Did Not Violate Due Process.

AT&T argues that the WUTC violated due process in concluding that AT&T was the AOS/OSP. AT&T Mem., p. 28. It argues that it did not have "fair notice" of the issue. AT&T's argument fails both factually and legally.

---

[9] As the WUTC noted, the rate disclosure requirement language from 1991 to 1999 is a "distinction without a difference under the circumstances of this case." R006836, ¶58. "That platform [P-III] ... was not able to receive a consumer request and provide a rate quote, which violated both the 1999 rule and WAC 480-120-141(5)(a)(iv)(1991)." *Id*.

[10] Prior to WAC 480-120-021's amendment in 1999, the definition of OSP excluded local exchange companies or "LECs." AT&T argues that it was exempt for a period of time from the disclosure requirements until the 1999 amendment because it was registered as a LEC in 1997.

SIRIANNI YOUTZ SPOONEMORE
999 THIRD AVENUE, SUITE 3650
SEATTLE, WASHINGTON 98104
TEL. (206) 223-0303 FAX (206) 223-0246

1. AT&T Knew That It Was an AOS/OPS in 1991.

A due process challenge for lack of notice or vagueness will fail in any situation "where reasonable persons would know that their conduct is at risk":

> Objections to vagueness under the Due Process Clause rest on the lack of notice, and hence may be overcome in any specific case where reasonable persons would know that their conduct is at risk.

Maynard v. Cartwright, 486 U.S. 356, 361, 108 S. Ct. 1853, 1857, 100 L. Ed. 2d 372 (1988). Understanding that conduct is potentially "at risk" is all that is required whenever a regulated enterprise has "the ability to clarify the meaning of the regulation by its own inquiry, or by resort to an administrative process." *Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489-99, 498, 102 S.Ct. 1186 (1982). *See also Brian B. Brown Const. Co. v. St. Tammany Parish*, 17 F. Supp. 2d 586, 591 (E.D. La. 1998) ("[A] regulation is not unconstitutionally vague where a 'regulated enterprise may have the ability to clarify the meaning of the regulation by its own inquiry or by result to an administrative process.'") (*quoting Village of Hoffman Estates*). Put differently, due process challenges are dead on arrival when a regulated entity could have, but did not, seek clarification of a rule it later claims was unconstitutionally vague. *See Ford Motor Co. v. Texas Dept. of Transp.*, 264 F.3d 493, 509 (5th Cir. 2001) ("By making an inquiry in this case, Ford could have obtained a pre-enforcement ruling on whether the Showroom complied with Texas law."); *United States v. Doremus*, 888 F.2d 630, 634 (9th Cir. 1989) (regulation not unconstitutional because the defendant had "the ability to clarify the meaning of the regulation by [their] own inquiry, or by resort to the administrative process.").

AT&T's communications with the WUTC over the meaning and scope of an AOS in the regulations indicate, ***first***, that AT&T had the opportunity to clarify the meaning of the AOS/OSP definition; and ***second***, that it actually did so.

The WUTC, in advance of formally adopting its 1989 regulations, provided the telecommunications industry with an opportunity comment on a proposed set of rules, including a proposed definition of AOS. In December of 1988, AT&T filed comments with the WUTC

SIRIANNI YOUTZ SPOONEMORE
999 THIRD AVENUE, SUITE 3650
SEATTLE, WASHINGTON 98104
TEL. (206) 223-0303 FAX (206) 223-0246

on "***the fundamental question of how to define an Alternative Operator Service (AOS) provider and, hence, to whom the proposed rules should apply***." R003086-87. In this filing, AT&T recognized that under the proposed regulations, ***AT&T would be an AOS subject to compliance with the rate disclosure obligations*** set forth in the proposed regulations. R003088. Specifically, AT&T recognized that the "incentive for the Washington Legislature to pass Senate Bill 6745 [in 1988] is the ongoing concern that the public, without adequate notice, is often being charged higher rates for operator assisted and card interexchange calls." AT&T argued that it should be exempt from the proposed AOS definition:

> The resolution of this problem does not require the inclusion of telecommunications companies such as US West Communications or ***AT&T*** within the proposed rules. Yet, ***the current definition of an AOS provider in the revised rules (WAC 480-120-021, WAC 480-120-141) has just this result***.

R003088 (emphasis added).

AT&T proposed three alternatives to the rules, each of which would have exempted AT&T from the disclosures required of an AOS. R003089-90. The WUTC ***rejected*** all of AT&T proposals. *Compare* WAC 480-120-021 (1989) (final rules) *with* R003086-91 (AT&T proposed and rejected modifications to draft rules). [11]

The WUTC amended some of its rules in 1991. It left unchanged, however, its definition of an AOS. *Compare* WAC 480-120-021 (1989) *with* WAC 480-12-021 (1991).

---

[11] AT&T therefore first proposed that the WUTC adopt a different definition of AOS provider which would exempt companies, such as AT&T, who "market directly to end-user customers." R003089 (offering language to "replace the definitions in WAC 480-120-021 and WAC 480-120-141"). In the alternative, AT&T argued that "if the Commission is concerned that a facilities-based carrier such as ATT or US West Communications would attempt to charge a unique rate to telephone customers," then the "definition now in WAC 480-120-021 and WAC 480-120-141 remain," but "an exception should be added to the definition" which would exempt companies such as AT&T that provide services directly to the public pursuant to uniform published price list. R003090. This, AT&T argued, would allow "AT&T to serve the telephone customer of an aggregator – in a manner similar to its other customers in the state – without being subject to unnecessary rules aimed at safeguarding the public from excessive and unexpected charges." R003090. Finally, AT&T argued that "[s]hould the Commission reject both of AT&T's suggested alternative definitions, AT&T respectfully requests that the notice added to WAC 480-120-142(a)(a) – implying that rates may be higher than normal ... be deleted at least for AT&T ...." R003090.

SIRIANNI YOUTZ SPOONEMORE
999 THIRD AVENUE, SUITE 3650
SEATTLE, WASHINGTON 98104
TEL. (206) 223-0303 FAX (206) 223-0246

AT&T admits this. AT&T Mem., p. 4, lns. 3-5 ("Each of these versions of the rules followed the Legislature's enacted definition of an AOS Company.").

In October 1991, just months after the 1991 amendments were adopted, the WUTC issued a bulletin to the industry reflecting a "staff consensus" that under the rules "[a]n AOS company is any which offers service through aggregators – service as defined in the rule," and that under this rule "***AT&T is an AOS company"*** in all non-equal access settings. R003094 (emphasis). (DOC facilities constituted "non-equal access settings" given that AT&T "held an exclusive contract" to provide the services to DOC facilities. R000287.)

Because it was classified as an AOS/OSP, AT&T was required to comply with a host of requirements under the 1991 rules. *See* WAC 480-120-141. For example, an AOS company was required to "[i]dentify the AOS company providing the service audibly and distinctly at the beginning of every call, and again before the call is connection, including an announcement to the called party on calls placed collect." WAC 480-120-141(5) (1991). ***AT&T branded itself as the AOS on all calls from the correctional facilities.*** R002894 ("The calls [from correctional facilities] are branded by AT&T to both the calling and called party.").

Certain requirements not at issue here placed on AOS companies did not make sense in the context of correctional facilities. As a result, AT&T petitioned the WUTC in 1991 for a partial waiver. R002894. The 1991 WUTC Order granting AT&T's petition explicitly held that AT&T "provides ... operator services" to the correctional facilities under the "AOS rules":

> On September 17, 1991, AT&T Communications of the Pacific Northwest, Inc. (AT&T) filed a petition requesting waiver of certain administrative rules. This waiver request concerns the ***provision of telecommunications services to inmates of correctional institutions***, and mental facilities. ***AT&T provides*** interLATA toll, and ***operator services*** at the price listed rates ….
>
> > The calls are branded by AT&T to both the calling and called party. Due to the restricted and specialized nature of its service, ***AT&T requests waiver*** of the following payphone and ***AOS rules*** ....

SIRIANNI YOUTZ SPOONEMORE
999 THIRD AVENUE, SUITE 3650
SEATTLE, WASHINGTON 98104
TEL. (206) 223-0303 FAX (206) 223-0246

R002894 (emphasis added). As the AOS in correctional facilities, AT&T received a waiver of many rules applicable to AOS companies, including the regulation requiring a disclosure sticker on the prison phones. *Id*. (*citing* WAC 480-120-141(4)(a)(1991)). However, AT&T did not seek – and never received – any exemption from rate disclosures, the form of disclosures at issue in this case. WAC 480-120-141(5)(a)(iv) (1991).[12]

In short, AT&T knew – in 1991 or before – that: (1) it was an AOS/OSP under the plain language of the rules, *see* R003088, R002894; (2) the WUTC staff consensus was that it was an AOS/OSP, *see* R003094; and (3) given its status as an AOS/OSP, it was required to seek (and did seek) exemptions of WAC 480-120-141 in order to avoid some of the rule's AOS disclosure requirements, *see* R002894. These facts certainly would have put a "reasonable person" on notice that AT&T was "at risk" for being deemed an AOS/OSP by the WUTC. *Maynard*, 486 U.S. at 361. AT&T not only had the ability to clarify the meaning of AOS/OSP before the WUTC, it actually did so and was specifically informed that "AT&T is an AOS company." R003094. *See Village of Hoffman Estates,* 455 U.S. at 489-99.

2. The Regulations are Not Unconstitutionally Vague.

A rule or regulation "is unconstitutionally vague only if its meaning is so ambiguous or unclear that an 'ordinary person exercising ordinary common sense' must guess at its meaning." *United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers,* 413 U.S. 548, 579, 93 S.Ct. 2880, 2897, 37 L.Ed.2d 796 (1973). If the rule or regulation regulates commercial activity and does not implicate the First Amendment or criminal law, the test is exceedingly lenient:

---

[12] As the WUTC notes, other telecommunications companies who also used the P-III platform sought and received waivers of the rate disclosures for a short period of time. R006836, ¶57 ("The Commission orders granting Qwest and Verizon waivers of WAC 480-120-141 make abundantly clear the Commission's position that an OSP violates Commission rules when it fails to provide rate quotes to consumers of operator-assisted collect calls. Indeed, the Commission in those orders initiated investigations into Verizon's and Qwest's compliance with that requirement, and both companies agreed to pay penalties for the rule violations uncovered as a result of those investigations."). Both Qwest and Verizon – who stood in the same position *vis-à-vis* the consumer as AT&T in the prison context – knew that they needed to obtain waivers even though T-Netix also provided them with the P-III platform to perform the operator service functions.

SIRIANNI YOUTZ SPOONEMORE
999 THIRD AVENUE, SUITE 3650
SEATTLE, WASHINGTON 98104
TEL. (206) 223-0303 FAX (206) 223-0246

> [E]conomic regulation is subject to a less strict vagueness test because its subject matter is often more narrow, and because businesses, which face economic demands to plan behavior carefully, can be expected to consult relevant legislation in advance of action. Indeed, the regulated enterprise may have the ability to clarify the meaning of the regulation by its own inquiry, or by resort to an administrative process.

Village of Hoffman Estates, 455 U.S. at 498 (footnotes omitted). *Accord, Chalmers v. City of Los Angeles,* 762 F.2d 753, 757 (9th Cir. 1985).

Under the *Village of Hoffman* standard, a rule regulating commercial or economic activity is unconstitutional only if it is "so vague and indefinite as really to be no rule or standard at all." *A. B. Small Co. v. American Sugar Refining Co.*, 267 U.S. 233, 239, 45 S.Ct. 295, 297 (1925). *See also Hoffman Estates,* 455 U.S. at 489, n. 7 (constitutional challenge only viable where "no standard of conduct is specified at all."); *Silverstreak, Inc. v. Washington State Dept. of Labor & Indus.*, 159 Wn.2d 868, 890, 154 P.3d 891, 903 (2007) ("Regulations are unconstitutionally vague if they allow an administrative agency to make arbitrary discretionary decisions."). A rule is not incomprehensible simply because it is ambiguous such that judges or lawyers may come to differing conclusions as the scope of the language. The rule must contain ***no*** coherent standards to be unconstitutional. *Franklin v. First Money, Inc.*, 427 F. Supp. 66, 69-70 (E.D. La. 1976), *aff'd,* 599 F.2d 615 (5th Cir. 1979). *See also Pest Comm. v. Miller*, 626 F.3d 1097, 1111-12 (9th Cir. 2010) (fact that courts come to different conclusions regarding interpretation of statute does not render it unconstitutionally vague); *Exxon Corp. v. Busbee*, 644 F.2d 1030, 1033 (5th Cir. 1981) ("To paraphrase, uncertainty ... is not enough for it to be unconstitutionally vague; rather, it must be substantially incomprehensible."). As the Washington State Supreme Court explained, "The fact that a statute requires interpretation does not make it void for vagueness." *Seven Gables Corp. v. MGM/UA Entm't Co.*, 106 Wn. 2d 1, 12, 721 P.2d 1, 7 (1986).

WAC 480-120-021 sets forth standards which are grounded in legislative intent and common sense. It places disclosure responsibility on the entity that: (1) has the legal

SIRIANNI YOUTZ SPOONEMORE
999 THIRD AVENUE, SUITE 3650
SEATTLE, WASHINGTON 98104
TEL. (206) 223-0303 FAX (206) 223-0246

relationship with the consumer, (2) is responsible for the connection, (3) bills for the services, and (4) profits from connection:

> The objective of the statute and Commission rules governing OSPs is to ensure that consumers are aware that they are using operator services and know or can request the rates they are paying for calls using those services. As with other telecommunication services, the company that charges, communicates with, and otherwise is identified as the service provider to, the consumer is obligated to make such disclosures.

R006821, ¶19. *See Seven Gables Corp. v. MGM/UA Entm't Co.*, 106 Wn.2d 1, 11, 721 P.2d 1, 6 (1986) ("A statute's announced purpose can provide the clarity necessary to establish what a statute prohibits."). As the WUTC concludes:

> [D]efining the OSP as the company that has the direct business relationship with the consumer is clear and unambiguous and avoids the protracted disputes over the nature and ownership of the network facilities used to provide the service that have been litigated so extensively in this proceeding.

R006823, ¶24.

AT&T cannot possibly claim that WAC 480-120-021 sets forth "no standards" or is "substantially incomprehensible." Indeed, AT&T itself had no trouble understanding the plain language when, in 1988, it objected to being defined as an AOS. R003088. It had no trouble understanding that, as the AOS/OSP, it was required to brand the calls. R002894. It knew that it needed to seek exemptions from WAC 480-120-141(4)(a), (b)(ii) and (iii) and (7) for its work in correctional facilities – all requirements placed exclusively on AOS/OPSs. R002894. The WUTC did not violate due process in deciding what AT&T itself had acknowledged years ago: that AT&T was an AOS/OSP.

E. The WUTC Did Not Violate its Rules, Procedure or Due Process in Deciding that AT&T Violated Relevant Regulations.

AT&T argues that it was not given the opportunity to present evidence on the second question before the WUTC – whether AT&T had violated relevant regulations. AT&T Mem., pp. 32-35. AT&T's premise is that no party had asked for a decision on question of whether the

SIRIANNI YOUTZ SPOONEMORE
999 THIRD AVENUE, SUITE 3650
SEATTLE, WASHINGTON 98104
TEL. (206) 223-0303 FAX (206) 223-0246

regulations had been violated and, as a result, the WUTC should never have considered and adjudicated this issue.

But AT&T's factual premise is wrong. AT&T itself sought a decision from the Commission on both questions referred by the King County Superior Court. AT&T's statement of the relief it sought could hardly be clearer:

> **RELIEF REQUESTED**
>
> 3. ***AT&T requests that the Commission*** make a summary determination finding that
>
> a. AT&T has not served as an OSP or AOS company to any state prison or correctional facility since June 20, 1996, ***and***
>
> b. ***AT&T has not violated any of the Commission's regulations applicable to an OSP or AOS company at those prison and correctional facilities since June 20, 1996***.

R000121 (AT&T Motion for Summary Determination).

AT&T made this identical request for relief five years later when, after discovery, it filed an amended motion for summary adjudication. R002728 (AT&T's amended motion). *See also* R008095, ¶39 (Intervenors recognizing that "AT&T's motion also asks for a declaration that it did not violate the regulations."), R008089-95 (arguments that AT&T violated regulations). Under WAC 480-07-375(1)(a) and WAC 480-07-380, AT&T identified ***two*** separate issues for the Commission to determine: (1) whether it was the AOS/OSP, and (2) if so, whether it violated "any of the Commission's regulations applicable to an OSP or AOS company." The ALJ recognized that AT&T, by its motion, sought answers to both questions:

> AT&T filed an answer to the formal complaint and a Motion for Summary Determination (AT&T's Motion), requesting that the Commission find that AT&T was not an OSP during the period in question ***and that AT&T had not violated the Commission's regulations applicable to OSPs.***

R003540, ¶ 5.

Because AT&T squarely raised the issue of its compliance in its request for relief, all the parties conducted discovery on the issue. *See, e.g.*, R008139-41 (Vitale deposition); R003683-

SIRIANNI YOUTZ SPOONEMORE
999 THIRD AVENUE, SUITE 3650
SEATTLE, WASHINGTON 98104
TEL. (206) 223-0303 FAX (206) 223-0246

88 (Rae deposition); R004002-05 (Clements deposition); R004010-14 (Gross deposition); R004019-20 (Passé deposition).

Intervenors directly addressed AT&T's request for a decision on the compliance issues, devoting an entire section of their briefing in opposition to AT&T's motion for summary adjudication to argue that AT&T violated the rule. R008089-008095. Intervenors also filed a lengthy declaration, with multiple exhibits, evidencing AT&T's failure to comply with the regulations. R008121-62. As intervenors' brief noted in summary, "AT&T's motion also asks for a declaration that it did not violate the regulations. As shown above, AT&T is liable for the failure to ensure that rate quotes were given as required by the regulations." R008095.

AT&T could have responded to intervenors' arguments in its reply brief. R004030-50. It could have disclaimed that it was seeking relief under the second question (despite the statement in its opening briefs to the contrary). It could have offered evidence that it made appropriate rate disclosures. It did none of these things. R004030-50; R003310-468.

The due process clause only ensures that a party will have notice and an "***opportunity*** to be heard." *Bellevue School Dist. v. E.S.*, 171 Wn.2d 695, 704-05 (2011). It is, however, up to that party to use that opportunity to make its case:

> As has been often said, "(t)he fundamental requirement of due process 'is the opportunity to be heard, 'at a meaningful time and in a meaningful manner,'" and, ***when this opportunity is granted a complainant, who chooses not to exercise it, that complainant cannot later plead a denial of procedural due process***.

Satterfield v. Edenton-Chowan Bd. of Ed., 530 F.2d 567, 572 (4th Cir. 1975) (emphasis added). *See also* 16D C.J.S. CONSTITUTIONAL LAW § 1777 (2001) ("Thus, a person who is afforded a full opportunity to be heard, but does not take advantage of it, is not deprived of any constitutional right by an adverse determination."). Here, AT&T, after raising the issue, conducting discovery, and seeing intervenors' evidence, elected not to respond. It cannot now claim that it never had an opportunity to do so.

SIRIANNI YOUTZ SPOONEMORE
999 THIRD AVENUE, SUITE 3650
SEATTLE, WASHINGTON 98104
TEL. (206) 223-0303 FAX (206) 223-0246

F. Rate Quotes Were Not Offered on Intrastate Calls Between June 20, 1996 and December 31, 2000.

1. All of the Evidence in the Record Indicates that Rate Quotes Were Not Offered on Intrastate Calls.

There is a very good reason why AT&T did not argue that it made appropriate rate disclosures during the relevant time period. AT&T's own witnesses and contemporary documents unambiguously show that no such disclosures were being made.

Intervenors' lawsuit was filed in June of 2000. R006815, ¶4. Sometime ***after*** that, AT&T became aware that rate quoting was not provided as required:

> Q. Okay. How did it become an issue [that intrastate rate quotes were not being provided]?
>
> A. I believe ***we [AT&T] learned that rate quote was not being provided***. It may be as a result of the lawsuit. I don't recall.
>
> Q. So after you learned that rate quoting was not being provided, then what did you do?
>
> A. Our operations team would have followed up with the T-Netix operational folks and asked that it be implemented.

R008140. AT&T contacted T-Netix to implement rate quotes for inmate-initiated phone calls. By August 2000, however, it was clear that T-Netix was unwilling to do the work needed to add intrastate rate quoting unless it was paid additional money:

> ***I am writing to follow up on T-NETIX's recent demand that AT&T agree to pay $2.50 per line, approximately $6,000 before T-Netix will implement rate quote for intrastate calls from correctional facilities in Washington State***. ***Because of the urgency of implementing rate quote, AT&T is willing to advance this amount.*** However, this advance should not be viewed as an admission by AT&T that it has any obligation to pay for rate quote. To the contrary, under its General Agreement with AT&T, T-NETIX is required to comply, at its own expense, with all laws in the performance of its obligations, including its obligations to provide operator services.
>
> * * *
>
> ***Please contact me at your earliest convenience to discuss an implementation schedule***.

R008123 (emphasis added).

SIRIANNI YOUTZ SPOONEMORE
999 THIRD AVENUE, SUITE 3650
SEATTLE, WASHINGTON 98104
TEL. (206) 223-0303 FAX (206) 223-0246

The same letter informed T-Netix, for the first time, that quotes must be provided for intrastate calls. R008123 ("The correct rate quote amounts for intrastate interLATA calls in Washington State follow:…"). Citing this evidence, the WUTC correctly found that "[c]orrespondence between AT&T and T-Netix confirms that as of August 2000, T-Netix had not implemented the platform's capability to make rate quote information available to consumers." R006835-36, ¶ 56.

The Commission also looked to the declarations of the experts when concluding that "[t]he record includes a detailed call flow of an inmate-initiated operator-assisted collect call from the Correctional Facilities, and at no time during that call flow is there any indication that either the inmate or the party receiving the call was notified of the ability to obtain a rate quote of the rates or charges for that call." R006835, ¶56. The evidence cited plainly supports this conclusion. R006835, ¶56, n. 60.

Mr. Wilson, a former AT&T employee, detailed the entire call flow. At no time during the call flow did the P-III platform give either the called or initiating party the opportunity to receive a rate quote. R008113-15, ¶13. He concluded that the P-III platform should have been upgraded to provide rate quotes, but that the upgrading was not done until early 2001. *See* R008116, ¶¶h-j ("From my employment with AT&T and from my experience in this industry, AT&T had oversight responsibility for the subcontractors" and "T-Netix should have upgraded its P-III platform to meet the rate quote requirements set by WUTC in 1991," but "I've seen no evidence that T-Netix upgraded their platforms at these institutions to give correct rate quotes for interLATA intrastate calls until early 2001."). [13]

Mr. Schott, T-Netix's expert, also detailed the call flow in his declaration. R001384-86, ¶18. His call flow analysis was the same as Mr. Wilson's. It showed that at no time in the call

[13] AT&T, in fact, relied upon its former employee, Mr. Wilson, to support its motion. R004034 (AT&T admits that "[a]mong that [other] evidence, AT&T cites Complainants' expert's testimony ...."). AT&T went so far as to defend Mr. Wilson's conclusions. R004034-35, ¶7. AT&T even cites Mr. Wilson's call flow description – which indicates that no disclosures were being made – in its present motion for judicial review. AT&T Mem., p. 5, lns. 22-23 (citing R008113-15, ¶¶13-14).

SIRIANNI YOUTZ SPOONEMORE
999 THIRD AVENUE, SUITE 3650
SEATTLE, WASHINGTON 98104
TEL. (206) 223-0303 FAX (206) 223-0246

flow was the opportunity to obtain a rate quote provided to either the party initiating the call or the called party. *Id*.

These facts are consistent with the declarations on the record from actual call recipients themselves – including high-volume recipients such as Columbia Legal Services' Institutions Project, which received hundreds of collect intrastate calls a year from inmates of correctional facilities during the relevant time period. R000958 (Columbia). *See also* R000913 (Defense attorney); R000915 (intervenor Herivel).

AT&T never disputed any of this evidence, from which the WUTC concluded that "no party disputes that the P-III Premise software platform did not make rate information available to consumers."[14] R006835. The Commission found, "The record includes a detailed call flow of an inmate-initiated operator-assisted collect call from the Correctional Facilities, and at no time during that call flow is there any indication that either the inmate or the party receiving the call was notified of the ability to obtain a rate quote of the rates or charges for that call." R006835, ¶56. The evidence, including AT&T's admissions and expert testimony, plainly supports this finding. R006835, ¶56, n. 60.

Initially, the ALJ mistakenly concluded that "[t]he parties did not raise this issue in their pleadings and did not present the Commission with facts upon which it could make a determination…." R004164. In fact, the parties ***did*** raise the issue in the pleadings (*see e.g.* R000121, R002728, R008089-008095, R008121-62) and substantial evidence ***was*** admitted on this issue (*see e.g*. R008140, R008123, R008113, ¶13, R008119, ¶h-j, R001384-86, ¶18, R000958, R000913, R000915). The WUTC properly corrected the ALJ's error, holding that "[w]e disagree with this aspect of Order 23, and find sufficient undisputed evidence in the record to enable us to respond to the Court's question at this time." R006834.

---

[14] In an argument never raised before the WUTC, AT&T suggests that the 1991 rules were not violated because "the 1991 disclosure requirement did not require a particular means for the consumer to make a request, other than posting on the phone a toll-free number to call." AT&T Mem., p. 35, n. 13. Of course, AT&T was not posting any information about rates on the phones at issue because it obtained an exemption from doing so. R002894-95.

SIRIANNI YOUTZ SPOONEMORE
999 THIRD AVENUE, SUITE 3650
SEATTLE, WASHINGTON 98104
TEL. (206) 223-0303 FAX (206) 223-0246

2. AT&T's Evidence That Is Outside the Record is Improper and Does Not Support its Position.

AT&T is unable to cite anything in the administrative record suggesting that intrastate rate quotes were being provided between June 20, 1996 and December 31, 2000. Instead, it offers a short passage from the deposition of Scott Passé as evidence that the P-III platform had the ability to "quote rates on the recording that provided for it." AT&T Mem., p. 34 (citing App. H, pp. 143-44). There are two fundamental problems with this "evidence."

First, AT&T could have – but did not – submit this evidence to the WUTC. R008089-008095 (intervenors' brief); R008121-62 (intervenors' evidence); R004030-50 (AT&T's reply brief, which fails to respond to intervenors' argument or evidence). AT&T cannot now, in an APA appeal, seek to introduce new evidence that it failed to submit before the agency. None of the limited exceptions in RCW 34.05.562(1) exists. RCW 34.05.558. AT&T's "App. H" should be stricken and ignored.

Second, this evidence is not relevant. AT&T attempts to reframe the issue as whether the P-III platform had the ability, if loaded with the correct software and configured with the correct hardware, to give rate quotes. It then cites to Mr. Passé's testimony, where he states that the P-III had that "capability." App. H, p. 143. Nobody disputes this fact.

The pertinent question is not whether the P-III platform had the "capability" to quote rates, but whether that capability was activated with the proper upgrades between June 20, 1996 and December 31, 2000. As the WUTC noted, the question was one of actual implementation of the P-III's platform's functionality: "[A]s of August 2000, T-Netix ***had not implemented the platform's capability to make rate quote information available to consumers***." R006835-36, ¶56 (emphasis added).

On this question, AT&T's Mr. Passé has nothing to offer. As he testified, "[T]he device is capable of that [providing rate quotes], but I can't comment on whether – as to whether that

SIRIANNI YOUTZ SPOONEMORE
999 THIRD AVENUE, SUITE 3650
SEATTLE, WASHINGTON 98104
TEL. (206) 223-0303 FAX (206) 223-0246

was ever done." Youtz Decl., *Exh. A*, p. 256.[15] *See also id.*, p. 236 (Mr. Passé is unable to testify what the call flow pattern would have actually been in 1999 or 2001), p. 255 (Mr. Passé has no knowledge "one way or the other about whether that [rate quote] announcement was being made within the state of Washington."); p. 259 (Mr. Passé has no "specific knowledge about what was quoted in terms of rates."); p. 270 (Mr. Passé has no recollection of "any of these functions being included in the call flow after 1996.").

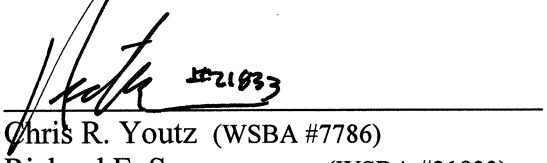
AT&T has absolutely no evidence – either in or outside the record – that ***intra***state rate quotes were being provided on inmate initiated telephone calls between June 20, 1996 and December 31, 2000. The WUTC's conclusion AT&T violated the disclosure regulations is based on "evidence in sufficient quantum to persuade a fair-minded person of the truth of the declared premises," and should not be disturbed. *Motley-Motley, Inc. v. State*, 127 Wn.App. 62, 77, 110 P.3d 812 (2005).

IV. CONCLUSION

AT&T asked the WUTC to decide both questions referred to it by the King County trial court. AT&T has now received those answers, which were well within the WUTC's expertise and supported by substantial evidence. The WUTC's Final Order should be affirmed.

DATED: October 31, 2011.

SIRIANNI YOUTZ SPOONEMORE



Chris R. Youtz (WSBA #7786)
Richard E. Spoonemore (WSBA #21833)
Attorneys for Plaintiffs

[15] Intervenors do not believe that any evidence outside of the administrative record should be considered in this APA appeal. *See* RCW 34.05.558. ***All*** of AT&T's off-record evidence should be stricken and ignored in this APA appeal. *Id.* However, if the court is inclined to consider Mr. Passé's off-record testimony, then it should have a complete picture of what he actually said.

SIRIANNI YOUTZ SPOONEMORE
999 THIRD AVENUE, SUITE 3650
SEATTLE, WASHINGTON 98104
TEL. (206) 223-0303 FAX (206) 223-0246