HONORABLE J. KATHLEEN LEARNED

IN THE SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

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

Plaintiff,

v.

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

Defendant,

Case No.: 00-2-17565-5 SEA

REPLY IN SUPPORT OF AT&T'S MOTION TO DISMISS

Plaintiffs admit that the statutes at issue do not, by their plain language, give rise to any claim against AT&T. To get around this problem, plaintiffs would have the court re-write those laws to more accurately reflect plaintiffs' view of what the legislature really intended. This is judicial legislation, which is simply not appropriate. Even if, as plaintiffs contend, the legislature had intended to create a CPA cause of action for the failure of a telecommunications provider to "assure appropriate disclosure" of OSP rates, the language of the statute did not accomplish this goal. It is not the role of the court to add words or meaning to a statute whose language is unambiguous, under the guise of accomplishing what the plaintiffs believe was the legislature's intent.

Further, the only conceivable cause of action available under RCW 80.36.530 — if indeed any claim at all is available — is for violation of the WUTC regulations, which by their plain language direct only OSPs to make disclosures. The fact that AT&T contracts with OSPs does not subject it to liability.

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Finally, if any claims against AT&T survive dismissal, all claims related to interstate long distance calls must be dismissed pursuant to the filed tariff doctrine. The controlling federal law is clear - AT&T must charge its tariffed rates. A "simple refund" of those rates is as abhorrent under the filed tariff doctrine as a complicated recalculation of the rates. The point of the doctrine is not to avoid difficult or complex rerating of calls. It is to avoid any action that would result in the imposition of some charge *other than* what is set forth in the tariff. There is no dispute that a damage award in this case (under plaintiffs' theory) would result in the imposition of zero charges rather than the rates contained in AT&T's federal tariff. Those claims must therefore be dismissed.

The Statutes Do Not Give Rise to a Cause of Action Against AT&T. Plaintiffs agree that RCW 80.36.520, by its plain terms, imposes a mandatory obligation only on the WUTC. Plaintiffs' Memorandum in Opposition to Defendants' Motions to Dismiss ("Opposition") at 15. They do not — because they cannot — argue that the express language of the statute imposes any duty upon any telecommunications carrier, including AT&T.

Instead, Plaintiffs ask this court to rewrite the statute to impose duties that plainly do not exist. Plaintiffs seek a judicial reconstruction of the statute. But they have failed to pass the threshold test necessary to invoke that judicial power -- they fail to identify any ambiguity in the statute. Absent an ambiguity, the court may not resort to statutory construction or legislative history. *Vita Food Products, Inc. v. State*, 91 Wn. 2d 132, 134, 587 P.2d 535 (1978) ("We should not and do not construe an unambiguous statute.") (citations omitted).[1] The statute must be enforced as written.

Plaintiffs also incorrectly argue that the Court must "harmonize" RCW 80.36.520 and .530. But there must first be a conflict — there is none on the face of these two provisions. Moreover, courts may not "harmonize" two statutes if doing so requires the court to add words the legislature did not include, or ignore or

[1] *Accord Bravo v. Dolsen Cos.*, 125 Wn.2d 745, 752, 888 P.2d 147 (1995) ("If the language of the statute is plain, free from ambiguity and devoid of uncertainty, there is no room for construction because the legislative intention derives solely from the language of the statute."); *Western Telepage Inc. v. Tacoma*, 95 Wn. App. 140, 144-47, 974 P.2d 1270 (1999) ("The interpretation of a statute is a question of law reviewed de novo. If a statute is plain and unambiguous, its meaning must be derived from the language of the statute itself. . . . Courts are not to read into statutes matters that are not there, or modify statutes by construction.") (citations omitted); *Credit Union v. Edwards*, 94 Wn.2d 666, 669, 619 P.2d 363 (1980) ("We must first seek to learn the legislature's intent by examining the language of the statute itself. If no ambiguity exists, there is no need for statutory construction and the legislation must simply be applied in the courts") (citations omitted); *Murphy v. Dep't of Licensing*, 28 Wn. App. 620, 623, 625 P.2d 732 (1981) (same); *Griffin v. Social & Health Servs.*, 91 Wn.2d 616, 624, 590 P.2d 816 (1979) ("Where the language of a statute is clear, we will respect it."); *Hatfield v. Greco*, 87 Wn.2d 780, 781, 557 P.2d 340 (1976) (same) (citations omitted).

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alter words the legislature included. *See State v. Martell*, 22 Wn. App. 415, 418, 591 P.2d 789 (1979) (court refuses to change "or" to "and" in order to harmonize two criminal statutes). In fact, courts will harmonize two statutes only when it is reasonably possible to do so without distorting the statutory language. *Peninsula School v. Employees*, 130 Wn.2d 401, 408, 924 P.2d 13 (1996) ("[I]f apparent conflicts in the statutes can be reconciled and effect given to each without distortion of the language used, the statute will be harmonized.").

In the present case, plaintiffs ask the court to significantly rewrite the statutes in order to salvage their claims. To save their complaint, plaintiffs propose adding and subtracting language from both RCW 80.36.520 and .530. For example, to reach the result plaintiffs seek the court must rewrite RCW 80.36.520 as follows[2]:

> ~~The utilities and transportation commission shall by rule require, at a minimum, that~~ [A]ny telecommunications company, operating as or contracting with an alternate operator services company, shall assure appropriate disclosure to consumers of the provision and the rate, charge or fee of services provided by an alternate operator services company, and shall comply with all rules of the utilities and transportation commission regarding such disclosure.

And the court must rewrite RCW 80.36.530 as follows:

> In addition to the penalties provided in this title, a violation of RCW 80.36.510, RCW 80.36.520, or RCW 80.36.530, and regulations passed thereunder, constitutes an unfair or deceptive act in trade or commerce in violation of chapter 19.86 RCW, the consumer protection act. . . .

Plaintiffs cite no case authorizing a court to intrude so far into the legislative process because none exists.

> "It is not within [a court's] power to add words to a statute even if we believe the legislature intended something else but failed to express it adequately."

Vita Food Products, 91 Wn.2d at 134. Plaintiffs' remedy must be with the legislature or the WUTC, not the courts. *Id.* They have no claim under RCW 80.36. Their case therefore must be dismissed.

AT&T Has No Liability Based on Its Contracts With OSPs.[3] As discussed above, plaintiffs have no claim against AT&T for violation of RCW 80.36.520. Likewise, plaintiffs have no claim against AT&T for

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[2] AT&T does not concede that what plaintiffs propose is indeed what the legislature intended. It is possible, as explained more fully in the Reply Brief filed by defendant Verizon, that the legislature intended that a violation of the WUTC regulations (and not a violation of RCW 80.36.520) would give rise to a cause of action under RCW 80.36.530. But even to effectuate that intention would require statutory redrafting which is not permitted. *Vita Food Products*, 91 Wn.2d at 134.

[3] AT&T is not an OSP, and plaintiffs' claim that they "properly alleged that AT&T provides operator services," Opposition at 10, is disingenuous. The very agreement upon which this lawsuit is based, between the Department of Corrections and AT&T (the "Agreement"), attached to the AT&T Motion to Dismiss as Ex. 1, and referenced in the First Amended Complaint at ¶ 14, makes clear that AT&T is not an OSP. On pages 2-3 of the Agreement, the obligations of AT&T and its subcontractors are identified. Each of the subcontractors (GTE, PTI (whose obligations were later taken over by T-Netix)

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violation of the WUTC regulations based on a theory of contractual privity.[4] The Washington legislature instructed the WUTC to enact rules requiring that "telecommunications compan[ies], operating as or contracting with an alternate operator services company, assure appropriate disclosure" of the rates at issue in this case. RCW 80.36.520. The WUTC then enacted regulations to define what disclosures it deemed "appropriate," but chose to impose specific disclosure obligations only on OSPs. This is reasonable, particularly given that the WUTC is well aware of the obligation imposed on all regulated telecommunications providers (including AT&T) to file tariffs with the WUTC (intrastate charges) and/or FCC (interstate charges).[5] *Marcus v. AT&T Corp.*, 138 F.3d 46, 63 (2nd Cir. 1998) (the public is "conclusively presumed" to know the content of tariffs on file with the FCC).

Thus, even if plaintiffs were right that under the statute "every telecommunications company that is a party to a contract involving the provision of operator services shares legal responsibility for assuring appropriate rate disclosure," Opposition at 11, there is absolutely no indication that the WUTC narrowed the scope of the statute. Instead, the WUTC enacted regulations designed to ensure that "appropriate disclosure" was made. The fact that the Commission did not impose any *additional* disclosure obligations on anyone except OSPs does not mean that other telecommunications companies have no obligation to disclose. Those other companies simply must make their disclosures in a different manner — through tariffs. *Marcus*, 138 F.3d at 63.

Claims Related to Interstate Long Distance Calls Must Be Dismissed Pursuant to the Filed Tariff Doctrine. Plaintiffs' request for a refund of long distance charges paid must be dismissed. The filed tariff doctrine *requires* that carriers charge their tariffed rates. *AT&T v. Central Office Telephone, Inc.*, 524 U.S. 214, 222, 118 S.Ct. 1956, 1962, (1998) ("[T]he rate of the carrier duly filed is the only lawful charge. Deviation from it is not permitted upon any pretext.") (citing *Louisville & Nashville R. Co. v. Maxwell*, 237 U.S. 94, 97, 35

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and US West) has the obligation to "provide . . . operator service." AT&T has no such obligation. Whether it is an OSP is a question of law that can — and should — be resolved in the context of this motion. However, in the event the case is not fully resolved by the pending motion, AT&T will file a motion for summary judgment on this issue, as it mentioned in its opening brief. Motion to Dismiss at 6, n. 6.

[4] Mere privity of contract is insufficient to impose vicarious liability in favor of third parties upon AT&T for any act or omission of the OSPs, who are independent contractors. *Phillips v. Kaiser Aluminum*, 74 Wn. App. 741, 749, 875 P.2d 1228 (1994) ("Generally, a principal is not vicariously liable for the acts of an independent contractor").

[5] As described more fully in Verizon's Reply Brief at ___, unlike regulated telecommunications providers, OSPs often are not regulated and have no obligation to file rates with the WUTC.

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S.Ct. 494, 495 (1915) A "simple refund", Opposition at 29, is as impermissible under the filed tariff doctrine as a complicated rerating of charges.[6]

> The filed rate doctrine prevents more than judicial rate-setting; it precludes any judicial action which undermines agency rate-making authority.

Marcus, 138 F.3d at 61. Thus, even if awarding the damages requested by plaintiffs would not require the court to engage in complex calculations to determine a reasonable rate, the filed tariff doctrine still bars the claims.

Here, as in *Marcus*, any award of damages related to interstate calls — even in the form of "simple refunds" — is impermissible under the filed tariff doctrine. Such an award would be tantamount to excusing plaintiffs from paying the rates that the FCC has ruled are reasonable, something the filed tariff doctrine forbids this court from doing. *Id.*

DATED this 27 day of October, 2000.

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[6] Plaintiffs' reliance on *Litton Systems, Inc. v. Southwestern Bell Tel. Co.*, 700 F.2d 785 (2nd Cir. 1983), for the proposition that a simple refund is not barred by the doctrine is misplaced. *Litton* was an antitrust suit in which AT&T's charges for certain telephone equipment were challenged. AT&T's filed tariff argument was rejected by the court, in part because the tariff upon which AT&T relied had been expressly disapproved by the FCC following an investigation: "The *Keogh* doctrine [involving application of the filed tariff doctrine in an antitrust setting] is inapplicable to ultimately 'disapproved tariffs . . . when . . . the regulatory agency expressly refuses to commit itself pending investigation.'" *Id.* At 820 (ellipses in original) (citations omitted). A later court, analyzing *Litton*, held that the filed tariff doctrine "has never been rejected [in an antitrust action] in which the conduct in question had actually been approved by a regulatory body." *In re Wheat Rail Freight Rate Antitrust Litigation*, 579 F. Supp. 517, 532 (N.D. Ill. 1984). Here, of course, *Litton* is inapplicable. There has been no suggestion that AT&T's long distance tariffs have even been challenged, much less disapproved.

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