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COURT OF APPEALS
DIVISION ONE
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COURT OF APPEALS NO. 48075-8-I

SUPREME COURT
OF THE STATE OF WASHINGTON

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STOEL RIVES LLP

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

Petitioners,

v.

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

Respondents.

PETITION FOR REVIEW

J Lawrence
5-14-03

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I. IDENTITY OF PETITIONERS

Petitioners Sandy Judd, Tara Herivel and Zurayah Wright petition this court to accept review of the court of appeals decision terminating review designated in Part II of this petition.

II. COURT OF APPEALS DECISION

Petitioners seek review of Division One's decision in *Judd v. American Tel. & Tel. Co.*, 66 P.3d 1102, ___ Wn. App. ___ (2003). A copy of the decision is in the Appendix at pages A-1 through A-20.

III. ISSUES PRESENTED FOR REVIEW

(1) Do RCW 80.36.510, .520 and .530 provide a cause of action, and have plaintiffs stated a claim, for violation of the Consumer Protection Act, based on defendants' failure to disclose telephone rates?

(2) Must a consumer first bring a review proceeding under the Administrative Procedure Act to attack the validity of agency action in order to maintain an action for failure to disclose telephone rates under the Consumer Protection Act?

(3) If the answer to issue No. 2 is no, does the WUTC's 1991 regulation conflict with the Disclosure Statutes and did the WUTC exceed the scope of its statutory authority in granting waivers to defendants Qwest and Verizon in 1999?

(4) Did the court of appeals err in dismissing defendant CenturyTel on the erroneous factual premise that it never provided long distance service to correctional institutions?

IV. STATEMENT OF THE CASE

Petitioners seek review of a number of purely legal issues. To the extent that factual or procedural issues are important, they are either incorporated into the argument that follows or may be found in the opinion of the court of appeals.

V. ARGUMENT

A. NATURE OF THE CASE AND SUMMARY OF THE ARGUMENT.

In 1988, the state Legislature enacted a series of statutes imposing rate disclosure requirements on all companies providing operator-assisted long distance service from public telephones. These statutes (the "Disclosure Statutes") addressed a growing problem. The calls were expensive and companies often failed to disclose rates at the time a call was placed or accepted. To remedy the situation, the Legislature expressly provided that violation of the disclosure requirements constitutes a *per se* violation of the Consumer Protection Act (CPA).

Among the beneficiaries of this law were the friends and families of inmates at state prisons. When inmates and family members, friends, or attorneys want to call each other, they may do so only by having the inmate place a collect call on a prison payphone. This telephone service is provided through contracts between the Washington Department of Corrections and "alternate operator services companies," or AOS companies. The defendants in this case are all AOS providers and billed thousands of recipients of inmate calls. They failed, however, to disclose rate information to these people for over ten years after the laws

mandating disclosure were enacted. This case seeks to certify a class of thousands of consumers who were called by inmates between 1996 and 2000, but who were not provided the statutorily-required disclosures.

The court of appeals affirmed the trial court's dismissal of plaintiffs' complaint, concluding that the statutes did not provide a cause of action under the CPA independent of regulations promulgated by the Washington Utilities & Transportation Commission (WUTC). Because those regulations exempted these defendants from all disclosures—despite the fact that they fell within the statutory definition of an AOS company—the court held that plaintiff could not state a claim for violation of the CPA. Under this holding, a consumer must first institute a review proceeding under the Administrative Procedure Act (APA) in order to assert a cause of action under the CPA for violation of statutory disclosure requirements. We do not think that the Legislature would have imagined that, 14 years after it enacted mandatory disclosure laws, a court would hold that a large group of telecommunications companies providing AOS service were exempt from all such disclosures for the first 11 years of the statutes' existence. This issue is of substantial public interest not only to the thousands of putative class members in this case, but to thousands of other Washington citizens who have used defendants' services to place long-distance calls through public telephones.

The second issue presented for review concerns plaintiffs' ability to challenge WUTC regulations and regulatory action through this lawsuit. When the WUTC issued regulations fleshing out the requirements of the Disclosure Statutes in 1991, it exempted an entire subclass of AOS

companies from the disclosure requirements. The exempted entities are known as local exchange companies (LECs). All three defendants-appellees fall within this subclass. Later, in 1999, the WUTC granted waivers to defendants Qwest and Verizon from a new regulation requiring disclosure of LECs. The WUTC exempted these companies despite the fact that LECs fit squarely within the statutory definition of "alternate operator services company."

Although the WUTC's exemption of LECs was facially inconsistent with the statute, the court of appeals held that plaintiffs could not challenge the validity of the WUTC regulations or waivers. It reasoned that plaintiffs were first required to institute a review proceeding under the state Administrative Procedure Act. This holding conflicts with this Court's decision in *Manor v. Nestle Food Co.*, 131 Wn.2d 439, 932 P.2d 628 (1997), a non-APA personal injury case in which the Court determined the validity of a regulation issued by Department of Labor & Industries. If the published opinion of the court of appeals is allowed to stand, it will cut off potentially meritorious challenges to agency regulations whenever that issue arises in a non-APA review proceeding. This is an issue of substantial public interest.

By footnote, the court of appeals rejected plaintiffs' arguments on the merits of the WUTC's regulation and waivers. It reasoned that the Disclosure Statutes were never aimed at defendants, which the court noted were heavily regulated and were already filing their rates via tariffs. The Disclosure Statutes, however, do not distinguish between LECs and non-LECs. Indeed, the Legislature's definition of AOS company expressly

includes the defendants in this case. The WUTC's exemption of LECs from disclosure requirements impermissibly alters a statutorily-defined term. If left intact, the court of appeals' opinion will prevent thousands of Washington citizens from obtaining the redress the Legislature determined they should have when a telephone company fails to provide appropriate rate disclosure.

B. THE DISCLOSURE STATUTES SET A MINIMUM FLOOR OF DISCLOSURE THAT IS ACTIONABLE IN THIS CASE; DISCLOSURE BY TARIFF IS NOT CONSISTENT WITH LEGISLATIVE INTENT.

1. The Statutory Framework.

In 1988, the state Legislature acted to require companies providing long-distance operator services at public telephones to disclose rates. *See* RCW 80.36.510, .520, and .530.

> 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.

These disclosure requirements were specifically imposed on "alternate operator service companies":

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

RCW 80.36.520. The Legislature was precise in identifying the companies that were required to disclose rates to consumers. "Alternate operator services company" is defined as follows:

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

WAC 80.36.520. There is no dispute that prisons are among the places covered by the statute. *See* WAC 480-120-141(2)(b). Collect calls from prisons require the "connection" described in the statute.

The Legislature sought to give the statute some teeth by making a violation of these provisions a *per se* violation of the CPA:

> In addition to the penalties provided in this title, a violation of RCW 80.36.510, RCW 80.36.520, or RCW 80.36.524 constitutes an unfair or deceptive act in trade or commerce in violation of chapter 19.86 RCW, the consumer protection act. Acts in violation of RCW 80.36.510, RCW 80.36.520, or RCW 80.36.524 are not reasonable in relation to the development and preservation of business, and constitute matters vitally affecting the public interest for the purpose of applying the consumer protection act, chapter 19.86 RCW.

RCW 80.36.530.

During the time period covered by this lawsuit (1996 to 2000), operators employed by defendants did not disclose the rate or charge for inmate calls.[1] CP 5. Nor did the operator provide any information on how to obtain the applicable rate. *Id.* The recipient of an inmate call was

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[1] Rates for some interstate calls were disclosed starting sometime in 1999. CP 5.

given two choices: (1) accept the call without any disclosure of rate information; or (2) hang up. *Id.*

2. The Disclosure Statutes Create A Cause Of Action Under The CPA.

RCW 80.36.530 states that a "violation" of RCW 80.36.510 and .520 "constitutes an unfair or deceptive act in trade or commerce in violation of chapter 19.86 RCW, the consumer protection act . . ." The substantive provision of section .510 that may be violated is the statement that the provision of long-distance services "without disclosure to consumers" is a deceptive trade practice. RCW 80.36.530 also refers to a "violation" of section .520. Section .520 provides a minimal floor of disclosure and requires the WUTC to flesh out disclosure requirements in more detail. What is clear is that, under sections .520 and .510, no disclosure cannot be "appropriate disclosure."

Despite the statutory references to a "violation" of section .520 and .510 and the point-blank statement in section .510 that the provision of long-distance services "without disclosure to consumers" is a deceptive trade practice under the CPA, the court of appeals held that the Legislature did not create a cause of action for failure to disclose, only a cause of action for failure to comply with yet-to-be-adopted WUTC regulations. As the dissent points out, this holding fails to give effect to the Legislature's statement that "provision of these services without disclosure to consumers is a deceptive trade practice." RCW 80.36.510. We agree with the majority's conclusion that the Legislature directed the WUTC to promulgate regulations fleshing out disclosure requirements.

But this does not mean that a company can utterly fail to provide disclosure for over ten years when the statute states that a failure to disclose ***is*** a deceptive trade practice. The most reasonable reading of this remedial legislation is that the Legislature required some form of disclosure but left the specifics up to the WUTC. A complete failure to disclose is still a violation of the statutory directive that "provision of these services without disclosure to consumers is a deceptive trade practice." RCW 80.36.510. Total failure to disclose is actionable and consistent with the language and intent of the statute.

3. Disclosure By Tariff Is Inconsistent With Legislative Intent.

In footnote 11, the court of appeals contends that the defendants had "already appropriately disclosed rates"—even before the enactment of the Disclosure Statutes. Appx., A-11-12 n. 11. This occurred, said the court, when defendants filed tariffs under RCW 80.36.100 and the WUTC determined the rates were just and reasonable. *Id.* According to the court of appeals, plaintiffs failed to "take into consideration" this pre-existing regulatory scheme. *Id.*

The court of appeals is wrong. ***All*** companies providing AOS services, including ***non***-LEC telecommunications companies, were required to and did file tariffs prior to the passage of the Disclosure Statutes. *See* Appellants' Opening Bf., pp. 36-37; Reply Bf., pp. 3-7. (citing RCW 80.36.100, which requires all telecommunications companies to file tariffs). The Legislature is presumed to have known this fact. Because all providers of AOS services were "disclosing" their rates

pursuant to tariffs when the Legislature identified the problem, the Legislature must have concluded that disclosure by tariff was not an acceptable solution to the problem. This makes sense. No one who has ever attempted to get their hands on a tariff, much less understand one, knows that it is not a workable means of communicating information to the general public. Accordingly, the "appropriate disclosure" required by RCW 80.36.520 is a type of disclosure that is more accessible, more immediate, and more practical than disclosure by tariff.

The court of appeals recognizes that disclosure by tariff is "likely a legal fiction." Appx., A-11 n.11. The Legislature was not concerned with fictions, however; it was concerned with the practical dissemination of information to consumers that would allow them to make informed choices. If disclosure by tariff had been deemed a sufficient consumer protection by the Legislature, there would have been no need to pass any legislation because such disclosure was already mandated by law.

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

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

The court of appeals' conclusion that "disclosure by tariff" satisfies the statutory requirement of "appropriate disclosure" is premised on a misreading of legislative intent. The court erroneously states that the Disclosure Statutes were aimed at "new" companies that did not file tariffs. Appx., A-7 ("The legislation was prompted by a growing number of non-regulated companies that were popping up to provide telecommunication services necessary to long distance service. . . . [T]hese 'new' telephone companies were unregistered with and unregulated by the WUTC.") This statement is factually incorrect. As noted above, all AOS companies were required to file tariffs. Moreover, nothing in the statutes or legislative history supports a distinction between LECs and non-LECs or suggests that the Legislature believed disclosure by tariff was acceptable.

The court of appeals' reasoning is flawed for another reason. The Disclosure Statutes are concerned with two forms of disclosure—rate disclosure and identification of the company providing AOS services ("branding"). Tariffs cannot accomplish the goal of identifying the company that provides AOS services for a particular call. That type of disclosure can take place only at the time a specific call is made using a specific AOS company.

In sum, the Legislature permitted the WUTC to set the precise level of disclosure, but it did not permit the WUTC to conclude that the statutory "minimum" required by RCW 80.36.520 was a form of disclosure that the Legislature had already found to be deficient. Under these circumstances, one need not consult a regulation to determine that a CPA violation has occurred.

C. A COURT MAY DETERMINE THE VALIDITY OF A REGULATION IN A NON-APA REVIEW PROCEEDING.

Before we address the substance of the WUTC regulations under the Disclosure Statutes, a threshold question must be answered: May a court hear a challenge to the validity of a regulation outside the confines of a review proceeding under the Administrative Procedure Act (APA)? The court of appeals, citing RCW 34.05.510 and *Manor v. Nestle Food Co.*, 131 Wn.2d 439, 932 P.2d 628 (1997), answered in the negative.

The court of appeals' reliance on *Manor* is misplaced—it supports plaintiffs' position. *Manor* was a personal injury case, not a review proceeding instituted under the APA. The *Manor* court did not refuse to hear a challenge to the validity of a regulation; it entertained extensive arguments on the validity of a regulation issued by the Department of Labor and Industries. The agency (L&I) never appeared in the case.

The *Manor* case is like this case: plaintiff brought a civil action for damages that required the court to interpret a statute and determine the validity of a regulation. The court relied on the analytical framework of the APA to determine whether the regulation was valid, posing some of the same questions that plaintiffs pose here: Did the rule exceed the

statutory authority of the agency? Was the rule arbitrary and capricious? *See id.* at 453-54. The court of appeals appears to have confused the *Manor* court's application of APA standards of judicial review with the separate concept of adjudication through an APA review proceeding. The former need not entail the latter.[2]

The court of appeals ruling purports to shut the door on review of agency regulations in non-APA proceedings. This creates a serious conflict among Washington appellate decisions and engenders uncertainty in an important area of the law. Review should be granted.

Review should also be granted because the court of appeals misapplied the statutory exception to exclusive APA review. RCW 34.05.510(1) provides that an APA review proceeding is unnecessary where "the sole issue is a claim for money damages or compensation and the agency whose action is at issue does not have statutory authority to determine the claim."

This case fits the exception. ***First***, plaintiffs have asserted a CPA claim for money damages. While plaintiffs' complaint contains a claim for injunctive relief, that claim is moot. Plaintiffs made this observation in the trial court and offered to withdraw the claim. CP 216.

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[2] *Manor* is not the only Washington case involving a challenge to the validity of an agency rule in a non-APA review proceeding. The court of appeals decision conflicts with other Washington case law. *See Bird-Johnson Corp. v. Dana Corp.*, 119 Wn.2d 423, 428, 833 P.2d 375 (1992); *State v. Thompson*, 95 Wn.2d 753, 759, 630 P.2d 925 (1981); *Gugin v. Sonico, Inc.*, 68 Wn. App. 826, 831, 846 P.2d 571 (1993); *Ward v. LaMonico,* 47 Wn. App. 373, 379, 735 P.2d 92 (1987).

It is no answer to say, as the court of appeals did, that plaintiffs "never moved to withdraw that portion of her claim." Appx., A-13. This is a 12(b)(6) motion. A motion to dismiss "should be denied if the plaintiff can assert any hypothetical factual scenario that gives rise to a valid claim, even if the facts are alleged informally for the first time on appeal." *Fondren v. Klickitat County*, 79 Wn. App. 850, 854 (1995). Independent of any suggestion or motion from plaintiffs, the trial court has a duty to determine whether the complaint can be saved through amendment. *See* 5A Charles A. Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1357, p. 339 (2d ed. 1990). The fact that plaintiffs did not file a separate motion to amend the complaint is not dispositive. *See Seattle Professional Photographers Ass'n v. Sears Roebuck Co.*, 9 Wn. App. 656, 661, 513 P.2d 840 (1973) (trial court erred in failing to allow amendment to delete claims where request made in trial brief; appellate court deemed complaint amended when reviewing dismissal for failure to state a claim).

Second, the WUTC does not have the statutory authority to determine whether the CPA has been violated. The WUTC has no authority to award damages, attorney fees, or costs under the CPA, or to provide any relief directly to individual consumers other than refunds of certain charges.

Finally, the court of appeals' reliance on *Department of the Army v. Blue Fox, Inc.*, 525 U.S. 255 (1999) is misplaced. The court's cursory analysis of the case implies that there is a parallel provision in the national APA with a similar "money damages" exception. *See* Appx., A-13. That

is not the case. The APA provision construed in *Blue Fox* concerns the circumstances under which the federal government waives sovereign immunity. 525 U.S. at 260-61. It has nothing to do with the circumstances under which a challenge to an agency rule may be heard in a non-APA review proceeding. The two statutes are not remotely parallel.

Even if they were, the court of appeals has misstated the holding in *Blue Fox*. The Supreme Court did not hold that plaintiff's claim for an equitable lien took it outside the "money damages" exception to the federal APA statute. It held the opposite: the claim was merely a means to the end of satisfying a claim for the recovery of money and therefore came ***within*** the "money damages" language, thus precluding the lawsuit on sovereign immunity grounds. *Id.* at 262-63. In short, the court of appeals' application of the law is misguided and its description of the holding in the case is wrong.

This Court can and should grant review to make it clear that the validity of an agency regulation may be challenged in the circumstances present here.

D. THE WUTC'S 1991 REGULATION AND ITS DECISION TO GRANT WAIVERS FROM ITS 1999 REGULATION CONFLICT WITH THE DISCLOSURE STATUTES.

If, as demonstrated above, a court may properly entertain a challenge to the WUTC regulations in this case, the question becomes whether defendants' reliance on those regulations is misplaced because they conflict with the statute they purport to implement. The content of the 1991 and 1999 regulations and the WUTC's decision to grant waivers to Qwest and Verizon exempting these defendants from compliance with

the 1999 regulation are described in the court of appeals opinion and in plaintiffs' briefing in the court of appeals. *See* Appellants' Opening Bf., pp. 8-12; Reply Bf., pp. 13-15. Below, we describe why review should be granted on the issues of: (1) whether the WUTC's decision to exempt defendants from all disclosure obligations in the 1991 regulation is void because it conflicts with the Disclosure Statutes; and (2) whether the WUTC exceeded the statutory scope of its authority in granting waivers from the 1999 regulation.

1. The 1991 Regulations Conflict With The Disclosure Statutes Because They Alter A Statutorily Defined Term.

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

> Statutory definitions of words used elsewhere in the same statute furnish official and authoritative evidence of legislative intent and meaning, and are usually given controlling effect. Such internal legislative construction is of the highest value and ***prevails over executive or administrative construction*** and other extrinsic aids.

State v. Leek, 26 Wn. App. 651, 655, 614 P.2d 209 (1980) (emphasis added) (quoting 1A C. Sands, STATUTES AND STATUTORY CONSTRUCTION § 27.02 at 310 (4th ed. 1972)).

The Disclosure Statutes explicitly define the term "alternative operator services company." RCW 80.36.520. That definition is clear. It

plainly includes local exchange carriers—like the three defendants on appeal—who choose to provide "a connection to intrastate or interstate long-distance services" from prisons.

It is equally clear that the definition of "alternative operator services company" in the 1991 regulation is facially inconsistent, and conflicts with, the statutory definition. The conflict is striking because—except for the exemption of LECs in the regulation—the regulatory definition tracks the statutory definition. Both define AOS companies as those companies "providing a connection to intrastate or interstate long-distance services." The only difference is the addition of the phrase "other than a local exchange company" in the regulation. *Compare* WAC 480-120-021 (1991) *with* RCW 80.36.520.

The definition of AOS in the statute is plain and unambiguous and must be given effect. The exemption of LECs in the 1991 regulation directly conflicts with the express statutory definition and is therefore null and void. *See State v. Dodd*, 56 Wn. App. 257, 260-61, 783 P.2d 106 (1989).

The court of appeals did not grapple with the conflict between the statute and the regulation. Instead, it held no conflict existed because: (a) defendants were already required to disclose rates by tariff (an argument addressed above); and (b) the WUTC exercised appropriate discretion in exempting LECs because "it was the non-local exchange companies that the Legislature pointed to as the problem companies charging higher rates." Appx., A-14 (emphasis in original).

The court of appeals does not cite to any authority for this latter proposition. There is none. One can search the statutes and legislative history in vain and find no distinction between LECs and non-LECs. The Legislature directed the WUTC to develop disclosure requirements for "***any*** telecommunications company, operating as or contracting with an alternate operator services company." RCW 80.36.520. Use of the word "any" indicates that the Legislature contemplated disclosure requirements that would apply uniformly to all providers of operator services, and that sub-classes of AOS companies could not be carved out of the statutory definition.

The majority opinion also fails to grapple with the fact that the Legislature twice rejected LEC-sponsored attempts to amend the Disclosure Statutes to exempt LECs from disclosure obligations. *See generally* Appellants' Reply, pp. 11-13. In 1990, the Legislature rejected an attempt to amend RCW 80.36.520 that would have redefined AOS company by inserting the language "other than a local exchange company." Reply Appx. at 0042. Later that year, it rejected another proposed amendment, lobbied for by US West (now Qwest), that would have exempted LECs from the statutory definition in RCW 80.36.520. *See id.* at 0059; 0061-63. Instead, the Senate unanimously passed a bill that relied on the existing statutory definition of AOS company. *Id.* at 0053 (now codified at RCW 80.36.522 and .524). This legislative history confirms what is plain in the statute: the Legislature intended ***all*** providers of AOS services to disclose rates.

The lobbying efforts of the LECs were more successful with the WUTC. When drafts of the 1991 regulation were proposed, an LEC exemption was debated and generated a heavy volume of comments. The WUTC staff then recommended that LECs not be exempted. *See id.* at 0068-76; 0081. Staff explained its rationale: "Staff is generally persuaded that the exclusion should not be allowed, in order to assure that the public informational requirements for AOSs and aggregators are standard throughout the state." *Id.* at 0079.

The LECs complained loudly. After a second round of comments were received, WUTC staff continued to recommend a version of the regulation that tracked the statutory definition and did not exempt LECs. *Id.* at 0107; 0098. In sticking with its recommendation that LECs be included in the definition, WUTC staff reasoned: "The chief benefit from including LECs in this definition would make performance more consistent among all providers—particularly regarding branding—and thus less confusing to consumers." *Id.*

One week later, the WUTC reversed course and put the exemption in its final regulation. *Id.* at 0123; 0125. The WUTC's rationale for exempting LECs does not address the conflict with the statutory definition of AOS company. Because the regulatory definition can be measured against a specific statutory provision, deference is inappropriate. Where the statutory definition is clear, that is the end of the matter. *See Chevron, Inc. v. Natural Resources Def. Council*, 467 U.S. 837, 842-43 (1984).

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

The waiver issue turns on the same considerations addressed above. In 1999, the WUTC issued a new regulation that eliminated the LEC exemption in the 1991 regulation. It nevertheless granted waiver petitions exempting Qwest and Verizon from disclosure obligations.

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

E. THE COURT OF APPEALS ERRED IN DISMISSING CENTURYTEL ON ALTERNATE GROUNDS.

The court of appeals dismissed defendant CenturyTel on the alternate ground that "a review of the record" indicates CenturyTel never provided long-distance service to inmates. Appx., A-16. To the extent this holding relies on declarations submitted by CenturyTel after the trial court had dismissed plaintiffs' claims under CR 12(b)(6), it is procedurally erroneous. By definition, a Rule 12 dismissal is based solely on plaintiffs' pleadings. Plaintiffs' complaint clearly alleges that "defendants, all telecommunications companies and operator service providers, have failed to assure appropriate disclosure of rates to the plaintiffs and other similarly situated, and continue to fail to do so ***for intrastate long-distance telephone calls***." CP 2, ¶ 6 (emphasis added); *see* CP 3, ¶ 10; CP 5, ¶ 16.

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

VI. CONCLUSION

The court of appeals has published an opinion filled with factual and legal errors that conflicts with appellate opinions in this state on issues of substantial public interest. Petitioners ask this Court to grant review and reverse the trial court's judgment dismissing this case with directions to remand for further proceedings.

RESPECTFULLY SUBMITTED this 14th day of May, 2003.

SIRIANNI YOUTZ
MEIER & SPOONEMORE

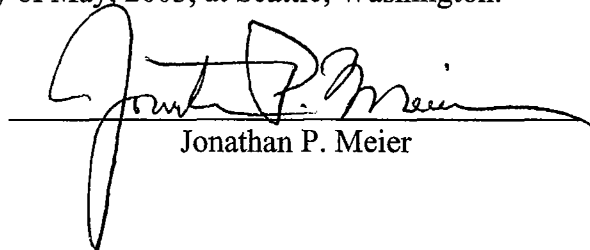
Jonathan P. Meier, WSBA #19991
Attorneys for Petitioners

CERTIFICATE OF SERVICE

I certify, under penalty of perjury pursuant to the laws of the United States and the State of Washington, that on May 14, 2003, a true copy of the foregoing PETITION FOR REVIEW was served upon counsel of record by legal messenger, addressed as follows:

Timothy J. O'Connell STOEL RIVES LLP 600 University Street, Suite 3600 Seattle, WA 98101 Attorneys for Defendant GTE Northwest, Inc.	[ ] [x] [ ] [ ]	By United States Mail By Legal Messenger By Federal Express By Facsimile Fax: (206) 386-7500 Phone: (206) 624-0900
Robert B. Mitchell Carol S. Arnold Athan E. Tramountanas PRESTON GATES & ELLIS LLP 925 Fourth Avenue, Suite 2900 Seattle, WA 98104 Attorneys for Defendants CenturyTel Telephone Utilities, Inc. and Northwest Telecommunications, Inc.	[ ] [x] [ ] [ ]	By United States Mail By Legal Messenger By Federal Express By Facsimile Fax: (206) 623-7022 Phone: (206) 623-7580
Kathleen M. O'Sullivan PERKINS COIE LLP 1201 Third Ave., Fl. 40 Seattle, WA 98101 Attorneys for Defendant U.S. WEST Communications, Inc.	[ ] [x] [ ] [ ]	By United States Mail By Legal Messenger By Federal Express By Facsimile Fax: (206) 583-8500 Phone: (206) 264-6375

DATED this 14th day of May, 2003, at Seattle, Washington.



Jonathan P. Meier

Appendix

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COURT OF APPEALS
STATE OF WASHINGTON-DIVISION 1
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Mary Kay Becker
CHIEF JUDGE

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

SANDY JUDD, TARA HERIVEL, and ZURAYA WRIGHT, for themselves, and on behalf of all similarly situated persons,	No. 48075-8-I
Appellants,	DIVISION ONE
v.	
AMERICAN TELEPHONE AND TELEGRAPH COMPANY;	PUBLISHED OPINION
Defendant,	FILED: APR 14 2003
GTE NORTHWEST, INC.; CENTURYTEL TELEPHONE UTILITIES, INC.; NORTHWEST TELECOMMUNICATIONS,INC., d/b/a PTI COMMUNICATIONS, INC.;U.S. WEST COMMUNICATIONS, INC.;	
Respondents,	
T-NETIX, INC.,	
Defendant.	

GROSSE, J. – The Legislature created a statutory scheme for the regulation of alternate operator service companies. It included a cause of action against providers of telecommunications services for violation of the Consumer Protection Act to assure appropriate disclosure of telephone rates. However, the Legislature did so only for violations of the regulations promulgated by the Washington Utilities and Transportation

Commission. Further, the Legislature preempted any direct action against the phone companies. The decision of the trial court is affirmed.

FACTS

Sandy Judd, Tara Herivel, and Zuraya Wright, hereafter collectively referred to as Judd, brought an action against five telecommunications providers seeking injunctive relief and damages, including damages for violation of Washington's Consumer Protection Act (CPA).[1] The suit is based on the alleged nondisclosure of telephone rates to those accepting long distance collect calls placed by inmates housed in Washington State correctional facilities. Sandy Judd and Tara Herivel received and paid for intrastate long distance collect calls from prison inmates in Washington State. Zuraya Wright received and paid for interstate long distance collect calls from a Washington State prison inmate.[2]

As argued by Judd, the appeal primarily involves a question of whether the phone companies assured the sufficient and appropriate disclosure of rates charged to consumers for services provided while connecting both intrastate and interstate long distance calls from the correctional facilities. We note, as did the trial court, that in doing so, Judd challenges the legitimacy of the Washington Utilities and Transportation

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[1]RCW 19.86 et seq.

[2]The case was brought, but never certified, as a class action for those persons who have been called by inmates at any time since June 20, 1996.

Commission (WUTC) regulations, without resorting to the Administrative Procedure Act[3] or making the WUTC a party to the action.

The respondents are three of the five telephone companies sued. U.S. West Communications, Inc. (now Qwest Corporation, hereinafter Qwest); GTE Northwest, Inc. (now Verizon Northwest, Inc., hereinafter Verizon); and CenturyTel Telephone Utilities, Inc. and Northwest Telecommunications, Inc. d/b/a PTI Communications, Inc. (now both known as CenturyTel Telephone Utilities, Inc., hereinafter CenturyTel), collectively called the phone companies or by their current monikers.

Judd's amended complaint alleges that the phone companies failed to make the rate disclosures required under the alternate operator services disclosure statute, RCW 80.36.520. In that statute, the Legislature directed the WUTC to establish rules to require the "appropriate disclosure" of rates of certain phone service providers. The statute provides:

> The utilities and transportation commission shall by rule require, at a minimum, that any telecommunications company, operating as or contracting with an alternate operator services company, assure appropriate disclosure to consumers of the provision and the rate, charge or fee of services provided by an alternate operator services company.
>
> For purposes of this chapter, "alternate operator services company" means a person providing a connection to intrastate or interstate long-distance services from places including, but not limited to, hotels, motels, hospitals, and customer-owned pay telephones.

[3]Chapter 34.05 RCW.

Judd asserts the phone companies violated the CPA by not making the required disclosures. Judd sought damages under RCW 80.36.530[4] and also sought injunctive relief. The complaint does not allege that phone company rates were excessive; that there was an incorrect method of calculation of the rates; or that the phone companies and/or the Department of Corrections conspired to obtain unreasonable profits.[5] Further, Judd does not name the WUTC as a defendant, assert any claims against it, or demand or seek action by it. This, despite Judd's argument that the WUTC exceeded its authority in promulgating its rules or in exempting the phone companies (as local exchange companies) from the disclosure regulations, or by later granting limited and temporary waivers to the phone companies regarding certain disclosure requirements.

Verizon was the first of the telephone companies to respond to the complaint by filing a motion to dismiss pursuant to CR 12(b)(6), arguing that Judd failed to state a claim upon which relief could be granted.[6] On October 13, 2000, after a hearing, the

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[4]RCW 80.36.530 provides that violations of alternate operator services rules are violations of the CPA. The statute is set forth later in this opinion.

[5]Any allegations concerning excessive rates and profits were raised for the first time on appeal (Opening Brief of Appellants at 6 n.1), are inconsistent with Judd's position below, and will not be considered by this court on appeal. See Bravo v. Dolsen Cos. 125 Wn.2d 745, 750, 888 P.2d 147 (1995).

[6]Verizon's argument was based on the fact that RCW 80.36.520 did not impose any direct obligation on it, but directed the WUTC to promulgate regulations. Even if Verizon had a direct duty under the statute, Verizon argued it did not violate the WUTC regulations regarding "appropriate disclosure" because it was exempted from them before the 1999 amended regulations as a local exchange company, or was properly

trial court issued a "Partial Decision on Summary Judgment and Order for Further Briefing," providing in part:

> [R]eading the statute as a whole, the legislature intended to create a cause of action under the Washington Consumer Protection Act ("CPA") only for violations of the regulations promulgated by the Washington Utilities and Transportation Commission ("WUTC") and did not create a cause of action for actions beyond or outside of the regulations.

The court held that Judd did not raise such violations but instead attacked the validity and sufficiency of the WUTC regulations, exclusions, and waivers. For this reason, the court held that the telephone companies were all entitled to dismissal from the action unless Judd alleged the telephone companies violated WUTC regulations. The court deferred entry of any orders of dismissal for 10 days to allow Judd to file supplemental briefing asserting violations of WUTC regulations. After the response deadline, the court indicated it would entertain motions to dismiss, or stay the case and refer it to the WUTC under the doctrine of primary jurisdiction for a determination of whether a violation occurred.

Supplemental briefing was provided but it included no allegations of violations of WUTC regulation. Thereafter the lower court dismissed Judd's claims against the telephone companies with prejudice on multiple grounds. First, the court concluded that the alternate operator services disclosure statutes (RCW 80.36.510, .520, .524,

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granted a waiver regarding the requirements. Further, Verizon correctly asserted that Judd's claims were subject to primary jurisdiction of the WUTC.

and .530) and the WUTC regulations created thereunder set forth a cause of action under the CPA only for violations of the regulations promulgated in response to the statutes. Second, under WUTC regulations the telephone companies' status as local exchange companies was either exempted from compliance under the regulations or, under later amended regulations that no longer provided exemptions for local exchange companies, Verizon and Qwest properly obtained waivers temporarily exempting them from certain specific disclosure requirements. The trial court determined that the case was not the proper proceeding for Judd to challenge the WUTC's regulations or actions as being beyond the scope of the agency's authority. The trial court determined that such a challenge is appropriate only in a proceeding under the Washington Administrative Procedure Act, citing RCW 34.05.510.

Additionally, as to CenturyTel only, the trial court took judicial notice of the fact that CenturyTel was deleted from the prison telephone providers contract in February 1997, and in any event had never provided long distance services to the correctional facilities, only local service. The court based its ruling in part on this fact when it entered judgment in favor of CenturyTel.

The telephone companies moved for entry of judgments pursuant to CR 54(b) on grounds there was no just reason for delay. Seeking an immediate appeal, Judd did not object to entry of final judgments. Thereafter the trial court entered final judgments.

Judd appeals the decisions of the trial court. She asserts that a claim was stated under the CPA for violations of the disclosure statutes; that she is entitled to challenge the validity of the WUTC regulations through this action; that the WUTC exceeded its authority in exempting local exchange companies from the statutory definition of alternate operator services companies in the 1991 regulation, and in the later grant of waivers to Qwest and Verizon. Finally, Judd asserts that the court should not have partially based its decision on the determination that CenturyTel never provided long distance service.

DISCUSSION

In 1988, after the breakup of the Bell system, the Legislature enacted the first component of the alternative operator services disclosure statutes. The legislation was prompted by a growing number of non-regulated companies that were popping up to provide telecommunication services necessary to long distance service "without disclosing the services provided or the rate, charge or fee."[7] Prior to the 1988 enactment these "new" telephone companies were unregistered with and unregulated by the WUTC. Unlike these new companies, the WUTC possessed the power to regulate local exchange companies, like the respondent telephone companies here. See RCW 80.36.080, RCW 80.36.140.

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[7]RCW 80.36.510.

In 1989, in response to the Legislature's mandate, the WUTC promulgated WAC 480-120-141. This rule imposed limited disclosure requirements on alternate operator services companies, but did not include the full contemporaneous disclosure of rates. The rule was amended in 1991. This amended rule clarified the term "alternate operator services company" by excluding local exchange companies from the definition. Former WAC 480-120-141 (1991). The WUTC explained the exclusion of local exchange companies from the requirements as follows:

> Unlike LECs [local exchange companies], AOS [alternate operator services] companies can be seen as entering and [exiting] markets at will. AOS companies were the subject of specific legislative enactment. AOS companies often charge higher rates than LECs, leading to consumer complaints. Consumers often expect that they are using their LEC when they use a pay phone; requirements that apply to non-LEC companies to inform the consumer that it is not the LEC are reasonable.

Washington State Register 91-13-078, at 106-07 (1991).

In 1988, as revised in 1990, the Legislature enacted RCW 80.36.530, which provides:

> In addition to the penalties provided in this title, a violation of RCW 80.36.510, 80.36.520, or 80.36.524 constitutes an unfair or deceptive act in trade or commerce in violation of chapter 19.86 RCW, the consumer protection act. . . . 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.

In 1991, the WUTC imposed a limit on the maximum rate to consumers for providing alternate operator services by specific reference to the rates charged by Qwest and American Telephone and Telegraph Company (AT&T). Former WAC 480-

120-141(11) (Supp. 1991). The WUTC also indicated that disclosure was required by the alternate operator services companies "upon request." See former WAC 480-120-141(5)(iii)(a) (1991).

In 1999, following changes in guidelines and rules of the Federal Communications Commission, the WUTC modified the disclosure requirements. The modified rules required:

> Before an operator-assisted call from an aggregator location may be connected by a presubscribed OSP [operator service provider], the OSP must verbally advise the consumer how to receive a rate quote, such as by pressing a specific key or keys, but no more than two keys, or by staying on the line. . . . This rule applies to all calls from pay phones or other aggregator locations, including prison phones, and store-and-forward pay phones or "smart" telephones.

Former WAC 480-120-141(2)(b) (1999). These revisions made disclosure requirements applicable to local exchange companies. The 1999 revised rules imposed more stringent disclosure requirements. But the revision of the regulations also allowed for potential waivers by the WUTC. Verizon and Qwest filed timely waiver petitions with the WUTC alleging, among other things, that the technology to access the information required by the more stringent disclosure requirements had not been perfected.[8]

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[8]In addition the waiver petitions or amended waiver petitions specifically requested a permanent waiver of that portion of the rule requiring automatic rate disclosure from the party originating the collect call, when that call originates from an inmate phone at a correctional facility. This was requested based on concerns that inmate access to live operators could result in fraud and harassment. The limited duration permanent waivers were granted on the condition that the telephone

Judd argues that RCW 80.36.520 provides an independent basis, without any reference to the WUTC or its regulations, for her direct claim against the telephone companies for their failure to make the disclosures. We cannot accept this claim.

RCW 80.36.510, entitled "Legislative finding," indicates its concern regarding the proliferation of the alternate operator services companies since the breakup of the Bell system, and the rates those companies were charging. The Legislature found that the provision of these services without disclosure to consumers was a deceptive trade practice. This statute provides an introduction to legislative policy, and statutory policy statements do not give rise to enforceable rights in and of themselves.[9] It is the statutory sections that follow the policy statement that provide the enforceability of certain rights. As the Final Bill Report of Senate Bill 6745[10] provides:

> 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 the Consumer Protection Act.

The language of RCW 80.36.520 does not specifically require that telephone companies make contemporaneous disclosures. A plain reading of the statute indicates that the legislative requirement directed the WUTC to assure "appropriate

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companies have technology in place no later than the last quarter of 2000 to allow recipients of inmate initiated collect calls to access rate information.

[9]In re Welfare of J.H., 75 Wn. App. 887, 891, 880 P.2d 1030 (1994).

[10]Effective June 9, 1988.

disclosure" to consumers through promulgation of rules. It is within the purview of the WUTC to direct how, when, or to whom the disclosure is made. Further, RCW 80.36.524 sets forth that the WUTC may adopt rules providing for the minimum service levels for telecommunications companies providing alternate operator services.

In the statutory scheme, RCW 80.36.530 sets forth that in addition to the penalties provided in the act, a violation of RCW 80.36.510, .520, and .524 constitutes violation of the CPA. We agree with the trial court that when these statutes are read together, in order for there to be a failure to disclose that is actionable under the CPA, the failure must violate the rules adopted by the WUTC. The trial court's interpretation achieves the legislative goal of creating a CPA cause of action for failure to disclose long distance alternate operator services rates consistent with the legislative finding of RCW 80.36.510. This interpretation properly places responsibility on the WUTC to promulgate rules requiring "appropriate disclosure" and "minimum service levels" in accordance with RCW 80.36.520 and .524.[11]

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[11]Additionally, Judd's argument does not take into consideration that the respondent telephone companies were local exchange companies already subject to regulation by the WUTC. See RCW 80.36.080 (rates, services, and facilities); RCW 80.36.100 (tariff schedules to be filed and open to public); RCW 80.36.140 (rates and services fixed by commission, when). Of particular relevance here is that the WUTC determines whether the rates of the telephone companies are just and reasonable. The telephone companies are required to file their tariffs. A tariff lists the rates, terms, and conditions under which service providers offer services to their customers. RCW 80.36.100; Allen v. Gen. Tel. Co. of the Northwest, Inc., 20 Wn. App. 144, 145, 578 P.2d 1333 (1978). Although this court recognizes that it is likely a legal fiction, once a

To accept Judd's arguments would require this court to rewrite three relatively unambiguous statutes. This we cannot do.

Judd also claims the trial court erred in concluding that the exclusive means of challenging the validity of the regulations was a proceeding under the Administrative Procedure Act. Again, Judd's argument misses the mark.

Judd acknowledges that this case is an attempt to challenge the validity of the WUTC regulations as exceeding the statutory authority of the agency but argues that it is not a review proceeding under the Administrative Procedure Act. We disagree. The Administrative Procedure Act, RCW 34.05.510,[12] is the exclusive means of judicial review of agency action. The act governs challenges to the validity of agency regulation.[13]

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tariff has been properly filed with and accepted by the WUTC, a consumer is conclusively presumed to know the tariff's contents. Hardy v. Claircom Communications Group, Inc., 86 Wn. App. 488, 492, 937 P.2d 1128 (1997) (claims barred because company disclosed rates in tariff). Therefore, the companies here have already appropriately disclosed their rates.

[12]The relevant portions of RCW 34.05.510 include:

> This chapter establishes the exclusive means of judicial review of agency action, except:
>
> (1) The provisions of this chapter for judicial review do not apply to litigation in which the sole issue is a claim for money damages or compensation and the agency whose action is at issue does not have statutory authority to determine the claim.

[13]Manor v. Nestle Food Co., 131 Wn.2d 439, 445-46, 932 P.2d 628, 945 P.2d 1119 (1997).

Of more serious concern is Judd's argument that her claims come within the "money damages only" exception of the Administrative Procedure Act, RCW 34.05.510(1). We disagree with this claim for a couple of reasons. First, the pleadings technically belie the argument. Judd seeks injunctive relief as well as a claim of money damages.[14] Although Judd claims she would forego the injunctive relief, she has never moved to withdraw that portion of her claim, only stating she would if necessary. Additionally, Judd seeks specific statutory remedies of presumed damages plus $200 and treble damages under the CPA. In a recent case regarding equitable liens against the federal government, the United States Supreme Court held that in a case with a similar type of prayer for relief, seeking more than "mere compensation," the prayer took the action outside of any "money damages only" exception.[15] Regardless, the damages prayed for here are necessarily for a violation of established agency rules and Judd does not claim any violation of these rules.

Further, the removal of local exchange companies from the 1991 alternate operator services disclosure regulations does not conflict with the disclosure provisions of RCW 80.36.520. RCW 80.36.520 requires the WUTC to assure appropriate disclosure to consumers. At the time of the 1991 alternate operator services regulation,

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[14]In her complaint Judd indicated that the plaintiffs and their class are entitled to an injunction under RCW 19.86.090.

[15]See Dep't of the Army v. Blue Fox, Inc., 525 U.S. 255, 260-61, 119 S. Ct. 687, 142 L. Ed. 2d 718 (1999).

local exchange companies were already required to disclose rates. The issue of determining what appropriate disclosure is, is exactly what the Legislature delegated to the WUTC. In its discretion, the WUTC concluded that the existing level of disclosure was appropriate, especially considering it was the non-local exchange companies that the Legislature pointed to as the problem companies charging higher rates. Where the Legislature specifically delegates to an administrative agency the power to make the rules, there is a presumption that such rules are valid.[16]

For example, as to the later waivers allowed by the WUTC, the waiver granted to Qwest reads in part as follows:

> The Commission finds that this is a sound request since the Company's operated-assisted rates compare favorably to other carrier's rates that serve inmate phones. With the condition of providing the Commission with a monthly report outlining specific action steps taken to ensure implementation of this technology by year end, the Commission will grant the waiver, temporarily, of WAC 480-120-141(2)(b) until December 1, 2000 only as it applies to the receiver of the collect call. . . .[17]

This waiver temporarily relieved Qwest, and a similar waiver temporarily relieved Verizon, from the requirement of oral disclosure of how to obtain a rate quote under the

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[16]Weyerhaeuser Co. v. Dep't of Ecology, 86 Wn.2d 310, 314, 545 P.2d 5 (1976); Armstrong v. State, 91 Wn. App. 530, 536-37, 958 P.2d 1010 (1998).

[17]Order of Wash. Utils. & Transp. Comm'n Granting Full and Partial Temporary Waiver of WAC 480-120-141(2)(b), In re Request for Waiver of Admin. Rules for Qwest Corp., No. UT-990043 (Sept. 27, 2000).

1999 regulation, but it did not relieve the phone companies from the duty to disclose its rates by tariff.

Judd cites the case of Rios v. Department of Labor & Industries[18] regarding the limits of agency discretion in carrying out mandatory duties imposed by statute. There the court distinguished between a mandatory duty and the agency's procedural discretion in implementing the duty. The Rios case is distinguishable from this case in at least two ways. First, in Rios, pesticide handlers challenged the validity of a Department of Labor & Industries' rule, and also challenged the Department's subsequent failure to initiate additional rulemaking under the Administrative Procedure Act. Here, unlike in Rios, Judd has failed to challenge either the validity of the WUTC rules or its failure to initiate rulemaking under the Administrative Procedure Act. Second, as explained in Rios, under the rules of the Washington Industrial Safety and Health Act of 1973,[19] the Department has a mandatory duty to adopt a safety regulation after it investigates and compiles evidence that a proposed regulation is appropriate. Upon obtaining such evidence, the Department of Labor & Industries no longer has discretion, it must adopt a safety regulation. But here, the alternate operator services statute has no similar language removing discretion from the WUTC.

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[18] Rios v. Dep't of Labor & Indus., 103 Wn. App. 126, 5 P.3d 19 (2000), aff'd in part, rev'd in part, 145 Wn.2d 483, 39 P.3d 961 (2002).

[19] Chapter 49.17 RCW.

The mandatory duty placed on the WUTC is that it adopt rules regarding appropriate disclosure. What was in fact "appropriate" was left to the discretion of the WUTC. The WUTC did not compile evidence that these phone companies inappropriately charged the consumer. In fact, the opposite was true. If Judd desired to challenge the validity of the rules or wanted to sue to compel the WUTC to promulgate additional rules then she should have brought the WUTC into the suit.

Even if WUTC regulations are determined to be invalid, the telephone companies' good faith reliance on the validity of the regulations would likely be a defense to Judd's claims for damages in any subsequent proceeding.[20]

Finally, Judd claims the trial court erred in dismissing claims against CenturyTel based, in part, on a determination that CenturyTel provided only local service and never provided long distance service. A review of the record supports the fact that neither PTI Communications, Inc., nor CenturyTel provided long distance telephone or long distance operator services with respect to Washington State prison inmates. PTI Communication, Inc.'s role as a subcontractor to AT&T was limited to local telephone service.

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[20]See Donaldson v. United States Dep't of Labor, 930 F.2d 339, 345 n.10 (4th Cir. 1991); Goodman v. McDonnell Douglas Corp., 606 F.2d 800, 809 (8th Cir. 1979).

The decision of the trial court is affirmed.

WE CONCUR:

APPELWICK, J. (Dissenting in part) – The majority opinion states that RCW 80.36.510 merely provides an introduction to legislative policy that does not give rise to enforceable rights in and of themselves. Majority opinion at page 10. I must take issue with this premise and the results which flow from it.

RCW 80.36.510, .520, and .530 were enacted as sections (1), (2), and (3) respectively of chapter 91, Laws of 1998. They must be read together. RCW 80.36.530 states: "[A] violation of RCW 80.36.510 or 80.36.52[0] constitutes . . . a violation of chapter 19.86 RCW, the consumer protection act . . . ." It goes on to provide a special damages rule that is different from the general rule stated in chapter 19.86 RCW. Subsequent amendments to chapter 19.86 RCW are of no consequence to this analysis and will not be discussed here.

"'Statues must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous.'" City of Seattle v. State, 136 Wn.2d 693, 701, 965 P.2d 619 (1998) (quoting Whatcom County v. Bellingham, 128 Wn.2d 537, 546, 909 P.2d 1303 (1996)). To give effect to RCW 80.36.530 requires that we read RCW 80.36.510 and .520 as creating rules which can be violated, triggering the penalties of RCW 80.36.530.

RCW 80.36.520 requires the Washington Utilities and Transportation Commission (WUTC) to adopt the rules. Any rule adopted by the WUTC must require a company operating as or contracting with an alternative operator services company (AOSC) to make two disclosures at a minimum. The rule must require disclosure of the AOSC service and of the charge or basis of the charge to be made. Nowhere in RCW

80.36.520 does the language expressly impose a substantive requirement directly on the telecommunication company. The WUTC could violate this section by failing to adopt rules, or by adopting rules which failed to conform to the statute. However, no one other than the WUTC could violate this section.

Clearly, the Legislature did not say a violation of the rules promulgated by the WUTC pursuant to RCW 80.36.520 is a violation of chapter 19.86 RCW. Yet, both the trial court and the majority concluded that when the Legislature said, "in violation of RCW 80.36.520," it intended the consumer protection act to apply only to violations of the rules once adopted pursuant to RCW 80.36.520 by the WUTC. Such a reading is a reasonable means to discharge the duty to give effect to that portion of RCW 80.36.530. Since Judd had not alleged violation of these rules, she could not establish a consumer protection action by way of violation of RCW 80.36.520. I agree with that analysis. I also agree she did not properly challenge the rules.

While the majority properly supplied an implied legislative intent relative to agency rules to give effect to the cross-reference to RCW 80.36.520, it failed to give effect to the cross-reference to RCW 80.36.510. RCW 80.36.510 provides:

> 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.

This section says two things: (1) there is a growing problem with disclosure; and (2) providing service without disclosure is a deceptive trade practice. The first sentence is

a factual observation within the legislative purview. Reading it without the words, "[t]he legislature finds that," makes clear the nature of the statement. Leave the same words off the second sentence, and one readily observes that the second sentence is a statement of law, not a finding of fact: "provision of these services without disclosure to consumers is a deceptive trade practice." RCW 80.36.510. If the trial court mislabels a conclusion of law and calls it a finding of fact, we would readily correct the label. We must do the same here. Only the second sentence of RCW 80.36.510 could give rise to a violation. We are bound to give it effect in order to avoid rendering the cross-reference in RCW 80.36.530 meaningless.

Clumsy or not, like the policy or not, this language is what the Legislature wrote. We must give it effect. The result is that RCW 80.36.510 may be violated independent of RCW 80.36.520. It may be violated by providing telecommunications services, in a nonresidential setting, without disclosing the services provided or the rate, charge or fee. Violation is a deceptive trade practice. Penalties are available under RCW 80.36.530 and chapter 19.86 RCW.

Summary judgment was therefore improper on this issue. Judd should have been allowed to proceed to trial to attempt to prove violation of RCW 80.36.510 and to recover damages consistent with such proof.

Therefore, I respectively dissent.

Judge

having their phones blocked from access to information delivery services.

(2) It is the intent of the legislature that the utilities and transportation commission and local exchange companies, to the extent feasible, distinguish between information delivery services that are misleading to consumers, directed at minors, or otherwise objectionable and adopt policies and rules that accomplish the purposes of RCW 80.36.500 with the least adverse effect on information delivery services that are not misleading to consumers, directed at minors, or otherwise objectionable." [1988 c 123 § 1.]

Investigation and report by commission: "By October 1, 1988, the commission shall investigate and report to the committees on energy and utilities in the house of representatives and the senate on methods to protect minors from obscene, indecent, and salacious materials available through the use of information delivery services. The investigation shall include a study of personal identification numbers, credit cards, scramblers, and beep-tone devices as methods of limiting access." [1988 c 123 § 3.]

Severability—1988 c 123: "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [1988 c 123 § 4.]

Cross References

Information delivery services, see § 19.162.010 et seq.

Library References

Telecommunications ⚯321, 321.1, 322.
WESTLAW Topic No. 372.

C.J.S. Telegraphs, Telephones, Radio, and Television § 78.

80.36.510. Legislative finding

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.
[1988 c 91 § 1.]

80.36.520. Disclosure of alternate operator services

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.

For the purposes of this chapter, "alternate operator services company" means a person providing a connection to intrastate or interstate long-distance services from places including, but not

limited to, hotels, motels, hospitals, and customer-owned pay telephones.
[1988 c 91 § 2.]

Library References

Telecommunications ⚬=311.
WESTLAW Topic No. 372.
C.J.S. Telegraphs, Telephones, Radio, and Television §§ 79, 85.

80.36.522. Alternate operator service companies—Registration—Penalties

All alternate operator service companies providing services within the state shall register with the commission as a telecommunications company before providing alternate operator services. The commission may deny an application for registration of an alternate operator services company if, after a hearing, it finds that the services and charges to be offered by the company are not for the public convenience and advantage. The commission may suspend the registration of an alternate operator services company if, after a hearing, it finds that the company does not meet the service or disclosure requirements of the commission. Any alternate operator services company that provides service without being properly registered with the commission shall be subject to a penalty of not less than five hundred dollars and not more than one thousand dollars for each and every offense. In case of a continuing offense, every day's continuance shall be a separate offense. The penalty shall be recovered in an action as provided in RCW 80.04.400.
[1990 c 247 § 2.]

Library References

Telecommunications ⚬=311.
WESTLAW Topic No. 372.
C.J.S. Telegraphs, Telephones, Radio, and Television §§ 79, 85.

80.36.524. Alternate operator service companies—Rules

The commission may adopt rules that provide for minimum service levels for telecommunications companies providing alternate operator services. The rules may provide a means for suspending the registration of a company providing alternate operator services if the company fails to meet minimum service levels or if the company fails to provide appropriate disclosure to consumers of the protection afforded under this chapter.
[1990 c 247 § 3.]

80.36.530. Violation of consumer protection act—Damages

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

[1990 c 247 § 4; 1988 c 91 § 3.]

Library References

Consumer Protection ⚷6.
WESTLAW Topic No. 92H.

C.J.S. Trade to Marks, Trade to Names, and Unfair Competition §§ 237 to 238.

80.36.540. Telefacsimile messages—Unsolicited transmission—Penalties

(1) As used in this section, "telefacsimile message" means the transmittal of electronic signals over telephone lines for conversion into written text.

(2) No person, corporation, partnership, or association shall initiate the unsolicited transmission of telefacsimile messages promoting goods or services for purchase by the recipient.

(3)(a) Except as provided in (b) of this subsection, this section shall not apply to telefacsimile messages sent to a recipient with whom the initiator has had a prior contractual or business relationship.

(b) A person shall not initiate an unsolicited telefacsimile message under the provisions of (a) of this subsection if the person knew or reasonably should have known that the recipient is a governmental entity.

(4) Notwithstanding subsection (3) of this section, it is unlawful to initiate any telefacsimile message to a recipient who has previously sent a written or telefacsimile message to the initiator clearly indicating that the recipient does not want to receive telefacsimile messages from the initiator.

(5) The unsolicited transmission of telefacsimile messages promoting goods or services for purchase by the recipient is a matter