NO. 73966-8

IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

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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.

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# SUPPLEMENTAL BRIEF OF PETITIONERS SANDY JUDD, TARA HERIVEL AND ZURAYA WRIGHT

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## I. NATURE OF THE CASE

In 1988, the state Legislature declared that a telephone company's failure to identify "the services provided or the rate, charge or fee" for a long distance, collect telephone call "is" an unfair trade practice and a *per se* violation of the Consumer Protection Act.

For over ten years, the respondents in this case—Verizon, Qwest, and CenturyTel—failed to disclose this information to friends and families of Washington state inmates. Plaintiffs are the spouses or relatives of three current or former inmates who received and paid for collect, long distance calls without receiving the required disclosure.

The question on appeal is whether the phone companies' failure to disclose gives rise to a claim under the Consumer Protection Act—a question that the Legislature has already answered in the affirmative.

## II. THE PRISON TELEPHONE SYSTEM AND THE PHONE COMPANIES' FAILURE TO DISCLOSE

Between 1988 and 2000, a Washington state inmate who wanted to talk to a family member, friend, or attorney outside of prison had a single option: place a collect call at a prison pay phone. CP 2, 4-5. Under a 1992 contract with the Washington Department of Corrections, each respondent provided operator pay phone services to specified prisons. *Id.* The contract grants each company what amounts to a monopoly on long distance service from the prisons. CP 220-22.

During the time period covered by this lawsuit (1996 to 2000), operators employed by the phone companies failed to disclose the charge

for inmate calls, failed to provide any information on how to obtain the applicable rate, and failed to identify the company that was providing the service. CP 5. The recipient of an inmate call was given two choices: (1) accept the call without any disclosure of rate or service information; or (2) hang up. *Id.*

## III. FOCUS OF SUPPLEMENT BRIEF

Although there are four distinct issues on appeal, *see* Petition for Review at 1, this brief focuses on a single issue: whether the Disclosure Statutes, RCW 80.36.510 and .530, provide a direct cause of action under the Consumer Protection Act (CPA). This is a pure issue of statutory construction.

If the Court concludes that the Legislature created a direct CPA cause of action for violation of RCW 80.36.510, then questions about the validity of regulations promulgated by the Washington Utilities & Transportation Commission (WUTC), or whether this lawsuit is the appropriate vehicle for challenging those regulations, are moot. This case can, and should, be resolved by deciding this threshold issue.[1]

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[1] One additional issue requires discussion. The trial court dismissed respondent CenturyTel on an alternative ground, ruling that CenturyTel never provided long distance service and therefore is not subject to the Disclosure Statutes. This Court should reject that factual conclusion for two reasons. First, the trial court erred by deciding factual issues on a CR 12(b)(6) motion to dismiss. Second, even if the trial court properly decided a question of fact, the facts are hotly disputed. A complete discussion of the issue is presented in Plaintiffs' Opening Brief at pp. 40-41; Reply Brief at pp. 32-35; and Petition for Review at pp. 19-20.

## IV. ISSUE

RCW 80.36.530 provides that "a violation of RCW 80.36.510 ... constitutes an unfair or deceptive act in trade or commerce in violation of chapter 19.86 RCW, the consumer protection act." RCW 80.36.510 provides that a failure to disclose "the services provided or the rate, charge or fee" for a collect, long distance telephone call "is a deceptive trade practice." Have plaintiffs stated a claim for violation of the CPA by alleging that the phone companies failed to disclose "the services provided or the rate, charge or fee" to plaintiffs when they received long distance collect telephone calls from Washington state inmates?

## V. ARGUMENT

### A. The statute provides a direct CPA cause of action for failure to disclose.

In 1988, the Legislature enacted three statutes that require companies providing long distance operator services at public telephones to disclose certain information to consumers. RCW 80.36.510 pinpoints the problem: long distance phone companies were not disclosing the "services provided or the rate, charge, or fee" for the call. As the legislative history makes clear, pay phone charges were often "very expensive compared to routine long distance calling of the same distance and duration." House Bill Report, SB 6745 (CP 126).

The statute flatly states that a failure to disclose rate information "is a deceptive trade practice":

> 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).

RCW 80.36.530 gives teeth to this pronouncement. It defines the relationship between section .510 and the CPA, making a violation of the former a *per se* violation of the latter:

> 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. 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.

RCW 80.36.530.

One way that the Legislature may create a CPA cause of action is to declare that the violation of a particular statute is an unfair trade practice. In *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.,* 105 Wn.2d 778, 786, 719 P.2d 531 (1986), this Court declared: "A per se unfair trade practice exists when a statute which has been declared by the Legislature to constitute an unfair or deceptive act in trade or commerce has been violated." All that is required is the Legislature's explicit reference to the CPA. "Where the Legislature specifically defines

the exact relationship between a statute and the CPA, this court will acknowledge that relationship." *Id.* at 787.

That is exactly what the Legislature has done here. In clear and unmistakable terms, the Legislature identified an unfair trade practice in section .510. Failure to disclose the "services provided or the rate, charge or fee" for a long distance call from a public telephone ***is*** an unfair trade practice. In equally clear and unmistakable terms, the Legislature provided the trigger for a CPA cause of action in section .530. A "violation" of section .510—failure to disclose—***is*** an unfair trade practice "in violation of . . . the consumer protection act." Read together, section .530 provides the trigger and the requisite reference to the CPA; section .510 provides the substantive rule that may be violated.

There is nothing ambiguous about this language. Total failure to disclose—as alleged in our complaint—violates section .510, which in turn gives rise to a CPA cause of action under section .530. *Hangman Ridge* requires recognition of the Legislature's clear cut declaration that a violation of section .510 is also a violation of the CPA.

### B. RCW 80.36.510 is not a mere policy statement—it identifies a statutorily-enforceable, substantive standard of conduct.

The parties diverge on a threshold issue of statutory interpretation. The phone companies (and the majority opinion of the Court of Appeals) treat section .510 as a statement of legislative policy, devoid of any substance or effect. Plaintiffs, and the dissenting opinion of Judge Appelwick (who served in the Legislature when the law was enacted), see

it differently: when the Legislature said that a failure to disclose "is a deceptive trade practice," and then said that a "violation" of section .510 was a *per se* violation of the CPA, it meant what it said.

### 1. The Court of Appeals ignores the first rule of statutory interpretation.

The "first rule" of statutory interpretation is that the court should assume that the Legislature means exactly what it says. *Western Telepage, Inc. v. City of Tacoma,* 140 Wn.2d 599, 609, 998 P.2d 884 (2000). The Court of Appeals ignored this rule when it held that RCW 80.36.510 was a statutory policy statement that could not give rise to enforceable rights. *See Judd v. American Tel. & Tel. Co.*, 116 Wn. App. 761, 770, 66 P.3d 1102 (2003). More specifically, the Court of Appeals ignored the Legislature's express statement, in RCW 80.36.530, that a "violation" of section .510 gives rise to a CPA cause of action. In fact, RCW 80.36.530 refers to a "violation" of section .510 twice: first in stating that a violation of section .510 constitutes a violation of the CPA, and second in stating that a violation of section .510 is a matter "vitally affecting the public interest," thus satisfying the public interest element of the CPA.

When the Legislature defines the relationship between statutes as clearly as it has here, there is no room for second-guessing or interpretation. *See Anderson v. Valley Quality Homes, Inc.*, 84 Wn. App. 511, 517-20, 928 P.2d 1143 (1997) (where statute declares violation of another statute or regulations to be violation of CPA, court must recognize that relationship); *Henery v. Robinson*, 67 Wn. App. 277, 289, 834 P.2d

1091 (1992) ("A defendant commits a *per se* unfair trade practice when his actions violate a statute describing an unfair or deceptive act in trade or business.").

The Court of Appeals ignored another cardinal rule of statutory interpretation: all of the words in a statute must be given effect so that no portion is rendered meaningless or superfluous. *See Judd,* 116 Wn. App. at 775 (Appelwick, J., dissenting). The two references to a "violation" of section .510 are not a mistake. The second sentence of section .510 contains a blunt statement of law: failure to disclose the services provided or rate, charge or fee "is" an unfair trade practice. By failing to give effect to the Legislature's cross-reference to section .510, the Court of Appeals rewrote the statutes and nullified legislative intent.

### 2. RCW 80.36.510 describes a standard of conduct and states that violation of the standard is an unfair trade practice.

The majority opinion of the Court of Appeals characterizes section .510 as an "introduction to legislative policy" that does "not give rise to enforceable rights." *Judd*, 116 Wn. App. at 770. That section, however, focuses on specific behavior by specific actors and declares that a lack of disclosure by those actors is a deceptive trade practice. Section .510 articulates a substantive standard of conduct. None of the cases cited by the phone companies or the Court of Appeals involves a statute that contains such a point-blank statement.

The fact that the code reviser labeled section .510 a "Legislative Finding" is of no consequence. Headings inserted by the code reviser

after a law has been enacted are not reliable indicators of legislative intent. *See Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 149 Wn.2d 660, 684 n.10, 72 P.3d 151 (2003).

There is, moreover, no need for an agency to create additional disclosure requirements in order to enforce this standard or determine whether it has been violated. If a phone company fails to disclose service or rate information, it has committed an unfair trade practice. That is what Judd alleged.

**3. Section .520 is not rendered meaningless.**

The phone companies contend that plaintiffs' reading of the law renders RCW 80.36.520 "meaningless." Joint Answer to Petition for Review at 8. A plain reading of section .530, however, compels the conclusion that section .520 serves an important and independent role in the Legislature's enforcement scheme.

The statute is worded in the disjunctive: "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." RCW 80.36.530. If there is a complete failure to disclose, the substantive provision of section .510 is violated. *See Judd*, 116 Wn. App. at 777 (Appelwick, J., dissenting) ("The result is that RCW 80.36.510 may be violated independent of RCW 80.36.520.").

But the Legislature also left room for regulations that set the bar higher. By directing the WUTC to issue regulations that "assure

appropriate disclosure," the Legislature gave the agency the flexibility to require additional, specific types of disclosure. Those requirements may themselves be violated. If, as alleged in this case, a company fails to make any disclosure, then .510 is violated. Alternatively, if a company makes a disclosure, but that disclosure fails to meet standards established by the WUTC, then .520 is violated. The Legislature determined that either violation may be enforced under the CPA. RCW 80.36.530.

From a policy perspective, it makes sense to provide a separate cause of action for utter lack of disclosure, while still permitting an agency to develop disclosure requirements that may be fine-tuned depending on changes in technology and commerce. This reading fulfills the remedial purpose of the law. What is beyond dispute, however, is that the plain text of the statute provides a CPA cause of action for distinct violations of either section .510 or section .520; those remedies coexist.

In short, the Court of Appeals' conclusion that the Legislature "preempted any direct action against the phone companies" and provided a cause of action "only for violations of the regulations," *Judd*, 116 Wn. App. at 762, runs afoul of a straightforward reading of the statute. The Legislature's express creation of alternative remedies for violations of ***either*** RCW 80.36.510 or 80.36.520 accomplishes the legislative purpose of requiring disclosure.

### 4. If the Court affirms the decision of the Court of Appeals, it will create a glaring inconsistency in the law.

By dismissing RCW 80.36.510 as a mere policy statement, the Court of Appeals has engendered uncertainty in Washington's consumer protection laws. In particular, the majority's reasoning guts other consumer statutes that prohibit deceptive conduct, but do so in terms of broad policy statements. A number of these statutes, all of which contain legislative findings and policy statements, serve as traditional springboards for CPA actions despite language that is much less specific than the statement in RCW 80.36.510. *See, e.g.,* RCW 19.116.010 (public interest finding concerning vehicle subleasing); RCW 18.16.250 (cosmetologists); RCW 61.34.040 (equity skimming); RCW 60.04.035 (acts of coercion by contractor); RCW 70.128.058 (operation of adult family home without license); RCW 70.127.216 (operation of in-home services agency without license). As these statutes underscore, legislative findings linked to the CPA are not toothless statements to be ignored—they are the very mechanism the Legislature has chosen to define deceptive conduct and tie that conduct to a cause of action under the CPA.

Another example is RCW 48.01.030, the legislative cornerstone of insurance bad faith actions in Washington. It provides:

> The business of insurance is one affected by the public interest, requiring that all persons be actuated by good faith, abstain from deception, and practice honesty and equity in all insurance matters. Upon the insurer, the insured, their providers, and their representatives rests the duty of preserving inviolate the integrity of insurance.

Using phrases like "actuated by good faith" and "practice honesty and equity in all insurance matters," this statute is the very essence of a broad policy statement. That has not stopped the courts from holding that it may serve as the basis for a CPA claim. *See Industrial Indem. Co. v. Kallevig*, 114 Wn.2d 907, 916-17, 792 P.2d 520 (1990) (affirming jury verdict under CPA for insurance bad faith); WPI 320.00, Introductory Note, 6A WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS, p. 282 (4th ed. 2002).

If statutory language this broad can give rise to a CPA claim, the Court of Appeals surely erred when it relegated the Legislature's unambiguous statement that nondisclosure is an unfair trade practice to the judicial dust bin.

### C. Disclosure by tariff is no disclosure at all.

The phone companies do not dispute that they failed to disclose rates to plaintiffs. They argue, however, that they satisfied the statutory mandate by filing tariffs that contained rate information. This argument should be rejected for three reasons.

#### 1. The "legal fiction" of disclosure by tariff clashes with legislative intent.

The Legislature was not engaging in an academic exercise when it required rate disclosure. Any layperson who has tried to decipher a telecommunications tariff knows that disclosure-by-tariff is illusory. The Court of Appeals acknowledged as much by describing such disclosure as a "legal fiction." *Judd v. American Tel. & Tel. Co.*, 116 Wn. App. 761,

771 n.11, 66 P.3d 1102 (2003). The notion of disclosure-by-tariff eviscerates the legislative goal of ensuring practical and timely disclosure.

To be meaningful, rate information must be conveyed before the consumer accepts a collect call, when the consumer has the ability to either refuse the call or limit its length. "Although some companies may charge several dollars to connect a caller to long distance from these phones, the customer is often unaware of the charge until it appears on the monthly bill from a local phone company." Final Bill Report, SB 6745 (CP 123). The House Bill Report described testimony in favor of the bill as follows:

> Some arrangements and charges were very expensive compared to routine long distance calling of the same distance and duration and the expense was not evident in any way to the caller beforehand.

House Bill Report, SB 6745 (CP 126). The only realistic way to ensure that consumers are made aware of the expense "beforehand" is to tell them what the charge is before a collect call is accepted. Disclosure must occur in "real time." The importance of disclosure is heightened where, as here, the phone companies are monopoly providers.

The Disclosure Statutes were intended to address a real problem by requiring real disclosure—not by letting phone companies hide behind a legal fiction.

Tariffs cannot accomplish the statutory mandate for another reason: the phone companies connecting the calls did not identify themselves. For example, when plaintiff Sandy Judd received a collect call from her inmate spouse, the operator failed to identify the company

providing the service. Thus, even if Ms. Judd had scrutinized phone company tariffs before she picked up the phone, she would have been unable to determine the cost of the call because she would not know which company's tariff to examine.

**2. The phone companies misread the statute.**

The phone companies postulate that the Disclosure Statutes were never really aimed at them. The Court of Appeals was persuaded by this argument, concluding that the Legislature directed its law at "new" telephone companies that were "popping up" and charging exorbitant rates. *Judd*, 116 Wn. App. at 767-68. The Court distinguished these "new" companies from the respondent phone companies, which are known as "local exchange companies," or LECs. *Id.* at 772 ("it was the *non*-local exchange companies that the Legislature pointed to as the problem companies charging higher rates"). The Court concluded that disclosure by tariff was consistent with the Legislature's intent to require real disclosure only from the non-LECs. *Id.*; *see id.* at 771 n. 11.

The problem with this reasoning is that there is not a shred of support for it in the statute. The Legislature never "pointed to" non-LECs as the source of the problem. Section .510 simply refers to "companies" that "provide, in a nonresidential setting, telecommunications services necessary to long distance service." Respondents fit that description. Section .520, which directs the WUTC to issue regulations, covers "alternate operator services companies" (AOS companies). Section .520 expressly defines this term to include any company "providing a

connection to intrastate or interstate long distance services from places including, but not limited to, hotels, motels, hospitals, and customer-owned pay telephones." Again, each respondent fits squarely within the statutory definition.

Although the Disclosure Statutes do not distinguish between LECs (respondents) and other providers of alternate operator services, the phone companies seek to manufacture a distinction by arguing that non-LECs were not required to file tariffs when the Disclosure Statutes were enacted in 1988. *See* Joint Answer to Petition for Review at 11. They do so in order to counter plaintiffs' argument that the Legislature was fully aware that all AOS companies—including the "new" non-LEC companies singled out by the Court of Appeals—were required to file tariffs. If all companies were required to file tariffs when the Disclosure Statutes were enacted, the Legislature must have required something more than disclosure by tariff.

In fact, Washington law required ***all*** providers of alternate operator services to file tariffs before 1988. *See* RCW 80.36.100 (1987) (all "telecommunications companies" required to file tariffs). Every AOS company was a telecommunications company regulated by the WUTC. *See* RCW 80.04.010 (1987); RCW 80.01.040 (1987). The WUTC has consistently described non-LEC AOS companies as statutory "telecommunications companies" falling within its regulatory jurisdiction. *See, e.g., WUTC v. Fone America, Inc.,* WUTC No. UT-911483, 1995 WL 125465, *1 & n.2 (1995).

To support their argument, the phone companies erroneously assert that non-LEC providers of alternate operator services were unregulated until 1990, when the Legislature passed RCW 80.36.522 and required them to register with the WUTC. Joint Answer at 11. In fact, AOS companies were required to register with the WUTC before the Disclosure Statutes were enacted in 1988. *See* RCW 80.36.350 (1987); *In re International Pacific, Inc.*, WUTC No. UT-920546, 1993 WL 500046, *1 (noting that AOS company had registered as telecommunications company under RCW 80.36.350 and had filed tariffs). Additional authority indicating that ***all*** telecommunications companies were required to file tariffs prior to 1988 is found in Appellants' Reply Brief at pp. 3-7; *see also WUTC v. Payline Sys., Inc.*, WUTC No. UT-911250, 1992 WL 230496, *2 (non-LEC provider of alternate operator services filed tariffs that predated WUTC's ability to subject tariffs to substantive review under 1990 law, RCW 80.36.522).

The upshot is this: when the Legislature identified the problem as the failure of companies to disclose their rates, it had already concluded that disclosure by tariff was insufficient. The disclosure referred to in section .510 must mean something more than fictional disclosure by tariff. If it did not, the Legislature was wasting its time in requiring disclosure that was already mandated by law. By creating a statutory loophole for the LEC phone companies where none exists, the Court of Appeals effectively arrogated the legislative role. That is reason enough to reverse.

### 3. The filed rate doctrine does not apply.

The phone companies argue that the filed rate doctrine compels the Court to recognize the legal fiction of disclosure-by-tariff. More specifically, they rely on the strand of the doctrine that presumes that utility customers have constructive knowledge of tariffs. *See Judd*, 116 Wn. App. at 771 n.11 (citing *Hardy v. Claircom Communications Group, Inc.*, 86 Wn. App. 488, 492, 937 P.2d 1128 (1997)).

The filed rate doctrine is a judge-made rule that serves two purposes: (1) preserving a regulating agency's authority to determine whether rates are reasonable; and (2) ensuring that regulated entities charge only those rates that are approved by law. *See Tenore v. AT & T Wireless Serv.*, 136 Wn.2d 322, 331-32, 962 P.2d 104 (1998).

The filed rate doctrine does not apply here. It is limited to "suits that seek to alter the terms and conditions" of a tariff. *American Tel. & Tel. Co. v. Central Office Tel., Inc.*, 524 U.S. 214, 229 (1998) (Rehnquist, J., concurring). Tariffs, however, do not govern the entirety of the relationship between a phone company and its customer. *Id.* at 230. State law may impose duties that lie outside the tariff; lawsuits based on such duties are not barred.[2] *Id.* at 230-31.

Plaintiffs do not challenge the rates in the phone companies' tariffs or allege that these rates were improper in light of the services provided.

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[2] *See, e.g., Hill v. MCI Worldcom Communications, Inc.*, 141 F. Supp. 2d 1205, 1213-15 (S.D. Iowa 2001); *Adamson v. Worldcom Communications, Inc.*, 78 P.3d 577, 582 (Or. App. 2003); *Qwest Corp. v. Kelly*, 59 P.3d 789, 800-02 (Ariz. App. 2002); *Lovejoy v. AT&T Corp.*, 111 Cal. Rptr.2d 711, 721-24 (Cal. App. 2001); *Pink Dot, Inc. v. Teleport Communications Group*, 107 Cal. Rptr.2d 392, 398 (Cal. App. 2001).

Nor do they ask the court to fashion a damages remedy that puts the court in the role of judicial rate-maker. Rather, plaintiffs are pursuing a statutory cause of action and a legislatively-imposed liquidated damages remedy. This remedy will not result in a retroactive change in tariffed rates, or require a court to second-guess or undercut an agency's authority to regulate rates. Instead, it will enforce a legislative mandate to impose damages for conduct that lies outside the scope of any tariff.

The reasonableness of the phone companies' rates is not the issue. What matters is whether information was properly disclosed to the paying consumer in a timely and practical manner. Because this case does not challenge the reasonableness of any provision in respondents' tariffs or undermine a government agency's authority to regulate rates, the filed rate doctrine does not preempt plaintiffs' statutory cause of action.

An additional reason supports this conclusion. The Court of Appeals concluded that tariffs filed with the WUTC barred plaintiffs' non-disclosure claim. *See Judd*, 116 Wn. App. at 771 n.11. The phone companies likewise pointed to the existence of tariffs required by Washington law. *See, e.g.,* CP 139, 142-45. It is therefore clear that the filed rate doctrine at issue here derives from state law. By asking this Court to invoke a judge-made, state law doctrine to bar a cause of action expressly sanctioned by the Legislature, the phone companies request a judicial veto of a statutory cause of action. That is improper.

### D. The phone companies may not avoid damages by purporting to rely on WUTC regulations.

The Court of Appeals concluded that the phone companies could "likely" avoid damages because of their "good faith reliance" on WUTC regulations exempting local exchange companies from disclosure rules. *Judd*, 116 Wn. App. at 774 & n.20. The Court's reasoning erroneously assumes that plaintiffs must demonstrate that the regulations issued under section .520 are invalid. *See id.* If, however, a CPA claim may be brought for violation of either section .510 or .520, reliance on agency regulations is no defense to a CPA action for violation of section .510.

To the extent that the phone companies argue that the WUTC's exemption of local exchange companies from the statutory definition of "alternate operator service company" forecloses a cause of action under section .510, their argument conflicts with basic principles of statutory construction. "An agency cannot modify or amend a statute through its own regulation." *Rettkowski v. Department of Ecology*, 122 Wn.2d 219, 227, 858 P.2d 232 (1993).

The WUTC exceeded its authority when it exempted LECs from a statutorily-defined term that plainly includes LECs. *See* Plaintiff's Opening Brief at 27-32; Reply Brief at 7-24; Petition for Review at 14-18. This constitutes an independent basis for reversal and renders unreasonable the phone companies' "good faith reliance." *See* Plaintiffs' Reply Brief at 28-30. Justice Kennedy's observation regarding the relationship between a statute and an implementing regulation fits this case well:

> Adoption of a regulation that does not implement the statute to its full extent does not erase the statutory requirement. This is not a case in which a statute is ambiguous and the agency interpretation can be relied upon to avoid a statutory obligation that is uncertain or arguable.

*McConnell v. Federal Election Comm'n*, 124 S. Ct. 619, 762 (2003) (Kennedy, J., concurring in part and dissenting in part).

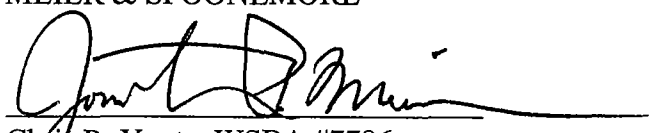
This Court, however, need not rule on the validity of the WUTC regulations, the WUTC's authority to grant waivers from its regulations, or any "good faith" defense, if it concludes that plaintiffs have stated a direct claim under the Disclosure Statutes for violation of the CPA. The case boils down to two basic principles: an unambiguous statute grants a CPA cause of action for failure to disclose, and a regulatory agency cannot extinguish a statutory cause of action.

## VI. CONCLUSION

Plaintiffs Sandy Judd, Tara Herivel, and Zuraya Wright ask this Court to reverse the judgment and remand for additional proceedings.

Respectfully submitted: January 22, 2004.

SIRIANNI YOUTZ
MEIER & SPOONEMORE



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## Certificate of Service

I certify, under penalty of perjury pursuant to the laws of the State of Washington, that on January 22, 2004, a true copy of the within SUPPLEMENTAL BRIEF OF PETITIONERS SANDY JUDD, TARA HERIVEL AND ZURAYA WRIGHT was served upon counsel of record as indicated below:

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DATED: January 22, 2004, at Seattle, Washington.