No. 57015-3-1

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

SANDY JUDD, *et al.*,

Appellants,

v.

AMERICAN TELEPHONE & TELEGRAPH, *et al.*,

Respondents.

REPLY BRIEF OF RESPONDENT T-NETIX, INC.

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I. NATURE OF THE CASE

This is the second appeal in a lawsuit filed almost six years ago alleging that several telephone companies, including respondents T-NETIX and AT&T, as well as US West, Verizon, violated the Washington Consumer Protection Act, RCW 19.86 *et seq.* ("CPA"). Plaintiffs alleged that these entities carried inmate-initiated calls during the period 1996 to 2000 without complying with RCW 80.36.520, as implemented in state regulations, WAC 480-120-141,[1] requiring audible, pre-connect disclosure of the rates charged for such calls. According to this Court's decision in the prior appeal, unless Plaintiffs demonstrate a violation of WAC 480-120-141, they have no CPA claim. *Judd v. AT&T Co.*, 116 Wn. App. 716, 66 P.3d 1102 (2003), *aff'd* 152 Wn.2d 195, 95 P.3d 337 (2004).

The question now before the Court is one of law, not of fact: were Plaintiffs entitled to rate disclosures on the inmate-initiated calls they received, given the uncontested fact that the telecommunications carriers which actually transported, completed, rated and billed for the calls had obtained waivers of WAC 480-120-141 from the Washington Utilities and Transportation Commission ("WUTC")? In other words, having now through discovery demonstrated that the calls in question were

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[1] This regulation was substantially revised in 2002 and re-codified at WAC 480-120-262.

all handled by telecommunications carriers exempt from the rate disclosure requirement, have Plaintiffs suffered any legally cognizable injury supporting standing to sue as a matter of law? The Superior Court (Ramsdell, J.) answered both questions in the negative and, as a result, entered summary judgment for T-NETIX and revoked the King County Superior Court's "primary jurisdiction" referral of the claims against T-NETIX and AT&T to the WUTC.

The complex procedural history of this case began in 2000, when the Superior Court dismissed Plaintiffs' claims against US West (now Qwest), GTE (now Verizon) and PTI (now CenturyTel) with prejudice. The Superior Court held that, as a matter of law, all of these entities were exempt from WAC 480-120-141, and had no obligation to include audible, pre-connect disclosures on inmate-initiated calls. These exemptions, the Court concluded, precluded a finding of CPA liability and required dismissal of US West, GTE and CenturyTel.

The Superior Court also referred two subissues to the WUTC under the doctrine of primary jurisdiction, seeking a determination whether T-NETIX and AT&T are subject to WAC 480-120-141 anywhere in the State of Washington. At that time, Plaintiffs had not disclosed the correctional facilities or phone numbers involved in their claims. In November 2000, the Superior Court dismissed T-NETIX and AT&T

without prejudice and imposed a stay on the lawsuit until the WUTC completed its inquiry. CR 29-30 (Order (Nov. 9, 2000)).

In 2003, this Court affirmed the dismissal of US West, GTE and CenturyTel, rejecting Plaintiffs' attempt to attack the validity of the waivers. The Court first held that Plaintiffs could not challenge the waivers collaterally, in a civil lawsuit, rather than by direct appeal of the WUTC's waiver decisions. It then upheld the waivers as a lawful exercise of the WUTC's authority and discretion over matter of telecommunications regulation. *Judd v. AT&T Co.*, 116 Wn. App. 716, 66 P.3d 1102 (2003). In 2004, the Washington Supreme Court affirmed that decision. *Judd v. AT&T Co.*, 152 Wn.2d 195, 95 P.3d 337 (2004).

Only well after the Supreme Court's affirmance did Plaintiffs turn their attention to T-NETIX and AT&T. Plaintiffs initiated the Superior Court's November 2000 primary jurisdiction referral in November 2004. These issues could easily have been pursued by Plaintiffs at the WUTC during the four-year appeals process, but were not.

In 2005, the WUTC proceeding began and T-NETIX finally learned, via discovery, the nature of the conduct for which it had been sued. It became readily apparent that Plaintiffs had suffered no injury because ***every*** inmate call they had received was covered by the WUTC waivers obtained by US West, GTE and CenturyTel. Moreover,

T-NETIX had maintained from the inception of this case that as an equipment provider to these local exchange carriers ("LECs"), it is not a telecommunications carrier subject to WAC 480-120-141. This conclusion became starkly clear when Plaintiffs finally identified the facilities from which they received calls, ***all*** of which were correctional institutions served by the LECs under WUTC waivers of the rate disclosure regulation.

In sum, Plaintiffs' CPA claim fails because they had no right to rate disclosures on any of the calls they received. Plaintiffs suffered no injury, and thus have legal no interest to protect here, because none of the calls in question were subject to WAC 480-120-141. The Superior Court was therefore correct in entering summary judgment on grounds of lack of standing as a matter of law, and that decision should be affirmed.

II. SUMMARY OF ARGUMENT

Plaintiffs appeal the Superior Court's entry of summary judgment for T-NETIX, arguing that an equipment manufacturer should be subject to telephone service regulations that do not even apply to the telephone service providers that carried, rated, and billed for the calls. Having litigated this case for six years — including unsuccessful previous appeals to this Court and the Washington Supreme Court — Plaintiffs now

seek to avoid the consequences of their previous errors by extending a regulation that exempted the inmate calls they received to an entity, namely T-NETIX, that did not carry any of those calls. Judge Ramsdell did not accept Plaintiff's ill-founded reasoning, nor should this Court.

In order for Plaintiffs to prevail, they must convince this Court of two things. First, that the LECs operating in the State of Washington had no reason to seek and obtain a waiver from WAC 480-120-141, because they were in fact not bound by that rule at all. Second, that the WUTC expended its resources and expertise to grant waivers that had no effect as a matter of law. These are questions of law, and not of fact.

Plaintiffs cannot plausibly persuade this Court on these two questions of law, and in fact devote only two paragraphs of their 22-page argument to the waiver issue. That Plaintiffs scarcely attempt to address these issues, which the Superior Court found dispositive, itself illustrates the futility of this appeal.

III. COUNTERSTATEMENT OF ISSUES

Do Plaintiffs that receive inmate-initiated collect calls that are transported, rated, and billed by entities exempt from WAC 480-120-121, the rate disclosure rule, have any cognizable interest in hearing rate

disclosures that would grant them standing to enforce WAC 480-120-121 against an entity that supplied the payphone from which the calls originated?

IV. COUNTERSTATEMENT OF THE CASE

A. Inmate Telecommunications Services

A brief description of the inmate telecommunications services industry may assist the Court in reviewing Judge Ramsdell's decision. Inmate telecommunications service is a unique, highly specialized submarket of telecommunications, and is the only market that respondent T-NETIX serves.

The most distinguishing feature of inmate telecommunications is its security component: inmate-initiated calls are lawfully restricted as to the persons that may be called and the length of each call, and can only occur on a person-to-person basis. Inmates cannot, according to regulations universally adopted by federal, state, and local correctional authorities throughout America, initiate or participate in three-way calls, or conference calls, or calls to judges, jurors or witnesses. These types of restrictions have routinely been endorsed by the Federal

Communications Commission[2] and WUTC,[3] and affirmed by dozens of courts across the county.[4]

For purposes of this appeal, four correctional facilities in Washington are relevant: Washington State Reformatory in Monroe, WA; McNeil Island Detention Center; Airway Heights Correctional Center; and Clallam Bay Correctional Center. Plaintiffs received calls only from these four correctional facilities. CR 254 (T-NETIX Motion for Summary

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[2] *Billed Party Preference for InterLATA 0+ Calls*, Second Report & Order and Order on Reconsideration, 13 FCC Rcd. 6122 (1998) (holding that inmate payphones are not required to permit access to alternative telecommunications carriers); *Policies and Rules Concerning Operator Service Providers*, 6 FCC Rcd. 2744 (1991), *aff'd*, *Amendment of Policies and Rules Concerning Service Providers and Call Aggregators*, 10 FCC Rcd. 1533 (1995) (holding that 47 U.S.C. § 226 requirements for unblocking 1-800 calls from payphones do not apply to inmate payphones).

[3] *Request for Petition of Waiver of Administrative Rules for Qwest Corp.*, Docket UT-990043, Order Granting Full and Partial Temporary Waiver of WAC 480-120-141(2)(b) (Sept. 27, 2000). The Court relied upon and quoted this order in its previous review of this case.

[4] *E.g.*, *Johnson v. California*, 207 F.3d 650 (9th Cir. 2000); *Washington v. Reno*, 35 F.3d 1093, 1100 (6th Cir. 1994) (telephone access is subject to limitations based on legitimate security interests of the facility); *Benzel v. Grammer*, 869 F.2d 1105 (8th Cir. 1989) (upholding phone restriction that resulted in inmates being unable to call any non-attorney, non-family males because it served a legitimate security purpose); *Miranda v. Michigan*, 168 F. Supp. 2d 685 (E.D. Mich. 2001); *Arney v. Simmons*, 26 F. Supp. 2d 1288 (D. Kan. 1998); *Lane v. Hutcheson*, 794 F. Supp. 877, 881 (E.D. Mo. 1992); *Wooden v. Norris*, 637 F. Supp. 543, 555-56 (M.D. Tenn. 1986); *Valdez v. New Mexico*, 54 P.2d 71 (N.M. 2002); *Bowers v. T-NETIX*, 837 A.2d 608 (Pa. Commw. 2003); *Feigley v. Pub. Util. Comm'n*, 794 A.2d 428 (Pa. Commw.), *appeal*

Judgment ("MSJ") at 13).[5] For ease of reference, T-NETIX refers to these facilities as "Monroe," "McNeil Island," "Airway Heights," and "Clallam Bay." All four facilities involved in this case — Monroe, Airway Heights, McNeil Island and Clallam Bay — were served by GTE, US West or CenturyTel.

It is undisputed that T-NETIX did not carry, set the rate of, or bill the charges for any of the calls Plaintiffs received. CR 254-55 (T-NETIX MSJ at 13-14); Pl. Br. at 34-35. Rather, T-NETIX sold the equipment used by the LECs to originate and carry the calls from these facilities. Pl. Br. at 17. The contracts to provide calling services at these facilities were held by GTE, US West and CenturyTel. CR 248 (T-NETIX MSJ at 7). These LECs installed the telephone lines, set the call rates, billed Plaintiffs, and collected Plaintiffs' money for every call at issue in this case.

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denied sub. nom. CURE of Pa. v. Pub. Util. Comm'n., 569 A.2d 863 (2002).

[5] Plaintiffs' sworn interrogatory responses did not list Clallam Bay as a facility from which calls were received. Plaintiffs' telephone bills produced in discovery, however, listed one call from Clallam Bay. Despite T-NETIX bringing this fact to Plaintiffs' attention, they did not update or amend their interrogatory responses. T-NETIX nonetheless has included Clallam Bay as a relevant facility in all of its papers challenging Plaintiffs' standing. Even if Plaintiffs include the Clallam Bay call in their claim, they still lack standing to pursue any claim. CenturyTel served Clallam Bay at the time of the call, and was exempted from WAC 480-120-141 at that time. CR 20 (T-NETIX Mot. for Summ. Determ. at 20 n.2).

In the lexicon of Washington telephone regulation, GTE, US West and CenturyTel are providers of "telecommunications," defined as "the offering of telecommunications for a fee directly to the public[.]" WAC 480-120-021. More specifically, these entities are, or were during the relevant period of this case, the local exchange carriers ("LECs") serving the four correctional facilities from which Plaintiffs received calls. They were licensed to provide local calling service and intraLATA calling service throughout Washington. An "intraLATA" call, sometimes called "local long distance," is one that both originates and terminates within one LATA — local access and transmission area — drawn according to the boundaries established by District Judge Harold Greene as part of the AT&T divesiture. *United States v. AT&T Co.*, 552 F. Supp. 131 (D.D.C. 1982). Under the terms of the AT&T divestiture decree, LECs were permitted to carry only local and intraLATA calls. *Id.* at 188-89.[6]

The WUTC rule upon which Plaintiffs rely for their CPA claim is WAC 480-120-141, which applied to "[a]ll telecommunications companies providing operator services (both live and automated)." As

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[6] The Telecommunications Act of 1996, 47 U.S.C. § 151 *et seq.*, included a provision whereby a LEC could obtain permission to provide interLATA services (for transmissions crossing a LATA boundary) if they met several competitive benchmarks. No LEC in Washington had obtained this interLATA permission during the relevant period of this case (August 1996 to August 2000).

this Court and the Washington Supreme Court have already affirmed in this case, GTE, US West and CenturyTel were exempt from this rule during the relevant period of the Complaint.

B. Procedural History

This appeal marks the second time that this Court has been asked to review a decision by the King County Superior Court in this case. In 2001, Plaintiffs appealed the Superior Court's dismissal of every LEC defendant — GTE, CenturyTel and US West—on the ground that they were exempt from the rate disclosure rule, WAC 480-140-121, by virtue of exemptions and waivers granted by the WUTC. This Court rejected Plaintiff's attempt to collaterally attack those WUTC regulations, deciding in 2003 that the WUTC's decision not to enforce the rate disclosure rule was valid.[7] In 2004, the Washington Supreme Court affirmed that decision.[8] Now in 2006, Plaintiffs ask this Court to impose those rate disclosure obligations on T-NETIX, an equipment provider, having lost GTE, US West and PTI as sources of damages.

Plaintiffs' claims against T-NETIX languished for four years, without discovery or any WUTC proceedings, while Plaintiffs

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[7] *Judd v. AT&T Co.*, 116 Wn. App. 716, 66 P.3d 1102 (2003), *aff'd* 152 Wn.2d 195, 95 P.3d 337 (2004).

[8] *Id.*

appealed the Superior Court's dismissal of the three LECs. Months after the Washington Supreme Court affirmed that dismissal, on November 14, 2004, Plaintiffs returned to the Washington WUTC to seek a finding of liability against T-NETIX as the provider of the phones from which inmate telephone calls originated. The WUTC then opened a proceeding to review the questions certified by Superior Court Judge Kathleen Learned. For the first time, T-NETIX obtained discovery to understand Plaintiffs' allegations and ascertain precisely the calls at issue.

T-NETIX filed a Motion for Summary Determination at the WUTC, arguing that Plaintiffs lack standing to proceed on their CPA claim, thus obviating any need for the WUTC to complete the November 2000 primary jurisdiction referral. The WUTC Administrative Law Judge held that the Commission had no jurisdiction or authority to decide the issue of standing. She instructed the parties to raise standing if and when the case returned to the Superior Court.

T-NETIX immediately returned to the Superior Court, moving for a lift of the stay and for summary judgment on the ground that neither Plaintiff has standing to pursue a CPA claim. T-NETIX presented a factual analysis of Plaintiffs' phone bills demonstrating conclusively that *every* call Plaintiffs received was carried, rated, and billed by US West,

GTE or PTI — the entities already exempt from WAC 480-120-141. Plaintiffs did not challenge the accuracy of T-NETIX's analysis.

On August 26, 2006, Judge Jeffrey Ramsdell heard argument on T-NETIX's motion. *See generally* Verbatim Report of Proceedings (Aug. 26, 2005) ("VRP"). Reasoning at argument that Plaintiffs' attempt to enforce WAC 480-120-141 against T-NETIX "logically makes no sense," *id.* at 52, Judge Ramsdell entered summary judgment for T-NETIX on September 6, 2006. CR 330-31. Judge Ramsdell subsequently clarified his order to include AT&T, and rescinded the November 2000 primary jurisdiction referral to the WUTC. CR 346-50.

V. STANDARD OF REVIEW

Courts of appeals employ the same standard of review on appeal of summary judgment as applied by the trial court. *E.g.*, *Vallandigham v. Clover Park Sch. Dist. No. 400*, 154 Wash.2d 16, 26, 109 P.3d 805, 810 (2005). Summary judgment will be granted "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Blenheim v. Dawson & Hall Ltd.*, 35 Wn. App. 435, 439, 667 P.2d 125, 128 (1983). "The court must consider all facts submitted and all reasonable inferences

from the facts in the light most favorable to the nonmoving party." *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). Further, "[a] party may not avoid an opponent's motion for summary judgment by resting on mere allegations of its complaint but must set forth specific facts showing that there is a genuine issue of material fact." *129 Retail Store Employees Local 631 v. Totem Sales, Inc.*, 20 Wn. App. 278, 281, 579 P.2d 1019, 1021 (1978).

VI. ARGUMENT

A. Plaintiffs Have Failed and Continue to Fail to Satisfy Their Burden of Demonstrating Standing to Pursue Their CPA Claim

Plaintiffs must have standing to pursue their CPA claim. The Washington Supreme Court established in 1986 that all private CPA plaintiffs must show "injury to plaintiff in his or her business or property" in order to pursue their claim. *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wash.2d 778, 785, 719 P.2d 531 (1986); *see Washington State Physicians Ins. & Exch. Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 311-12, 858 P.2d 1054 (1993) (holding that doctors have standing to sue drug manufacturer when prescribed drug harms their patients).

Plaintiffs bear the burden of proving facts sufficient to demonstrate standing. *Allan v. Univ. of Wash.*, 140 Wash.2d 323, 329, 997 P.2d 360, 363 (2000) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 566 (1992)). This burden includes "'a factual showing of perceptible harm.'" *Id.* (holding that wife of professor lacked standing to challenge amendments to the University of Washington faculty disciplinary code). Plaintiffs apparently acknowledge this burden. *See* Pl. Br. at 17.

For purposes of this case, Plaintiffs would have a cognizable interest if they received a call that ***should have included*** an audible, pre-connect rate disclosure but did not. In the Complaint, Plaintiffs alleged that they received inmate calls and that they do not recall hearing an audible disclosure. *See* Pl. Br. at 2. Yet Plaintiffs have been unable to show that, as a matter of law, the calls should have included audible disclosures under the WUTC rule, WAC 480-120-141.

As analyzed in greater detail below, every single call of which Plaintiffs produced evidence was carried, rated, and billed by Qwest/US West, GTE/Verizon, or CenturyTel/PTI. All of these LECs were exempt from WAC 480-120-141 for every call Plaintiffs received — until 1999, the rule contained an express clause exempting these carriers, and after 1999, the WUTC granted waivers of the rule that covered the

entire time period in which Plaintiffs received inmate calls. CR 245 (T-NETIX MSJ at 4 ("T-NETIX MSJ")).

Plaintiffs therefore must establish that WAC applies as a matter of law to T-NETIX and AT&T. Plaintiffs' brief is rife with uncorroborated technical discussion, the validity of which has never been accepted by any tribunal, to argue that T-NETIX or AT&T were indeed the entities to which WAC 480-120-141 had always applied. Via this technical analysis, Plaintiffs attempt to manufacture disputed material facts — yet the Superior Court relied upon none of it, and none of it is necessary to deciding the questions of law before this Court.

Plaintiffs' exercise is immaterial and pointless as a matter of law. As the Superior Court expressly recognized, Plaintiffs' argument would lead to two absurd results: first, that the WUTC simply wasted its time in crafting the exemptions that operated during the relevant period of this case; and second, that an equipment vendor selling equipment to a phone company should be regulated as a telecommunications service provider. *See* VRP at 52. Focusing on the obvious flaws in this approach, the Superior Court held that Plaintiffs were not entitled to hear audible disclosures on the contested calls, and thus had no right to bring a claim under the CPA. Plaintiffs' Brief, which offers exactly the same logic and

purported "evidence" available to the Superior Court, provides this Court no reason to disturb the Superior Court's ruling.

B. The Washington Supreme Court Upheld the Exemptions Obtained by GTE, US West and CenturyTel From the Rate Disclosure Rule

Every LEC involved in Plaintiffs' claims — GTE, US West and CenturyTel — was exempt from the rate disclosure rules for every call that Plaintiffs received. Plaintiffs have never disputed this ultimate fact. Rather, Plaintiffs attacked those exemptions, here and before the Washington Supreme Court, because the exemptions deprive Plaintiffs of any cognizable injury under RCW 80.36.520. Those exemptions were, however, upheld, and they bar Plaintiffs from pursuing their claims against T-NETIX now. Any contrary finding would render the WUTC's review and grant of the LEC exemptions, as well as this Court's decision on appeal, a nullity.

1. Plaintiffs concede that the waivers operated during the entire relevant period of this case.

Plaintiffs have never challenged the conclusion that the relevant period of this case is August 1, 1996 to August 1, 2000 by operation of RCW 19.86.120. *See* CR 245 (T-NETIX MSJ at 4 n.3). Plaintiffs concede that the rate disclosure rule did not apply to GTE, US West or CenturyTel until 1999. Pl. Br. at 21. Plaintiffs also concede that

GTE and US West obtained waivers lasting through 2000. *Id.* at 37; CR 500 (Pls.' Opp. to T-NETIX MSJ at 17). Thus, the exemptions and waivers, which this Court and the Supreme Court have deemed valid, operated during the entire period in which Plaintiffs received inmate calls.

2. The waivers evidence the WUTC's decision that the charges Plaintiffs paid for inmate calls were not contrary to the public interest.

A good deal of Plaintiffs' brief is devoted to decrying inmate telephone rates in order to lend a sympathetic component to their appeal. Pl. Br. at 2, 18. Plaintiffs' intent, it seems, is to avert attention away from their failure to demonstrate any cognizable interest or harm in this suit by collaterally challenging the rates they paid for inmate calls. Yet while the enactment of RCW 80.36.520 indicates the Washington Legislature's concern that collect calls from payphones — including public payphones — were high, that legislative finding has no bearing on this case, according to both the WUTC and this Court.

The WUTC expressly held when granting US West a waiver in September 2000 that "Qwest/US West's operator-assisted rates **have not been a source of complaints** for this Commission, [and] **have not harmed the public**." *Request for Petition of Waiver of Administrative Rules for Qwest Corp.*, Docket UT-990043, Order Granting Full and Partial Temporary Waiver of WAC 480-120-141(2)(b) (Sept. 27, 2000)

(emphasis added). The WUTC also found that Qwest's petition for waiver made "a sound request **since the Company's operator-assisted rates compare favorably to other carrier's [*sic*] rates that serve inmate phones**." *Id.* (emphasis added). This Court quoted and relied upon this finding in affirming the validity of the LEC waivers. *Judd*, 116 Wn. App. at 773, 66 P.3d at 1108-09. Consequently, the essence of Plaintiffs' lament — that the calls they received were somehow priced "too high" — was expressly rejected in the waiver proceedings that exempted the LECs from the rate disclosure regulations.

According to T-NETIX's uncontroverted analysis of Plaintiffs' phone bills, approximately half of the calls Plaintiffs received were Qwest/US West calls. CR 20 (T-NETIX Mot. for Summ. Determ. at 8). The WUTC manifestly had no concern regarding the amounts charged for these calls. Moreover, Plaintiffs likely know that any attempt to attack those rates in court would immediately fail under the filed rate doctrine, which provides that an approved, tariffed rate "is *per se* reasonable and unassailable in judicial proceedings brought by ratepayers." *Wegoland Ltd. v. NYNEX Corp.*, 27 F.3d 17, 18 (2d Cir. 1994). *See also AT&T v. Central Office Tel. Co.*, 524 U.S. 214, 23 (1998).

As such, the Court should grant no consideration to the public policy contentions that Plaintiffs offer in support of their claim.

Rather, the Court's focus should remain on whether Plaintiffs were entitled to pre-connect rate disclosures on any of the inmate-initiated calls they received. Unless they were so entitled, Plaintiffs have no standing to seek relief of any kind, against any defendant.

3. Plaintiffs' argument would render the WUTC exemptions and waivers, and this Court's affirmed decision on appeal, meaningless.

Plaintiffs pursued GTE, US West and CenturyTel all the way to the Washington Supreme Court, arguing that the exemptions these LECs obtained could not shield them from liability under RCW 80.36.520. *Judd*, 152 Wn.2d at 205, 95 P.3d at 342; *Judd*, 116 Wn. App. at 767, 771, 66 P.3d at 1105-06, 1108. Discovery finally obtained by T-NETIX in April 2005 demonstrates that one of these exempted carriers was the telecommunications company for every inmate call they received. CR 20 (T-NETIX Mot. for Summ. Determ. at 8). Plainly, Plaintiffs recognized that if the rule exemptions were upheld, their claim would be extinguished. In 2004, the Washington Supreme Court, the tribunal of last resort, upheld the waivers. *Judd*, 152 Wn.2d at 206-07, 95 P.3d at 343.

Now Plaintiffs pretend that the exemptions are irrelevant because neither GTE, nor US West, nor CenturyTel are the entities Plaintiffs are now suing. Plaintiffs devote only two paragraphs to the

waiver issue in an effort to minimize its crucial, and dispositive, import in this case. Pl. Br. at 37-38. In effect, Plaintiffs argue that the WUTC had no reason to grant GTE, US West and CenturyTel exemptions from WAC 480-120-141 because that rule applies to a multitude of different entities.

At bottom, Plaintiffs ask this Court to tell the WUTC that its efforts were wasted, and the entire waiver inquiry was needless. Unless Plaintiffs can effect this obviously absurd result, they have no standing to pursue their rate disclosure claims. Being unable to do so, and having set forth no facts to demonstrate an injury to any "showing of perceptible harm," *Allan*, 140 Wash.2d at 329, 997 P.2d at 363, Plaintiffs have failed their burden to demonstrate CPA standing. *Hangman Ridge*, 105 Wash.2d at 785, 719 P.2d at 535.

C. The Superior Court Had Undisputed Evidence That Every Documented Call Received by Plaintiffs Was Carried, Rated, and Billed by GTE, US West, or CenturyTel

1. Plaintiffs concede that T-NETIX did not provide calling services at any facility from which the allegedly unlawful calls arose.

Plaintiffs acknowledge that T-NETIX did not carry, set the rates of, or bill for any of the calls they received. Pl. Br. at 35. They nonetheless maintain that T-NETIX is subject to WAC 480-120-141 as an operator services provider ("OSP"). Plaintiffs also imply that T-NETIX

has admitted it performs operator services, Pl. Br. at 15, which is a flat misstatement. T-NETIX has maintained, since the inception of this case in 2000, that as a mere equipment vendor it is not an OSP. It reiterated this position at the WUTC and in Superior Court. But for purposes of this appeal, now that we know the facilities and calls involved in Plaintiffs' claim, there is no need to prove out this conclusion.

Here again the LEC waivers are the dispositive ultimate fact. The very existence of the waivers demonstrate that T-NETIX is not an OSP under Washington law at the correctional facilities in question — the LECs are the OSPs. The rate disclosure rule, WAC 480-120-121, applies to OSPs. GTE and US West obtained waivers from that rule, demonstrating that they are the OSPs. T-NETIX, which is a vendor to these two entities at every correctional facility involved in this case, thus cannot be an OSP. Otherwise, there would be two OSPs at these facilities. That conclusion plainly cannot be correct, yet it necessarily is Plaintiffs' position in this case.

The undisputed fact is this appeal is that Plaintiffs have not contested the veracity or accuracy of T-NETIX's analysis of their phone bills. T-NETIX recorded every inmate call appearing on every phone bill Plaintiffs produced — numbering more than 40 — and noted the LEC that carried and billed the call. T-NETIX then researched each call to

determine whether they were local, intraLATA, or interLATA. As demonstrated in the designated record on appeal, every call recorded on Plaintiffs' phone bills is local or intraLATA. That means that GTE, US West or CenturyTel were the telecommunications carriers — the entities for whom WAC 480-120-141 was written — for every call Plaintiffs received. Thus, unless the Court concludes that two OSPs served the facilities at issue in this case, an obviously absurd notion, then Plaintiffs again fail to demonstrate any cognizable interest under the CPA.

2. Plaintiffs' bare, unsupportable, and late-filed allegation that Tara Herivel received an interLATA call not covered by the exemptions was insufficient as a matter of law to defeat summary judgment.

Plaintiff Tara Herivel continues to rely on a mere allegation — one can never be corroborated — that she received one call not covered by the LEC rule exemptions that included no audible rate disclosure, and thus has suffered "injury" under the CPA. Pl. Br. at 29-30. This naked allegation is insufficient to defeat summary judgment, especially when compared to the contrary evidence T-NETIX submitted in the record. *129 Retail Store Employees Local 631*, 20 Wn. App. at 281, 579 P.2d at 1021 ("A party may not avoid an opponent's motion for summary judgment by

resting on mere allegations of its complaint but must set forth specific facts showing that there is a genuine issue of material fact.").

Ms. Herivel alleged, after the close of briefing on this issue at the WUTC, that she received an interLATA call. Plaintiffs did not contest any part of T-NETIX's analysis of their phone bills — which demonstrates that every inmate call was carried by a carrier exempt from the rate disclosure rule — and merely contended in a supplemental filing that Ms. Herivel received one call from a prison located across a LATA boundary from her home: Airway Heights.[9] If Ms. Herivel could advance any evidence of that call, she may have a claim against an interLATA carrier – a carrier other than GTE, US West and PTI – because that carrier would have been subject to the rate disclosure rule, WAC 480-120-141.

Nonetheless, Airway Heights, like the other three prisons at issue in this case, is one for which T-NETIX sold the phones and other telecommunications equipment. T-NETIX would therefore have a record of the call, because part of the service it renders is keeping a log of all calls that originate on its payphones. T-NETIX tried twice to find any record that Ms. Herivel received a call from Airway Heights during the stated period. It never found one. Thus, under the prevailing summary

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[9] A call from Airway Heights to Plaintiff Judd would not be an interLATA call.

judgment standard, which rejects bare allegations having no factual support, *129 Retail Store Employees Local 631*, 20 Wn. App. at 281, Ms. Herivel has no standing to pursue her CPA claim against T-NETIX.

T-NETIX researched its database twice, because Ms. Herivel's recollection about the call changed. First, she alleged that the call occurred at some time in October 1998. T-NETIX responded that it found no such call between October 1 and December 31, 1998. CR 255-56 (T-NETIX MSJ at 14-15). Ms. Herivel then alleged that the call came at some time during 1998. CR 269 (Herivel Decl. ¶ 6). T-NETIX thus broadened its search. **It found no call from Airway Heights to Ms. Herivel on any day between January 1 and December 31, 1998.** *Id.* The T-NETIX Vice President of Billing Services provided two sworn affidavits to verify the results of this research. CR 280-281 (Decl. of Nancy Lee).

Faced with this evidence, which the Superior Court found sufficiently compelling to conclude that there was no material disputed question of fact as to any call, Plaintiffs now assert on appeal that T-NETIX's call research was incomplete. Pl. Br. at 29. They observe that "T-NETIX didn't bother to research calls placed earlier [than January 1, 1998] — despite Ms. Herivel's statement that the call may have been placed sometime after August 26, 1997." *Id.* For Plaintiffs to make this

argument is shocking: Ms. Herivel's second declaration states that "**my best estimate** of when I receive the telephone call is somewhere **between June and December 1998**." CR 268. Hence T-NETIX researched the entire 1998 time period. It is unfortunate that Plaintiffs persist in this obvious gamesmanship with respect to the alleged interLATA call, and it is improper.

Ms. Herivel has admitted that she has no record of the purported interLATA call and will never be able to provide one. Pl. Br. at 29-30. Thus, other than T-NETIX's records, which refute the existence of this alleged call, there is no factual evidence supporting Ms. Herivel's contention. Her bare allegation cannot defeat summary judgment. *129 Retail Store Employees Local 631*, 20 Wn. App. at 281, 579 P.2d at 1021. Plaintiff concededly will not be able to demonstrate via admissible evidence that the interLATA call actually occurred, rendering the allegation a "mere scintilla" of evidence that as a matter of law does not present a disputed material fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). The Superior Court was thus correct not to give weight to Ms. Herivel's alleged interLATA call, and to grant summary judgment for T-NETIX.

D. The Superior Court Correctly Concluded That the Waivers Exempted All Calls Received by Plaintiffs from the Rate Disclosure Rule

Judge Ramsdell concluded that the waivers and exemptions, which Plaintiffs concede affected every documented call they received, had the legal effect of stripping Plaintiffs of any right to relief. Though Plaintiffs persisted in arguing that T-NETIX or AT&T may be OSPs subject to WAC 480-120-141, Judge Ramsdell aptly recognized that "**logically it just doesn't make any sense.**" VRP at 52 (emphasis added).

Counsel for T-NETIX provided a simple analogy at oral argument to demonstrate the flaw in Plaintiffs' theory. *See* VRP at 25-26. Counsel asked Judge Ramsdell to suppose that the WUTC adopted a rule requiring Internet Service Providers ("ISPs") to disclose their rates and actual transmission speed at the start of a user's Internet session. Suppose that under this rule, the WUTC determined that certain well-known ISPs, such as AOL and Earthlink, deserved waivers from the rule. Months later, an Internet user sues AOL for failure to disclose its rates and speed. Then, when AOL is dismissed from the case due to the rule waiver, the Internet user sues Cisco because it sold the Internet routers and servers to AOL that AOL used to offer ISP services. Suddenly Cisco, which does not offer ISP services to consumers, is subject to a telecommunications rule

via the extension of liability from telecommunications providers to equipment vendors.

That absurd result is what Plaintiffs are trying to achieve in this appeal. Having lost GTE, US West and CenturyTel as sources of damages, Plaintiffs turn to the equipment provider to make them whole. As a matter of law, this attempt must fail. Judge Ramsdell plainly recognized the flaw in Plaintiffs' argument, stating:

> It seems to me — what counsel was saying a moment ago seems to make logical sense, in essence. **If the carrier is not required to make the disclosure because they are exempt, does it make any sense to require somebody else to do it for them?** That's sort of the loop I get myself into. And **logically it just doesn't make any sense.**

VRP at 52 (emphasis added).

Plaintiffs simply were not entitled to audible disclosures on the calls they received and thus have no cognizable interest that permits them to continue pursuing their CPA claim. *Hangman Ridge*, 105 Wash.2d at 785. Consequently, on the undisputed facts T-NETIX was "entitled to a judgment as a matter of law." *Blenheim*, 35 Wn. App. 435 at 439, 667 P.2d at 128. The Superior Court's conclusion on this point was sound, and its entry of summary judgment therefore should be upheld.

E. This Court Already Rejected Plaintiffs' "Contracting With" Argument in 2003

Recognizing their inability to allege harm from T-NETIX, Plaintiffs refer to a clause in the CPA, RCW 86.30.520, that authorized the WUTC to adopt rate disclosure rules affecting those "contracting with" an OSP. Pl. Br. at 35-36. This argument warrants no consideration in this appeal, because this Court already rejected it in 2003.

RCW 80.36.520 provides, in part, that

> [T]he [WUTC] 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."

Plaintiffs argue that they have standing "if AT&T and/or T-NETIX 'contracted with' an OSP that failed to disclose rates on calls received by one of the plaintiffs." Pl. Br. at 22. Yet this argument is predicated on the notion that RCW 80.36.520 is a legitimate ground for assessing liability in this case. It is not.

In its 2003 decision, this Court reasoned that "[t]he 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 disclosure' to consumers through promulgation of rules." *Judd*, 116 Wn. App. at 770, 66 P.3d at 1107 (emphasis added). This Court thus concluded that "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**." *Id.* (emphasis added). The Washington Supreme Court upheld this conclusion. *Judd*, 152 Wn.2d at 204, 95 P.3d at 342.

Plaintiffs therefore cannot rely on the language of RCW 80.36.520 to support their claims, but rather must focus on the WUTC's language in WAC 480-120-141. And nothing in that rule includes the "contracting with" clause that Plaintiffs believe establishes their standing. Accordingly, the Court should not devote its attention to Plaintiffs' "contracting with" strategy for reviving their claims, but rather should focus on the actual WUTC rules, including the LEC exemptions and waivers, to discern whether Plaintiffs have alleged or can allege any harm in this case.

RESPECTFULLY SUBMITTED this 19th day of April, 2006.

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CERTIFICATE OF SERVICE

I certify, under penalty of perjury pursuant to the laws of the United States and the State of Washington, that on April 19, 2006, a true copy of the Response Brief of Respondent T-NETIX, Inc. was served upon counsel of record as indicated below:

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