BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

SANDY JUDD, and TARA HERIVEL, **Complainants,** **v.** **AT&T COMMUNICATION OF THE PACIFIC NORTHWEST, INC., and T-NETIX, INC.,** **Respondents.**	**Docket No. UT-042022**

AT&T'S PETITION FOR ADMINISTRATIVE REVIEW

SUMBITTED BY:

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AT&T Communications of the Pacific Northwest, Inc. ("AT&T"), by its attorneys, petitions the Commission to reject certain erroneous findings of fact and conclusions of law contained in the April 21, 2010 Initial Order Denying in Part AT&T's Amended Motion For Summary Determination and Granting T-Netix's Motion and Amended Motion For Summary Determination (the "Initial Order"). As explained more fully below, the Administrative Law Judge (the "ALJ") ignored certain key T-Netix admissions that go to the heart of the issue that the ALJ identified as being determinative of which party served as the Operator Services Provider ("OSP"). Once those admissions are considered, it is apparent that T-Netix was the OSP and the Commission should enter a final order that reflects that determination.

I. NATURE OF THE CHALLENGE

1. This case was filed as a putative class action in the Superior Court of Washington for King County. It involves the disclosure of rates for collect calls originating from Washington Department of Corrections ("DOC") facilities. The Superior Court referred two questions to this Commission for resolution: "(1) whether AT&T or T-Netix were OSPs and (2) whether they violated the WUTC disclosure regulations."[1] AT&T and T-Netix only addressed the first issue in their respective amended motions for summary determination, and that was the only issue addressed by the ALJ in the Initial Order. Consequently that issue is the sole subject of this petition.[2]

2. Under the Commission's rules, the Commission may grant a motion for summary determination where the pleadings and evidentiary support show there are no genuine issues as to

[1] *Judd v. AT&T et al.*, No. 00-2-17565-5, August 28, 2000 Order, Superior Court of Washington for King County; *Judd & Herivel v. AT&T & T-Netix*, Order 23, Initial Order at ¶9.

[2] The second issue will be the subject of subsequent proceedings. *See* Initial Order at ¶¶138, 148. AT&T expressly reserves, and does not waive, all rights with respect to the second issue and all other aspects of this matter.

any material fact. WAC 480-07-380(2); Initial Order at ¶25. Consistent with the uncontested supporting evidence and law, the ALJ correctly concluded (1) that the P-III Premise platform linked the calling party at the prison to the local or long-distance provider (Initial Order at ¶96); (2) that the P-III platform performed the operator services at the correctional facilities (*id.* at ¶97); and (3) that the OSP for collect calls from the prisons at issue was the party that owned the platform at the prisons (*id.* at ¶97).

3. The ALJ materially erred, however, in concluding that AT&T was the owner of the P-III platform. First, AT&T respectfully submits that the ALJ overlooked the uncontroverted evidence in the record, particularly T-Netix's own admissions, establishing that T-Netix, and not AT&T, owned the P-III platform. AT&T also respectfully submits that, given the uncontroverted evidence that T-Netix owned the P-III platform, the ALJ should have concluded that T-Netix was the OSP. AT&T therefore requests that the Commission not adopt the ALJ's finding, but instead find that T-Netix is the OSP.

4. Second, the ALJ erred by basing her decision on the interpretation of a general, commercial contract between AT&T and T-Netix. For the reasons discussed below, T-Netix's admission that it owned the P-III platform at the relevant prisons during the relevant time period proves that the contract did *not* transfer ownership of the P-III platform to AT&T, as the ALJ mistakenly concluded. Moreover, AT&T respectfully submits that the ALJ exceeded the scope of the referral and of her authority by even attempting to interpret this commercial contract between AT&T and T-Netix. Thus, AT&T requests that the Commission reverse that part of the ALJ's ruling which rests on her interpretation of the general contract between AT&T/T-Netix.

5. The ALJ also erroneously determined that AT&T did not qualify for the local exchange carrier exemption from OSP obligations that existed between 1991 and 1999. *See* Ex.

A-5, Tab 1 (WAC 480-120-021 (adopted June 17, 1991)). Although it is not necessary to reach this issue if the Commission concludes that AT&T is not the OSP, in any event, to the extent that it is necessary to address this point, AT&T also asks that the Commission reverse the ALJ's ruling. It is uncontroverted that from January 1997 to the present, AT&T was certified as a local exchange company. *See* Bench Ex. 2, Tab 2 (AT&T's Response to Bench Request No. 2 including a copy of AT&T's LEC certification). As such, when local exchange companies were exempt from the definition of an OSP/AOS Company, between 1991 and 1999, AT&T too was exempt. The ALJ concluded, however, that AT&T was entitled to invoke the local exchange carrier exemption only if AT&T was acting as the local exchange carrier for the particular calls made. The regulations do not contain such a requirement and it would be improper and fundamentally unfair for the Commission to now add such a requirement after the fact, without any prior notice.

II. EVIDENCE RELIED UPON TO SUPPORT CHALLENGE

6. AT&T relies on the following evidence to support its challenge:

- ALJ's Initial Order entered on April 21, 2010;
- AT&T's Amended Motion for Summary Determination (Ex. A-1HC) and all exhibits attached thereto;
- AT&T's Response to T-Netix's Amended Motion for Summary Determination (Ex. A-22HC) and all exhibits attached thereto;
- AT&T's Reply in Support of its Amended Motion for Summary Determination (Ex. A-45HC) and all exhibits attached thereto;
- T-Netix's Motion for Summary Determination (Ex. T-1HC) and all exhibits attached thereto;
- T-Netix's Amended Motion for Summary Determination (Ex. T-13) and all exhibits attached thereto;
- T-Netix's Opposition to AT&T's Amended Motion for Summary Determination (Ex. T-25) and all exhibits attached thereto;

- T-Netix's Reply in Support of its Amended Motion for Summary Determination (Ex. T-29) and all exhibits attached thereto;
- Complainants Memorandum in Opposition to T-Netix's Motion for Summary Determination and AT&T's Motion for Summary Determination (Ex. C-1C) and all exhibits attached thereto;
- Bench Exhibits 1-6;
- T-Netix's Response to Data Request No.15 (Tab 3);
- August 7, 2009 Deposition of Kenneth Wilson at 131:4 – 133:18 (Tab 4);
- August 6, 2009 Deposition of Robert Rae at 251:4 – 257:19 (Tab 5).

III. REMEDY SOUGHT

7. The Commission should reject the wholesale adoption of the ALJ's Initial Order and instead, modify the order as described below. Further, the Commission should deny T-Netix's Motion and Amended Motion for Summary Determination and grant AT&T's Amended Motion for Summary Determination. Alternatively, if the Commission finds, albeit mistakenly in light of T-Netix's admission, that there exists a material issue of disputed fact regarding who owned the P-III platform at the relevant prisons during the relevant time period, the Commission should deny both parties' motions and remand this matter to an ALJ for further proceedings on the issue of ownership.

IV. ARGUMENT

A. THE ADMINISTRATIVE LAW JUDGE CORRECTLY DETERMINED THAT THE OWNER OF THE P-III PLATFORM IS THE OSP.

8. The ALJ correctly determined that "[t]he issue of who owns the [P-III] platform is at the crux of any determination of which Respondent acted as the OSP." Initial Order at fn. 46. At all relevant times, the Commission's regulations have, at their essence, defined the OSP as the party "providing a connection to intrastate or interstate long-distance or to local services from" aggregator locations. *See* Ex. A-4, Tab 6 (WAC 480-120-021 (1989)); Ex. A-5, Tab 1 (WAC

480-120-141 (1991)); Ex. A-6, Tab 7 (WAC 480-120-021 (1999)). To determine who provided the all-important "connection," the ALJ first analyzed the call flow and determined that the P-III platform "linked the calling party at the prison to the local or long-distance provider." Initial Order at ¶96.

9. [redacted] Ex. A-19HC at ¶15, Tab 8 (July 27, 2005 Supplemental Affidavit of Alan Schott (T-Netix's expert)) (underlined language has been designated highly confidential and has been redacted from the public version of this motion); Ex. A-18 at ¶¶4-6, Tab 9 (August 5, 2009 Declaration of Robert L. Rae (T-Netix's expert) (adopting Alan Schott's June 10, 2005 Affidavit)). T-Netix's expert admitted that the P-III platform [redacted] Ex. A-17HC at ¶9, Tab 10 (June 10, 2005 Affidavit of Alan Schott (T-Netix's expert)); *see also* Ex. A-19HC, at ¶¶13, 15, Figure 1, 18(a)-e), Tab 8 (July 27, 2005 Schott Supplemental Affidavit); Ex. A-18 at ¶¶4-6, Tab 9 (Rae Declaration) (adopting Alan Schott's July 27, 2005 Supplemental Affidavit). If the P-III platform determines that the called number is valid and the inmate has authority to place the call, the P-III "platform's automated voice will announce that [the call recipient has] received a call from an inmate (platform plays the inmate's actual pre-recorded name) and then prompts the called party on the procedure to accept the call." Ex. A19HC at ¶18(g), Tab 8 (June 27, 2005 Schott Supplemental Affidavit). If the called party accepts the call, the P-III platform allows the inmate and called party to talk. *Id.* at ¶18(h).

10. Scott Passe, one of the developers of the P-III platform and the T-Netix employee probably most knowledgeable about the hardware, explained that "[t]he [P-III] telephony module is the device that *connects* the inmate to the PSTN period." Ex. A-23 at 38:23-39:25, 49:1-7, 97:8-24, Tab 11 (April 5, 2009 Deposition of Scott Passe ("Passe Dep.") (emphasis added)). Similarly, [redacted] Ex. A-24HC at 224:10-24, Tab 12 (August 6, 2009 Deposition of Robert Rae ("Rae Dep.")). [redacted] *Id.* at 219:24-220:14.

11. Tracing the call flow, the ALJ correctly concluded that "[c]onnection, based on an examination of the call schematics and the plain meaning of the regulation, occurs after the P-III Premise platform verifies that the call is valid and not prohibited, and when the platform passes the '0+' call to the local or long-distance service provider by out pulsing it as a '1+' call." Initial Order at ¶142.

12. The ALJ also correctly determined that the P-III platform performed the operator services at the prisons. *Id*. at ¶97. The Commission's regulations define "operator services" as "any intrastate telecommunications service provided to a call aggregator location that includes as a component any automatic or live assistance to a consumer to arrange for billing or completion, or both, of an intrastate telephone call . . . ." Ex. A-5, Tab 1 (WAC 480-120-021 (1991)); Ex. A-6, Tab 7 (WAC 480-120-021 (1999)). The ALJ properly looked at the functions served by the P-III platform and concluded that it provided these operator services. Initial Order at ¶97. "A typical call flow for a T-Netix P-III premise-based call control platform" included the following services performed by the platform:

- "Inmate . . . [redacted] . . . ."

- "Platform validates the destination number and PIN, if required, using several database tables."

- "If the platform allows the call, the automated voice prompts the inmate to record his name. If the platform denies the call, the automated voice will play a rejection message to the inmate and return simulated dial tone to allow another attempt."

- "A valid call will cause the platform to seize the dedicated outbound trunk and listen for true dial tone from the serving end office (LEC). When the platform validates the presence of battery and dial tone from the serving end office, it will then out pulse the destination number."

- ". . . The platform's automated voice will announce that they have received a call from an inmate (platform plays the inmate's actual pre-recorded name) and then prompts the called party on the procedure to accept the call. . . ."

- "If the called party accepts the call, [redacted] the platform will configure the audio paths to allow two-way conversation between the inmate and called party."

- "The platform will provide call timing and perform multiple fraud detection tests throughout the duration of the call."

- "When the call has ended, the platform will record the call detail that includes start time, stop time, date, origination number, terminating (destination) number, call acceptance flags, and other validation information."

- "Call detail data is downloaded periodically from the platform to a centralized data center where it is formatted and sent to the LEC or IXC that owns that traffic."

Ex. A-19HC at ¶18, Tab 8 (July 27, 2005 Schott Supplemental Affidavit); s*ee also* Ex. A-25, Tab 13 (T-Netix Resp. to AT&T Second Data Req. No. 16); Ex. A-26, Tab 14 (T-Netix Second Supp. Resp. to AT&T Second Data Req. No. 18). T-Netix's expert acknowledged that these services constitute operator services that historically were provided by a live operator. Ex. A-19HC at ¶4, Tab 8 (July 27, 2005 Schott Supplemental Affidavit). The P-III Premise platform obviated the need for live operators and, instead, performed those services to assist with billing and call completion. *Id.* at ¶¶8, 9. Complainants' expert agreed that these services provided by the P-III Premise platform constitute operator services, both historically and under the WUTC

definition. *See* Ex. A-20HC at ¶¶13-21, Tab 15 (August 15, 2005 Decl. of Kenneth Wilson (*e.g.*, "In the [redacted] configuration, the T-Netix platform performs operator services functions on each call dialed by an inmate")).

13. Because the P-III platform both connected calls from the prisons to local and long-distance providers and provided operator services, the ALJ correctly determined that the owner of the P-III platform was the OSP. Initial Order at ¶97. AT&T agrees with that reasoning from both a technical and legal standpoint.

B. THE ALJ, HOWEVER, MADE A CLEARLY ERRONEOUS FINDING WHEN SHE DETERMINED THAT AT&T OWNED THE P-III PLATFORM.

1. The ALJ Disregarded T-Netix's Admissions That It Owned the P-III Platform.

14. Although the ALJ correctly determined that the owner of the P-III is the OSP, she mistakenly determined that AT&T owns that platform. *See, e.g.*, Initial Order at ¶¶100, 134. That finding is clearly erroneous. T-Netix has admitted repeatedly that it owned the P-III platform at the relevant prisons during the relevant time period. AT&T served a Data Request that asked T-Netix to "[i]dentify as specifically as possible all equipment (including hardware and software) provided by T-Netix relating to the telephone service at Washington state prisons during the relevant period, including for each particular piece of equipment . . . the person or entity that owned the equipment at the time. . . ." Ex. A-33, Tab 16 (T-Netix's Response to AT&T Data Request No. 7). T-Netix responded by identifying documents that described equipment including the P-III premise platform and admitting that "T-Netix owned the premise-based equipment described in these documents . . . ." *Id.* It also admitted that it "believes it held legal title to the premise-based equipment described in these documents." Ex. A-32, Tab 17 (T-Netix's Amended and First Supplemental Response to AT&T's Data Request No. 7). This

should have conclusively resolved the determination of who owned the platform and served as the OSP.

15. T-Netix cannot now contend that its Responses to AT&T's Data Request are incorrect. Parties are required to "immediately supplement any response to a data request . . . upon learning that the prior response was incorrect or incomplete." WAC 480-07-405(8). T-Netix has never supplemented its Responses, even after AT&T attached them to its Response to T-Netix's Amended Motion for Summary Determination. Ex. A-22HC at ¶32, Tab 18 (AT&T 's Response to T-Netix's Amended Motion For Summary Determination). T-Netix cannot now reverse course. Its admission that it owned the P-III platform is binding and dispositive of what the ALJ determined was the crux of who is the OSP.

16. AT&T included these admissions by T-Netix in the record and briefed this issue on the motions for summary determination. *Id.*. In its response to T-Netix's Amended Motion for Summary Determination, AT&T explicitly stated, citing the relevant evidence and admissions: "Accordingly, T-Netix's P-III Premise platform operated on site at each of the four prisons at issue for the entire relevant time period. Moreover, T-Netix always owned and held legal title to its P-III Premise platform at each prison." *Id*.

17. Unfortunately, the ALJ erred by overlooking AT&T's briefing on this issue, the evidence submitted, and T-Netix's clear admissions that it owned its P-III platform at the relevant prisons during the relevant time period. Nowhere in the Initial Order does the ALJ even mention these admissions.

2. The ALJ Misconstrued a General, Commercial Contract Between AT&T and T-Netix.

18. The only bases that the ALJ cited in support of the claim that T-Netix sold the P-III platform to AT&T is an argument contained in T-Netix's original motion for summary

determination, which it later amended, and a 1997 general agreement for the procurement of equipment, software services and supplies. Ex. T-2C, Tab 19 (June 4, 1997 Agreement between AT&T and T-Netix (the "1997 Agreement")); Initial Order at ¶36 fn 46. Neither item even remotely raises a legitimate factual issue over who owned the P-III platform. Rather, the ALJ's interpretation of the 1997 Agreement is directly contradicted by T-Netix's binding and conclusive admissions and based on a misunderstanding of the 1997 Agreement.

19. T-Netix's argument in its original motion is not evidence that can support a motion for summary determination. As the ALJ recognized elsewhere in the Initial Order, a party cannot rely on argumentative assertions, but rather, must present actual evidence to support its claims on a motion for summary determination. *See* Initial Order at ¶27 **(**citing *Marshall v. Bally's Pacwest, Inc.*, 62 Wash. App. 386, 395, 814 P.2d 255 (1991); *Vacova Co. v. Farrell*, 62 Wash. App. 386, 395, 814 P.2d 255 (1991) ("Unsupported conclusory allegations are not sufficient to defeat summary judgment.")); *Adams v. King County*, 164 Wash. 2d 640, 647, 192 P.3d 891 (2008) (finding that facts sufficient for summary judgment "must move beyond mere speculative and argumentative assertions.").

20. Nor does the 1997 Agreement indicate in any way that T-Netix sold or otherwise transferred ownership of the P-III platform used at Washington prisons to AT&T. The 1997 Agreement was a nationwide agreement entered into years after T-Netix began providing services in Washington.[3] The 1997 Agreement sets out standard terms and conditions for the provision of services, a software license, and the purchase of equipment in the event AT&T were to issue a purchase order to buy any equipment. [redacted]

[3] T-Netix admits that it provided equipment at the Washington state prisons before June 20, 1996, when the Complainants first received calls from those prisons. *See* Ex. A-32, Tab 17 (T-Netix Amended and Supp. Resp. to Data Request No. 7). The agreement, however, was entered into as of June 4, 1997. *See* Ex. T-2C, Tab 19 (1997 Agreement).

[redacted] Ex. T-2C at 4, Tab 19 (1997 Agreement). In other words, if somewhere in the world, AT&T wanted to purchase equipment from T-Netix, it could do so by issuing a purchase order and the terms and conditions set out in the 1997 Agreement would apply. But the agreement does not, in and of itself, sell any equipment to AT&T as the ALJ erroneously determined – it merely provided a mechanism whereby AT&T could do so in the future if it so chose. However, AT&T never issued a purchase order to buy the P-III platform at use in the Washington prisons. *See* Tab 3 (T-Netix Response to Data Request No.15).[4] Instead, as T-Netix admits, T-Netix continued to own the P-III platform at all relevant times.

3. The ALJ Should Have Refrained From Interpreting the 1997 Agreement.

21. In making her fourth finding of fact, that T-Netix and AT&T contractually agreed that AT&T would purchase the P-III Premise platform (Initial Order at ¶134), the ALJ unnecessarily and improperly exceeded her jurisdictional authority by interpreting AT&T's 1997 contract with T-Netix. Ex. T-2C. The ALJ should have abstained from interpreting this general commercial contract because an interpretation was unnecessary to decide the questions submitted by the Superior Court and because contract interpretation is outside the special expertise of the Commission.

[4] Because T-Netix admitted in response to Data Request No. 7 that it owned the P-III platform at all times and never sold it to AT&T, T-Netix's response to Data Request No. 15 may be cumulative. However, in the event the Commission is prepared to enter any order other than an order finding that T-Netix is the sole OSP, AT&T hereby moves pursuant to WAC 480-07-830 to reopen the record for the limited purpose of admitting this Data Request Response into evidence. T-Netix's admission is essential to demonstrating that AT&T did not purchase the P-III platform pursuant to the terms of the 1997 Agreement and a manifest injustice would result from a contrary finding without proper consideration of this evidence.

22. This case is before the Commission on a primary jurisdiction referral, so the Commission's authority is limited to the specific questions that the Superior Court referred to it. "[W]here a court refers issues to an agency under the doctrine of primary jurisdiction, the referral does not invoke the agency's jurisdiction over all issues in dispute, only those issues referred to the agency." *Judd, et al. v. AT&T, et al.*, July 18, 2005 Order No. 5, Order Denying T-Netix's Motion for Summary Determination and to Stay Discovery, at ¶35. The "precise function of the doctrine of primary jurisdiction is to guide a court in determining whether the court should refrain from exercising its jurisdiction until after an administrative agency has determined *some question or some aspect of the question* arising in the proceeding before the court." *Dioxin/Organochlorine Ctr. v. Dept. of Ecology*, 119 Wash.2d 761, 775, 837 P.2d 1007 (Wash. 1992) (emphasis added).

23. The Superior Court did not refer to the Commission the question of who owned the P-III platform, and the Court is competent to interpret the 1997 Agreement on its own.[5] The Commission can adequately and completely answer the Superior Court's referral question by replying that the owner of the P-III Premise platform is the OSP in this case. Moreover, the ALJ

[5] In referring this matter to the Commission, the Superior Court stated that it wanted the Commission, in the first instance, to determine, whether T-Netix and/or AT&T was "considered by the Agency to be an OSP under the contracts at issue herein and if so if the regulations have been violated . . . ." *Judd v. AT&T et al.*, No. 00-2-17565-5, August 28, 2000 Order, Superior Court of Washington for King County. The contracts referenced in that referral order could not possibly have included the 1997 Agreement. In the briefing on the motions to dismiss that prompted the referral, the parties had submitted to the Superior Court AT&T's Agreement with the Department of Corrections (Ex. A-8, Tab 20) and AT&T's agreements with each of the LECs (Ex. A-9, Tab 21; Ex. A-10, Tab 22; and Ex. A-11, Tab 23). Those agreements allocated responsibility for local service, intraLATA service, interLATA service and operator services, areas directly within the Commission's core expertise. The parties had not submitted to the Superior Court the 1997 Agreement and there is no reason whatsoever for the Superior Court to have even been aware of that agreement.

did not need to construe the 1997 Agreement to determine who owned the P-III platform because T-Netix has admitted that it owned it throughout the relevant time. *See* §IV(B)(1), *supra*.

24. The role that the P-III platform played in "connecting" calls and in the provision of operator services is within the Commission's jurisdiction because it involved the Commission's specialized expertise. On the other hand, it is the province of the court to interpret this general, commercial contract. "Contract interpretation is not in [an agency's] jurisdiction and does not require [agency] expertise, and indeed the [agency] refrains from arbitrating contract disputes." *BNSF Ry. Co. v. Tri-City & Olympia RR Co. LLC*, No. 09-5062, 2009 WL 3149569 at *3 (E.D. Wash. Sep. 28, 2009); *see also, e.g., Bd. of Public Works, City of Blue Earth, MN v. Wisconsin Power & Light Co.*, 613 F.Supp.2d 1122, 1131 (D. Minn. 2009) ("Because this case presents a question of straightforward interpretation of a contract, FERC does not have any special expertise that is applicable."). The 1997 Agreement is a standard commercial contract. It does not contain any terms or provisions unique to the utilities or transportation industries. Ex. T-2C, Tab 19 (1997 Agreement). As such, there was no need for the ALJ to disregard T-Netix's admission about ownership and instead, attempt to construe the meaning of this agreement.

25. Therefore, the fourth finding of fact (Initial Order at ¶134) was outside of the Commission's jurisdiction and should not have been made. Likewise, paragraphs 36, 57, 100, and 117 and footnote 46 of the Initial Order depend on the ALJ's interpretation of the 1997 Agreement. They, too, should be eliminated. As explained above, the undisputed evidence before the Commission demonstrates that T-Netix owned the P-III platform. There was no need for the ALJ to venture outside the Commission's core area of expertise.

4. It is Unsound Policy to Find that AT&T is the OSP on Calls it Never Handled in Any Way.

26. The ALJ's determination that AT&T should be deemed the OSP is not just factually wrong, it is also unsound as a matter of regulatory policy. AT&T played absolutely no role whatsoever in connection with the majority of calls that the Complainants received. AT&T was only the interLATA service provider. The Agreement between AT&T and the Washington Department of Correction explicitly provided that GTE, PTI, and US West would each provide all of the local and intraLATA service from calls originating from specified prisons, including the four prisons at issue here. Ex. A-8 at ¶4, Tab 20 (March 16, 1992 Agreement between State of Washington Dept. of Corrections and AT&T). T-Netix subsequently replaced PTI at those facilities PTI previously handled. *See id.* at Amendment No. 3. The agreements between AT&T and each of those LECs also specified that the LECs would provide local and intraLATA service and would deliver any interLATA traffic to AT&T's point of presence. Ex. A-9 at ¶3, Tab 21 (March 16, 1992 Agreement between GTE and AT&T); Ex. A-10 at ¶3, Tab 22 (March 16, 1992 Agreement between US West and AT&T); Ex. A-11 at ¶4, Tab 23 (March 16, 1992 Agreement between PTI and AT&T). In short, if a call was a local or intraLATA call, AT&T never even touched the call, had no information that the call had been placed and collected no revenue from the call. *Id*. Because AT&T had no contact with these calls, it would make little sense to require AT&T to quote other carriers' rates.

27. T-Netix, in contrast, admits that its P-III platform served as the "gateway" for every call. Ex. A-25, Tab 13 (T-Netix Resp. to AT&T Second Data Req. No. 16). T-Netix, through its P-III platform, validated every call and ultimately delivered it to the applicable LEC. *Id.* T-Netix also dealt directly with each inmate placing the call and each called party through the automated announcements that the P-III platform generated. Because T-Netix handled every

call and dealt directly with each called party, it makes far more sense for the Commission to expect T-Netix to serve as the OSP than a party such as AT&T that has no involvement whatsoever in many of the calls at issue.

C. THE ADMINISTRATIVE LAW JUDGE MADE A CLEARLY ERRONEOUS FACTUAL FINDING WHEN SHE DETERMINED THAT AT&T POSSESSED THE ABILITY TO DIRECT T-NETIX TO MODIFY THE P-III PLATFORM.

28. As discussed above, the sole issue before the ALJ was who was the OSP for collect calls from the relevant prisons. The ALJ concluded that the OSP was the owner of the P-III platform, but then took her decision a step further by erroneously finding that AT&T, not T-Netix, owned the P-III platform, despite T-Netix's admissions in the record to the contrary. Having decided who the OSP was — the owner of the P-III platform — the ALJ unnecessarily and improperly went on to make a seventh finding of fact that "AT&T possessed the ability to direct T-Netix to modify the P-III platform." Initial Order at ¶137. Respectfully, that issue was not before the ALJ, and even if it was, no evidence in the record supports the ALJ's finding, the ALJ cited none, and the evidence that is in the record contradicts the finding. The record evidence actually shows that T-Netix operated autonomously. At the very least, this issue presents a factual dispute that is not proper for summary determination.

1. The ALJ's Seventh Finding of Fact Exceeds the Scope of the Primary Jurisdiction Referral.

29. The ALJ initially summarized the evidence in the record demonstrating that "T-Netix exerted control over its own work product," "worked autonomously," determined for itself how frequently its employees would visit the correctional facilities, and operated its business wholly apart from AT&T (*id.* at ¶¶124, 125), but properly declined to assess that evidence because it was outside of her jurisdiction. She explained that "[t]he question of whether an agency relationship existed is outside the scope of the questions referred to us by the Court.

There is no specialized expertise necessary for making a determination of the existence of such a relationship. As a result, we decline to make a determination on this issue." *Id.* at ¶128. That determination is correct, and directly contradicts the seventh finding of fact that "AT&T possessed the ability to direct T-Netix to modify the P-III platform." *Id.* at ¶137. Accordingly, although the Initial Order does not explain the basis for the seventh finding of fact, it *cannot* be based on any premise that AT&T controlled, exercised authority over, or had the ability to direct T-Netix because any such premise, as the ALJ properly determined, falls outside the scope of the Superior Court's primary jurisdiction referral.[6] Thus, to the extent the seventh finding of fact is based on any assumption or conclusion that AT&T controlled, exercised authority over, or had the ability to direct T-Netix, the finding exceeds the scope of the ALJ's and the Commission's jurisdiction and authority.

30. AT&T's ability to "direct" T-Netix's actions lies at the heart of the agency issue the ALJ correctly recognized was outside the Commission's expertise. Washington courts hold that "[t]he crucial factor [in determining whether a principal/agent relationship exists] is the right to control the manner of performance that must exist to prove agency." *O'Brien v. Hafer*, 122 Wash. App. 279, 283 93 P.3d 930, 932 (Wash. App. 2004). The Superior Court should determine, if necessary, whether T-Netix was AT&T's agent, and likewise whether AT&T could direct T-Netix's to modify the P-III platform.

[6] Although the Initial Order does not explain the basis for the seventh finding of fact, the only possible basis could be the ALJ's erroneous determination that AT&T *owned* the P-III platform and therefore it must have "possessed the ability to direct T-Netix to modify the P-III platform." As discussed above in Section IV(B)(1), that determination is incorrect and flatly contradicted by T-Netix's own admissions in the record. Because T-Netix, *not* AT&T, owned the P-III platform, AT&T did *not* possess the ability to modify, or to direct T-Netix to modify, the P-III platform. Accordingly, to the extent the ALJ's seventh finding of fact implicitly relies on the ALJ's determination that AT&T owned the P-III platform — the only rationale discernable from the Initial Order — the finding is clearly erroneous because, as discussed above, T-Netix, *not* AT&T, owned the P-III platform.

31. Furthermore, there was no need to address the agency question to decide whether AT&T or T-Netix was the OSP in this situation. The fourth conclusion of law is that "AT&T, as the owner of the platform, was the operator service provider. . . ." Initial Order at ¶144; s*ee also id.* at ¶97 ("we find that the owner of the P-III platform . . . is the OSP.") Thus, the ALJ correctly determined that the OSP depended on who owned the P-III platform. If, as the ALJ repeatedly made clear, ownership determined who was the OSP under the Commission's regulations, then there was no need to go outside the area of the Commission's special expertise to address whether any party could direct T-Netix to modify the platform. There is no dispute here that T-Netix owned and operated the platform. To answer the questions posed by the Superior Court, there is no need for the Commission to decide whether AT&T could direct T-Netix to modify the P-III platform.

2. The Record Evidence Shows T-Netix Operated Autonomously and No Evidence Supports the ALJ's Seventh Finding of Fact.

32. Even if the issue of whether "AT&T possessed the ability to direct T-Netix to modify the P-III platform" was within the scope of the primary jurisdiction referral, the record evidence shows that T-Netix operated autonomously and no evidence supports the seventh finding of fact. First, other than the conclusory statement in the seventh finding of fact (¶137 of the Initial Order), which itself does not include any citation to supporting record evidence, the Initial Order contains no evidentiary basis for a finding that "AT&T possessed the ability to direct T-Netix to modify the P-III platform." Initial Order at ¶137. Nowhere in the Initial Order is any record evidence discussed to support that finding, nor is any elaboration or explanation given for it.

33. Second, the undisputed record shows the contrary — T-Netix operated autonomously and AT&T did *not* control T-Netix or have the ability to direct modifications of T-Netix's P-III platform. For example, the record evidence shows:

- The contractual scheme established by the Washington DOC made the LECs, or someone retained by them, such as T-Netix, responsible for providing operator services; it did *not* make AT&T responsible for doing so. Ex. A-1HC at ¶¶10, 11, Tab 24 (AT&T's Amended Motion for Summary Determination); Ex. A-9 at ¶3, Tab 21 (GTE Agreement); Ex. A-10 at ¶3, Tab 22 (US West Agreement); Ex. A-11 at ¶4, Tab 23 (PTI Agreement).

- T-Netix admitted in its original motion for summary determination that it "provided its [P-III Premise] platform to US West, GTE, and PTI" — the three LECs who were allocated operator services responsibility under the DOC contractual scheme. T-1HC at ¶9, Tab 25 (T-Netix Original Motion for Summary Determination).

- T-Netix further admitted that its independent relationships with LECs such as US West and GTE [redacted], and "allow[ed] the . . . LECs to provide [T-Netix's] sophisticated control services to prison facilities while leaving [the LECs'] existing telephones in place." Ex. A-27 at TNXWA 00370, Tab 26 (T-Netix Products – Due Diligence); Ex. A-24HC at 231:22-232:22, Tab 12 (Rae Dep.); *see also* Ex. A-39 at 141:9-142:3, 233:22-234:2, Tab 27 (April 23, 2009 Deposition of Alice Clements).

- As evidence of T-Netix's direct dealings with the LECs, when US West changed its name to Qwest and asked T-Netix to change announcements made by the T-Netix platform to reflect the name change, T-Netix demanded that Qwest, not AT&T, pay for the work required to make the change. Ex. A-38 at 71:14-19, 104:13-105:13, Tab 28 (June 4, 2009 Deposition of Daniel Gross).

- [redacted] Tab 4 at 133:13 – 133:18, (August 7, 2009 Deposition of Kenneth Wilson).

[7] AT&T cited to this testimony and discussed it in its Reply Brief in Support of its Motion for Summary Determination. AT&T inadvertently attributed the testimony to Robert Rae, rather than Kenneth Wilson. Ex. A-45HC at 13-14, Tab 31 (AT&T's Reply in Support of its Amended Motion for Summary Determination). AT&T also inadvertently included as Ex. A-48HC pages 131-133 of Rae's deposition transcript, instead of the same pages of Wilson's transcript. AT&T now offers pages 131-133 of Wilson's deposition transcript as Tab 4 to correct that clerical mix-up. To the extent necessary, AT&T hereby moves pursuant to WAC 480-07-830 to reopen the record for the limited purpose of admitting Wilson's testimony into evidence.

- [redacted] *Id.* at 131:4 – 133:18.
- [redacted] *Id.*
- [redacted] Ex. A-49HC at 116:2 – 117:12, 182:15 – 183:19, Tab 29 (April 15, 2009 Deposition of Scott Passe); *see also* Ex. A-37 at 36:14-37:10, 40:17-24, 87:3-6, Tab 30 (April 24, 2009 Deposition of Kenneth Rose); Ex. A-39 at 168:14-169:5, Tab 27 (Clements Dep.) (describing duties of a site administrator).

34. T-Netix failed to rebut or dispute this evidence, which consists largely of its own admissions. [redacted] Tab 4 at 131:4 – 133:18, (Wilson Dep.). Instead, T-Netix made those decisions unilaterally. *Id*. These admissions contradict the seventh finding of fact that "AT&T possessed the ability to direct T-Netix to modify the P-III platform." Initial Order at ¶137. To the contrary, T-Netix and Complainants both admitted that AT&T was not involved in such modifications.

35. T-Netix was not simply an equipment vendor that sold a carrier equipment and left the carrier to operate it. T-Netix directly controlled the management and operation of the P-III platform. [redacted] Ex. A-49HC at 116:2 – 117:12, 182:15 – 183:19, Tab 29 (Passe Dep.); *see also* Tab 5 at 251:4 – 257:19 (August

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Wilson's testimony is important to demonstrate that AT&T did not control T-Netix's operation of the P-III platform and a manifest injustice would result from a contrary finding without proper consideration of this evidence.

6, 2009 Deposition of Robert Rae)[8]; Ex. A-37 at 36:14-37:10, 40:17-24, 87:3-6, Tab 30 (Rose Dep.); Ex. A-39 at 168:14-169:5, Tab 27 (Clements Dep.) (describing duties of a site administrator). [redacted] Tab 4 at 131:4 – 133:18 (Wilson Dep.). According to Complainants, "T-Netix controlled the equipment and software that provided operator services for the DOC facilities at issue in this case." Ex. C-1C, at ¶19, Tab 32 (Complainants' Memorandum in Opposition to T-Netix's Motion for Summary Determination and AT&T's Motion for Summary Determination).

36. None of this undisputed record evidence is reflected in the Initial Order's findings of fact or conclusions of law. For example, although it is relevant and material that the Washington DOC's contractual scheme made the LECs responsible for providing operator services and limited AT&T's role to providing long-distance service, the Initial Order's findings of fact omit these key undisputed facts, even though they are cited earlier in the Order. *See* Initial Order at ¶131 (omitting both allocation of operator services responsibility to the LECs and limitation of AT&T's role to long-distance service); *compare id.* at ¶33 ("AT&T would only provide "0+" interLATA and international operator assisted long distance service on its own.), ¶34 ("The LECs also contracted to complete all '0+' local and intraLATA telephone calls, provide various live or mechanical operator announcements, and provide call timing and call blocking features."), ¶99 ("the DOC contract also mandates that the LECs will provide the

[8] Similarly to fn 7 above, AT&T offers pages 251-257 of Rae's deposition as Tab 5. AT&T inadvertently cited to and attached pages 251-257 of Wilson's deposition transcript rather than attaching those same pages of Rae's transcript. To the extent necessary, AT&T hereby moves pursuant to WAC 480-07-830 to reopen the record for the limited purpose of admitting the pages of the Rae transcript in place of the Wilson pages. Rae's testimony is important to demonstrate that AT&T did not control T-Netix's operation of the P-III platform and a manifest injustice would result from a contrary finding without proper consideration of this evidence.

operator services at the prisons in question"). Similarly, the Initial Order's findings of fact omit the undisputed evidence that T-Netix operated autonomously, including making decisions about modifying the P-III platform's recordings and voice chips, without involvement by AT&T.

37. Nonetheless, the Initial Order includes the unsupported conclusory statement that "AT&T possessed the ability to direct T-Netix to modify the P-III platform." Initial Order at ¶137. That finding has no support in the record – indeed it is contradicted by the undisputed record evidence – and therefore is clearly erroneous.

3. At a Minimum, this Issue Presents a Factual Dispute that Cannot Be Resolved on Summary Determination.

38. Even if this issue is properly before the Commission and the ALJ (it is not), and even if there were some record evidence supporting the ALJ's seventh finding of fact (there is none), at the very least this issue would present a factual dispute that is inappropriate for resolution on a motion for summary determination. The ALJ correctly concluded that "[s]ummary judgment is properly entered if there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Initial Order at ¶¶25, 139. Assuming, as the seventh finding of fact apparently does, that it is material whether AT&T "possessed the ability to direct T-Netix to modify the P-III platform" (Initial Order at ¶137), then that fact is certainly disputed. As the evidence discussed above shows, substantial evidence supports AT&T's position that it did *not* control, or have the ability to control, T-Netix or T-Netix's P-III platform. There is no evidence to the contrary, but even if there were, AT&T's evidence would plainly make the issue a factual dispute. Accordingly, at the very least, this issue is inappropriate for summary determination.

D. THE ALJ ERRONEOUSLY DETERMINED THAT AT&T WAS NOT EXEMPT FROM THE OPERATOR SERVICE PROVIDER REQUIREMENTS AS A CERTIFIED LOCAL EXCHANGE CARRIER.

39. Between 1991 and 1999, the Commission's regulations exempted LECs from the definition of an "alternate operator services company." Ex. A-5, Tab 1 (WAC 480-120-021 (1991)). Before the Commission adopted the term "OSP" in 1999, it defined the party responsible for making rate disclosures as an "alternate operator services (AOS) company." *Id*. The regulatory definition read:

> Alternate operator services company – any corporation, company, partnership, or person *other than a local exchange company* providing a connection to intrastate or interstate long-distance or to local services from locations of call aggregators.

Id. (emphasis added). Under the definition, LECs were exempt from the obligations otherwise imposed upon AOS companies.

40. There is no dispute that AT&T has been a certified LEC from 1997 through the present. Initial Order at ¶16; Ex. A-12 at ¶12, Tab 33 (December 14, 2004 Affidavit of Frances Guiterrez). Therefore, pursuant to the plain language of WAC 480-120-021, AT&T was exempt from the applicable AOS regulations.

41. Despite these undisputed facts, the ALJ erroneously determined in her eighth conclusion of law that "AT&T does not qualify for the LEC exemption under WAC 480-120-021." Initial Order at ¶146. The ALJ's basic reason for rejecting AT&T's exemption was that "the LEC exemption within the OSP definition does not apply to AT&T . . . since AT&T was not acting as a LEC in the matter before us." *Id.* at ¶121. There is nothing in the regulation, however, that requires the LEC to be "acting as a LEC" during the call in order to qualify.

42. The ALJ's conclusion would improperly add an additional requirement, beyond those articulated in WAC 480-120-021, to qualify for the LEC exemption. Adding an additional

requirement in this manner raises serious due process concerns. "Due process requires that prior notice of proscribed conduct be provided before punishment may be imposed for failure to comply." *In re Krier*, 108 Wash.App. 31, 39, 29 P.3d 720 (2001). Here, AT&T did not have any notice that it would need to be operating as a LEC on a particular call in order for the LEC exemption to apply. It would be highly improper to subject AT&T to liability for failing to comply with a requirement that is mentioned nowhere in the regulations. Case law confirms this conclusion. *See Deemer v. Ashtabula City Civ. Serv. Comm.*, 707 N.E.2d 20, 25 (Ohio Ct. App. 1997) (finding that it is "improper for the commission to impose additional requirements *ex post facto*.").

43. The ALJ claimed that limiting the LEC exemption to companies acting in their capacity as a LEC makes sense because the Commission stated, when it adopted the exemption, that "[c]onsumers often expect that they are using their LEC when they use a pay phone. . . ." Initial Order at ¶121. But that is only one of several stated justifications for treating LECs differently than AOS companies. The Commission also explained that it was distinguishing LECs from AOS companies, in part, because "[u]nlike LECs, AOS companies can be seen as entering and existing [sic] markets at will." Ex. A-5, Tab 1 (WSR 91-13-078, Comments to 1991 Rule Change). In short, because AOS companies were less stable, the Commission chose to impose additional disclosure obligations on them. *Id*. Basing the exemption on the LEC's status as a LEC, as the regulations did, rather than on whether they were "acting as the LEC," makes complete sense under this rationale because the Commission considers a telephone company's financial stability and ability to provide service on an ongoing basis at the time the company applies to register as a LEC. *See, e.g.*, WAC 480-121-020; 480-121-040. If the applicant has sufficient financial resources and stability to qualify as a LEC, then the justification

for giving the exemption is achieved regardless of what kind of traffic the applicant might be handling at any particular time.

44. The ALJ's interpretation would improperly and unfairly add a previously unknown and undisclosed requirement to qualify for the LEC exemption. The ALJ's eighth conclusion of law (Initial Order at ¶146), as well as ¶121 of the Initial Order, should be rejected. Instead, the Commission should find that AT&T, as a certified LEC from 1997 to the present, was exempt from the AOS regulations in effect between at least 1991 and 1999.

V. SPECIFIC FINDINGS OF FACT, CONCLUSIONS OF LAW AND RESULTS THAT WERE ERRONEOUS

A. RECOMMENDED ALTERNATIVE FINDINGS OF FACT

45. The ALJ's Finding of Fact (1) was:

> In 1992, AT&T Communications of the Pacific Northwest, Inc., entered into a contract with the State of Washington Department of Corrections to provide telecommunication services and equipment for various inmate correctional institutions and work release facilities.

This finding should be replaced by the following:

> In 1992, AT&T Communications of the Pacific Northwest, Inc., entered into a contract with the State of Washington Department of Corrections for the provision of telephone service from state prisons and work release facilities. The contract required AT&T to provide interLATA and international service, while three LECs, or someone retained by the LECs, would provide local service and connect the calls from telephones at the facilities to AT&T's POP.

See Ex. A-8, Tab 20 (Agreement between State of Washington DOC and AT&T at ¶¶3 and 4) and discussion at ¶26, *supra*.

46. The ALJ's Finding of Fact (2) was:

> Due to the unique challenges involved in providing inmate telecommunications services, the original contract was amended in 1995 to require AT&T to arrange for the installation of call control

> features for intraLATA, interLATA, and international calls through its subcontractor, Tele-Matic Corporation.

This finding should be replaced by the following:[9]

> Due to the unique challenges involved in providing inmate telecommunications services, the original contract was amended in 1995 to require AT&T to arrange, through its subcontractor, Tele-Matic Corporation, for the installation of call control features for "*calls carried by AT&T*."

See Ex. A-8, Tab 20 (Agreement between State of Washington DOC and AT&T, Amendment No. 2 at ¶2) and discussion at ¶26, *supra*.

47. The ALJ's Finding of Fact (4) was:

> In 1997, T-Netix and AT&T contractually agreed that AT&T would purchase title to the P-III Premise software platform from T-Netix and that T-Netix would solely provide support and training for the platform.

This finding should be replaced by the following:[10]

> T-Netix was at all times the owner of the P-III Premise platform.

See Ex. A-33, Tab 16 (T-Netix's Response to AT&T Data Request No. 7), and discussion at ¶¶14-17, *supra*. At a minimum, if the Commission were to find, albeit mistakenly given T-Netix's admission, that there is any disputed issue regarding who owned the P-III platform, then the Commission should enter the following:

> AT&T and T-Netix dispute the ownership of the P-III Premise platform, with AT&T contending that T-Netix was at all times the owner of the P-III platform, and T-Netix claiming that it sold the P-III platform to AT&T in 1997.

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[9] Paragraph 102 of the Initial Order indicates that AT&T's service carried the calls in question. It should be corrected in accordance with AT&T's recommended alternative Finding of Fact.

[10] Paragraphs 36, 57, 100, 101, 117, 129, and 130 of the Initial Order indicate that AT&T owned the P-III platform, are incorrect for the same reason that Finding of Fact (4) is incorrect, and should be corrected in accordance with AT&T's recommended alternative Finding of Fact.

48. The ALJ's Finding of Fact (7) was:

> AT&T possessed the ability to direct T-Netix to modify the P-III platform.

The Commission should eliminate Finding of Fact (7) altogether on the grounds that it is unnecessary to any resolution of this matter and would require the Commission to determine matters outside of its jurisdiction. *See* discussion at ¶31, *supra*. If the Commission were to make any finding on this issue, the finding in the Initial Order should be replaced by the following:

> At all relevant times, T-Netix managed and operated the P-III platform autonomously.

See discussion and evidence referenced at ¶¶32-36, *supra*. At a minimum, if the Commission were to find, albeit mistakenly given the absence of any contrary evidence, that there is a disputed issue over the extent to which T-Netix acted autonomously, then the Commission should enter the following:

> The parties dispute whether AT&T possessed the ability to direct T-Netix to modify the P-III platform, with AT&T offering evidence that it did not posses this ability, and T-Netix claiming that AT&T did possess it.

Id.

B. RECOMMENDED ALTERNATIVE CONCLUSIONS OF LAW

49. The ALJ's Conclusion of Law (3) was:

> With regard to AT&T's and T-Netix's Motions for Summary Determination, none of the nonmoving parties raised questions of material fact as to the role of Respondents in connecting the calls in question from the correctional institutions.

This conclusion of law should be replaced with the following:[11]

> None of the non-moving parties raised any genuine issue of material fact as to T-Netix's ownership of the P-III platform or the extent to which T-Netix acted autonomously in regard to the management and operation of the P-III platform.

See discussion at ¶¶14-20 and ¶¶32-37, *supra*.

50. The ALJ's Conclusion of Law (6) was:

> AT&T, as the owner of the platform, was the operator service provider from June 4, 1997, the date of the execution of the General Agreement for the Procurement of Equipment, Software, Services, and Supplies Between T-Netix, Inc. and AT&T Corp.

This conclusion of law should be replaced with the following:

> T-Netix, as the owner of the platform, was the operator service provider at all relevant times for the correctional institutions at issue in this proceeding.

See discussion at ¶¶14-20, *supra*. Alternatively, AT&T proposes the following conclusion:

> The party that owned the platform was the operator service provider for the correctional institutions in this case.

51. The ALJ's Conclusion of Law (7) was:

> T-Netix was not the OSP for the correctional institutions involved in this case.

This conclusion of law should be eliminated or replaced with the following:

> T-Netix, as the owner of the platform, was the operator service provider at all relevant times for the correctional institutions at issue in this proceeding.

See discussion at ¶¶14-20, *supra*. Alternatively, AT&T proposes the following conclusion:

> The party that owned the platform was the operator service provider for the correctional institutions in this case.

[11] Paragraph 89 of the Initial Order indicates that there are no questions of material fact in dispute, is incorrect for the same reasons that Conclusion of Law (3) is incorrect, and should be corrected in accordance with AT&T's recommended alternative Conclusion of Law.

52. The ALJ's Conclusion of Law (8) was:

> AT&T does not qualify for the LEC exemption under WAC 480-120-021.

This conclusion of law should be replaced with the following:[12]

> AT&T qualifies for the LEC exemption under 480-120-021.

See discussion at ¶¶39-44, *supra*.

VI. CONCLUSION

For the reasons explained above, AT&T requests that the Commission enter a final order granting AT&T's Amended Motion for Summary Determination and Denying T-Netix's Motion and Amended Motion for Summary Determination.

Dated: May 11, 2010

SUBMITTED BY:

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By: /s/ Charles H.R. Peters

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[12] Paragraph 121 of the Initial Order indicates that AT&T is not eligible for the LEC exception, which is incorrect for the same reasons that Conclusion of Law (8) is incorrect, and should be corrected in accordance with AT&T's recommended Conclusion of Law (8).

CERTIFICATE OF SERVICE

Pursuant to WAC 480-07-150, I hereby certify that I have this day, May 11, 2010, served this document upon all parties of record by e-mail and Federal Express overnight delivery at the e-mail addresses and mailing addresses listed below:

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Pursuant to WAC 480-07-145, I further certify that I have this day, May 11, 2010, filed MS Word and PDF versions of this document by e-mail, and twelve copies of this document by Federal Express, with the WUTC at the e-mail address and mailing address listed below:

Mr. David W. Danner
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Pursuant to the Prehearing Conference Order 08 and Bench Request Nos. 5 & 6, I further certify that I have this day, May 11, 2010, provided a courtesy copy of this document, in MS Word, to ALJ Friedlander by e-mail at the following e-mail address: mfriedla@utc.wa.gov.

Dated: May 11, 2010

/s/Charles H.R. Peters
Charles H.R. Peters