TAB 31

Contains language designated highly confidential, which has been redacted from the public version of this motion pursuant to the Protective Order entered in Docket No. UT-042022

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 REPLY IN SUPPORT OF ITS AMENDED MOTION FOR SUMMARY DETERMINATION

SUBMITTED BY:

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Introduction

1. Complainants readily agree with AT&T that T-Netix was the OSP for calls from the prisons at issue during the relevant time period. The WUTC's regulations and the undisputed evidence make that clear. Having conceded that T-Netix was the OSP, Complainants must resort to a vicarious liability theory in order to keep AT&T in this case. Complainants attempt that by resurrecting an old and already-rejected argument that a party who "contracts with" the OSP is also liable for the OSP's conduct. That argument is based on a flawed interpretation of the statutory and regulatory scheme. More importantly, Complainants already made that argument, and the Superior Court and the appellate courts rejected it. Accordingly, the doctrine of collateral estoppel bars Complainants from raising it in this proceeding. Moreover, at most, T-Netix was only an independent contractor for AT&T. Because a party cannot be held liable for the conduct of an independent contractor, AT&T cannot be held liable for any alleged wrongdoing by T-Netix. These fundamental flaws defeat Complainants' attempt to hold AT&T vicariously liable. But even if Complainants had a viable theory of vicarious liability, that is not an issue for the WUTC to decide, as it falls outside of the scope of the primary jurisdiction referral.

2. For its part, T-Netix continues to point its finger back at AT&T, though it offers no new substantive basis for the WUTC not to find that T-Netix was the OSP. Rather, T-Netix simply rehashes its Amended Motion for Summary Determination, to which AT&T has already thoroughly responded.[1]

[1] AT&T replies to the response briefs filed by both Complainants and T-Netix. The vast majority of T-Netix's response brief, however, merely rehashes — word-for-word in many places — T-Netix's amended motion for summary determination. AT&T has already submitted its response to T-Netix's amended motion and does not intend to rehash here its own arguments from that response. Accordingly, in reply to the vast majority of T-Netix's response brief (Continued . . .)

3. For the reasons stated below, in AT&T's Amended Motion for Summary Determination, and in AT&T's Response to T-Netix's Amended Motion for Summary Determination, the WUTC should grant AT&T's Amended Motion, deny T-Netix's Amended Motion, and make a finding that T-Netix, not AT&T, was the OSP for the prisons at issue during the relevant time period.

I. Complainants Concede that T-Netix Was the OSP

A. Complainants Recognize that There Is No Dispute that T-Netix Connected the Calls and Provided the Operator Services

4. Complainants concede that T-Netix "clearly met the definition of an OSP." (Complainants' Opp'n at ¶ 42.) Complainants recognize that T-Netix "connected the call from the inmate to the recipient" for calls from the prisons at issue. (*Id.* at ¶¶ 41-49.) Complainants further recognize that T-Netix "provided operator services" for those calls. (*Id.* at ¶¶ 50-52.) Indeed, Complainants fully agree with AT&T that "T-Netix is not simply an equipment supplier." (*Id.* at ¶ 53.) Accordingly, everyone but T-Netix agrees that T-Netix was the OSP for calls from the prisons at issue during the relevant time period.

B. A Finding that T-Netix Was the OSP Is Supported by Proper and Undisputed Evidence

5. As AT&T explained in its Amended Motion for Summary Determination and its Response to T-Netix's Amended Motion for Summary Determination, a wide range of legitimate and undisputed evidence demonstrates that T-Netix, not AT&T, was the OSP. This includes documents, fact witness testimony, and expert witness testimony put in the record by all parties. (*See, e.g.*, AT&T Am. Mot. at ¶¶ 10-16, 21-28 (and exhibits thereto); AT&T Resp. to T-Netix

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constituting a rehash of its amended motion for summary determination, AT&T incorporates by reference its response to T-Netix's amended motion. To the extent T-Netix has raised new (Continued . . .)

Am. Mot. at ¶¶ 8-46 (and exhibits thereto); Complainants' Opp'n at ¶¶ 41-59 (and exhibits thereto).) Indeed, even T-Netix's own evidence establishes that T-Netix was the OSP. (*See, e.g.*, AT&T Resp. to T-Netix Am. Mot. at ¶¶ 8-12 (citing T-Netix's documents and expert witness testimony).)

6. Yet, in an attempt at misdirection, T-Netix asserts the red herring argument that AT&T "relies principally" on the testimony of Complainants' expert witness and that that testimony is inadmissible "because it is irrelevant." (T-Netix Opp'n at ¶¶ 32-38.) As an initial matter, AT&T hardly "relies principally" on Complainants' expert. Rather, as noted above and as cited throughout AT&T's Amended Motion and Response to T-Netix's Amended Motion, AT&T relies on a broad range of legitimate, consistent, and undisputed evidence, all of which establishes that T-Netix was the OSP. Among that evidence, AT&T cites Complainants' expert's testimony because it is consistent with and corroborates the logical conclusion that T-Netix was the OSP here.[2]

7. Complainants' expert's testimony is properly considered by the WUTC. T-Netix purports to make arguments for excluding that testimony in its Opposition Brief; yet, tellingly, T-Netix has not moved to exclude Complainants' expert on any basis. From a procedural perspective, T-Netix cannot request relief such as the exclusion of evidence through its response

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points or arguments in its response brief, AT&T addresses those in this reply brief.

[2] T-Netix asserts in a footnote that AT&T's expert did not adopt the affidavit of Fran Gutierrez submitted in support of AT&T's initial motion for summary determination. (T-Netix's Opp'n at p. 19, n.13.) There was no need for AT&T's expert to do so. AT&T submitted Ms. Gutierrez's affidavit in support of its initial and its amended motions. Moreover, unlike witnesses put forward by T-Netix earlier in this case, such as Alan Schott, Ms. Gutierrez appeared for a deposition and T-Netix (and Complainants) had every opportunity to question her regarding her affidavit.

to AT&T's Amended Motion for Summary Determination.[3] Substantively, there is no basis to exclude such evidence because it is clearly relevant. Complainants' expert, like the other parties' experts, looked at how services were delivered from the prisons at issue, focusing heavily on the context of T-Netix's P-III Premise platform and the services that T-Netix provided, to determine how those facts apply to the WUTC's regulations. Like AT&T, Complainants' expert concluded that T-Netix both connected calls from the prisons at issue to local and long-distance services, and provided the operator services for those calls. T-Netix has offered no reasonable argument for why these conclusions are "irrelevant" and should be excluded.[4]

II. AT&T Cannot Be Held Vicariously Liable for T-Netix's Conduct

8. Having conceded that T-Netix was the OSP, Complainants' only hook for keeping AT&T in this case is a vicarious liability theory. Complainants' theory boils down to pointing out that AT&T contracted with the Washington DOC for prison telephone service, and that AT&T contracted with T-Netix, the undisputed OSP for calls from the prisons. (*See* Complainants' Opp'n at pp. 8-15.) This theory is flawed for at least two reasons. First, the regulatory scheme does not impose liability on a party that contracts with an OSP. As a result, AT&T cannot be liable for T-Netix's failure to fulfill its OSP obligations. Second, AT&T cannot be vicariously liable for T-Netix's conduct because T-Netix was not AT&T's agent. At

[3] WAC 480-07-375(2) ("Parties must file motions separately from any pleading or other communication with the commission. The commission will not consider motions that are merely stated in the body of a pleading or within the text of correspondence.").

[4] T-Netix suggests that Complainants' expert (and AT&T) misapplied the "connection" test in the WUTC's regulations. Ironically, it was T-Netix's expert who struggled most with the "connection" test. (AT&T Resp. to T-Netix Am. Mot. at ¶ 16 (citing testimony of T-Netix's expert).)

most, T-Netix was an independent contractor for AT&T. Accordingly, AT&T cannot be liable for T-Netix's failure to fulfill its OSP obligations.[5]

A. The WUTC's Regulations Did Not Impose Liability on a Party that Contracts with an OSP

9. The regulatory scheme does not impose liability on a party that contracts with an OSP. This issue has already been litigated and resolved. Moreover, reading "contracting with" liability into the regulatory scheme would amount to an ex post facto law and violate due process.

1. Liability Can Only Be Based on a Violation of the WUTC's Regulations, not the Enabling Statute

10. In this case, Complainants claim that they did not receive verbal rate disclosures for calls from Washington prisons in violation of Washington law. The applicable law is the WUTC's regulation that required "the OSP" to "verbally advise the consumer how to receive a rate quote, such as by pressing a specific key or keys, but no more than two keys, or by staying on the line." WAC 480-120-141 (1999) (Ex. 5 to AT&T's Am. Mot.). Prior to 1999, the regulation had required the AOS Company (the predecessor to the OSP) to disclose to the consumer "a quote of the rates or charges for the call" upon the consumer's request. WAC 480-120-141 (1991) (Ex. 4 to AT&T's Am. Mot.). The WUTC's regulation imposes responsibility *only* on the OSP (or the AOS Company). The regulation does *not* impose responsibility on any other entity, including any entity that contracts with the OSP.

[5] In addition, it is undisputed that the contractual scheme established by the Washington DOC made the LECs, or someone retained by them, responsible for providing operator services. (AT&T Am. Mot. at ¶¶ 10, 11 & Exs. 7-10 thereto (DOC contracts).) That scheme did *not* make AT&T responsible for providing operator services; it limited AT&T's role to providing long-distance service. (*Id.*)

11. Recognizing this, Complainants fall back on — as they have before — the enabling statute, RCW 80.36.520. The enabling statute, which authorized the WUTC to establish regulations to assure appropriate disclosure to consumers of rate information, refers to AOS Companies and parties "contracting with" AOS Companies. *Id.* It does not obligate or require the WUTC to impose liability on AOS Companies (or OSPs) *and* parties "contracting with" AOS Companies (or OSPs). Instead, it authorized the WUTC to determine what steps should be taken and by whom. In short, the enabling statute does not itself regulate or impose liability on anyone; rather, it simply authorizes the WUTC to impose liability by establishing regulations. Nevertheless, Complainants attempt to use the enabling statute to impose "contracting with" liability on AT&T. (Complainants' Opp'n at ¶¶ 32-38.)

12. Complainants made this precise argument in the Superior Court prior to the primary jurisdiction referral. In response to the motions to dismiss filed by all the defendants — at that time Qwest, Verizon, CenturyTel, T-Netix, and AT&T — Complainants argued that "*all* of the defendants are obligated to assume rate disclosure to consumers as a matter of law because they are all in privity of contract" and "every telecommunications company that is party to a contract involving the provision of operator services shares legal responsibility for assuring appropriate rate disclosures" under the "contracting with" language of the enabling statute, RCW 80.36.520. (Ex. 1 hereto, Pls.' Mem. in Opp'n to Defs.' Mots. to Dismiss (Wash. Sup. Ct. Sept. 22, 2000), at 11.) The Superior Court rejected that argument. It held that "the [Washington] legislature intended to create a cause of action . . . only for violations of the regulations promulgated by the [WUTC] and did not create a cause of action for actions beyond or outside of the regulations." (Ex. 2 hereto, Oct. 10, 2000 Wash. Sup. Ct. Partial Decision on Summ. Judg., at 1.) Notwithstanding Complainants' argument citing the "contracting with" language, which

they claimed applied to all of the defendants, the Superior Court granted the defendants' dispositive motions. The Superior Court also dismissed the claims against the LECs and entered judgment in their favor. And the Superior Court dismissed certain claims against AT&T and referred to the WUTC the issues of whether AT&T was itself an OSP and whether it violated WUTC regulations — the questions currently pending before the WUTC in this proceeding. (*See id.*; Ex. 2 to AT&T's Am. Mot., Nov. 8, 2000 Wash. Sup. Ct. Order Granting AT&T's Mot. to Dismiss; Ex. 3 hereto, Nov. 8, 2000 Wash. Sup. Ct. Order Granting Def. Qwest's Mot. to Dismiss.)

13. Thus, Complainants made their "contracting with" argument in the Superior Court and the Court considered and rejected the argument, entering judgment in favor of the LECs and partially in favor of AT&T, and referring limited questions regarding AT&T and T-Netix to the WUTC. Of course, one of those limited questions was *not* whether AT&T could be liable for "contracting with" an OSP, for the Superior Court had already decided that the "contracting with" language of the enabling statute could not impose liable on the LECs, AT&T, or anyone else.

14. Complainants appealed the Superior Court's decision, among other things, pointing out the "contracting with" language. (*See* Ex. 4 hereto, Pls.' App. Reply Br. (Wash. Ct. App. Oct. 24, 2001), at 2, 10, 31.) The Appellate Court affirmed the Superior Court's judgment. *Judd v. American Tel. and Tel. Co.*, 116 Wash. App. 761, 66 P.3d 1102 (2003). The Appellate Court held that the enabling statute, the source of the "contracting with" language, did not create a cause of action. "The language of RCW 80.36.520 does not specifically require that telephone companies make contemporaneous disclosures." *Id.* at 770, 66 P.3d at 1107. Complainants appealed to the Washington Supreme Court, which affirmed the Appellate Court and Superior

Court decisions. *Judd v. American Tel. and Tel. Co.*, 152 Wash. 2d 195, 95 P.3d 337 (2004) (en banc). Accordingly, the Superior Court's decision, including its rejection of Complainants' "contracting with" argument, was upheld after an appeal all the way up to an en banc panel of the Washington Supreme Court. That decision is now a final judgment.

15. The doctrine of collateral estoppel, or issue preclusion, prevents a party from relitigating a previously determined issue in order to promote judicial economy, and to prevent harassment of and inconvenience to litigants." *Malland v. State, Dept. of Retirement Systems*, 103 Wash. 2d 484, 489, 694 P.2d 16, 21 (1985) (en banc). The elements of collateral estoppel are:

> (1) identical issues; (2) a final judgment on the merits; (3) the party against whom the plea is asserted must have been a party to or in privity with a party to the prior adjudication; and (4) application of the doctrine must not work an injustice on the party against whom the doctrine is to be applied.

Id.; *see also Shoemaker v. City of Bremerton*, 109 Wash. 2d 504, 507, 745 P.2d 858, 860 (1987) (en banc).

16. All four elements are satisfied here. Complainants make the same "contracting with" argument now that they previously made, and lost, in the Superior Court. The Superior Court's decision as to that issue is now a final judgment. Complainants were themselves the plaintiffs in the Superior Court proceeding (and the appeals). Moreover, Complainants actually litigated their "contracting with" argument in the Superior Court. *See id.* at 508, 745 P.2d at 860. Finally, collaterally estopping Complainants from relitigating their "contracting with" argument will not work an injustice because they had a "full and fair hearing of the issues" in the Superior Court and on appeal. *See Thompson v. State, Dept. of Licensing*, 138 Wash. 2d 783, 799-800,

982 P.2d 601, 610 (1999) (en banc). Accordingly, the doctrine of collateral estoppel applies here.

2. Extending Liability to a Party Not Explicitly Covered by the Regulation Would Violate Fundamental Concepts of Due Process

17. As noted above, the WUTC's regulation at issue explicitly imposes liability *only* on the OSP (or the AOS Company), and *not* on any other entity, including any entity that contracts with the OSP. Complainants now urge the WUTC to extend that liability beyond the regulation's explicit language to include additional parties — namely, parties "contracting with" OSPs. Extending liability in this manner would violate fundamental concepts of due process. "The Fourteenth Amendment requires that people be given notice of that which is prohibited. If individuals of common intelligence must guess at a statute's meaning and differ as to its application, it violates due process." *Medina v. Pub. Util. Dist. No. 1 of Benton County*, 147 Wash. 2d 303, 314, 53 P.3d 993, 999 (2002) (en banc) (citations omitted). Complainants essentially seek to transform the WUTC's regulation into an unconstitutional ex post facto law.

3. Imposing "Contracting With" Liability Would Create Uncertainty as to Who Would Be Responsible for Taking the Required Actions

18. Complainants and AT&T agree that T-Netix provided the requisite "connection" for calls from prisons and that, therefore, T-Netix was the OSP. One of the primary benefits of the "connection" test is that it imposes responsibilities on the party who deals directly with the consumer and is in the best position to provide notice and fulfill OSP responsibilities. T-Netix was the only entity that communicated directly with either the calling party or the called party during the call flow process. As such, it was in the best position to perform the OSP function of notifying those parties how they could receive rate disclosures. Accordingly, imposing liability

on T-Netix makes sense both in terms of construing the plain language of the WUTC's regulations and in terms of practical reality.

19. Extending liability to any entity that "contracts with" an OSP, as Complainants urge, would destroy the certainty, and the practical sense, of imposing liability on the party making the "connection" who is in direct contact with the consumer (*i.e.*, T-Netix). Instead, extending liability in the way Complainants urge would make it unclear whether the party that "provides the connection from the aggregator location" to local or long distance service is responsible for taking action and carrying out OSP duties, or whether anyone that contracts in any way with that party is responsible. Complainants only seek to introduce confusion to an otherwise clear and unambiguous regulatory scheme.

B. AT&T Cannot Be Held Liable for T-Netix's Conduct Because T-Netix Was Not AT&T's Agent

20. T-Netix was not AT&T's agent. T-Netix contracted with the LECs, as well as AT&T. T-Netix also assumed the LEC's contractual obligation under the DOC contractual scheme to provide operator services. Even if, for the sake of argument, T-Netix was serving as AT&T's subcontractor, as opposed to the LECs subcontractor, T-Netix was an independent contractor and was not AT&T's agent. Accordingly, AT&T cannot be held liable for T-Netix's conduct.

1. Complainants Wrongly Suggest that T-Netix Was Acting as AT&T's Sub-Contractor

21. Complainants suggest that T-Netix was acting as AT&T's subcontractor when T-Netix was acting as the OSP for the prisons at issue, which Complainants apparently contend makes AT&T a "joint" OSP. (Complainants' Opp'n at ¶¶ 21-31.) First, Complainants point to a 1991 petition filed by AT&T requesting a waiver of certain WUTC regulations, including some

applicable to OSPs. Complainants argue that this petition shows that AT&T believed that it would be an OSP for the prisons at issue. Complainants' logic is flawed.

22. The petition Complainants focus on was filed before AT&T even contracted with the Washington DOC for telephone services at the prisons at issue. At the time the waiver was sought, it was unclear how service would be provided, how responsibilities would be allocated under the DOC contractual scheme, and who would do what. For example, it was unclear if AT&T or someone else would serve as the OSP. AT&T's request in 1991 for a waiver does not evidence in any way that AT&T considered itself as the OSP for the prisons at issue at a later time such as the relevant time period here.

23. Complainants also point to the second amendment to the DOC Contract as evidence that AT&T had OSP responsibilities. To the contrary, the second amendment does not suggest that AT&T was an OSP. In it, the DOC merely recognized that T-Netix, not AT&T, would be providing the operator services, such as call control features. Although AT&T contracted with the DOC, the DOC contractual scheme explicitly allocated operator services responsibilities, which would include call control features, to the LECs or someone retained by the LECs. Because the primary DOC Contract was between AT&T and the DOC, the second amendment to that contract naturally identified those two parties to the primary contract. However, the second amendment must be placed within the broader DOC contractual scheme, which included subcontracts with the LECs and which explicitly stated that the LECs, not AT&T would provide operator services at the prisons at issue, or would arrange for someone else such as T-Netix to provide the operator services. This is undisputed. (*See* AT&T Am. Mot. at ¶¶ 10, 11 & Exs. 7-10 thereto (DOC contracts).) The second amendment did not alter the allocation of

responsibility under the DOC contractual scheme. Rather, it confirmed that T-Netix, not AT&T, would be providing call control features.

2. Regardless of Whether T-Netix Was Serving as a Subcontractor of AT&T or the LECs, T-Netix Was Not AT&T's Agent

24. In any event, AT&T cannot be liable for T-Netix's conduct because T-Netix was, at most, an independent contractor. Regardless of whether T-Netix was operating pursuant to a contract with the LEC's or AT&T, T-Netix was operating as an independent entity and certainly not as AT&T's agent. A principal is only liable for the acts of its agents, not its independent contractors. *See Getzendaner v. United Pac. Ins. Co.*, 52 Wash. 2d 61, 67, 322 P.2d 1089, 1092 (1958); *Gaines v. Pierce County*, 66 Wash. App. 715, 725, 834 P.2d 631, 636 (1992).

25. T-Netix was not AT&T's agent, and at most was an independent contractor. In determining whether an agency or independent contractor relationship exists, Washington courts examine several factors, including:

- "the extent of control which, by the agreement, the master may exercise over the details of the work";
- "whether or not the one employed is engaged in a distinct occupation or business";
- "the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision";
- "whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work";
- "whether or not the parties believe they are creating the relation of master and servant."

Kroshus v. Koury, 30 Wash. App. 258, 263-64, 633 P.2d 909, 911 (1981) (citing RESTATEMENT (SECOND) OF AGENCY § 220(2) (1958)). Of these factors, the most important and decisive is that

of control. *See McLean v. St. Regis Paper Co.*, 6 Wash. App. 727, 732, 496 P.2d 571, 574 (1972).

26. In contrast with an agent, an independent contractor is "at liberty to perform the work he undertakes in his own way, at his own time, within the limits of the time fixed in the contract, and by such means as to him seems most suitable. This does not mean of course, that the contractor itself may not prescribe that the work shall be performed in a particular manner, or that certain parts of it must be completed within a time less than the time fixed for completion of the whole." *Dishman v. Whitney*, 121 Wash. 157, 161, 209 P. 12, 13 (1922); *see also In re North Bend Lumber Co. v. Chicago Mil. & P.S. R. Co.*, 76 Wash. 232, 244, 135 P. 1017, 1022 (1913) ("One of the tests to determine the question is whether the employer retained the right, or had the right under the contract, to control the mode or manner in which the work was to be done."); *Glover v. Richardson & Elmer Co.*, 64 Wash. 403, 408, 116 P. 861, 863 (1911) ("An independent contractor is one who, carrying on an independent business, contracts to do a piece of work according to his own methods, and without being subject to control of his employer as to the means by which the result is to be accomplished, but only as to the result of the work.").

27. Applying the relevant factors to the undisputed facts here demonstrates that, at most, T-Netix was an independent contractor for AT&T. T-Netix certainly was not AT&T's agent. First and foremost, T-Netix exercised near-complete control over its own operations, working autonomously by any means, mode, or manner it found most suitable. (*See* AT&T Resp. to T-Netix Am. Mot. at ¶¶ 35-39 (and exhibits cited therein).) T-Netix's expert admitted:

- [redacted];
- [redacted];
- [redacted];

- [redacted];
- [redacted];
- [redacted];
- [redacted];
- [redacted];
- [redacted];
- [redacted];
- [redacted]; and
- "[redacted]."

(Ex. 5 hereto, Excerpts of August 6, 2009 Deposition of Robert Rae, at 131:4 – 133:18.)

28. Similarly, T-Netix's employee most knowledgeable about the P-III Premise platform, Scott Passe — also the person who actually made the recordings played during prison collect calls — admitted that T-Netix's site administrators, taking directions from T-Netix or prison officials, would administer the platforms, perform day-to-day maintenance, make necessary changes, and test platform functionality such as rate files. (Ex. 6 hereto, Excerpts of April 15, 2009 Deposition of Scott Passe, at 116:2 – 117:12, 182:15 – 183:19.) Complainants' expert confirmed and agreed with these admissions by T-Netix's expert and Mr. Passe. (*See* Ex. 7 hereto, Excerpts of August 7, 2009 Deposition of Kenneth Wilson, at 251:4 – 257:19.) Thus, with respect to the element of control — the most important factor in determining whether a relationship was one between independent contractors or principal and agent — T-Netix very clearly controlled itself, operated autonomously, and made independent decisions.

29. With respect to the other factors, second, T-Netix, of course, is engaged in its own independent business separate and apart from AT&T. Third, T-Netix offers specialized services that others, including AT&T, cannot provide. (Ex. 1 to T-Netix Initial Mot., 7/27/05 Schott Supp. Aff., at ¶¶ 6-10 (explaining modern operator services in the inmate market and the specialized niche that T-Netix filled).) Fourth, T-Netix owned, installed, maintained, and operated its proprietary P-III Premise platform at the prisons at issue during the relevant time period. (*See* AT&T Resp. to T-Netix Am. Mot. at ¶¶ 32-34 (and exhibits cited therein).) Fifth, T-Netix and AT&T clearly believed that they did not have an agency relationship, and even made explicit that, at most, their business relationship was one between separate, independent contractors. T-Netix admitted in its 1991 contract with AT&T that it was serving as an independent contractor. Section 14.5 of that contract provided:

> Independent Contractors. The parties declare and agree that each party is engaged in business which is independent from that of the other party and each party shall perform its own obligations hereunder as an independent contractor and not as the agent, employee, or servant of the other party. . . .

(Ex. 21 to AT&T Resp. to T-Netix Am. Mot., Deposition Exhibit 25, November 1, 1991 Contract, at A000063-74.) This leaves no doubt that any relationship between AT&T and T-Netix amounted to a business relationship between independent contractors, not any type of agency or other relationship.

30. Accordingly, AT&T was not responsible for T-Netix's conduct.

III. In any Event, Holding AT&T Liable for T-Netix's Conduct on a Vicarious Liability Theory Would Exceed the Scope of the Referral Order

31. There is no legitimate basis for the Commission to even address the issue of whether AT&T should be held responsible for T-Netix's conduct as the OSP. The Superior Court, in granting AT&T's request to refer certain matters to the WUTC, entered an order that

identified only two questions for the WUTC to answer: (1) whether AT&T is "considered by the agency to be an OSP under the contracts at issue," and (2), if so, whether any WUTC "regulations have been violated." Complainants ask the WUTC to address a wholly different issue — whether AT&T should also be held accountable for T-Netix's conduct if T-Netix was the OSP. Complainants concede that T-Netix was the OSP. (*See, e.g.*, Complainants' Opp'n at 15 ("T-Netix was an OSP because it connected the call from the inmate to the recipient.").) Nonetheless, they ask the WUTC to find that AT&T should still be held responsible for T-Netix's conduct because AT&T contracted with T-Netix and, according to Complainants, cannot contract away its responsibilities. But that was not one of the questions referred to the WUTC and, as such, is outside of the WUTC's jurisdiction.

32. The WUTC has already recognized that its authority to address issues in this case is limited to the specific questions that the Superior Court referred to it. In ruling on T-Netix's prior Motion for Summary Determination, Judge Rendahl held that "where 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. At that time, T-Netix was asking the WUTC to find that Complainants lacked standing. In response, the Complainants acknowledged that "an agency's role in a primary jurisdiction referral is strictly limited to the questions referred to the agency, and that primary jurisdiction does not invoke the independent jurisdiction of the agency." *Id.* at ¶ 29. Judge Rendahl agreed. She explained, "[a]s this matter is on referral from the Superior Court and not a complaint filed initially with the Commission, the Commission does not have jurisdiction to decide the issue of standing." *Id.* at ¶ 37. That ruling was consistent

with well established precedent. *See, e.g. Dioxin/Organochlorine Center v. Dept. of Ecology*, 119 Wash. 2d 761, 775, 837 P.2d 1007, 1015, (1992) (recognizing that 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") (emphasis added); *International Assoc. of Heat & Frost Insulators and Asbestos Workers v. United Contractors Ass'n*, 483 F.2d 384, 401 (3d Cir. 1973) (the independent jurisdiction of an agency is not invoked under the doctrine of primary jurisdiction, but rather, its jurisdiction is derivative from that of the court and as such, it has no power to address any question other than one specifically referred by the court).

33. The premise underlying the primary jurisdiction doctrine is that there are certain technical questions that are best addressed by the specialized expertise of an administrative agency. *See Tenore v. AT&T Wireless Servs.*, 136 Wash. 2d 322, 345, 962 P.2d 104, 115 ("'Primary jurisdiction' is a doctrine which requires that issues within an agency's special expertise be decided by the appropriate agency"); *United States v. Gen. Dynamics Corp.*, 828 F.2d 1356, 1365 (9th Cir. 1987) ("[P]rimary jurisdiction doctrine is . . . essentially concerned with ensuring that administrative bodies possessed of both expertise and authority delegated by [the legislature] pass on issues within their regulatory authority before consideration by the courts."). Here, however, the issue of AT&T's vicarious liability does not invoke the WUTC's technical expertise. It is a legal question, which the Superior Court is fully capable of answering on its own. As a result, there would have been no reason for the Superior Court to refer that issue to the WUTC in the first place, and there is no legitimate reason for the WUTC to reach beyond its jurisdiction to address it now.

Contains language designated highly confidential, which has been redacted from the public version of this motion pursuant to the Protective Order entered in Docket No. UT-042022

Conclusion

34. For the reasons stated above, in AT&T's Amended Motion for Summary Determination, and in AT&T's Response to T-Netix's Amended Motion for Summary Determination, the WUTC should grant AT&T's Amended Motion, deny T-Netix's Amended Motion, and make a finding that T-Netix, not AT&T, was the OSP for the prisons at issue during the relevant time period.

Dated: September 24, 2009

Respectfully submitted,

AT&T COMMUNICATIONS OF THE PACIFIC NORTHWEST, INC.

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CERTIFICATE OF SERVICE

Pursuant to WAC 480-07-150, I hereby certify that I have this day, September 24, 2009, 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, September 24, 2009, filed MS Word and PDF versions of this document by e-mail, and the original and four copies of this document by Federal Express, with the WUTC at the e-mail address and mailing address listed below:

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Pursuant to the Prehearing Conference Order 08, I further certify that I have this day, September 24, 2009, 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: September 24, 2009

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