BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

SANDRA JUDD, et al., Complainants, v. AT&T COMMUNICATIONS OF THE PACIFIC NORTHWEST, INC.; and T-NETIX, INC., Respondents.	DOCKET NO. UT-042022 **REDACTED** COMPLAINANTS 1) ANSWER TO AT&T's PETITION FOR ADMINISTRATIVE REVIEW AND 2) PETITION FOR ADMINISTRATIVE REVIEW

I. INTRODUCTION

1. AT&T filed a petition for administrative review of the Initial Order in this matter. The complainants submit this response to that petition and also seek review of certain conclusions and findings reached by the ALJ, as described below.

II. FACTUAL BACKGROUND

A. The requirement for rate disclosure

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

> The legislature finds that a growing number of companies provide, in a nonresidential setting, telecommunications services necessary to long distance service without disclosing the services provided or the rate, charge or fee. The legislature finds that provision of these services without disclosure to consumers is a deceptive trade practice.

RCW 80.36.510.

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

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

RCW 80.36.520. The phrase "alternate operator services company" was defined by the legislature as follows:

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

RCW 80.36.520.

4. The Commission issued rate disclosure regulations in accordance with these statutes in 1991—the year before AT&T would enter into a contract with the Washington Department of Corrections to provide telephone services to the prisons. Under the 1991 regulations alternate operator services companies were required to disclose rates for a particular call "immediately, upon request, and at no charge to the consumer." WAC 480-120-141(5)(a)(iv) (1991). The operator was required to provide "a quote of the rates or charges for the call, including any surcharge." *Id.* An alternate operator services company, or AOSC, was defined to include any company, other than a local exchange company, providing a connection to intrastate or interstate long-distance or to local services from locations of call aggregators. WAC 480-120-021 (1991).

5. In 1999, the WUTC amended the regulation, substituting the term "operator services provider" (OSP) for "alternate operator services company" (AOSC). *See* WAC 480-120-021 (1999). Although the regulation now applied to local exchange companies, the definition of an OSP was identical in all other respects to the older definition of "alternate operator services company." Thus, the terms AOSC and OSP are synonymous and interchangeable for purposes of these motions. We shall refer to both as OSP.

6. The 1999 regulation imposed stronger disclosure requirements. The rules required automatic rate disclosure that is activated by pressing keys on the telephone keypad:

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

WAC 480-120-141(2)(b) (1999).

7. Under both the 1991 and 1999 regulations, the company responsible for operator services must disclose rates as part of the services it provides. *See* WAC 480-120-141(2)(b) (1999) ("***the OSP*** must verbally advise the consumer how to receive a rate quote ...") (emphasis added); WAC 480-120-141(5)(a)(iv) (1991) ("***The alternate operator services company shall:*** ... immediately, upon request, and at no charge to the consumer, disclose to the consumer: a quote of the rate or charges for the call, including any surcharge") (emphasis added).

B. The AT&T/DOC contract

8. In 1991, when the rate quote requirements were being introduced into the regulations, AT&T was preparing its proposal to provide telephone services to the correction facilities managed by the Washington Department of Corrections ("DOC"). AT&T was awarded the contract, and in a contract dated March 16, 1992, agreed to be responsible for the entire project and to enter into subcontracts with PTI, GTE, and U.S. West who would serve as LECs for the prisons in their service areas. Ex. A-8 at p. 1[1].

9. It appears that live operators provided by either by AT&T or an LEC were used to handle calls initiated by inmates beginning in 1992. The use of live operators for inmate calls was impracticable. "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, [T-Netix]." Initial Order, finding of fact 2. This amendment, adopted a year before the time period relevant to this lawsuit, provided, in part:

> Department and Contractor [AT&T] agree that Contractor shall arrange for the installation of certain call control features for intraLATA, interLATA and international calls carried by AT&T. The State Correctional Institutions and Work Facilities to receive such call control features and the installation schedule shall be determined by agreement

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[1] Exhibit references are to the exhibit numbers assigned by the ALJ that are part of the record accompanying the initial order.

> between Department and Contractor. Contractor shall install and operate such call control features through its subcontractor Tele-Matic Corporation in accordance with the terms and conditions set forth in Attachment B and Exhibit 1 hereto, which are incorporated by reference.

Ex. A-8, Amendment No. 2. Tele-Matic later changed its name to T-Netix. Ex. C-13.

10. The call control features required by the amended contract were provided by the PIII premise platform developed by T-Netix. By June, 1996 -- the beginning of the relevant time period for this case -- the PIII platform was operating at the DOC facilities.

11. The PIII platform was a collection of computer related equipment physically located at the prisons. Inmates were permitted to only make collect telephone calls. Collect calls require operator services for completion that were provided on the PIII platform for every call that inmates made. Wilson declaration, Ex. C-2HC at paragraphs 10-11. The PIII platform is where rate disclosures should have been made and, in fact, is the only place where such disclosures could have been made. *Id* at paragraph 16.

C. The lawsuit

12. This lawsuit was filed in June, 2000, because recipients of collect phone calls from inmates were not being provided with rate information as required by the regulations. After the lawsuit was filed, AT&T contacted T-Netix to provide rate quote information for intrastate calls from Washington prisons. T-Netix refused to do so unless it was paid additional money by AT&T.

13. The suit alleges that rate disclosures for intrastate calls for the Washington prisons were not made until early 2001 at the earliest, in violation of both the 1991 and 1999 regulations.

14. The trial court in this case referred two questions to the Commission: 1) Was AT&T him and and/or T-Netix an operator services provider for the inmate-initiated calls that are the subject of this lawsuit?; and 2) did either AT&T or T-Netix violate the regulations?

III. RESPONSE TO AT&T'S PETITION FOR ADMINISTRATIVE REVIEW

A. The Commission should not reverse the ALJ's conclusion that AT&T is an OSP

1. The determination of who is the operator services provider depends on who is responsible for providing operator services

a. Introduction

15. The ultimate question to be answered in this case is whether rate disclosures for collect calls from inmates incarcerated in Washington prisons were provided as required by regulations issued by the Commission. The regulations place the burden of making those disclosures on the OSP. AT&T and T-Netix each claim that the other is the OSP for the calls at issue in this case and each brought a motion for summary determination that it cannot be liable for the duties imposed on OSPs by the regulations.

16. The Commission defines an OSP as follows:

> Operator Service Provider (OSP)—any corporation, company, partnership, or person ***providing a connection*** to intrastate or interstate long-distance or to local services from locations of call aggregators. The

> term "operator services" in this rule means ***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*** through a method other than (1) automatic completion with billing to the telephone from which the call originated, or (2) completion through an access code used by the consumer with billing to an account previously established by the consumer with the carrier.

WAC 480-120-021 (1999) (emphasis added).

17. After substantial briefing, the ALJ concluded that the PIII platform made the necessary "connection" for long-distance and local calls made by inmates and provided "operator services" for those calls. She then concluded that AT&T was the OSP because it owned the PIII platforms used at the prisons.

2. The P-III platform provides the operator services

18. We agree with both the ALJ and AT&T that the PIII platform made the necessary "connection" to complete local and long-distance telephone calls made by inmates and provided the operator services for those calls.

19. Experts for all three parties agree that traditionally an OSP provided operator services with live operators who assisted callers with requests to make collect telephone calls. Kenneth Wilson is a telecommunications expert with more than 30 years experience, which includes employment with AT&T. As Mr. Wilson notes, an operator receiving a request to complete a collect phone call would use another line to contact the recipient of the call to ask if the called party would pay for the call. After it was established that the call would be paid for, the operator connected the two parties by plugging them together, completing the call. This constituted the "connection"

referenced by the statute and the regulation. Wilson Dec. ¶¶ 9-10, Ex. C-2HC. *See also,* Schott Dec. ¶¶ 4-5, Ex. A-19HC.

20. All three experts also agree that the T-Netix platform replaces a live operator with an automated platform that handles the functions previously performed by the live operator. Thus, the T-Netix platform completes the "connection" after assuring that the call should be passed through, just like its live counterpart did years earlier. *Id.*

21. Mr. Wilson's declaration submitted in support of complainants' response to the motions for summary determination, details the path of calls made through the PIII platform. Both AT&T and the ALJ use his analysis to further support the finding that the PIII platform provides the requisite "connection" and "operator services" for inmate-initiated calls. *See* Ex. C-2HC.

22. Having concluded that the PIII platform provides the necessary connection and operator services, the next question is whether it is AT&T or T-Netix who is the responsible OSP for the services provided by the platform. The ALJ was offered two approaches for determining who the OSP is. First, it was suggested that the party who actually operated the PIII platform to provide operator services for inmate calls was the OSP. That is T-Netix, who maintained the equipment, swapped out voice and program chips on the computers, and developed the specific software to operate the platform. Second, it was argued that the party who had legal responsibility for providing operating services should be the OSP. That is AT&T under its contract with the DOC and, in particular, Amendment No. 2 to that contract. The ALJ followed

the second approach, but with a twist: she concluded that the entity responsible for providing operator services was the owner of the PIII platform, which she concluded was AT&T.

23. We accept the ALJ's finding that AT&T should be the OSP, but believe that this conclusion should be based on who was "responsible" for providing operating services rather than who "owned" the platform.

3. The OSP should be the entity that is responsible for providing operating services, not the entity that "owns" the platform

24. The ALJ correctly stated the issue to be addressed in determining whether AT&T or T-Netix should be the OSP: "The facts material to our determination of the legal questions before us are those that tell us what [*sic*] whose ***responsibility*** it was to provide the operator services to correctional facilities and how they went about providing such services." Initial Decision, paragraph 32 (emphasis added). Throughout much of her discussion in the Initial Order, the ALJ examines AT&T's responsibility to provide operator services for inmate calls.

25. After examining the technical reasons why the PIII platform provided the "connection" and "operator services" needed to qualify as an OSP, the ALJ concluded that the underlying contracts pointed to AT&T as the OSP.

26. The first contract examined by the ALJ was the agreement between AT&T and the DOC in 1992 that, among other things, gave AT&T the right—and the obligation--to provide the equipment and services for inmate telephone calls. Initial order, paragraph 99.

27. In 1992, it appeared that AT&T anticipated that the LECs would provide some operator services, presumably through a live operator. As noted by the ALJ, however, it became impracticable to use live operators for inmate calls. Initial Decision, finding of fact 2.

28. Thus, in 1995 AT&T and the DOC agreed to change the way in which calls from the DOC facilities were handled. The contract was amended to provide:

> Department and Contractor [AT&T] agree that Contractor shall arrange for the installation of certain call control features for intraLATA, interLATA and international calls carried by AT&T. The State Correctional Institutions and Work Facilities to receive such call control features and the installation schedule shall be determined by agreement between Department and Contractor. Contractor shall install and operate such call control features through its subcontractor [T-Netix] in accordance with the terms and conditions set forth in Attachment B and Exhibit 1 hereto, which are incorporated by reference.

Ex. A-8 (Amendment No. 2 at section 1) him. Attachment B identifies the services to be provided as "AT&T Inmate Calling Services, ("ICS")." Ex. A-8, Attachment B to Amendment 2, section 1. This attachment also demonstrates that AT&T recognized it was responsible for providing operator services under this amendment, whether through the planned platform or with a live operator: "In the event AT&T is unable to provide ICS as of the effective date of this Agreement, as defined in Section 3 of the Agreement, then AT&T will provide its standard live operator services to connect the inmate's call to the called party until it is able to provide ICS." *Id* at section 4.

29. Amendment 2 to the DOC contract is a significant document in determining the answer to the question of who is the OSP. This document shows that

AT&T agreed that it would be responsible for providing the operator services necessary to complete the inmate calls and that it would provide live operator services until it was able to connect the calls through its ICS platform.

30. As the ALJ found, AT&T recognized its responsibility for ensuring that rate information was provided for intrastate calls in Washington (albeit too late). Shortly after the lawsuit was filed, AT&T sent a letter telling T-Netix to provide rate information for intrastate calls. Exhibit C-4C.

31. The ALJ then examined the 1997 contract between AT&T and T-Netix. She determined that AT&T obtained title to the PIII platform under this agreement. *See* exhibit T-2C, at pages 6 and 8.

32. AT&T argues that there is no evidence that the 1997 contract applied to the equipment and services provided to the Washington DOC. This is the first contract between AT&T and T-Netix following the execution of amendment 2 to the DOC contract in 1995. Although the 1997 agreement was executed after the PIII platform was already in service, it appears to be the only contract applicable to the equipment and services provided by T-Netix after 1995. If another contract was applicable, presumably AT&T would have produced it in this litigation. It should also be noted that this agreement applies to "[redacted]" *Id* at page 31 (emphasis added). Thus, the 1997 agreement could apply to orders already in

progress, such as the order from AT&T to T-Netix for the equipment and services for inmate calls in Washington.

33. The 1997 contract was referenced in a 2001 agreement entered into between AT&T and T-Netix. The 2001 agreement was an amendment to the 1997 agreement and provided that the terms and conditions of the original 1997 agreement remained applicable unless changed by the 2001 agreement. AT&T has not disputed that the 2001 agreement applies to the PIII platforms at DOC facilities. Since the amendment to the 1997 agreement is applicable to the DOC sites, so should the original, 1997 agreement also apply.

34. Both the 1997 and 2001 agreements are instructive because they show that AT&T exerted control over the operator services being provided through the PIII platform. The 1997 agreement generally provides that the services and equipment provided must be acceptable to AT&T. The 2001 agreement is more specific; it contains specific criteria that must be met and sets forth the verbiage that was to be used for providing rate information for the PIII platform. Exhibit T-6C at page 15.

35. AT&T contends that the Commission is required to accept the legal conclusion that T-Netix was the owner of the PIII platform because of a response in a request for factual information addressed to T-Netix and that T-Netix must be the OSP. AT&T also contends that the Commission is required to ignore the contract that contain the legal basis for determining the ownership of the platform, claiming that it is outside the scope of the referral for the Commission to consider this contract. That argument makes no sense. There is nothing in the referral from the court that limits

the types of evidence the Commission should consider. In fact, the initial referral from Judge Learned specifically mentioned that the Commission should determine who the OSP was "under the contracts." *See* Ex. A-3. Also, AT&T has offered several legal agreements for the Commission to consider motions for summary determination.

36. AT&T has also objected to the finding that it was able to control the PIII platform. The 2001 contract, however, which required T-Netix to modify the platforms to add a voice chip for rate disclosures, shows that AT&T was directing how the platforms would be configured. This agreement specifically charged T-Netix with making equipment and software changes to meet rate quoting requirements for interstate calls. In that agreement, AT&T details the verbiage that should be used in the announcements.

37. Further, the August, 2000, letter referenced by the ALJ to support her conclusion that AT&T exercised control over the T-Netix platform, shows that AT&T did have responsibility for operator services, and exercised it when it chose to do so. Unfortunately for AT&T, it chose to ignore the state's requirements for rate disclosures until after litigation had been filed. See exhibit --.

38. Also significant is the second amendment to the DOC Contract where AT&T agrees to install call control features for intraLATA, interLATA, and international calls, to be handled by the T-Netix platform. The amendment states:

> Contractor [AT&T] shall install and operate such call control features through its subcontractor Tele-Matic Corporation [T-Netix]....

Amendment No. 2 to DOC Contract, A-8.

39. While the evidence submitted supports the conclusion that AT&T controlled the PIII platform (and for a period of time owned the platform), we believe that ownership is not the appropriate test to determine who the OSP is. If ownership is the test, then a company could avoid its OSP obligations by simply having a third-party purchase the equipment and keep the title in the name of the third-party. Accordingly, a party otherwise responsible for providing operating services, could avoid liability as an OSP by merely putting the title to equipment in another party's name. In essence, as we argued in our response submitted to the ALJ, this is what AT&T attempted to do.

40. Thus, even though the evidence supports the ALJ's findings that AT&T either "owned" or "controlled" the PIII platform, we believe that the better test is whether AT&T was alternately responsible for providing operator services under its arrangements with the DOC. As described above, that test has also been satisfied, and the Commission should rule that AT&T is an OSP.

B. The Commission should not reverse the ALJ's conclusion that AT&T cannot take advantage of the LEC exemption

41. AT&T contends that it is exempt from providing rate disclosure because it was a LEC during the time that LECs were exempt from OSP rate disclosure requirements. AT&T received permission to provide local exchange services as part of its existing classification is a competitive telecommunications company. *See* Bench Exhibit 2. AT&T, however, provided no evidence that it ever provided local exchange services anywhere within the state of Washington. Further, AT&T's witness, Fran

Gutierrez, testified that "at no time did AT&T take over the provision of local exchange services under the DOC contract at any DOC location." ¶12, Ex. A-12. In other words, AT&T did not act as an LEC in connection with the telephone calls at issue in case. If AT&T is not actually acting as a LEC it cannot take advantage of the short exemption during 1997-98 to avoid its responsibilities for rate disclosure.

42. The ALJ agreed that AT&T did not qualify for the LEC exemption under WAC 480-120-021 (1991), explaining that it made no sense to allow an interexchange carrier to escape regulation under the OSP definition simply because it obtained approval to provide local exchange services without ever providing those services.

43. Common sense is also buttressed by RCW 80.04.010, which contains definitions applicable all of RCW Title 80, including the telecommunications provisions in Chapter 80.36. There "local exchange company" is defined as: "'Local exchange company' means a telecommunications company ***providing*** local exchange telecommunications service." RCW 80.04.010 (emphasis added). Similarly, the regulations provide the same definition: "'Local exchange company (LEC)' means a company providing local exchange telecommunications service." WAC 480-120-021. Thus, when the statutes and regulations refer to an LEC, they mean a company that is actually "providing" local exchange services. AT&T did not provide local exchange services, and cannot claim the exemption from OSP responsibilities.

IV. COMPLAINANTS' PETITION FOR ADMINISTRATIVE REVIEW

A. Introduction

44. Pursuant to WAC 480-07-825(4)(c)[2] the complainants challenge portions of the Initial Order.

45. ***First***, as discussed in the previous section, the complainants challenge the portions of the Initial Order that find that the OSP should be determined by who owns the PIII platform, rather than who is responsible for providing operator services for inmate calls. If the Commission accepts our argument, AT&T is the OSP and the remaining challenges we make are moot. Specifically, this challenge addresses conclusion of law 6, which states: "AT&T, as the owner of the platform, was the operator service provider from June 4, 1997, the date of the execution of the Gen. agreement for the procurement of equipment, software, services, and supplies between T-Netix, Inc. and AT&T Corp." Complainants request that this conclusion be changed to read: "AT&T was the operator service provider from at least June 1, 1996, for collect calls originating from inmates at Washington DOC facilities where the PIII Premise platform was in use."

46. ***Second***, if the Commission accepts the ALJ's conclusion that OSP status should be determined by ownership of the PIII platform, then we challenge the conclusion that T-Netix's motion for summary determination should be granted, as

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[2] This section provides: "Challenge to order in answer. A party who did not file a petition for administrative review of an Initial Order may challenge the order or portions of the order in its answer to the petition of another party.

stated in conclusion of law 7. The ALJ determined that AT&T's ownership of the PIII platforms began in 1997 when a contract between AT&T and T-Netix was executed. The relevant time period for this case, however, begins in June, 1996. Thus, the Initial Order does not account for who the OSP is for the period between June, 1996, and June, 1997. Prior to June, 1997, T-Netix presumably retained title to the equipment until the 1997 agreement was signed.. Thus, T-Netix would be the OSP from June, 1996 through June, 1997, at which time AT&T would become the OSP until the end of the relevant time. Alternatively, this matter should be remanded to determine who the owner of the PIII platform is for the 1996-97 period.

47. Thus, complainants request that conclusion of law 7 be changed to read: "T-Netix, as the owner of the platform from June 1, 1996, through June 3, 1997, was the operator service provider during that time." The complainants request that this change be made only if the Commission holds a) that ownership of the PIII platform should determine who the OSP is, and b) that AT&T is the owner of the platform and OSP beginning on June 4, 1997, in accordance with conclusion of law 6.

48. ***Third***, the ALJ erred when she determined that AT&T could not be found liable as a party who "contracts with" an OSP on the grounds of collateral estoppel.

49. The statute directing compliance with the rate disclosure rules established by the Commission requires that those disclosures be made "by any telecommunications company, operating as ***or contracting with*** an [OSP]." RCW 80.36.520. Thus, if T-Netix, rather than AT&T, was the OSP, AT&T is still liable

because contracted with T-Netix. While she did not make a finding of fact or conclusion of law regarding this issue, her analysis could later be argued by AT&T to foreclose further consideration of this claim.

50. AT&T argues that it cannot be liable under the "contracting with" portion of the statute because the regulations issued by the Commission under that statute do not include that phrase. This argument arises from the holding in *Judd v. AT&T*, 152 Wash.2d 195 (2004), which held that for there to be a failure to disclose rates that is actionable under the CPA, the failure must violate the rules adopted by the WUTC for "appropriate disclosure" of rates.

51. There were two statutes at issue in *Judd*. The first, RCW 80.36.510, states:

> The legislature finds that a growing number of companies provide, in a nonresidential setting, telecommunications services necessary to long distance service without disclosing the services provided or the rate, charge or fee. The legislature finds that provision of these services without disclosure to consumers is a deceptive trade practice.

52. The second statue, RCW 80.36.520, provides:

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

53. The issue on appeal was whether the first statute by itself provided a cause of action for violation of the Consumer Protection Act, or whether it was necessary to show a violation of the specific disclosure rules issued by the

Commission pursuant to the second statute. The court held that the first statute "does not establish a cause of action independent from claims based on violations of the disclosure regulations adopted by the WUTC." *Id.* at 199.

54. The court of appeals opinion concluded that the Commission was in the best position to understand what constituted "appropriate disclosure." "A plain reading of the statute indicates that the legislative requirement directed the WUTC to assure "appropriate disclosure" to consumers through promulgation of rules. It is within the purview of the WUTC to direct how, when, or to whom the disclosure is made." *Judd v. AT&T*, 116 Wn. App. 761, 770 (2003). The legislature had already determined that alternative operator services companies and those who contracted with them would be bound by the rules issued by the Commission; the expertise needed from the Commission involved the appropriate levels and means of disclosing rates.

55. AT&T presented no evidence that the Commission intended to exclude companies who contract out their OSP responsibilities to companies like T-Netix from complying with the OSP rules. Instead, AT&T argued in its reply brief that the doctrine of collateral estoppel precluded the complainants from arguing that AT&T could be liable for "contracting with" an OSP. The ALJ agreed, and issued a finding that complainants were barred by collateral estoppel from raising that argument. She is mistaken.

56. Collateral estoppel limits the issues that can be raised against a party to a previous lawsuit:

> Collateral estoppel, or issue preclusion, bars relitigation of an issue in a subsequent proceeding involving the same parties. 14A Karl B. Tegland, Washington Practice, *Civil Procedure* § 35.32, at 475 (1st ed.2003) (hereafter Tegland, *Civil Procedure*).

Christensen v. Grant County Hosp. Dist. No. 1, 152 Wash. 2d 299, 306, 96 P.3d 957, 960-961 (2004).

57. Further,

> "When a subsequent action is on a different claim, yet depends on issues which were determined in a prior action, the relitigation of those issues is barred by collateral estoppel." Collateral estoppel, or issue preclusion, requires
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> > "(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; him and (4) application of the doctrine must not work an injustice on the party against whom the doctrine is to be applied."
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> ***"In addition, the issue to be precluded must have been actually litigated and necessarily determined in the prior action."***
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> *City of Arlington v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 164 Wash.2d 768, 791-92, 193 P.3d 1077 (2008) (citations omitted).

Gold Star Resorts, Inc. v. Futurewise, 167 Wash. 2d 723, 737-738, 222 P.3d 791, 798 (2009) (emphasis added).

58. First, there is no final judgment. This case is still active against AT&T, which is the only party asserting collateral estoppel. As noted above, collateral estoppel bars relitigation of an issue in a subsequent proceeding involving the same

parties. Here, there is no subsequent proceeding because the first proceeding isn't completed. The ALJ assumed that there was a final judgment because the Court of Appeals allowed an appeal to be taken from those dismissals of some of the parties even though the remainder of the case was still pending. Although some parties were dismissed on motions to dismiss, which were certified for appeal, there is no final judgment.

59. Second, even if a dismissal for another party that does not terminate the entire case can support collateral estoppel -- and it cannot -- AT&T has not shown that those issues are identical to the issue here.

60. AT&T claims that the issue of whether it may be bound by the "contracting with" language in the statute was decided by the trial court. The order granting dismissal, however, provides no statement regarding any issue relating to the "contracting with" language. *See* Ex. A-46, order granting defendant quest Corporation's motion to dismiss. As noted in plaintiffs' supplemental memorandum in response to the defendants motions to dismiss, contained in exhibit a-46, the defendants that had been dismissed had releasing them from obligations to make rate disclosures in certain areas where they served as an OSP. This memorandum argues: "AT&T is not a local exchange company and, hence, is not excluded by these regulations. It is the principal contracting party with the Department of Corrections to provide the collect telephone call service for the prisons, and is liable as a telecommunications company who provided operator services or "contracted with" other companies who were to provide the appropriate disclosures." The court denied

AT&T's motion to dismiss, so AT&T cannot argue that the court decided that issue in its favor.

61. Third, there has been no showing that this issue was actually litigated and necessarily determined when the court granted some partys' motions to dismiss. The ALJ does not even mention this requirement in her analysis, nor was it argued by AT&T in its reply brief. In fact, this requirement cannot be met. The defendants that were dismissed had obtained waivers from making rate disclosures for the areas of the state where they also served as OSP's. Even if the trial court concluded that the "contracting with" language was inapplicable because it was not contained in the regulations -- and there is no evidence that the court even considered making such a ruling -- the ruling would not be necessary to dismiss those parties.

62. Finally, it is unlikely that the Commission ignored the "contracted with" language in the statute when it addressed the regulations and either assumed that it was implicit in the rules issued by the Commission or determined that it would be better for court to determine who "contracted with" an OSP once it was determined who the OSP was. This is because the only reason for making a determination of who contracted with the OSP is to determine potential liability under the consumer protection act, which could be done only through a lawsuit, not an administrative proceeding.

63. Also, it is unclear why the ALJ determined that it was outside the scope of the referral to address the issue of whether T-Netix was an agent of AT&T yet decide an issue of collateral estoppel, which is typically left to courts. That is true

especially here, where the Superior Court is in the best position to know the scope of this prior rulings and whether it has ruled on this issue. Her conclusion that collateral estoppel applies should be vacated.

64. ***Fourth,*** the Commission should delete finding of fact 8, which states: "The parties have not provided sufficient evidence to support a decision as to whether AT&T violated the Commission's rules governing operator service providers." All parties and the ALJ agree that the only issue being decided in the motions for summary determination was who was the OSP. The issue of whether the regulations have been violated by the OSD is to be decided later. Accordingly, there is no need for this finding, which leads a reader to conclude that the Commission considered whether there was sufficient evidence presented regarding this issue.

V. CONCLUSION

65. Complainants respectfully request that the Commission grant the relief requested above. Him

DATED: May 21, 2010.

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