[Service Date: May 21, 2010]

BEFORE THE
WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION

SANDY JUDD and TARA HERIVEL, Complainants, v. AT&T COMMUNICATIONS OF THE PACIFIC NORTHWEST, INC., and T-NETIX, INC., Respondents.	Docket No. UT-042022 **T-NETIX, INC. RESPONSE TO AT&T PETITION FOR ADMINISTRATIVE REVIEW [REDACTED VERSION]**

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Respondent T-Netix, Inc. ("T-Netix"), pursuant to WAC 480-07-825 and through counsel, submits this Response to the Petition for Administrative Review filed May 11, 2010, by AT&T Communications of the Pacific Northwest, Inc. ("AT&T"). AT&T is attempting to reverse the 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 issued April 21, 2010 ("Initial Order") by positing an impossibly narrow scope of the Administrative Law Judge's authority to decide issues that are squarely within the purview of this proceeding. In addition, AT&T assigns errors of fact to findings that are fully supported by record evidence, including the plain terms of the operative agreement between it and T-Netix. AT&T provides no credible grounds on which to disturb any finding or conclusion in the Initial Order.

SUMMARY

1. The Initial Order answers very cogently the first of two questions referred by the Superior Court of King County: did AT&T or T-Netix act as an Operator Services Provider ("OSP") for purposes of Complainants' allegations, rendering them subject to WAC 480-120-141? In doing so, the Initial Order reviews evidence that it plainly and necessarily was permitted to review, and reached conclusions soundly based in that evidence.

2. AT&T presents an untenable, unreasonably narrow scope of ALJ Friedlander's authority that has no basis in law or logic. It secondary arguments are evidentiary challenges that simply ignore record evidence and ALJ Friedlander's express statements in the Initial Order.

3. AT&T has failed to establish any infirmity in the Initial Order that would require the Commission to amend or reject it. The Commission therefore should reject the Petition and affirm the Initial Order.

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STANDARD OF REVIEW

4. In considering a petition for administrative review of an initial order, the Commission conducts its review *de novo*. *SEATAC Shuttle, LLC v. Kenmore Air Harbor*, TC-072180, 2008 WL 4824352, at *2 (WUTC 2008). However, in reviewing the findings of fact by a presiding officer (here ALJ Marguerite Friedlander), the Commission is required to "**give due regard to** the presiding officer's opportunity to observe the witnesses." RCW § 34.05.464(4) (emphasis added); *see also Superior Refuse Removal, Inc. v. Wash. Utils. & Transp. Comm'n*, 86 Wash. App. 1020, 1997 WL 270583, at *8 (Wash. Ct. App. 1997). As such, although the Commission has "authority to judge independently the credibility of the witnesses who testified at the hearing" as well as the sufficiency of the evidence, RCW 34.05.464, to the extent that the Commission modifies or replaces the ALJ's findings of fact, a court will "apply the substantial evidence test [to those findings] on appeal." *Chandler v. Office of the Ins. Comm'r*, 173 P.3d 275, 280-81 (Wash. Ct. App. 2007); *see also Costanich v. Washington State Dept. of Social & Health Servs.*, 156 P.3d 232, 237-38 (Wash. Ct. App. 2007) (rejecting reviewing judge's order that ignored ALJ's credibility determinations and chose to base final decision on the very evidence rejected by the ALJ as lacking credibility). "To constitute substantial evidence, there must be a **sufficient quantum of evidence in the record to persuade a reasonable person that the declared premise is true.**" *Penick v. Employment Security Dept.*, 917 P.2d 136, 141 (Wash. Ct. App. 1996) (emphasis added).

5. For orders of the full Commission, courts will affirm an order unless the "agency erroneously interpreted or applied the law ... or the decision was arbitrary or capricious." *Griswold v. Employment Security Dept.*, 15 P.3d 153, 156-57 (Wash Ct. App. 2000).

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EVIDENCE RELIED UPON

6. T-Netix relies upon the following evidence, which is in the record before the Commission, to oppose the Petition:

(Ex. A) Docket UT-042022, Initial Order entered April 21, 2010;

(Ex. B) Docket UT-042022, AT&T's Petition for Administrative Review filed May 11, 2010 [HIGHLY CONFIDENTIAL VERSION];

(Ex. C) General Agreement for the Procurement of Equipment, Software, Services, and Supplies Between T-Netix, Inc. and AT&T Corp. (excerpt) (Ex. T2C)[1] [CONFIDENTIAL];

(Ex. D) Docket UT-042022, T-Netix Motion for Summary Determination filed July 28, 2005 (Ex. T-1HC) [HIGHLY CONFIDENTIAL VERSION];

(Ex. E) Docket UT-04022, T-Netix Motion for Summary Determination filed April 21, 2005, and all exhibits thereto (Ex.T-4C);

(Ex. F) Docket UT-042022, Complainants' Response to T-Netix, Inc.'s Motion for Summary Determination filed May 6, 2005 (Ex.T-5C) [CONFIDENTIAL VERSION];

(Ex. G) Docket UT-04022, AT&T's Amended Motion for Summary Determination filed August 24, 2009 (Ex. A-1HC) [HIGHLY CONFIDENTIAL VERSION];

(Ex. H) Docket UT-04022, T-Netix, Inc.'s Amended Motion for Summary Determination filed August 27, 2009);

(Ex. I) Deposition of Robert Rae at 219:25 (Aug. 6, 2009) (excerpt) (Ex. T-15)

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[1] Exhibit Numbers are those assigned by the ALJ and which appear in the Final Exhibit List that was finalized April 12, 2010.

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(Ex. J) Case No. 00-2-17565-5 SEA, Order Granting AT&T's Motion to Dismiss (Ex. A-3) (King County Super. Ct. Aug. 28, 2000)

ARGUMENT

I. THE INITIAL ORDER SHOULD NOT BE DISTURBED BASED ON AT&T's IMPROPER CONSTRUCTION OF THE SCOPE OF AUTHORITY IN THIS CASE

7. AT&T's challenge to the Petition rests absolutely on a novel construction of the ALJ's authority to decide the issues before her. These issues were framed by the questions referred to the Commission by the Superior Court pursuant to the primary jurisdiction doctrine. They were: (1) whether AT&T or T-Netix was an OSP for purposes of Complainants' (there, the Plaintiffs') Complaint; and (2) whether a violation of WAC 480-120-141, the rule that as of January 1, 2000, required audible disclosures of the rates applied to an inmate-initiated call prior to call acceptance, has occurred. Initial Order ¶ 9. In the order establishing the referral, the Superior Court expressly asked whether AT&T is "considered by the agency to be an OSP **under the contracts at issue**." Case No. 00-2-17565-5 SEA, Order Granting AT&T's Motion to Dismiss (Aug. 28, 2000) (emphasis added) (Ex. A-3) **(Ex. J hereto)**.

8. The Initial Order resolves three motions: the T-Netix Motion for Summary Determination filed July 28, 2005; the T-Netix Amended Motion for Summary Determination filed August 27, 2009; and the AT&T Amended Motion for Summary Determination filed August 24, 2009. Those three motions addressed only the Court's first question: which carrier, if any, acted as an OSP. This question necessarily requires an inquiry into how the correctional facilities at issue in this case were served. It is undisputed in this case that AT&T held the inmate telecommunications service contracts with those facilities. Initial Order ¶ 33; Docket UT-042022, AT&T's Amended Motion for Summary Determination ¶ 10 (Aug. 24, 2009) (Ex.

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A-1HC) **(Ex. G hereto)**. It is also undisputed that AT&T and T-Netix entered into a contract regarding the equipment — called the "P-III platform" — installed at the facilities in order to enable inmate calling. Initial Order ¶ 36; *see also* Petition ¶¶ 23-24. ALJ Friedlander thus appropriately reviewed that contract in order to determine the nature of the transaction and the relationship between AT&T and T-Netix. AT&T fails to persuade that these actions were outside the bounds of the ALJ's authority, the Commission's authority, or the questions that the Superior Court referred for decision.

A. The Administrative Law Judge Did Not Exceed the Bounds of Her Authority In Interpreting an Unambiguous Contract (Finding of Fact 4)

9. AT&T argues that the Initial Order should be reversed on the ground that the ALJ exceeded the bounds of her, and the Commission's, authority by the act of reading the contract between AT&T and T-Netix, dated June 4, 1997, that was effective for the alleged calls at issue in this case (the "Contract") **(Ex. C hereto)**. Petition ¶¶ 21-27. ALJ Friedlander's reading of the Contract forms the basis of Finding of Fact 4 of the Initial Order which states that

> 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.

10. AT&T cannot successfully attack the substantive conclusion of this Finding, because the Contract is unambiguous as to the fact that AT&T took title to the P-III platform. AT&T therefore asserts that ALJ Friedlander "improperly exceeded her jurisdictional authority by interpreting the" Contract. Petition ¶ 21. This argument rests on a concept of the ALJ's and the Commission's authority that is simply unsustainable.

11. As AT&T states in the Petition, quoting from a previous order in this very case, "'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

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the agency.'" Petition ¶ 22 (quoting Docket UT-042022, Order No. 5 (July 18, 2005)). AT&T also relies (Petition ¶ 22) on a similar explication of the bounds of a primary jurisdiction referral in *Dioxin/Organochlorine Center v. Dept. of Ecology*, 119 Wash. 2d 761, 837 P.2d 1007 (Wash. 1992) (*en banc*), which states 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 some question arising in the proceeding before the court."

119 Wash. 2d at 775, 837 P.3d at 1015 (internal citation omitted).

12. The terms of the Contract as they relate to ownership fall squarely within the Commission's authority under AT&T's own standard for primary jurisdiction referrals. The question that was before ALJ Friedlander, and now before the Commission, is who was the OSP for purposes of Complainants' allegations. In this case, that question is answered in the manner in which the phone companies serving the relevant facilities handled the calls Complainants allegedly received. It is well established in this case that AT&T served those facilities and "entered into a contract (DOC contract) with the State of Washington Department of Corrections (DOC) to provide telecommunications services and equipment to various inmate correctional institutions and work release facilities." Initial Order ¶ 33. It is also well established that AT&T chose to "subcontract with three LECs, Verizon, Qwest, and CenturyTel, for the provision of public telephone sets and equipment, lines ... and local and intraLATA telephone service and operator service." *Id.* AT&T has conceded these facts. AT&T Motion for Summary Determination ¶ 11 (Ex. G).

13. It is also well established that in 1995 AT&T was "required" by Amendment No. 2 to the DOC contract to "'arrange for the installation of certain call control features for intraLATA, interLATA, and international calls' which AT&T was to carry." Initial Order ¶ 35.

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T-Netix was chosen in 1995 "to provide a computerized platform at the correctional facilities[.]" *Id.* In 1997, AT&T and T-Netix established the Contract whereby AT&T obtained from T-Netix a particular type of "computerized platform" called the P-III Platform. *Id.* Nothing in the Petition attempts to refute these facts. *See* Petition ¶¶ 8-13.

14. The P-III platform provides a [redacted] as T-Netix's expert witness, Robert Rae, explained. Deposition of Robert Rae at 219:25 (Aug. 6, 2009) (Ex. T-15) **(Ex. I hereto)**. As the Initial Order puts it, the P-III is a "gatekeeper." Initial Order ¶ 96. This "gatekeeper" equipment was obtained by AT&T pursuant to the Contract. As such, ALJ Friedlander necessarily was required to read the Contract in order to understand the question of P-III ownership.

15. For these reasons, the Superior Court expressly stated that the question for referral is whether AT&T is "considered by the agency to be an OSP under the contracts at issue[.]" Order Granting AT&T's Motion to Dismiss (Ex. J).

16. Even absent the Court's express reference to "the contracts," AT&T is incorrect in asserting that the ALJ erred in reviewing the Contract. Where, as here, rights or duties of the parties to a telecommunications dispute are defined by contract, the Commission will not only read the contract but apply its understanding of the canons of interpretation and general contract law. *E.g.*, *Qwest Corp. v. Level 3 Communs., LLC*, Docket UT-063038, Order 10 Final Order Upholding Initial Order, 2008 WL 2810028 (WUTC July 16, 2008); *McLeodUSA Communs. Svcs., Inc. v. Qwest Corp.*, Docket UT-063013, Order, 207 WL 678433 (WUTC Feb. 16, 2007). In *Level 3*, the Commission was required to decide whether Qwest was required to compensate Level 3 for certain types of calls. The compensation requirement was written in the parties' Interconnection Agreement ("ICA") which, as the Commission stated, "is a contract between the

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parties[.]" 2008 WL 2810028, Section II.F.1 (page 97 ¶ 269). The Commission went on to state that "the appropriate analysis [of the ICA] derives from principles of contract law." *Id.* In *McLeodUSA*, the question before the Commission was whether Qwest was required to bill McLeodUSA for collocation power on a usage basis. Billing for collocation power was described in the parties' ICA, and thus the Commission read and interpreted the ICA. 2007 WL 678433, at *3. In both of those cases, the parties' rights and duties were defined by an ICA, a type of "contract between the parties." The Commission thus as a matter of course reviewed the ICAs and made its decisions.

17. AT&T's attempt to prevent the Commission from reading the Contract is unsupportable. The precedent on which AT&T relies are inapposite, and do not regard a case that, as here, requires the Commission to determine the relationship between two litigants, which relationship is defined by contract. Petition ¶ 24 (citing *BNSF Ry. Co. v. Tri-City & Olympia RR Co. LLC*, No. 09-5062, 2009 WL 3149569 (E.D. Wash. Sept. 28, 2009); *Board of Public Works, City of Blue Earth, MN v. Wisconsin Power & Light Co.*, 613 F. Supp. 2d 1122 (D. Minn. 2009)). In fact, AT&T's two cases do not even involve a primary jurisdiction referral — ***the courts rejected requests for a referral.*** The cases did not, in contrast to this dispute, involve any technical issues of regulatory law, but rather only general, transactional contracts. Thus, in *BNSF*, the court denied a request for referral to the Surface Transportation Board on the ground that "this dispute is about a contract ... resolving the dispute requires only determining the parties' rights under contract, not altering rights over railroad tracks." 2009 WL 3149569, at *3. Likewise, in *Wisconsin Power and Light*, the federal court for the District of Minnesota refused to refer a case about whether compensation was due under an electricity contract: "Plaintiff has asserted a standard contract dispute. Defendants have not demonstrated any particular technical

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issue that would fall within [the Federal Energy Regulatory Commission's] special expertise." 613 F. Supp. 2d at 1130-31.

18. It is not surprising that, in the cases on which AT&T relies, the courts refused to ask an expert regulatory agency to review the contracts. And because no primary jurisdiction referral issued in either case, they have absolutely no bearing on whether the Commission or ALJ Friedlander was authorized to read the Contract.

19. This case is not a contract case that could possibly involve a question of telecommunications regulation. This case is a telecommunications case that involves a contract. More specifically, this case began as a consumer protection putative class action involving telecommunications in which a necessary question remains whether any entity provided those telecommunications. A contract, the AT&T/T-Netix Contract, is a component of that question. The ALJ and the Commission thus, in order to comport with the Court's referral, read that Contract. None of AT&T's purported authority would require the ALJ or the Commission to "abstain" (Petition ¶ 21) from reading the Contract. The Contract is part of this referral as the Superior Court expressly stated. (Ex. J).

20. It is moreover nonsensical for AT&T to assert that the ALJ was correct in focusing on the ownership issue, but had no right to read the Contract by which such ownership was conferred.[2] The positions are irreconcilable, and would prevent the ALJ and the Commission from reaching any decision in this case at all. Indeed, AT&T appears to suggest that the Commission should eschew the Court's referral and send the question back to the Court for its own determination. By AT&T's lead, the case would become a continuous merry-go-

[2] T-Netix notes that although the ALJ chose to focus on the question of which entity owned the P-III Platform, she could have reached the same conclusion — that AT&T is the OSP — on the ground that T-Netix does not meet the definition of "OSP" because it does not provide "telecommunications" as the definition requires. T-Netix August 2009 Motion ¶¶ 16-23 (quoting WAC 480-120-021) (Ex. G).

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round between the tribunals, with neither tribunal able to determine whether AT&T or T-Netix was the OSP. The Commission plainly would like to avoid this absurd result, and thus it should reject AT&T's attempt to prevent ALJ Friedlander and the Commission from reviewing the Contract.

21. For these reasons, the Commission should not disturb Finding of Fact 4 as AT&T requests.

B. The ALJ Did Not Exceed Her Authority in Finding that AT&T Directed T-Netix to Modify and Maintain the P-III Platform (Finding of Fact 7)

22. The Initial Order finds that "AT&T possessed the ability to direct T-Netix to modify the P-III platform." Initial Order at 53 (Finding of Fact 7). This finding is a reasonable, if not ineluctable, conclusion to draw from the record evidence in this case. It is moreover an integral issue in, as AT&T would have it, answering "'those issues referred to the agency'" by the Superior Court of King County. Petition ¶ 22 (quoting Order No. 5). As explained below, the Commission can affirm the Initial Order on this independent ground, regardless of the question of who held title to the P-III Platform.

23. Positing a second and substantial limitation on ALJ Friedlander's purview in this case, AT&T asserts that "that issue was not before the ALJ" and "the finding exceeds the scope of the ALJ's and the Commission's jurisdiction and authority." Petition ¶¶ 28, 29. Again AT&T attacks an unfavorable finding by drawing unreasonably narrow lines around the Commission's authority to determine the issue expressly referred to it by the Superior Court.

24. The Commission, initially through ALJ Friedlander, has been asked to determine which entity was the OSP for purposes of Complainants' allegations. That entity was required to comply with WAC 480-120-141 for the calls Complainants' allegedly received, absent Commission waiver or forbearance of that rule. As such, that entity was required to perform

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certain functions, such as rate disclosure, or cause them to be performed. Elemental to that issue is the question of which entity performed the actions or caused them to be performed.

25. ALJ Friedlander found that the P-III platform was the means by which the functionalities required by WAC 480-120-141 were performed. Initial Order ¶ 96. It allowed inmates to dial called parties, it ensured that the number was valid, and it included a feature to provide audible announcements. Rae Depo. at 220:20-25, 291:2-8 (Ex. I). The question of who directs the operation of these functionalities answers the question of which entity caused OSP-type functions to be performed. For this reason, this issue of AT&T "directing" T-Netix itself supports the affirmance of the Initial Order, because the entity directing the manner of handling inmate-initiated calls can reasonably be deemed the OSP.

26. ALJ Friedlander was obligated to determine who was the actor in this case for the purpose of completing inmate phone calls. Stated differently, the issue is who caused the calls to be completed. The question whether it was T-Netix or AT&T who caused the calls to be completed is, like the Contract, a necessary component of that determination. As such, ALJ Friedlander was well within her authority in considering this question, and was resolving precisely the issue before the Commission when she analyzed whether it was T-Netix or AT&T who directed the operation of the P-III platform.

27. AT&T's attack on Finding of Fact 7 is, like the contract issue discussed above, illogical. The Court has asked the Commission to determine whether AT&T or T-Netix acted as an OSP, as AT&T is aware. But AT&T nonetheless believes that the Commission is powerless to determine whether AT&T directed the manner in which inmate calls were handled from the correctional facilities in question. The Commission would presumably have been authorized to find, contrary to record evidence, that T-Netix acted to complete inmate calls, but has no right to

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determine whether that action was caused by AT&T. AT&T's argument appears not to rest on any principle other than its dislike for the outcome. And as a matter of law, AT&T provides no basis to find that ALJ Friedlander acted *ultra vires* by analyzing the relationship between AT&T and T-Netix by which inmate calls were handled. The Commission should thus reject AT&T's challenge to Finding of Fact 7.

II. AT&T's REMAINING GROUNDS FOR ATTACKING THE INITIAL ORDER ARE WITHOUT MERIT

28. The brunt of AT&T's challenge lies in its implausible understanding of the nature of the Commission's authority. That challenge having been revealed as baseless and contrary to law, T-Netix will now turn to AT&T's remaining grounds for challenging the Initial Order. These grounds are (1) AT&T was not involved in the calls, (2) the ALJ had no evidence, despite documents such as the Contract itself, to find that T-Netix acted at the direction of AT&T, and (3) the Contract is somehow unclear as to the fact that AT&T obtained title to the P-III Platform. The first of these grounds is demonstrably false, the second is easily disproved by record evidence, and the third is at best quixotic, for the language of the Contract, as ALJ Friedlander found, "clearly demonstrates" that AT&T owned the P-III. Initial Order ¶ 101.

A. AT&T Improperly Attempts to Disclaim Its Role in the Calls at Issue in This Case

29. AT&T argues that the Initial Order is "unsound as a matter of regulatory policy," because it finds "that AT&T is the OSP on [c]alls it [n]ever [h]andled in [a]ny [w]ay." Petition at 14. This statement is extremely disingenuous. As AT&T knows, the alleged calls at issue in this case are interLATA calls. AT&T as the interLATA carrier, the long distance company serving the facilities from which inmate calls were received, of course handled those calls.

30. Five years ago, during the previous phase of this proceeding, T-Netix proved that the only calls for which (a) Plaintiffs could produce any phone bills, or (b) T-Netix could find

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any call record, were local or intraLATA calls. Docket UT-04022, T-Netix Motion for Summary Determination at 7-9 (April 21, 2005) (Ex. T-4C) ("T-Netix April 2005 Motion") **(Ex. E hereto)**. Complainants did not contest that showing. Docket UT-042022, Complainants' Response to T-Netix, Inc.'s Motion for Summary Determination ¶¶ 24-25 (May 6, 2005) ("Complainants' May 2005 Response") **(Ex. F hereto)**.

31. T-Netix also showed that, according to its call records, Complainants received the calls from only three facilities: Washington State Reformatory in Monroe; McNeil Island Detention Center; and Airway Heights Correctional Center. T-Netix April 2005 Motion ¶ 16. In discovery responses, Complainants independently identified those as the three facilities from which they received calls. T-Netix April 2005 Motion, Exs. 9 and 10. It is undisputed that calls from these facilities to the Complainants who received them were local or IntraLATA calls. T-Netix April 2005 Motion at 8-9 (Table).

32. T-Netix also showed that the carriers which handled these calls were GTE and US West which were the resident local exchange carriers ("LECs"). T-Netix April 2005 Motion ¶ 17. Complainants did not contest this showing. Complainants' May 2005 Response ¶¶ 24-25.

33. T-Netix argued that these calls, the only ones of which a record exists, were exempt from the rate disclosure rule, WAC 480-120-141. T-Netix April 2005 Motion ¶¶ 20-21. The LECs, GTE and US West, had obtained waivers from WAC 480-120-141 that lasted through December 31, 2000. Those waivers exempted all inmate-initiated calls connected by GTE or US West from the rule. This holding was reached by the Superior Court of King County in 2000. Complainants appealed that holding all the way to the Supreme Court of Washington, and lost. *Judd v. AT&T*, 116 Wash. App. 761, 66 P.3d 1102, *aff'd* 152 Wn.2d 195, 95 P.3d 337 (2003).

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34. For these reasons, the only calls that could possibly result in relief for Complainants would be interLATA calls. AT&T was the interLATA carrier for interLATA calls from these facilities. It is thus disingenuous for AT&T to state that "it never handled in any way" the calls at issue in this case.

B. Unrefuted Record Evidence Demonstrates that T-Netix Acted at AT&T's Direction With Regard to the P-III Platform (Finding of Fact 7)

35. As stated in Section I.B above, AT&T attacks Finding of Fact 7, that AT&T "possessed the ability to direct T-Netix to modify the P-III platform," principally on the ground that ALJ Friedlander lacked the authority to evaluate the manner in which AT&T and T-Netix interacted. That argument rests on a view of the Commission's authority in this case that is simply illogical and would unreasonably constrain the Commission from answering the Court's questions. AT&T thus also has lodged a secondary, and equally specious, evidentiary attack on Finding of Fact 7, arguing that "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.'" Petition ¶ 32 (quoting Initial Order Finding of Fact 7, ¶ 137).

36. This secondary argument would ignore the very document that AT&T appends to its Petition — the AT&T/T-Netix Contract (Ex. T-2C) (AT&T Tab 19) [HIGHLY CONFIDENTIAL]. The Contract plainly states that AT&T had the right to give orders and instructions to T-Netix for the maintenance and installation of the P-III Platform.

37. The Contract plainly states that AT&T as [redacted] and may [redacted] Contract p. 11 (TNXWA00751) (Ex. C). The [redacted] *Id.* If corrections were requested, AT&T had [redacted] *Id.* The

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Contract allowed AT&T [redacted]

Id. p. 14. A [redacted] from AT&T was to contain several instructions, including [redacted] *Id.* These terms of the Contract amply demonstrate that AT&T "directed" T-Netix.

38. In addition, AT&T's assertion that "no evidence in record supports the ALJ's finding, [and] the ALJ cited none" (Petition ¶ 28) ignores Paragraph 100 of the Initial Order which states that "the August 2000 letter from AT&T to T-Netix clearly shows that AT&T had certain responsibility for the implementation of rate quotes[.]" That letter is in the record as **Exhibit C-4.** It regards [redacted] The ALJ reasonably concluded from this additional record evidence that AT&T in fact "directed" T-Netix.

39. ALJ Friedlander thus rests soundly in the record in finding that AT&T "directed" T-Netix with regard to how inmate calls were handled by the P-III Platform. The Commission should not disturb Finding of Fact 7.

C. The ALJ Did Not Err in Finding that AT&T Owns and Controls the P-III Calling Platform

40. The ALJ correctly found that AT&T owns the P-III platform based on the plain language of the Contract. Initial Order ¶¶ 99-101. It is notable that AT&T fully supports the ALJ's reliance on the question of platform ownership in her determination of which entity was the OSP, Petition ¶¶ 8-13, but challenges her answer to the question on grounds that quickly are revealed as specious.

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41. The ALJ correctly relied on the plain language of the Contract to resolve the question of which entity owned the P-III platform, and as explained in Section I.A did not exceed her authority in doing so. The Contract states that

Ex. C at 6 (TNXWA 00746) (emphasis added) [HIGHLY CONFIDENTIAL]. There is no allegation or evidence in this case that any condition precedent in this provision was not satisfied. The Contract also states that [redacted] Ex. C at 17 (TNXWA 00757) [HIGHLY CONFIDENTIAL].

42. The Contract could not be more clear in stating that AT&T owns the P-III platform. The clarity of the language would render any decision that AT&T did not own the P-III baseless and capricious. Indeed, AT&T's choosing the issue of the ALJ's authority as its principle argument for reversal of the Initial Order itself demonstrates that even cursory review of the Contract results in a finding that AT&T owned the P-III platform.

43. Finally, AT&T, faced with the ALJ's well-supported reasoning, thus resorts to the argument that the ALJ should not have engaged in this ownership inquiry at all. AT&T provides no authority of any kind to support this argument. Rather, AT&T rests on T-Netix discovery responses in which it stated that it [redacted] Petition ¶ 14 (quoting Ex. A-33 (AT&T Tab 16)). AT&T also notes that a T-Netix response states that [redacted] Petition ¶ 14 (quoting Ex. A-32) (AT&T Tab 17). AT&T does not admit, however, that these same T-Netix responses state that T-Netix [redacted]

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[redacted] Ex. A-32 (AT&T Tab 17). Under any reasonable definition of [redacted] T-Netix thus had stated that it ***gave the equipment to AT&T.*** For example, Webster's II New College Dictionary lists "to furnish: supply" as the first definition of [redacted] Webster's II New College Dictionary at 890 (1986).[3] ALJ Friedlander thus reasonably did not rely on the T-Netix responses as having conceded the issue of which entity held title.

44. Moreover, the T-Netix responses to which AT&T refers do not even regard the Contract. Rather, they state

> Subject to and without waiving these objections, T-Netix refers AT&T to TNXWA00001-599, TNXWA01052-1125, TNXWA01126-1239, and TNXWA01528-1652 for detailed descriptions of equipment, software, and products provided by T-Netix to AT&T in Washington State. T-Netix owned the premise-based equipment described in these documents and provided that equipment, and any or all associated software, as a subcontractor to AT&T.

Ex. A-33 (AT&T Tab 16); Ex. A-32 (AT&T Tab 17). The Contract, however, is labeled TNXWA00741-771. ***It is not the same document referenced in the T-Netix responses.*** For all these reasons, to the extent AT&T is attempting to characterize these responses as "admissions," that attempt fails.

45. More importantly, AT&T is rightly careful not to assert some form of judicial or equitable estoppel on this point. Estoppel occurs where a party makes an admission upon which the opponent then relies. *E.g.*, *Robinson v. City of Seattle*, 119 Wash. 2d 34, 82, 830 P. 2d 318, 345 (Wash. 1992) (*en banc*) (rejecting assertion of estoppel). Here, AT&T has failed to establish that T-Netix "admitted" anything. In addition, AT&T did not rely upon this purported

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[3] The Supreme Court of Washington has held that a "standard dictionary" is an appropriate source for obtaining the meaning of an undefined statutory term. *State v. Sullivan*, 143 Wash. 2d 162, 175, 19 P.3d 1012, 1019 (Wash. 2001) (*en banc*).

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"admission" in its motion papers before the ALJ. AT&T cannot assert otherwise. T-Netix is thus not barred from supporting the ALJ's finding that AT&T owned the P-III Platform.

46. Finally, AT&T does not and cannot reasonably assert that ALJ Friedlander was ***required*** to take the T-Netix responses as admission ***to the exclusion of*** the plain language of the Contract. Nor was she required to give less credit to a Contract, the authenticity of which AT&T has not contested, than to T-Netix discovery responses that at best are ambiguous. For all the reasons explained in Sections I and II above, ALJ Friedlander was correct in reading and relying on the Contract to find that AT&T owned and took title to the P-III Platform.

47. For these additional reasons, the Commission should not disturb Finding of Fact 4.

III. THE INITIAL ORDER RESTS ON ADDITIONAL SOUND POLICY BASES

48. The Initial Order rests on two sound policy bases in holding that AT&T acted as the OSP. First, this finding comports with the purpose of WAC 480-120-141 to ensure that persons receiving collect inmate phone calls do not pay more than they can or would like to do. Second, the finding comports with the related purpose of WAC 480-120-141 which is to ensure that called parties know the identity of the carrier that they are paying for the call. Indeed, WAC 480-120-141 requires disclosure of the responsible carrier, and AT&T provided it, demonstrating its own intent as an OSP to comply with the rule.

49. As ALJ Friedlander noted in the Initial Order,

> the Commission's order adopting the OSP rules indicated that the OSP disclosure rules were created, at least in part, to protect the consumer from accepting collect calls without being properly informed as to who was providing the service and at what charge.

Initial Order ¶ 102.

50. In this case, it is undisputed that AT&T provided the interLATA calling service pursuant to the DOC Contract. *Id.* ¶ 33. And it is undisputed that the rates charged for

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interLATA calls were AT&T's rates. *Id.* ¶ 102. These are among the data that were required to be disclosed WAC 480-120-141. That data is AT&T's.

51. It is thus sensible that the Initial Order holds that AT&T is the OSP and thus is subject to WAC 480-120-141. The rule ensures that consumers know what they are buying and how much it will cost. AT&T as the seller of those goods is thus the proper entity to be bound by the disclosure requirements.

52. What is telling is that AT&T indisputably complied with one portion of WAC 480-120-141. That is, WAC 480-120-141 states that an OSP must identify itself "audibly and distinctly at the beginning of every call." This obligation is otherwise known as "branding." As ALJ Friedlander found, "the rule provided that the OSP must disclose the identity of the OSP providing the service to the customer." Initial Order ¶ 102. Neither Complainants nor AT&T ever have contested the fact that AT&T branded the calls from the facilities at issue in this case. These facts demonstrate that AT&T was cognizant of its obligations as an OSP. As such, AT&T should not be surprised that ALJ Friedlander found that AT&T was in fact the OSP for purposes of Complainants' claims.

53. These additional reasons simply underscore the conclusion that the Initial Order is the product of reasoned decision-making, is not arbitrary or capricious, and is not contrary to the law. *See Griswold*, 15 P.3d at 156-57. At bottom, the Initial Order reflects simple common sense. The Commission thus should reject the Petition and adopt and affirm the Initial Order.

CONCLUSION

54. For all these reasons, the Commission should reject the AT&T Petition and adopt the Initial Order of ALJ Friedlander.

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DATED this 21st day of May, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that I have this 21st day of May, 2010, served via e-filing a true and correct copy of the foregoing, with the WUTC Records Center. The original, along with the correct number of copies (9), of the foregoing document will be delivered to the WUTC, via the method(s) noted below, properly addressed as follows:

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I hereby certify that I have this 21st day of May 2010, served a true and correct copy of the foregoing document upon parties of record, via the method(s) noted below, properly addressed as follows:

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Ex. B

Highly Confidential Per Protective Order in UT-042022

Ex. C

Confidential Per Protective Order in UT-042022

Ex. D

Highly Confidential Per Protective Order in UT-042022

Ex. F

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Ex. G

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