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 PETITION FOR ADMINISTRATIVE REVIEW

SUMBITTED BY:

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INTRODUCTION

1. AT&T, by its attorneys, respectfully submits this Answer to Complainants' Petition for Administrative Review pursuant to WAC 480-07-825(5)(a). (Complainants' (1) Answer to AT&T's Petition for Administrative Review and (2) Petition for Administrative Review is referred to herein as "Complainants' Answer/Petition".) For the reasons stated below, the Commission should deny the relief Complainants request.

2. The Commission's regulations throughout the relevant time have defined the Operator Services Provider ("OSP") as the person or entity "***providing a connection*** to interstate or intrastate long distance service from a call aggregator location." Ex. A-4, Tab 6 (WAC 480-120-021 (1989)); Ex. A-5, Tab 1 (WAC 480-120-021 (1991)); and Ex. A-6, Tab 7 (WAC 480-120-021 (1999)) (emphasis added).[1] In response to AT&T's and T-Netix's amended motions for summary determination, Complainants made clear that T-Netix was the OSP because it "connected the call from the inmate to the recipient." Ex. C-1C, Tab 32 at 15 (Complainants' Memorandum in Opposition to T-Netix's Motion for Summary Determination and AT&T's Motion for Summary Determination). Complainants also made clear that T-Netix was the OSP because it provided operator services. *Id*. at 19.

3. Now, however, Complainants attempt to shift away from the actual language of the Commission's regulations and argue that AT&T should be deemed the OSP, not because it *provided the connection*, but because AT&T was legally or *contractually responsible* to the call aggregators, in this case the Washington Department of Corrections (the "DOC"), for providing "call control" features. Complainants' Answer/Petition at ¶¶ 28-29, 38-40. That argument is fatally flawed for several reasons. First, it substitutes the bright line test derived from the plain

[1] Tabs 1-33 comprise the exhibits AT&T attached to its Petition for Administrative Review. Tabs 34-41 are additional exhibits attached hereto.

language of the regulation with the amorphous concept of "responsibility," which is nowhere to be found in the regulations. Second, it plainly ignores the fact that the regulation was amended in 1991 to make clear that an OSP is not defined as the party contracting with the call aggregator (here, the DOC). Third, even if the identity of the OSP could theoretically turn on AT&T's contract with the DOC, the contract simply did not, by its terms, place responsibility for providing all operator service obligations on AT&T.

4. Alternatively, Complainants again ask the Commission to find that AT&T is liable because it contracted with T-Netix, who was the OSP. Complainants, however, have already fully litigated that theory of liability, and are barred from re-litigating it under the doctrine of collateral estoppel.

5. Therefore, AT&T respectfully submits that Complainants' Petition for Administrative Review should be denied. Instead, the OSP should be determined, as the ALJ found, by who owned the P-III platform and therefore, actually *provided the connection* consistent with the plain language of the regulation. That is T-Netix, not AT&T.

I. THE COMMISSION SHOULD DENY COMPLAINANTS' REQUEST TO REVERSE THE ALJ'S DETERMINATION THAT THE OWNER OF THE P-III PLATFORM WAS THE OSP.

6. Administrative Law Judge Friedlander correctly determined that, under the Commission's regulation defining an OSP, WAC 480-120-021 (1991 & 1999), "[t]he P-III Premise platform provided the connection between the intrastate or interstate long-distance or local services and the correctional facilities." Initial Order at ¶143; *see also id.* at ¶129. Because the P-III platform "provided the connection" — the key determination under the regulation — the ALJ further determined that "the owner of the P-III platform, having connected the '0+' call to the local or long-distance service provider and outpulsing it as a '1+' call, is the OSP" for calls

from the prisons at issue in this matter. *Id.* at ¶97.[2] As shown in AT&T's Petition for Administrative Review, the ALJ mistakenly identified AT&T as the owner of the P-III platform, overlooking T-Netix's direct admission that *it* owned and held title to the P-III platforms at all times relevant to this dispute. T-Netix's admission established *T-Netix's* ownership of the P-III as an undisputed fact. AT&T's Petition for Administrative Review at ¶¶14-17.

7. In their Petition, Complainants do not question the ALJ's determination that the P-III platform provided the all-important connection for the calls at issue. Instead, they argue that ownership of the P-III platform is not dispositive, but rather, the OSP "should be the entity that is responsible for providing operator services."[3] Complainants' Answer/Petition at 9. They also argue that "responsibility" is determined by AT&T's contract with the DOC. Those arguments fail for the following reasons.

A. COMPLAINANTS' THEORY DISREGARDS THE PLAIN LANGUAGE OF THE COMMISSION'S OSP REGULATION AND THE HISTORY OF THAT REGULATION.

8. It is axiomatic that a regulation must be construed and applied according to its plain terms. *State, Dept. of Labor & Indus. v. Tyson Foods, Inc.*, 143 Wash.App. 576, 582, 178 P.3d 1070 (2008) ("We look no further than the plain language of a facially unambiguous administrative regulation."). That is exactly what the ALJ did here, when she found (1) that the definition of an OSP under WAC 480-120-021 is and always has been the entity "providing a connection to intrastate or interstate long-distance or to local services from locations of call

[2] *See also* Initial Order at ¶¶ 129 & 144 (concluding the owner of the P-III platform was the OSP, but mistakenly identifying AT&T, rather than T-Netix, as the P-III's owner).

[3] Complainants suggest that it is a mistake to identify the OSP based on who owns the P-III platform because a party could lease the equipment. That is a complete red-herring. There is no lease involved here. Nor is there any dispute that T-Netix both owned and operated the P-III platform. *See* AT&T's Petition for Administrative Review at ¶¶8-11, 18-21.

aggregators," and (2) that the meaning of the term "connection" is "critical to [her] analysis." Initial Order at ¶¶28, 91. The ALJ also applied that regulation correctly when she analyzed the call flow, ruled that the "crucial connection" was provided by the P-III platform, (*id.* at ¶¶129, 143) and therefore, the owner and operator of the P-III platform was the OSP for purposes of the regulation. This is the type of simple and straightforward analysis that the law requires. It also was precisely the type of analysis the Superior Court anticipated when it referred the matter to the Commission. The Court was fully capable of determining "legal or contractual responsibility." It needed the Commission's technical expertise to determine who actually provided the connection from the prisons to the called parties as prescribed by the regulation. The ALJ's sole error was to rule that AT&T was the owner of the P-III Platform.[4]

9. Complainants' theory disregards the plain language of the regulation and seeks to impose a new rule in its place – namely, a rule that would require the Commission to determine who is legally or contractually responsible for providing operator services. As a fundamental matter, Complainants simply may not ask this Commission to change, through an adjudicative ruling, the substance of a clear regulation. It goes without saying that the proper process to

[4] Complainants suggest that the ALJ "followed" an approach "that the party who had legal responsibility for providing operator services should be the OSP." Complainants' Answer/Petition at ¶22. That is incorrect and strategically misreads the ALJ's Initial Order, which very clearly determined that the owner of the P-III platform was the OSP. Initial Order at fn 46, ¶97. Indeed, that is why Complainants petitioned for administrative review of the Initial Order — precisely because the ALJ took a bright-line "ownership" approach instead of Complainants' nebulous "responsibility" approach. Where, as here, multiple parties work together to deliver traffic from an aggregator to a called party, they frequently share legal responsibility for delivering services. Here, for example, AT&T entered into a general contract with the DOC but everyone involved recognized that LECs would be "responsible" for "operator services." And T-Netix would actually provide call control services and connect the call to the LECs' point of presence. The ALJ rejected nebulous approaches to determining the OSP where, for example, "there would be several OSPs for one call" because, taking that approach, "[w]e would never be able to determine who the OSP was, and that result obviously cannot be what the regulation intends." *Id.* at ¶94.

amend a regulation is through a rulemaking, not through the complaint process. Therefore, any further analysis of Complainants' attempt to apply its self-created rule of "responsibility" is unnecessary and contrary to the Court's referral.[5]

10. Even if it were necessary to further analyze Complainants' claim, it fails. In addition to deviating improperly from the plain terms of the regulation, Complainants also incorrectly argue that AT&T's "responsibility" here derives from its contracts with the DOC. Complainants' argument that AT&T could be subject to OSP-liability merely because of its contractual relationship with the DOC was anticipated and foreclosed by the Commission in a 1991 amendment to the relevant regulation. In that amendment, the Commission revised the definition of Alternate Operator Services Company ("AOS Company"), which was the earlier name for the OSP. The Commission specifically struck language requiring contractual privity between the AOS Company (*i.e.*, the OSP) and the call aggregator (*e.g.*, a DOC facility) as follows:

> Alternate operator services company – any corporation, company, partnership, or person <u>other than a local exchange company</u> providing a connection to intrastate or interstate long-distance or to local services from ((~~places including but not limited to, hotels, motels, hospitals, campuses, and customer owned pay telephones. **Alternate operator services companies are those with which a hotel, motel, hospital, campus, or customer owned pay telephone, etc., contracts to provide operator services to its clientele**~~)) <u>locations of call aggregators.</u>

See Ex. A-5, Tab 1 at 108 (WSR 91-13-078, Commission Docket No. UT 900726, Order R-345 (June 18, 1991)) (underlined language added by amendment, stricken language deleted by amendment) (emphasis added).

[5] Here the Court did not ask the Commission to create new law and policy; rather, it simply asked the Commission to apply its existing regulation to the facts of this case to determine the OSP.

11. In short, the 1991 amendment obviates any attempt by Complainants to now claim that liability arises *per se* because AT&T had contracts with the DOC, the "aggregator" for purposes of the regulation.

12. The Complainants' proposed standard for determining the OSP based on who has contracted with the call aggregator to provide operator services risks fundamentally upsetting the Commission's regulatory scheme. First, it would require AT&T to act as the OSP for calls that it never touches and to provide services to consumers who are not its customers. The regulations properly define the OSP as the party providing the connection from the aggregator to the local or long distance service provider because that party is in the best position to actually provide the required disclosures. It is the party that deals directly with the consumer placing the call, for every call. Here, that party is T-Netix. This case brings that sharply into focus, because the bulk of the calls placed from these prisons are local or intra-LATA, and AT&T has absolutely no role in those calls or their rates and never has any contact whatsoever with those consumers. In an aggregator environment such as a prison, the regulations recognize that someone other than the local or long distance provider will frequently be dealing directly with the called party. That is the entity actually providing the connection to the local or long distance service provider, not the local or long distance service provider itself.

13. Second, the Complainants' proposed test would create undesirable ambiguity as to who is the OSP. From a regulatory perspective, clarity is beneficial. If the identity of the OSP turns on a nebulous concept, such as finding legal or contractual responsibility, the Commission is inviting the type of finger-pointing seen in this case, because in an aggregator environment, there will frequently be multiple parties involved in transmitting a call from the calling to the called party. *See supra* fn. 4. In contrast, the plain language of the Commission's regulation

places that responsibility squarely on the party "providing the connection." And as a matter of sound regulatory policy, the Commission should not inject new ambiguity into the regulatory scheme.

B. COMPLAINANTS' THEORY IS NOT EVEN SUPPORTED BY THE DOC CONTRACTS ON WHICH THEY RELY.

14. Further, the Complainants are simply incorrect to the extent they attempt to argue that AT&T contractually bound itself to be "responsible" for providing operator services through its contracts with the DOC.[6] Indeed, the DOC contracts show that AT&T was *not* responsible for providing operator services and certainly was *not* responsible for providing the requisite "connection."

15. First, AT&T's March 1992 contract with the DOC (referred to in Complainants' Answer/Petition at ¶26) specified that AT&T would provide only interLATA and international service, and that the LECs, *not* AT&T, "shall install and maintain public telephone sets, all associated equipment, lines, call timing and call blocking software" and "shall also provide local and intraLATA telephone service *and operator service* to the [LEC's] Public Telephones." Ex. A-8, Tab 20 at 2-4 (March 16, 1992 Agreement Between State of Washington Dept. of Corrections and AT&T) (emphasis added). Similarly, the other DOC contracts involving the LECs, executed contemporaneously with the AT&T DOC contract, specified that the LECs, *not* AT&T, "shall provide . . . [d]elivery of interLATA traffic originating from the Public Pay Telephones to AT&T's Point of Presence over switched access facilities," "[c]ompletion of all

[6] As a threshold matter, this is not a breach of contract case involving liability arising from duties created and imposed by a contract. Complainants have sued for alleged statutory and regulatory violations. Accordingly, the relevant statute or regulation — not any contract — must create and impose the duties that were allegedly violated. Further, the Washington DOC is not suing AT&T or anyone else for alleged violations of any duties under those contracts and Complainants are not third-party beneficiaries to those DOC contracts who have standing to sue for any such alleged violations.

"0+ local and intraLATA calls from all Public Pay Telephones," and certain "live or mechanical operator announcements" and other services. *See, e.g.,* Ex. A-9, Tab 21 at 2-3 (March 16, 1992 Agreement between GTE and AT&T). Accordingly, under the DOC contracts, the LECs or someone retained by them (*i.e.*, T-Netix), *not* AT&T, were responsible for connecting calls from prisons to local or long-distance service providers and for providing the operator services for such calls.

16. Second, the 1995 amendment to AT&T's contract with the DOC, on which Complainants primarily rely, does not make AT&T the OSP. Ex. A-8, Tab 20 at Amendment 2 (1995 Amendment to Agreement Between State of Washington Dept. of Corrections and AT&T). It did not shift responsibility for connecting calls and providing the operator services from the LECs or someone retained by them (*i.e.*, T-Netix) to AT&T, nor did it make AT&T responsible for connecting calls. The 1995 amendment simply called for the addition of "call control features" at the prisons. While these "call control features," such as security filtering, might constitute a subset of the broader category of operator services, it is a logical fallacy (committed by Complainants) to conclude that the party responsible for providing "call control features" was the OSP. Most importantly, the provision of "call control features" did *not* include or involve providing the requisite "connection" under the Commission's OSP regulation. As discussed above, the DOC contracts already allocated that responsibility to the LECs or someone retained by them (*i.e.*, T-Netix). In addition, the provision of "call control features" did not constitute providing all operator services, which the DOC contracts also already allocated to the LECs or someone retained by them. Complainants mistakenly reason by backwards logic that (i) "call control features" equal operator services, (ii) the party responsible for providing "call control features" provides operator services, and therefore (iii) the 1995 amendment made

AT&T the "operator services provider." All three points are wrong. The ALJ's approach, by contrast, is logically sound: (i) the Commission's regulation defines the OSP as the party who provides the requisite "connection," (ii) the P-III platform undisputedly provided that connection, and therefore (iii) the owner of the P-III platform was the OSP.

17. Moreover, the 1995 amendment addressed only calls "carried by AT&T," which, consistent with the DOC contracts, were limited to interLATA and international calls. The LECs, not AT&T, were responsible for local and intraLATA calls, and the LECs were responsible for delivering interLATA and international calls to AT&T's point of presence. Accordingly, the 1995 amendment does not address that traffic allocated to and carried by the LECs — another reason why Complainants' reliance on it is misplaced.[7]

18. Alternatively, to the extent the meaning of the 1995 amendment has any bearing on the determination of who was the OSP under the Commission's regulation, that amendment is ambiguous and cannot be construed without providing the parties with a full opportunity to present evidence as to what it means. Summary determination cannot be entered based on an ambiguous contractual amendment.

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[7] Complainants' application of its proposed "responsibility" test would mistakenly render AT&T the OSP for intraLATA and local calls which AT&T never handled in any way. *See* AT&T's Petition for Administrative Review at ¶¶26-27. T-Netix, for its part, incorrectly suggests that only interLATA calls are at issue here. T-Netix's Response to AT&T's Petition for Administrative Review at ¶34. T-Netix has claimed that the LEC exemption means that recipients of intraLATA calls were not entitled to rate quotes. Ex. T-1HC, Tab 25 at ¶39 (T-Netix Original Motion for Summary Determination). Complainants disagree. Ex. C-1C, Tab 32 at ¶¶54-59 (Complainants' Memorandum in Opposition to T-Netix's Motion for Summary Determination and AT&T's Motion for Summary Determination). No court, however, has yet made a final, binding determination in that regard. Moreover, T-Netix's assertion ignores the obvious fact that the OSP, by the Commission's regulatory definition, provides the "connection to . . . long-distance or local services," thus covering local, intraLATA, and interLATA calls. For the purposes of determining who was the OSP, all of these types of calls are at least theoretically relevant regardless of whether Complainants actually received one type of call or another. In other words, T-Netix was the OSP for local calls, for intraLATA calls, and for interLATA calls. It provided the requisite "connection" for all of these types of calls.

C. THE UNDISPUTED EVIDENCE CONTRADICTS COMPLAINANTS' ASSERTION THAT AT&T HAD THE ABILITY TO CONTROL HOW T-NETIX PROVIDED OPERATOR SERVICES.

19. In yet another attempt to find AT&T liability where none exists, Complainants also contend — in the alternative in the event that AT&T does not have "responsibility" under the DOC contracts — that AT&T should be liable because it had the ability to "control" T-Netix's P-III platform. Complainants' Answer/Petition at ¶¶36-37. The undisputed evidence contradicts Complainants' assertion. For example, the August 2000 letter relied upon by Complainants (*id.* at ¶37) actually undercuts their position because, as Complainants recognized in their opposition to the motions for summary determination, "T-Netix was unwilling to do the work" to update its P-III platform in response to that letter. Ex. C-1C, Tab 32 at ¶25 (Complainants' Memorandum in Opposition to T-Netix's Motion for Summary Determination and AT&T's Motion for Summary Determination). Accordingly, AT&T *did not* and *could not* control T-Netix.

20. Similarly, Complainants rely on a 2001 amendment to a general contract between AT&T and T-Netix, which Complainants contend shows that AT&T was directing T-Netix's configuration of its P-III platform. Complainants' Answer/Petition at ¶36. Complainants' point disproves their theory: if this 2001 amendment gave AT&T the ability to somehow control T-Netix's operation of its P-III platform, then, necessarily, AT&T did not have that ability *before* the 2001 amendment.

21. Moreover, the Complainants' suggestion that the Commission should find a relationship based upon the alleged "control" existing between AT&T and T-Netix is tantamount to finding an agency relationship existed between AT&T and T-Netix.[8] The ALJ clearly

[8] *Washington v. Garcia,* 146 Wash.App. 821, 827, 193 P.3d 181 (2008) ("an agency relationship results from the manifestation of consent by [the principal] that [the agent] shall act

recognized, as should this Commission, that any questions of agency are beyond both the referral and the Commission's jurisdiction. Initial Order at ¶¶ 112, 116.

II. THE COMPLAINANTS ALSO MAY NOT SEEK TO IMPOSE LIABILITY ON AT&T INDIRECTLY THROUGH THE T-NETIX CONTRACT.

22. Undoubtedly because of concern about their ability (or inability) to establish that AT&T is the OSP either under the regulation or through its contracts with the DOC, the Complainants also attempt to renew an argument that they have already fully litigated up to an *en banc* hearing before the Washington Supreme Court and lost.

23. The ALJ correctly determined that Complainants are collaterally estopped from arguing that AT&T was obligated under RCW 80.36.520 to provide rate disclosures because it "contracted with" an OSP. Collateral estoppel requires (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. *Malland v. State, Dept. of Retirement Systems*, 103 Wash. 2d 484, 489, 694 P.2d 16, 21 (1985) (en banc); *Shoemaker v. City of Bremerton*, 109 Wash. 2d 504, 507, 745 P.2d 858, 860 (1987) (en banc). It is undeniable that Complainants were parties in the prior adjudications in this case, and therefore that element is satisfied. The other three elements of collateral estoppels are satisfied as well.

24. *The Issues are Identical.* In opposition to AT&T's motion for summary determination, Complainants argued that under the enabling statute, RCW 80.36.520, AT&T was responsible for rate disclosures because it "contracted with" the OSP. Ex. C-1C, Tab 32 at ¶¶32-39 (Complainants' Memorandum in Opposition to T-Netix's Motion for Summary

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on his behalf and subject to his control, with a correlative manifestation of consent by the [agent] to act on his behalf and subject to his control.") (citing *Moss v. Vadman*, 77 Wash.2d. 396, 463 P.2d 159 (Wash. 1969)).

Determination and AT&T's Motion for Summary Determination). Complainants made, and lost, the very same "contracting with" argument in the Superior Court, prior to the primary jurisdiction referral. Tab 34 at 1 (Oct. 10, 2000 Wash. Sup. Ct. Partial Decision on Summ. Judg.).

25. In response to the motions to dismiss filed by all the defendants (at that time, T-Netix, AT&T, and the three LECs: Qwest, Verizon, and CenturyTel), 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 in the enabling statute. Tab 35 at 11 (Pls.' Mem. in Opp'n to Defs.' Mots. to Dismiss (Wash. Sup. Ct. Sept. 22, 2000) (citing RCW 80.36.520)).

26. The Superior Court rejected Complainant's 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*."[9] Tab 34 at 1 (Oct. 10, 2000 Wash. Sup. Ct. Partial Decision on Summ. Judg. (emphasis added)). The Superior Court granted the defendants' dispositive motions, dismissed the claims against the three LECs and entered judgment in their favor. At the same time, the Superior Court dismissed certain claims against AT&T and referred the two

[9] The Superior Court's determinations that the legislature only intended to create a cause of action for violations of the Commission's regulations further demonstrates why the Commission should not delve into matters of contract interpretation that are outside of its regulatory expertise. The Superior Court found that any liability could *not* be based on matters "outside of the regulations." To the extent Complainants (or T-Netix) now suggest that AT&T should be held accountable based not on the Commission's interpretation of its own regulatory language, but rather, on matters outside the regulations, such a finding would be in direct violation of the Superior Court's holding.

questions currently pending before the Commission in this proceeding. Ex. A-3, Tab 36 (Nov. 8, 2000 Wash. Sup. Ct. Order Granting AT&T's Mot. to Dismiss); Tab 37 (Nov. 8, 2000 Wash. Sup. Ct. Order Granting Def. Qwest's Mot. to Dismiss).

27. Complainants appealed the Superior Court's decisions, among other things, pointing out the "contracting with" language. Ex. A-47, Tab 38 at 2, 10, 31 (Pls.' App. Reply Br. (Wash. Ct. App. 10/24/01)). The Appellate Court affirmed the Superior Court's judgment, holding that the enabling statute, the source of the "contracting with" language, did not create a cause of action. *Judd v. American Tel. and Tel. Co.*, 116 Wash. App. 761, 66 P.3d 1102 (2003). "The language of RCW 80.36.520 does not specifically require that telephone companies make contemporaneous disclosures." *Id.* at 770. Complainants then 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).

28. Because the "contracting with" argument that Complainants made, and lost, in the Superior Court is identical to their argument to the ALJ, the first element of the collateral estoppel doctrine is satisfied.

29. *There Was a Final Judgment on the Merits.* The Superior Court's dismissal of the claims against the three LECs, including its rejection of the Complainants' "contracting with" argument, was upheld after an appeal all the way up to an *en banc* panel of the Washington Supreme Court and is now a final judgment.

30. Complainants argue that AT&T cannot assert collateral estoppel because there has been no "final judgment" *of AT&T's claims*. The doctrine of collateral estoppel, or issue preclusion, bars a party from relitigating an issue on which there has been *a* final judgment on the merits. *Malland*, 103 Wash. 2d at 489. There is no requirement that there be a final

judgment in favor of the party asserting collateral estoppel. And there is no requirement that the previously-litigated issue involve all of the same parties. *State v. Dorsey*, 40 Wash. App. 459, 464 n.2, 698 P.2d 1109 (1985). The "final judgment" element of collateral estoppel is satisfied if there has been a final judgment on the merits entered against the party to be bound – in this case, Complainants. *Id.* The Superior Court decision on the LECs' claims, as affirmed by the Washington Supreme Court, is a final judgment against Complainants and the second element of the collateral estoppel doctrine is satisfied.

31. Complainants' argument is contrary to the law and to common sense. There is no dispute that Complainants would be collaterally estopped from raising their "contracting with" argument if AT&T had not been part of the state court action in which the courts rejected the "contracting with" argument and granted the LECs a final dismissal of their claims. Complainants argue, however, that they are not foreclosed from re-raising this argument against AT&T simply because AT&T *was* a party to the state court action, and because the courts found in favor of AT&T on the "contracting with" point. In other words, Complainants believe they can re-litigate the "contracting with" argument *because* AT&T already opposed this argument, and won, in state court. That is counter to the very notion of the collateral estoppel doctrine, which is intended to preclude a party that had an opportunity to litigate an issue and lost (in this case, Complainants) from relitigating the same issue again in a different context.

32. *Application of Collateral Estoppel Will Not Work an Injustice Against Complainants.* Finally, applying the rule of this case that OSP liability cannot be premised on contracting with an OSP will not work an injustice on Complainants. Complainants will have a remedy — it will merely be only against whichever party is found to be the OSP. And, Complainants cannot be heard to legitimately complain that there has been an "injustice" merely

because a party is deemed not liable to them.

33. Accordingly, the ALJ correctly determined that Complainants cannot re-litigate the claim that a party is liable because it contracted with an OSP.

III. THE COMMISSION SHOULD NOT FIND THAT T-NETIX OWNED THE P-III PLATFORM ONLY FROM JUNE 1996 THROUGH JUNE 1997.

34. Complainants ask for one additional, alternative form of relief. Specifically, they ask to amend the Initial Order to state that T-Netix was the owner of the P-III platform, and was therefore the OSP, between June 1996 and June 1997. Fundamentally, AT&T does not disagree that T-Netix was the OSP in that time period because it owned the platform then.

35. But, to be clear, AT&T's agreement that T-Netix owned the P-III platform in that period in no way is intended to imply that AT&T acquired the platform in June 1997, and therefore became the OSP at that time. In that regard, AT&T expressly incorporates herein the arguments raised in AT&T's Petition. In summary, the only evidence that the Complainants — and T-Netix — rely on in claiming that AT&T owned the P-III platform as of June 1997 is the 1997 Agreement. Ex. T-2C, Tab 19 (June 4, 1997 Agreement between AT&T and T-Netix). T-Netix, however, has repeatedly admitted that it owned the P-III platform throughout the relevant time period, and the 1997 Agreement, by its plain language, does not indicate anything to the contrary.

A. T-NETIX ADMITTED THAT IT OWNED THE P-III PLATFORM THROUGHOUT THE ENTIRE RELEVANT TIME PERIOD.

36. In the Initial Opinion, the ALJ misinterpreted a general commercial contract and found that the 1997 Agreement passed title of the P-III platform from T-Netix to AT&T. Initial Order at ¶134. But the Commission can readily determine ownership of the P-III platform without even interpreting the 1997 Agreement: T-Netix has repeatedly admitted that it owned

the platform.[10] *See* Ex. A-33, Tab 16 (T-Netix's Response to AT&T Data Request No. 7); Ex. A-32, Tab 17 (T-Netix's Amended and First Supplemental Response to AT&T's Data Request No. 7). AT&T offers the following background as an explanation for T-Netix's admissions.

37. In its initial Motion for Summary Determination, T-Netix claimed that it was "solely . . . an equipment and software provider" for the phone calls at issue. Ex. T-1HC, Tab 25 at ¶ 13.[11] In order to investigate this claim, AT&T propounded Data Requests seeking documents related to T-Netix's claimed sale of equipment and software. AT&T's Data Request 7 read:

> **Identify as specifically as possible** all equipment (including hardware and software) provided by T-Netix relating to telephone service at Washington state prisons during the relevant period, including for each particular piece of equipment the dates during which T-Netix provided the equipment, the Washington state prison at which the equipment was provided or for which it facilitated telephone service, **the person or entity that owned the equipment at the time,** and the person most knowledgeable about such equipment.

Ex. A-33, Tab 16 (T-Netix's Response to AT&T Data Request No. 7) (emphasis added). In response, T-Netix identified the P-III platform and admitted that it "owned the premise based equipment." *Id.*

38. AT&T's Data Request 15 asked T-Netix to:

> Produce all documents relating to the transfer from T-Netix to AT&T of ownership of any equipment relating to telephone

[10] In contrast, AT&T has always denied that it owned the P-III platform. *See* Ex. A-12, Tab 33 at ¶9 (December 14, 2004 Affidavit of Frances Gutierrez) ("As with the underlying LEC facilities, AT&T does not own or provide the operator interface between the called party and the collect call announcement or the access to rate quotes. These services were provided by T-Netix and the underlying intraLATA toll rates would have been dictated by the underlying LEC provider's tariffs.").

[11] AT&T reattaches Tab 25 to this brief to correct a printing error making the document attached as Tab 25 to AT&T's Petition difficult to read. The documents are otherwise identical.

> service at Washington state prisons during the relevant period, including any bills of sale, transfers of title, or sales receipts.

Tab 3 (T-Netix's Response to AT&T Data Request No. 15). Initially, T-Netix responded by claiming that it lacked sufficient information to determine whether it ever transferred the equipment to AT&T. *Id.* After the ALJ granted AT&T's motion to compel, stating that "evidence of [T-Netix's sale of the P-III platform to AT&T] would go far in proving that [T-Netix's] involvement was limited to non-OSP functions," T-Netix conceded that it did not have any documents evidencing any transfer of ownership. Tab 39 at ¶46 (Order 14 Granting AT&T's Motion to Compel); Tab 40 (T-Netix's Second Suppl. Resp. to Second Data Request 15) ("T-Netix responds that it has no responsive documents"). If the 1997 Agreement actually transferred ownership, as the ALJ mistakenly concluded and T-Netix now tries to claim, this response would have been false. T-Netix had the 1997 Agreement and recognized at the time that it did not transfer ownership. Instead, T-Netix claimed, at the time, that ownership of the P-III was irrelevant to the issue of which entity was an OSP. *Id.*

39. In further response to the ALJ's order granting AT&T's motion to compel, T-Netix amended its answer to Data Request No. 7, once again admitting that "it held legal title to the premise-based equipment." Ex. A-32, Tab 17 (T-Netix's Amended and First Supplemental Response to AT&T's Data Request No. 7).

40. T-Netix now argues that it "provided" the equipment as a sub-contractor to AT&T and that should be read as a transfer of ownership. That is wrong. T-Netix admitted that it owned the P-III equipment at all relevant times and operated it to transfer calls to the LECs. Ex. T-1HC, Tab 25 at ¶¶30-31 (T-Netix Original Motion for Summary Determination); Ex. T-13, Tab 41 at ¶3 (T-Netix's Amended Motion for Summary Determination). T-Netix cannot now disavow that admission and attempt to claim that its provision of services somehow equates to a

transfer of ownership thereby creating an issue of material fact on review of summary determination.

B. THE 1997 AGREEMENT DID NOT TRANSFER OWNERSHIP OF THE P-III PLATFORM TO AT&T.

41. Even if the Commission does consider the 1997 Agreement, its plain language does not transfer ownership of the P-III to AT&T. Instead, the 1997 Agreement merely formalized a process by which T-Netix could transfer equipment to AT&T if the parties subsequently wished to make such a transfer. The Agreement is titled "General Agreement For the Procurement of Equipment, Software, Services and Supplies Between T-Netix, Inc. and AT&T Corp." Ex. T-2C, Tab 19 (June 4, 1997 Agreement between AT&T and T-Netix). It refers to itself as a "General Purchase Agreement." *Id.* at 4. It is only a general framework setting forth the parties' rights, not a specific transfer of equipment.

42. If the 1997 Agreement was intended to convey ownership of the P-III platform to AT&T, which it was not, the contract would have identified the equipment and price specifically.[12] It did not. Instead the contract set up a purchase order arrangement whereby equipment *could be* purchased, but T-Netix produced no subsequent purchase order pursuant to this contract showing that AT&T purchased the platform because there wasn't one.

43. While the 1997 Agreement was legally sufficient to create general terms and conditions for the structure of AT&T's and T-Netix's nationwide relationship, it fails to provide

[12] To form a contract, "parties must assent to sufficiently definite terms." *Hoglund v. Meeks*, 139 Wash.App. 854, 870, 170 P.3d 37 (2007). "The essential elements of a contract are (1) the subject matter, (2) the parties, (3) the promise, (4) terms and conditions, and (5) consideration." *Trotzer v. Vig*, 149 Wash.App. 594, 605, 203 P.3d 1056 (2009). The 1997 Agreement does not define the subject matter of any sale, does not set forth a promise, and does not define any consideration (the price to be paid for any equipment). *See Miller v. Robinson*, 93 Wash.App. 1089, 1999 WL 65638 at *9 (Feb. 12, 1999) ("In a purchase and sale agreement, price is a material term.") (citing *Browning v. Howerton*, 92 Wash.App. 644, 966 P.2d 367 (1998)).

for the actual sale of any Washington equipment. The Agreement never even refers to the P-III platform or any other specific equipment. The Complainants recognize that the 1997 Agreement does not specifically transfer ownership of the P-III platform by avoiding discussion of the 1997 Agreement's precise language regarding what equipment, if any, is to be transferred or purchased. Complainants merely argue that "the 1997 agreement could apply" to a sale of the P-III, and point out that the 1997 Agreement "appears to be the only contract applicable to the equipment and services provided by T-Netix after 1995." Complainants' Answer/Petition at ¶32. Complainants arguments fail to prove the very point they ask the Commission to find. The mere fact that the 1997 Agreement is the only contract that *could possibly* have transferred ownership of the P-III platform does not establish that the 1997 Agreement *did in fact transfer* such ownership.

44. Furthermore, the 1997 Agreement required T-Netix to furnish AT&T with a bill of sale or purchase order to transfer title to any equipment sold under the terms of the Agreement. Ex. T-2C, Tab 19 at 6 (June 4, 1997 Agreement between AT&T and T-Netix). But T-Netix produced no bill of sale or any other documentation indicating that AT&T acquired the P-III platform. Tab 40 (T-Netix's Second Suppl. Resp. to Second Data Request 15). The 1997 Agreement does not, on its face, transfer title to the P-III platform to AT&T.

45. At the very least, the evidence AT&T cites in this section shows a material question of disputed fact as to whether AT&T obtained ownership of the P-III platform in June 2007. If that is the case, then the Commission need not resolve the ownership issue in the context of this referral. Rather, it may affirm that portion of the ALJ's holding determining that ownership of the P-III platform determines who is the OSP, and leave it to the trial court to decide that issue.

CONCLUSION

46. For all the foregoing reasons, AT&T respectfully requests that the Commission reject the Complainants' assertions that it may ignore the plain language of its regulation and adopt a newly created responsibility test. Rather, AT&T asks simply that the Commission apply its relevant OSP regulation, as written, to the undisputed facts and find that the OSP is, as the regulation states, the person or entity providing a connection to interstate or intrastate long distance service from a call aggregator location, and that entity is the one that owns the P-III platform.

Dated: May 26, 2010

SUBMITTED BY:

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, May 26, 2010, served this document upon all parties of record by e-mail and Federal Express overnight delivery at the e-mail addresses and mailing addresses listed below:

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Pursuant to WAC 480-07-145, I further certify that I have this day, May 26, 2010, filed MS Word and PDF versions of this document by e-mail, and twelve copies of this document by Federal Express, with the WUTC at the e-mail address and mailing address listed below:

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Pursuant to the Prehearing Conference Order 08 and Bench Request Nos. 5 & 6, I further certify that I have this day, May 26, 2010, provided a courtesy copy of this document, in MS Word, to ALJ Friedlander by e-mail at the following e-mail address: mfriedla@utc.wa.gov.

Dated: May 26, 2010

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