TAB 41

[Service Date: August 27, 2009]

BEFORE THE
WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION

COPY

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.'S AMENDED MOTION FOR SUMMARY DETERMINATION**

Respondent T-Netix, Inc. (T-Netix), through counsel, submits this amended motion for summary determination (Motion) in the above-captioned primary jurisdiction proceeding.

1. On July 28, 2005, T-Netix submitted a motion for summary determination (the Initial T-Netix Motion) in which it argued that respondent AT&T Communications of the Pacific Northwest, Inc. (AT&T) was the telecommunications carrier serving as and meeting the definition of Operator Service Provider (OSP) promulgated by the Washington Utilities and Transportation Commission (WUTC) for inmate calls originating from correctional institutions in Washington. Pursuant to ALJ Friedlander's invitation, in a telephonic status conference on August 24, 2009, T-Netix now submits this amended motion for summary determination to fairly reflect the post-discovery evidence of record and to ensure that the Commission has before it all

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material factual and legal considerations. This Amended Motion supplements the Initial T-Netix Motion and adopts and incorporates the Initial T-Netix Motion, in its entirety, by reference herein.

I. SUMMARY

2. The Initial T-Netix Motion, filed before any depositions and prior to significant discovery in this matter, argued that T-Netix "did not act as an operator service provider in this case — not for any of the institutions involved or the calls that Complainants challenge." Initial T-Netix Mot. at 1 ¶ 2. The facts compiled in discovery corroborate that conclusion and provide ample factual and legal support for a Commission determination that, as the common carrier providing all intrastate interLATA telecommunications services (including all "0+" collect calls) at the Washington Department of Corrections (DOC), AT&T alone was the OSP for those facilities for such calls. There are several parallel reasons for this determination, which the Commission can and should make as matter of law given the undisputed facts of record.

3. First, under the definition of OSP in WAC 480-120-021, the entity "providing a connection" to local or long-distance services from payphones is considered the operator service provider. At all of the correctional facilities in question, the facts make clear that the applicable T-Netix "platform" — a combination of hardware and software ***sold to AT&T*** pursuant to contract and operated by T-Netix ***on behalf of AT&T*** at the prisons — did not provide a "connection" for any calls. All inmate calls from these correctional institutions were sent directly by T-Netix to the central office of serving local exchange carrier (LEC) over plain old telephone service (POTS) lines ordered by T-Netix on behalf of AT&T; no switching or routing of inmate calls was performed by T-Netix. Thus, the LECs made the "connection" to local exchange services by switching local calls onto their own local exchange facilities/services and

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AT&T made the "connection" to long-distance services by switching interLATA calls, at its point of presence (POP), onto AT&T long-distance facilities/services.

4. Second, the OSP rules, themselves derived from earlier 1991 regulations governing so-called Alternative Operator Services (AOS) providers, are premised expressly on the precondition that an OSP is a provider of "telecommunications services," in other words a common carrier. WAC 480-120-021 (1991), attached as Exhibit 4 to AT&T's Amended Motion for Summary Determination (hereafter cited at "AT&T Exh. ___"). Because it is undisputed that AT&T, contractually and as a matter of telecommunications law, was the common carrier serving inmates for **inter**LATA collect calling from these institutions, only AT&T can be the OSP for those calls.[1] Whatever functions T-Netix and its "platform" performed are irrelevant to whether AT&T, as the entity holding itself out to the public as the carrier and the entity providing transmission of 0+ calls from the institutions, can escape its OSP responsibilities by virtue of a subcontract. The law is plain and settled that a reseller is responsible for regulatory compliance with respect to its own services, not any of its underlying facilities or services providers.

5. Third, a determination that T-Netix was the OSP for purposes of the verbal rate quote requirement cannot be squared with AT&T's compliance with the other OSP mandates — branding, customer service, etc. — or with the purpose of the Commission's regulations. For interLATA collect calls, branded (by T-Netix on behalf of AT&T) as AT&T calls, charged at rates set by AT&T and billed on behalf of AT&T through arrangements made contractually by AT&T with T-Netix, the rates Complainants argue were not disclosed **are indisputably**

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AT&T's collect calling rates. It makes no sense for AT&T to assume responsibility for branding calls, something that only the OSP is required to do, if it were in fact not acting as an OSP. Nor does it make any sense as a matter of regulatory policy to require T-Netix to disclose rates **set by another carrier over which it has no control** for payphone-originated calls.

6. Finally, Complainants have assumed that the verbal rate quote requirements of WAC 480-120-141 govern collect calls placed by inmates at correctional institutions. They do not. The WUTC adapted its rate disclosure rule from a Federal Communications Commission (FCC) requirement for verbal rate quote disclosures that applied only to services provided at "aggregator locations." But the FCC ruled in 1991 that prisons are not aggregators and thus, when it wanted to extend rate quote requirements to inmate services providers, passed a separate rule. The WUTC never did so here. Consequently, the 1999 verbal rate quote disclosure requirement has never governed payphones serving only correctional facility inmates, as here, and cannot lawfully be applied to the calls at issue in this proceeding.

III. EVIDENCE RELIED UPON

7. T-Netix relies upon the following evidence in support of its Motion that has either been filed with the Commission in this docket or was produced in discovery in this proceeding and is annexed hereto:

a. All affidavits, documents and other evidence relied on in support of the Initial T-Netix Motion, filed on July 28, 2005, including the evidence listed at page 2, ¶¶ 5(a)-5(o).

b. Declaration of Robert Rae [12/12/2008] (attached as Exh. 4).

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[1] Similarly, the LECs serving those institutions were the common carriers serving inmates for intraLATA collect calling, and, if the WUTC's OSP rules applied to them, only they could be the OSPs for those calls.

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c. Declaration of Robert Rae [8/5/2009] (attached as Exh. 6).

d. Excerpts from deposition transcript of Kenneth Wilson [8/7/2009] (attached as Exh. 5).

e. Excerpts from deposition transcript of Mark Pollman [8/10/2009] (attached as Exh. 3).

f. Excerpts from deposition transcript of Robert Rae [8/6/2009] (attached as Exh. 2).

g. Deposition Exhibit 77, List of Opinions of Kenneth Wilson (attached as Exh. 1).

h. Letter from WUTC Secretary to Interested Persons, Docket No. 900726 (dated April 30, 1991) (attached as Exh. 10).

i. Billed Party Preference for InterLATA 0+ Calls, Second Report and Order on Reconsideration, CC Docket No. 92-77, 13 FCC Rcd. 6122 (1998) (attached as Exh. 7).

j. Policies and Rules Concerning Operator Service Providers, Notice of Proposed Rulemaking, 6 FCC Rcd 2744, 2752 (1991) (attached as Exh. 11).

k. In the Matter of Amending WAC 480-120-021, 480-120-106, 480-120-141 and Adopting WAC 480-120-143, Order R-345, Docket No. UT-900726 (1991), WSR 91-13-078 (AT&T Exh. 4).

l. In the Matter of Amending WAC 480-120-021, 480-120-138 and 480-120-141; and repealing WAC 480-120-137, 480-120-142 and 480-120-143, Order R-452, Docket No. UT-970301 (1998), WSR 99-02-020 (AT&T Exh. 5).

m. AT&T's Comments on proposed rules in Docket No. U-88-1882-R, dated December 21, 1988 (attached as Exh. 8).

n. Clarification Comments from Paul Curl, WUTC, Docket No. UT-900726, dated October 1, 1991 (attached as Exh. 9).

IV. BACKGROUND

8. Complainants Sandy Judd and Tara Herivel sued AT&T and T-Netix, among other parties, claiming they received inmate-initiated collect phone calls from Washington prisons that lacked the audible rate disclosures required by the Commission. The trial court

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dismissed three of the defendants (Qwest, Verizon and CenturyTel) because they were LECs exempt from the disclosure requirements. The Court of Appeals and the Washington Supreme Court affirmed. *Judd v. Am. Tel. & Tel. Co.*, 116 Wn. App. 761, 66 P.3d 1102 (2003), *aff'd*, 152 Wn. 2d 195, 95 P.3d 337 (2004).

9. Later, the trial court entered summary judgment for the remaining defendants and vacated its referral of certain issues to the Commission under the doctrine of primary jurisdiction. The Court of Appeals, in an unpublished opinion, reversed and remanded the case to the trial court with directions to reinstate the primary jurisdiction referral for the issues originally before the WUTC, namely (1) whether AT&T or T-Netix were OSPs, and (2) whether they violated the WUTC disclosure regulations. *Judd v. Am. Tel. & Tel. Co.,* 2006 WL 3720425 (Wash. App. Div. 1, December 18, 2006). This proceeding was initiated as a result of reinstatement of the referral.

10. The relevant factual background regarding the AT&T/T-Netix relationship and the provision of operator services at the Washington DOC facilities is set forth in Section IV (¶¶ 7-12) of the Initial T-Netix Motion.

V. ARGUMENT

A. UNDER THE UNDISPUTED FACTS, T-NETIX WAS NOT THE OSP FOR WASHINGTON DOC INMATE CALLS BECAUSE T-NETIX DID NOT "PROVIDE A CONNECTION" FOR ANY OF THE CALLS COMPLAINANTS RECEIVED

11. There is no dispute regarding the configuration and functionality of the T-Netix "P-III" platform, the equipment provided by T-Netix to AT&T at the four correctional institutions in question, or the relationship of AT&T to T-Netix. T-Netix sold software, equipment and maintenance services "to" AT&T pursuant to a 1997 contract. Initial T-Netix

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Mot. at ¶¶ 17-20; Depo. Exh. 77 [Wilson opinion #5] (Exh. 1). T-Netix was solely a subcontractor to AT&T, having no direct or independent relationship to the Washington DOC or to either the calling parties (inmates) or called parties for collect calls placed from these institutions. The P-III platform was interconnected with the PSTN by a series of POTS lines, provisioned by T-Netix on behalf of AT&T, and performed no routing or switching functions whatever. Initial T-Netix Mot. at ¶¶ 22-24; Rae Depo. Tr. at 289:4 – 291:8 (Exh. 2); Pollman Depo. Tr. at 89:22 – 90:4, 91:3-9 (Exh. 3). At all times, T-Netix maintained a 1:1 ratio between station lines (to inmate phones) and trunks to the LEC, acting merely as a gate for approval of the calls. Rae Depo. Tr. at 219:22 – 220:14, 235:11-22, 289:4 – 290:10 (Exh. 2).

12. The Commission's definition of OSP in WAC 480-120-021 (1999) (identical in substance to the earlier definition of AOS provider in WAC 480-120-021 (1991)) provides in full:

> 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: Automatic completion with billing to the telephone from which the call originated, or completion through an access code used by the consumer with billing to an account previously established by the consumer with the carrier.

(Emphasis added) (AT&T Exh. 4 and 5).

13. Under the operative language of the first sentence of this definition, T-Netix could not have been the OSP for inmate collect calls from the four Washington DOC institutions because T-Netix did not "provide a connection" to either local or long distance services. The

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rule does not define "connection," which is not a recognized term in the telecommunications industry. Rae Decl., Dec. 12, 2008, ¶ 9 (Exh. 4). However, T-Netix did not provide switching, routing, access or transport for any of the local exchange or intrastate interLATA calls originating from these institutions. *Id.* Moreover, as T-Netix expert Robert Rae explained:

> As corroborated by the Schott Supplemental Affidavit, a call was placed by an inmate, processed by the T-Netix platform (essentially holding the voice path while the call was verified and the called party queried for collect call acceptance), outpulsed to a LEC trunk and thereafter switched at the LEC central office to connect either to (a) a local or intraLATA called party, via the LEC's local or intrastate toll networks, respectively, or (b) LEC intrastate switched access services purchased by AT&T and thereafter to AT&T's point-of-presence (POP). *Id.* For interLATA calls, the call was then switched at the AT&T POP to connect to AT&T's long-distance network and then to a terminating LEC via the LEC's intrastate switched access service (typically at the tandem in the serving wire center) and finally switched by that terminating LEC to the called party's line. In this call flow, the entity that "connects" a collect call to local and long-distance services (WAC 99-02-020) is in every case the LEC or AT&T, so reviewing the engineering details underlying any of the T-Netix platforms, or their quantity and provider of trunks, facilitating this call flow will tell the Complainants and this Commission nothing of relevance.

Id. ¶ 8.

14. The opinions offered by the purported experts testifying on behalf of Complainants (Kenneth Wilson) and AT&T (Mark Pollman), in contrast, are based on a test — specifically, which party performed "operator services functions" — that is neither drawn from nor consistent with the Commission's OSP definition. Wilson Depo. Tr. 64:3-19, 158:5 – 159:16, 245:18 – 246:18 (Exh. 5); Pollman Depo. Tr. 61:23 – 62:25 (Exh. 3). Further, Mr. Wilson testified that a call is "connected" within the meaning of WAC 480-120-021 only when it is terminated to the called party and an "end-to-end connection" established. Wilson Depo. Tr.

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213:9-12, 227:22 – 228:14, 236:16 – 237:7, 245:2-7 (Exh. 5). Neither of these positions can possibly be correct. The former is wrong because (a) the rule in question applies to operator **service** providers, not operator **functionality** providers, and (b) it bears no textual or logical relationship to the definition's "providing a connection" criterion. The latter is wrong because OSPs remain OSPs even for incomplete, busy, and other call attempts, whether or not an end-to-end connection is established to the called party. Indeed, under Mr. Wilson's approach, there could be ***no*** OSP for incomplete 0+ call attempts from payphones, because no end-to-end connection is ever established by any entity, even though the Commission's substantive rules expressly prohibit OSPs from billing for uncompleted calls. *See* WAC 480-120-141(5)(b) (1999).

15. Moreover, there is no dispute as to when — putting aside Complainants' unsupported and *sui generis* end-to-end connection theory — an interLATA call was "connected to . . . long-distance services" in this case. As Mr. Pollman conceded, the first possible point at which an interLATA call from the prisons was "connected" to long-distance services was when the LEC delivered the call to AT&T, via intrastate switched access services ordered by AT&T from the LEC as a carrier, at AT&T's POP. Pollman Depo. Tr. 57:1-22, 60:11 – 61:7 (Exh. 3). Therefore, as Mr. Rae explained: "[f]or interLATA traffic, the question for the Commission to resolve is whether the LEC (by 'connecting' to AT&T's switched access services) or AT&T (by 'connecting' to its long-distance network) connected such calls to 'long-distance services.'" Rae

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Decl., Aug. 5, 2009, ¶ 9 (Exh. 6). Either way, T-Netix was not and could not have been the OSP for interLATA calls pursuant to the definition set forth in WAC 480-120-021.[2]

B. UNDER THE UNDISPUTED FACTS, T-NETIX WAS NOT THE OSP FOR WASHINGTON DOC INMATE CALLS BECAUSE T-NETIX DID NOT SERVE AS THE COMMON CARRIER PROVIDER OF "TELECOMMUNICATIONS SERVICES"

16. The central purpose of the WUTC's OSP rules, the history of OSP regulation and the language of the regulations themselves all lead to the conclusion that to be an OSP an entity must be a common carrier, in other words a "telecommunications company" that provides "telecommunications service," as those terms are defined under state law. An OSP must also be the entity that contracts with the call aggregator. T-Netix cannot be considered to be an OSP because it does not satisfy either of these requirements; AT&T was the common carrier for all interLATA calls from the Washington DOC institutions, both as a matter of contract and telecommunications law, and it contracted with the DOC, which Complainants will argue is the aggregator in this case[3].

17. The objective of OSP regulation has always been to protect consumers from the high charges formerly assessed by some carriers for calls from public phones at aggregator locations. The concern is with carriers contracting with aggregators to be designated as the presubscribed IXC for long distance calls from the payphones and charging excessive fees due to their preferred status. The policy problem was described by the FCC in its *Billed Party*

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[2] Similarly, T-Netix was not and could not have been the OSP for intraLATA calls, because the LEC performed the function of "connecting" to LEC-carried intraLATA long distance services.

[3] As discussed below, as a matter of law, a prison is not a call aggregator for inmate phones.

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Preference for InterLATA 0+ Calls, Second Report and Order on Reconsideration, 13 FCC Rcd. 6122 (1998), as follows:

> OSPs generally compete with each other to receive 0+ traffic by offering commissions to payphone or premises owners on all 0+ calls from a public phone. In exchange for this consideration, the premises owners agree to designate the OSP as the "presubscribed" IXC or PIC serving their payphones. Many OSPs using this strategy agree to pay very high commissions to both premises owners and sales agents who sign up those premises owners and claim, as a consequence, they must assess very high usage charges to consumers placing calls from payphones. While this process has generated added revenues for the premises owners and sales agents, it forces callers to pay exceptionally high rates.

Exh. 7).

18. The FCC and the WUTC both adopted a number of protections for consumers that were designed to address this concern. In its 1991 rules, which mirrored earlier FCC regulations, the WUTC required AOS providers (as a part of any contract with an aggregator) to require aggregators to post a notice advising that services provided on the phone may be provided at rates that are higher than normal, identifying the AOS provider and its telephone number, and disclosing that, among other things, the caller has the right to access other carriers from payphones. WAC 480-120-141(4) (1991) (AT&T Exh. 4). The AOS provider was required to withhold payment of commissions to any aggregator that blocked access to other IXCs. WAC 480-120-141(2)(a) (1991) (AT&T Exh. 4). The AOS was also required to have the aggregator post a notice stating whether a location surcharge was imposed for calls from the phone, the amount of the surcharge and the circumstances when it would apply, to identify or "brand" itself

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at the beginning of a call and to disclose the charges for the call upon request.[4] WAC 480-120-141(4)(d) (1991) (AT&T Exh. 4).

19. In its 1998 Order implementing the verbal rate quote requirement (effective in 1999), Order No. 452, Docket No. UT-970301, at 8 (Dec. 29, 1998), the Commission "adopt[ed] the FCC's verbal disclosure requirement on an intra-state basis." (AT&T Exh. 5) The federal scheme specifically defines a "provider of operator services" as "any **common carrier** that provides operator services or any other person determined by the Commission to be providing operator services." 47 U.S.C. § 226(a)(9) (emphasis added). Likewise, the 1998 FCC rule imposing a rate disclosure requirement on providers of inmate operator services states that a "[p]rovider of inmate operator services means any **common carrier** that provides outbound interstate, domestic, interexchange operator services from inmate telephones." 47 C.F.R. 64.710(b)(4) (emphasis added). As a matter of law, the FCC provision that OSPs are common carriers must be deemed incorporated into the WUTC's definitions due to its "adoption" of the FCC rule.[5]

20. This conclusion is equally supported, without regard to the FCC's approach, by the language of the second sentence of WAC 480-120-021. There, the WUTC makes clear that the term "operator service provider" applies to a common carrier that provides calling service to end users at aggregator locations. WAC 480-120-021, both the 1991 and 1999 versions, defines

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[4] In later rules adopted by FCC and mirrored by the WUTC, at issue here, additional protections were added including a requirement that OSPs disclose orally to payphone callers how to obtain the rates for a operator-assisted call before the call is connected. It is the latter 1999 mandate that Complainants allege was violated in this proceeding.

[5] *State v. Bobic*, 140 Wash. 2d 250, 264 (2000); *Everett Concrete Products, Inc. v. Department of Labor & Industries*, 109 Wash. 2d 819, 823-24 (1988); *State v. Carroll*, 81 Wash. 2d. 95, 109 (1972); *State v. Tranchell*, 164 Wash. 71, 75 (1932); *Peoples State Bank v. Hickey*,

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"operator services" as "any intrastate **telecommunications service** provided to a call aggregator location that **includes as a component** any automatic or live assistance to a consumer to arrange for billing or completion, or both, of an intrastate telephone call." (Emphasis added). Accordingly, to be a provider of operator services subject to the WUTC's rules, an entity must provide an intrastate "telecommunications service" that includes the assistance of an operator to arrange for billing or completion of an intrastate call. "Telecommunications" is defined in RCW 80.04.010 as "the transmission of information" and "telecommunications company" is defined as "every corporation, company, . . . operating or managing any facilities used to provide telecommunications for hire, sale, or resale to the general public within this state." Thus, an OSP — which of course provides "operator services" — in Washington is an entity providing an intrastate transmission service to the general public that includes operator assistance as a component.

21. T-Netix cannot be considered to be an OSP with respect to the correctional facilities at issue in this case for three basic reasons. First, T-Netix did not operate as a common carrier or telecommunications company at any of those facilities, because it did not offer a "telecommunications" services (*i.e.*, transmission) to the public, let alone any end user. The incumbent LECs and AT&T were the entities offering transmission services, *i.e.*, local and intraLATA long-distance calling in the case of the LECs and interLATA long-distance calling in AT&T's case. Second, T-Netix did not contract with the aggregator.[6] Rather, AT&T contracted with the

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55 Wash. App. 367, 371 (1989); *McClellan v. Sundholm*, 89 Wash. 2d 527, 531 (1978); *State v. Williams*, 17 Wash. App. 368, 371 (1977).

[6] The WUTC's 1989 rules defined AOSCs as those companies "with which a hotel, motel, hospital, campus, or customer-owned pay telephone, etc., contracts to provide operator services to its clientele." The reference to "contracts" was dropped from the definition in later versions of the rule, but other provisions of those later rules make it clear that the Commission

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Washington DOC, and that contract expressly obligates AT&T "to provide '0+' interLATA and international service" to inmate phones at the prisons. AT&T/DOC Contract, Mar. 16, 1992, at 2 (AT&T Exh. 7). Third, T-Netix supplied equipment and services to AT&T; the LECs and AT&T provided the long-distance services of which operator services were a component. Depo. Exh. 77 [Wilson opinion #5] (Exh.1). As such, under this Commission's precedent, AT&T was reselling the services it purchased from T-Netix to its own end users (called parties), which makes AT&T and not T-Netix the common carrier for the operator services at issue.

22. AT&T has admitted as much in the past. For instance, in December 21, 1988 comments in Docket No. U-88-1882-R (Exh. 8), AT&T acknowledged that the WUTC's AOS rules applied to carriers. Addressing "the fundamental question of how to define an Alternative Operator Service (AOS) provider and, hence, to whom the proposed rules should apply" (AT&T Comments, at 1), AT&T stated that the incentive for the Washington Legislature to pass what is now RCW 80.36.520 was

> the ongoing concern that the public, without adequate notice, is often being charged higher rates for operator assisted and card interexchange calls than they have come to expect from their local exchange company and presubscribed interexchange carrier when calls are made from an institution (or aggregator) such as a hotel, hospital or university. This would occur when the aggregator enters into an agreement with an AOS provider, whose rates may be different than those which end-user customers are usually charged by their presubscribed carriers, to provide interexchange service to that aggregator and its patrons.

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considered AOSCs/AOS providers as the entities that contracted with the call aggregator. For example, an AOS's "customer" was defined as "the call aggregator, i.e., the hotel, motel, hospital, prison, campus, pay telephone, etc., **contracting with an AOS for service**." WAC 480-120-141 (1991) (emphasis added). The rules also required AOS providers to assure its customers (aggregators) complied fully with contract provisions specified in the rules and withhold payment to aggregators if they did violate them. WAC 480-120-141(1), (1)(a) (1991). An AOS couldn't do that if it wasn't the entity contracting with the aggregator.

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AT&T Comments at 2. AT&T went on to explain that:

> AOS providers are resellers who specialize in operator handled long distance calls. AOS providers enter into contracts with the aggregator industry, *i.e.* hotels, hospitals, privately owned pay telephone owners, for the purpose of providing operator assisted calls to the telephone customers of the aggregator.

Id. at 2-3. These companies have an incentive to maximize revenue for the aggregator and themselves. *Id.* at 2-3. On the merits, AT&T argued that "if the Commission is concerned that a facilities-based carrier such as AT&T or US West Communications would attempt to charge a unique rate to telephone customers of a particular aggregator — beyond the rate offered to the general pubic — AT&T suggests that the definition now in WAC 480-12-021 and WAC 480-120-141 remain." *Id.* at 4. That is just what the WUTC did, left the definition alone.

23. Significantly, in a clarification notice to all parties in Docket No. UT-900726, dated October 1, 1991, the WUTC Secretary advised it was a Staff consensus that, among other things, "[a]n AOS company is any which offers service through aggregators — service as defined in the rule. In a non-equal access setting, AT&T is an AOS company although the person who controls the instrument has no other option for presubscribed AOS service." (Exh. 9) In other words, to be an AOS provider one must be an entity that offers a telecommunications service and the entity that contracts with an aggregator. Also, since a state correctional facility is essentially the equivalent of a non-equal access setting because only a single interLATA provider, AT&T, can be accessed, AT&T is by Staff consensus an AOS provider.

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C. A DETERMINATION THAT T-NETIX WAS THE OSP CONFLICTS WITH THE COMPLIANCE BY AT&T, IN AT&T'S OWN NAME, WITH THE OTHER SUBSTANTIVE OSP OBLIGATIONS IMPOSED UNDER THIS COMMISSION'S RULES

24. A determination that T-Netix was the OSP for purposes of the verbal rate quote requirement cannot be squared with AT&T's compliance with the other OSP mandates — branding, customer service, *etc.* — or with the purpose of the Commission's regulations. For interLATA collect calls, branded (by T-Netix on behalf of AT&T) as AT&T calls, charged at rates set by AT&T and billed on behalf of AT&T through arrangements made contractually by AT&T with T-Netix, the rates Complainants argue were not disclosed are indisputably AT&T's collect calling rates. Wilson Depo. Tr. at 151:7-14 (Exh. 5). It makes no sense for AT&T to assume responsibility for branding calls, something that only the OSP is required to do[7], if it were in fact not acting as an OSP. Nor does it make any sense as a matter of regulatory policy to require T-Netix to disclose rates set by another carrier for payphone-originated calls when it is neither responsible for establishing nor has any control over those rates.

25. The approach advocated by Complainants and AT&T would make large portions of the Commission's OSP regulations a nullity. For instance, under these parties' approach, an OSP can brand traffic from payphones with the name of whatever carrier it desires as a business matter. Wilson Depo. Tr. at 134:18 – 136:22; 168:6-17 (Exh. 5). Since the purposes of the rules are to assure the identification and accountability of parties offering operator services to the public, segregating the branding requirement from the serving OSP is irrational, as end users would have no way to discern which carrier is responsible for service to payphones. Furthermore, since the objective of the rate quote disclosure requirement is obviously to guaranty

[7] WAC 480-120-141(5) (1991) and WAC 480-120-141(4) (1999).

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that **the OSP's rates** can easily be known to consumers before payphone-originated calls are accepted, divorcing OSP status from the entity whose rates are applied (and thus disclosed) is equally absurd.

26. Not unsurprisingly, therefore, neither AT&T nor Complainants can explain how T-Netix could as a matter of law be the OSP for purposes of the rate quote mandate yet AT&T be named the OSP for calls "branded" from the same phones. As even Mr. Wilson concedes, there can only be one OSP for any call from a payphone. Wilson Depo. Tr. at 56:22 – 57:16 (Exh. 5). Consequently, AT&T's assumption of responsibility for compliance with the branding requirement (directing T-Netix to brand the calls in AT&T's name) and for pricing of the calls, among other things, means that AT&T was the OSP. The result of any other conclusion would be chaos, in that some of the OSP regulations would apply to one party for some calls while other portions of those same regulations would apply to a different entity for the very same calls. There is nothing in the Commission's rules, orders or jurisprudence to sanction such a result.

D. REGARDLESS OF WHICH OF T-NETIX OR AT&T WAS THE OSP, COMPLAINANTS CANNOT PREVAIL BECAUSE THE RATE QUOTE REGULATIONS DO NOT APPLY AS A MATTER OF LAW TO INMATE PAYPHONE CALLS

27. Complainants have assumed that the verbal rate quote requirement of WAC 480-120-141 governs collect calls placed by inmates at correctional institutions. It does not. The WUTC adapted its rate disclosure rule from an FCC requirement for verbal rate quote disclosures that applied only to services provided at "aggregator locations." But the FCC decided in 1991 that prisons are not aggregators and thus, when it wanted to extend rate quote requirements to inmate services providers, the FCC passed a separate rule. The WUTC never did so here. Consequently, the 1999 verbal rate quote disclosure requirement has never governed

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payphones serving only correctional facility inmates, as here, and cannot lawfully be applied to the calls at issue in this proceeding.

28. After the break-up of the Bell System in the 1980s, the Washington Legislature enacted statutes to protect consumers of calls provided by alternative operator services companies. RCW 80.36.520. The statute defines an "alternate operator services company" as "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." *Id.* Both the statute and the legislative history are silent as to the inclusion of correctional institutions with regard to inmate-only phones. The statute directs the WUTC to make rules that:

> 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.

Id.

29. As is clear from the Commission's definition, an OSP must provide a "connection to" long-distance services "from locations of call aggregators." WAC 480-120-021. The term "call aggregator" was defined (now and in 1991) in the WUTC's rules as:

> any corporation, company, partnership, or person, who, in the ordinary course of its operations, makes telephones available to the public or to users of its premises for telephone calls using a provider of operator services, including, but not limited to, hotels, motels, hospitals, campuses, and pay phones.

WAC 480-120-021.

30. These WUTC rules mirror the federal Telephone Operator Consumer Services Improvement Act of 1990, 47 U.S.C. § 226 ("TOCSIA"), and the federal rules adopted by the

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FCC to implement it.[8][9] That federal act defines "aggregator" as "any person that, in the ordinary course of its operations, makes telephones available to the public or to transient users of its premises, for interstate telephone calls using a provider of operator services." 47 U.S.C. §226(a)(2). It defines "operator services" as:

> any interstate telecommunications service initiated from an 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 interstate telephone call through a method other than
>
> (A) automatic completion with billing to the telephone from which the call originated; or
>
> (B) completion through an access code used by the consumer, with billing to an account previously established with the carrier by the consumer.

47 U.S.C. § 226(a)(7). It also provides that the term "provider of operator services" means "any common carrier that provides operator services or any other person determined by the Commission to be providing operator services." 47 U.S.C. § 226(a)(9). The FCC's rules adopted the same definitions contained in the Act, 47 U.S.C. § 226. *See* 47 C.F.R. § 708(b)("aggregator"), (g)("operator services"), (i)("provider of operator services").

31. In its Order adopting the rules, the FCC held that "the definition of 'aggregator' does not apply to correctional institutions in situations in which they provide inmate-only

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[8] 47 C.F.R. §§ 64.703-708.

[9] It is clear that the WUTC and its Staff had the FCC's rules in mind as the WUTC's rules were being developed. In fact, Paul Curl, Secretary of the WUTC, sent a letter to Interested Persons participating in the rulemaking docket which contained a summary sheet comparing the principal provisions of the recent FCC rules with those of the WUTC's draft rules. Letter, dated April 30, 1991, to Interested Persons, Docket No. 900726, attached as Exhibit 10. Also the Commission in its order adopting the 1991 rules stated "The definition of operator services is changed to more closely reflect federal definitions, and to emphasize that the alternative operator services, AOS, rules apply only to operator services, as defined." In the Matter of Amending

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phones." *Policies and Rules Concerning Operator Service Providers*, Report and Order, 6 FCC Rcd 2744, 2752 (1991) (Exh. 11). Correctional institutions are not aggregators with respect to inmate payphones because they do not make these phones available to the "public" or to "transient users," but rather only to persons who are involuntarily incarcerated. The commenters pointed out that administrators of correctional institutions typically require that inmate-only phones allow only collect calls and that phone numbers for certain individuals such as judges, witnesses, and jury members be blocked. The FCC explained:

> We are persuaded that the provision of such phones to inmates presents an exceptional set of circumstances that warrants their exclusion from the regulation being considered herein. Accordingly, inmate-only phones at correctional institutions will not be subject to any requirements under the Act or the Commission's rules. Phones provided for the use of the public, however, such as those in visitation areas, would be covered by the Operator Services Act and the rules.

Id. (footnotes omitted).

The FCC also held that the carrier providing service to inmate-only phones at correctional institutions would not fall under the definition of "provider of operator services" as such service is not provided at an "aggregator" location with respect to inmate-only phones. *Id.* at 2752, ¶15. A carrier that provides service to phones at correctional institutions that are made available to the public or to transient users would have to comply with the requirements of the FCC's rules and TOCSIA. *Id.*, 6 FCC Rcd at 2752 n.30.

32. It is well-established in Washington that when a statute or rule is identical or substantially similar to a federal law, the Washington law will carry the same construction and the same interpretation as the federal law. *See, e.g.*, *State v. Bobic*, 140 Wash. 2d 250, 264

WAC 480-120-021, 480-120-106, 480-120-138, and 480-120-141 and Adopting WAC 480-120-

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(2000) ("Because our law was taken 'substantially verbatim' from the federal statute, it carries the same construction as the federal law and the same interpretation as federal case law."); *State v. Williams*, 17 Wash. App. 368, 371 (1977) ("When a state borrows federal legislation it also borrows the construction placed upon such legislation by the federal courts."). Therefore, the WUTC's 1991 disclosure rules do not apply to inmate calling services — and **neither** T-Netix nor AT&T are OSPs under those rules with respect to inmate services at the Washington DOC institutions — because inmate calling service was not provided at an "aggregator" location.

33. In 1998 the FCC modified its position and decided that providers of 0+ service to inmate-only phones should verbally disclose the rates for inmate operator services.[10] However, when it did so the FCC did not change its earlier determination that correctional institutions are not aggregators for inmate-only phones. Instead, the FCC adopted a separate disclosure rule that applied specifically to inmate calling services, requiring carriers serving inmate phones to orally identify themselves to the party to be billed and orally disclose to such party how, without having to dial a separate number, it may obtain the charge for the call prior to deciding whether to accept the call. *Id.* ¶ 60. The FCC regulation specifically addresses identification and rate disclosure requirements for providers of inmate operator services. *See* 47 C.F.R. § 64.710.

34. When the WUCT adopted its oral rate quote disclosure requirement in 1998, it did not change the definition of "aggregator." Unlike the FCC, however, the Commission did not adopt a rule specifically addressing rate disclosure obligations of providers of inmate services. Accordingly, there is no change from the previous situation; *i.e.*, the WUTC's rules do not apply to providers of operator services to inmate-only phones, and those providers have no rate

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143, Order R-345, Docket No. UT-900726 (1991), WSR 91-13-078, at 106 (AT&T Exh. 5).

disclosure obligations under the WUTC's rules. While the WUTC's mandate does make reference to "prison phones" in connection with other aggregator locations, as a matter of law that reference is only to the provision of phones for use of the public or transient users, such as in visitation areas. If the WUTC's rules were construed so that providers of 0+ service to inmate-only phones were considered to be OSPs, as the Complainants contend, many of the requirements, such as Billed Party Preference, which the FCC considered inappropriate for prison inmates because of security concerns would automatically apply to them. Such a result would be nonsensical and would put the WUTC in conflict with federal policy and the documented security needs of prison authorities.

CONCLUSION

For the reasons stated above and in the Initial T-Netix Motion filed on July 28, 2005, T-Netix respectfully requests the entry of an Order granting summary determination in favor of T-Netix.

DATED this 27th day of August, 2009.

T-NETIX, INC.

By: ______________________

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[10] *Billed Party Preference for InterLATA 0+ Calls*, Second Report and Order on Reconsideration, CC Docket No. 92-77, 13 FCC Rcd. 6122 (1998) (Exh. 7).

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CERTIFICATE OF SERVICE

I hereby certify that I have this 27th day of August, 2009, 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 (4), 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 27th day of August, 2009, 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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