[Service Date: May 26, 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 COMPLAINANTS' PETITION FOR ADMINISTRATIVE REVIEW**

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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 21, 2010, by Complainants ("Complainants' Petition"). Complainants are attempting improperly through their Petition to relitigate well-settled matters and to expand the scope of this referral to include questions of statutory interpretation. Complainants' Petition has no place in this proceeding and therefore should be denied.

SUMMARY

1. A response is warranted as to the second and third issues that Complainants present for review.[1] These issues are either outside the scope of this proceeding or seek to re-open issues that have long been adjudicated and decided, and as such the Commission need not consider them. Complainants' second issue regards the means by which AT&T provided operator services prior to obtaining the T-Netix P-III Platform in 1997. Yet the only calls which occurred prior to 1997 were intraLATA calls that, according to the Washington Court of Appeals, were expressly exempt from WAC 480-120-141. As such, the question of who was the Operator Services Provider ("OSP") prior to the 1997 Contract is irrelevant and moot.

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[1] Complainants' first issue is that ALJ Friedlander should have focused on the issue that AT&T "directed" T-Netix (Initial Order, Finding of Fact 7) with regard to the P-III Platform. Complainants' Petition ¶ 43. Complainants assert that the finding that AT&T owned the P-III Platform (Initial Order Finding of Fact 4) is not dispositive. *Id.* Yet Complainants do not seek reversal of Finding of Fact 4 and do not assign error to it. T-Netix thus does not address it, other than to reiterate that Finding of Fact 7 presents independent grounds to affirm the Initial Order, regardless of the ownership issue. T-Netix, Inc. Response to AT&T Petition for Administrative Review ¶ 22. Complainants' fourth issue regards Finding of Fact 8 which accurately states that there is not "sufficient evidence" to find that any violation of WAC 480-120-141 occurred. Complainants' Petition ¶ 64. The Commission has no need to address that challenge, because the Initial Order plainly states that this proceeding will continue in order to reach this question, Initial Order ¶ 148, and complete the primary jurisdiction referral. The fact that evidence of a violation has not yet been adduced in no way prejudices, let alone disposes of, this second question.

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2. Complainants' third issue is that ALJ Friedlander erred in not applying the "contracting with" language of RCW 80.36.520, a provision of the Washington Consumer Protection Act, within the Initial Order. That statutory provision has no place in this proceeding. The Superior Court of King County referred two questions to the Commission that squarely are grounded in the Commission's rules, not a state statute. Moreover, even without regard to the quite narrow scope of the Court's referral, it is improper to ask the Commission to review or apply a statute that gives rise to a legal claim for damages. Complainants must seek relief under RCW 80.36.520 in Superior Court, and should not invite the Commission to prejudice that court action or to overstep the authority given to it by this primary jurisdiction referral. Finally, the "contracted with" issue already was settled by the Washington Court of Appeals and Supreme Court against Complainants, and that determination is law of the case. That doctrine is the more applicable to this ongoing proceeding, and precludes Complainants from re-litigating a question, like this one, that a supervisory tribunal already decided.

3. Complainants have failed to present any question that the Commission could resolve, and thus the Petition should be denied.

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*, Docket No. TC-072180, 2008 WL 4824352, at *2 (WUTC Oct. 31, 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

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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 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).

EVIDENCE RELIED UPON

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

(Ex. K)[2] Docket UT-042022, Initial Order entered April 21, 2010;

(Ex. L) Docket UT-042022, Complainants' (1) Response to AT&T Petition for Administrative Review and (2) Petition for Administrative Review filed May 21, 2010 [CONFIDENTIAL VERSION];

(Ex. M) Docket UT-042022, T-Netix Motion for Summary Determination filed April 21, 2005, and all exhibits thereto (Ex.T-4C);[3]

[2] T-Netix used Exhibits A to J for its Response to AT&T Petition for Administrative Review filed May 21, 2010. To avoid confusion, T-Netix will use the next consecutive letters for its exhibits hereto.

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

(Ex. O) GTE Northwest Inc. Independent Contractor Agreement (Ex. A-9);

(Ex. P) US West Communications, Inc. Independent Contractor Agreement (Ex. A-10);

(Ex. Q) *Judd v. AT&T Co.*, Case No. 00-2-17565-5 SEA, Order Granting T-Netix's Motion for Summary Judgment (King County Super. Ct. Aug. 2005);

(Ex. R) *Judd v. AT&T Co.*, Case 57015-3-1, 2006 WL 3720425 (Wash. Ct. App. Dec. 18, 2006);

(Ex. S) *Judd v. AT&T Co.*, 116 Wash. App. 761, 66 P.3d 1102 (Wash. Ct. App. 2003);

(Ex. T) *Judd v. AT&T Co.*, 152 Wash. 2d 195, 95 P.3d 337 (Wash. 2004).

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

(Ex. V) Docket UT-042022, Order No. 5 (July 18, 2005) (Ex. T-12).

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[3] Exhibit Numbers beginning with A- and T- are those assigned by the ALJ and which appear in the Final Exhibit List that was finalized April 12, 2010.

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ARGUMENT

I. THE COMMISSION NEED NOT ADDRESS COMPLAINANTS' SECOND ISSUE, BECAUSE IT IS WELL ESTABLISHED IN THIS PROCEEDING THAT CALLS ALLEGEDLY RECEIVED BY COMPLAINANTS PRIOR TO 1997 CANNOT HAVE VIOLATED WAC 480-120-141

7. The Initial Order has resolved fully the first question that was referred by the Superior Court for resolution — were AT&T or T-Netix an OSP for purposes of Complainants' allegations. ALJ Friedlander held that AT&T was the OSP, because it owned outright the P-III Platform and because it directed T-Netix how to configure the P-III Platform so that AT&T could provide OSP service. Initial Order ¶ 134 (Finding of Fact 4), ¶ 137 (Finding of Fact 7). She relied, in part, on the General Agreement Between T-Netix, Inc. and AT&T Corp. dated June 4, 1997 (the "Contract") (Ex. T-2C) [HIGHLY CONFIDENTIAL]. Complainants support Finding of Fact 7 in their Response to AT&T Petition for Administrative Review. Complainants' Petition ¶¶ 36-40.

8. Complainants assert as their second issue for review, however, that ALJ Friedlander should have resolved the question whether AT&T was the OSP prior to the execution of the Contract. Complainants' Petition ¶¶ 46-47. Specifically, Complainants want the Commission to reach back to the period beginning June 20, 1996 — purportedly the beginning of the relevant period under their underlying claim before the Superior Court — and ending when AT&T obtained the P-III Platform in 1997. But the ALJ had no obligation to resolve that question, because calls allegedly received during that time period are irrelevant as a matter of law.

9. The 1991 version of WAC 480-120-141, the rate disclosure rule, expressly exempted all local exchange carriers ("LECs") from its requirements. Initial Order ¶¶ 28-29. Neither the existence nor the validity of that exemption is or can be disputed in this proceeding.

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The Supreme Court of Washington upheld the exemption *en banc* in 2004. *Judd v. AT&T Co.*, 152 Wash. 2d 195, 205, 95 P.3d 337, 342 (Wash. 2004) (*en banc*). Thus, in 2005, T-Netix demonstrated that GTE and US West both were expressly exempted from any requirement of WAC 480-120-141 until 1999.[4] Complainants' request that the Commission determine whether AT&T was the operative OSP in 1996 and 1997 thus falls squarely in the teeth of these exemptions.

10. As T-Netix explained in its Response to AT&T Petition for Administrative Review filed May 21, 2010, in 2005 it analyzed all of the phone bills that could be found or produced in this case. The only calls that are relevant to 1996 and 1997 would have been calls allegedly received by Ms. Judd. Complainants' phone bills showed that the calls for which Ms. Herivel seeks relief occurred November 11, 1999 to November 30, 2000. Docket UT-042022, T-Netix Motion for Summary Determination at 6-8 (April 21, 2005) **(Exhibit M hereto)** ("T-Netix April 2005 Motion").[5]

11. It is conceded by Complainants that Ms. Herivel has no other record of any other calls.[6] Therefore, for purposes of Complainants' Petition, Ms. Herivel's alleged calls were well after 1997 and thus are irrelevant. And Complainants have never disputed T-Netix's analysis of Ms. Judd's and Ms. Herivel's calls. Docket UT-042022, Complainants' Response to T-Netix, Inc.'s Motion for Summary Determination filed May 6, 2005 **(Exhibit N hereto)** ("Complainants' May 2005 Response") [CONFIDENTIAL VERSION].

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[4] For sake of completeness, T-Netix notes that GTE and US West then obtained waivers of the 1999 version of WAC 480-120-141 that expired December 1, 2000. *E.g.*, *Judd*, 116 Wash. App. at 769 & n.8, 66 P.3d at 1107 & n.8.

[5] The calls on Ms. Herivel's phone bills were intraLATA calls. *Id.* at 8 (Table).

[6] Ms. Herivel later stated in an affidavit that to the best of her recollection she received an interLATA call in at some time between June 1, 1998, and December 31, 1998, but that purported call is not relevant to Complainants' challenge regarding the June 1996-June 1997 timeframe. Ms. Herivel neither has nor can obtain a record of that call.

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12. Ms. Judd's calls occurred from February 26, 1996, to September 17, 2000. T-Netix April 2005 Motion at 8 (Table) (Ex. M). All of her calls for which a phone bill could be found were either local calls or intraLATA calls. *Id.* According to the phone bills, during the period February 1996 to November 29, 1997, all of those calls were handled by GTE or US West. *Id.* Complainants concede these facts. Complainants' May 2005 Response ¶¶ 25, 38 (Ex. N).

13. Ms. Judd stated in response to T-Netix Data Request No. 3 that she received calls from Monroe Correctional Complex and McNeil Island Corrections Center. T-Netix April 2005 Motion, Ex. 9, Responses to T-Netix, Inc.'s First Set of Data Requests to Complainant Sandy Judd (Ex. M). According to AT&T's subcontracts, GTE provided local and intraLATA calling from Monroe Correctional Complex. GTE Northwest Inc. Independent Contractor Agreement at 2 ¶ 3 **(Exhibit O hereto)**. US West provided local and intraLATA calling from McNeil Island Corrections Center. US West Communications, Inc. Independent Contractor Agreement at 2 ¶ 3 **(Exhibit P hereto)**. The two carriers at issue for Ms. Judd, then, are GTE and US West.

14. It is well settled in this longstanding dispute that the calls handled by US West and GTE were exempt from the 1991 version of WAC 480-120-141. None of the calls Ms. Judd received were subject to the rate disclosure rule in any form. Thus, the calls that Ms. Judd received prior to the 1997 Contract are irrelevant.

15. The effect of the 1991 LEC exemption on Complainants' case has been a settled matter under the law of the case doctrine since 2006. When in 2005 the Commission felt that it did not have authority to grant the T-Netix April 2005 Motion, on the ground that it could not terminate this dispute for lack of standing, the case returned to the Superior Court for King County. T-Netix filed a Motion for Summary Judgment in the Superior Court on August 26,

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2005, making the same presentation to the Court as it made to the Commission. That is, T-Netix demonstrated that all of the documented calls in this case were local or intraLATA, were carried by GTE or US West, and were not subject to WAC 480-120-141 by virtue of the express LEC exemption and the subsequent LEC waivers. The Superior Court granted the Motion. Case No. 00-2-17565 SEA, Order Granting Defendant T-Netix's Motion for Summary Judgment (Aug. 2005) **(Exhibit Q hereto)**.[7]

16. Complainants appealed that ruling to the Washington Court of Appeals. On December 18, 2006, the Court of Appeals issued its opinion. *Judd v. AT&T Co.*, Case 57015-3-1, 2006 WL 3720425 (Wash. Ct. App. Dec. 18, 2006) **(Exhibit R hereto)**.[8] In that opinion, the Court of Appeals noted that

> In 1991, the WUTC required all alternate operator service companies (AOSCs) to disclose their rates for collect calls.

Judd, 2006 WL 3720425, at *1. It also noted that

> **Local exchange companies (LECs)**, which provide only **local and intraLATA long distance** (local long distance) service but not interLATA or out-of-state long distance, **were excluded from the definition** of an [alternate operator service company].

Id. (emphasis added). The Court of Appeals also noted that

> In 1999, the WUTC changed the rules to require all operator service providers (OSPs) to verbally disclose the rates for inmate-

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[7] This document is a public document from King Court Superior Court demonstrating the disposition of a lawsuit. As such, it is not factual "evidence" but rather is provided for the Commission's ease of reference. The Commission need not reopen the record to consider this court order. To the extent that any party disputes this conclusion, T-Netix hereby petitions the Commission pursuant to WAC 480-07-830 to reopen the record for admission of this document. AT&T made a similar motion in its Petition for Administrative Review (at 18 n.7 and 20 n.8) in order to insert deposition testimony into the record that previously was not submitted as evidence.

[8] T-Netix provides the Commission with a copy of this decision for its ease of reference. Like the Superior Court Order Granting T-Netix's Motion for Summary Judgment, it is not "evidence," but if any party objects to its submission, T-Netix petitions the Commission to reopen the record pursuant to WAC 480-07-830.

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> initiated collect calls. Although the new rules applied to LECs as well, the **WUTC granted time-limited waivers exempting many LECs from the disclosure requirement.**

Id. (emphasis added). Based on these facts, the Court of Appeals concluded that

> Consequently, **from 1996 to 2000**, most calls for which LECs served as OSPs **were exempt from the WUTC disclosure requirements.**

Id. (emphasis added). The appeal, and thus this dispute, thus came to rest on the question whether Ms. Herivel received the alleged interLATA phone call (*see supra* n.6) which would not have been exempt from WAC 480-120-141. *Id.*, 2006 WL 3720425, at * 2.

17. "The law of the case doctrine requires that **'once there is an appellate court ruling, its holding must be followed in all of the subsequent states of the same litigation.'"** *Drake v. Burgess*, No. 62800-3-I, 2009 WL 2595545, at *1 (Wash. Ct. App. Aug. 24, 2009) (quoting *State v. Schwab*, 163 Wash. 2d 664, 672, 185 P.3d 1151 (Wash. 2008)) (emphasis added). Stated differently, the law of the case doctrine precludes attempts by litigants "to get a second bite at the apple." *Preview Properties, Inc. v. Landis*, 148 Wash. App. 1046, 2009 WL 429891, at *5 (Wash. Ct. App. Feb. 23, 2009).

18. The Washington Court of Appeals already has held that local and intraLATA calls carried by GTE or US West for the period 1991 to 2000 were exempt from WAC 480-120-141. *Judd*, 2006 WL 3720425, at *1 (Ex. P). As noted above, Complainants had challenged the validity of that exemption and lost at both the Court of Appeals and the Washington Supreme Court. *Judd v. AT&T Co.*, 116 Wash. App. 761, 772, 66 P.3d 1102, 1108 (Wash. Ct. App. 2003) **(Exhibit S hereto)**; *aff'd Judd v. AT&T Co.*, 152 Wash. 2d 195, 205, 95 P.3d 337, 342 (Wash. 2004) **(Exhibit T hereto)**. The only calls for which Complainants have any record or have made any allegation during the period June 20, 1996, through June 1997 were GTE and US West intraLATA calls.

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19. It is thus law of the case that the documented calls that Ms. Judd received, the identification of which is not and never has been disputed, for the period June 20, 1996, through June 1997 were exempt from WAC 480-120-141. And as shown above, Ms. Judd is the only Complainant to have received calls during this time. The Commission therefore need not consider Complainants' request to determine whether AT&T was an OSP prior to the 1997 Contract.

20. For these reasons, the Commission should deny as moot Complainants' second request for review that is stated in paragraphs 46 and 47 of Complainants' Petition.

II. THE COMMISSION NEED NOT ADDRESS COMPLAINANTS' "CONTRACTING WITH" ARGUMENT, BECAUSE IT IS OUTSIDE THE SCOPE OF THE COURT'S REFERRAL AND IT IS LAW OF THE CASE THAT THE COMMISSION CANNOT RESOLVE A QUESTION UNDER THE CONSUMER PROTECTION STATUTE, RCW 80.36.520

21. The Commission likewise should not consider Complainants' argument that the ALJ should have considered their "contracting with" argument[9] under the consumer protection statute, RCW 80.36.520. Complainants' Petition ¶¶ 48-63. That argument has no place in this proceeding, for two reasons. First, the primary jurisdiction referral from the Superior Court does not request the Commission's interpretation of RCW 80.36.520, but rather focuses solely on WAC 480-120-141, the rate disclosure rule. Secondly, it is law of the case that Complainants must not request an interpretation of RCW 80.36.520 from the Commission, because that statute is not within the Commission's authority to apply or interpret.

A. The "Contracting With" Argument Is Well Outside the Bounds of the Court's Referral Questions

22. The Superior Court referred two questions to the Commission: (1) whether AT&T was the OSP for purposes of the Complaint, and (2) was WAC 480-120-141 violated. Case No.

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[9] The Initial Order appropriately contains no Finding of Fact or Conclusion of Law regarding the "contracting with" issue. *See* Initial Order ¶¶ 131-148.

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00-2-17565-5 SEA, Order Granting AT&T's Motion to Dismiss (Ex. A-3) (King County Super. Ct. Aug. 28, 2000) **(Exhibit U hereto)**. To be precise, the Superior Court asked whether "**the regulations** have been violated." *Id.* (emphasis added). It thus was improper for Plaintiffs to attempt to insert a request for statutory interpretation into this proceeding.

23. According to a previous order in this case, "where a court refers issues to any agency under the doctrine of primary jurisdiction, the referral does not invoke the agency's jurisdiction over all issues in dispute, **only those issues referred to the agency**." Docket UT-042022, Order No. 5 ¶ 35 (July 18, 2005) **(Exhibit V hereto)** (emphasis added). Here, the issues referred lie only in the Commission's "regulations," namely WAC 480-120-141, and whether it was violated. Ex. U.

24. Complainants' "contracting with" argument, by contrast, lies in the consumer protection statute which states that "any telecommunications company, operating as or contracting with an alternate operator services company" must provide "appropriate disclosure to consumers of the provision and the rate, charge, or fee" in accordance with what the "Commission shall by rule require." RCW 80.36.520. This argument has nothing to do with who was the OSP or whether a rule violation occurred. Rather, in the event that the Commission finds during this referral proceeding that a violation of WAC 480-120-141 did occur, Complainants can return to Superior Court for a determination as to whether any entity is liable under RCW 80.36.520 for that rule violation or for having "contracted with" the violator. That liability question is not for the Commission to decide. Moreover, and as a result, nothing in the Initial Order itself, if adopted, could prejudice Complainants' ability to make their "contracting

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with" argument in the appropriate tribunal — the Superior Court.[10] As such, ALJ Friedlander was correct not to accept the argument, and the Commission has no need to review that decision.

25. For these reasons, the Commission has no obligation to resolve Complainants' "contracting with" argument.

B. It Is Law of the Case That Complainants Cannot Ask the Commission To Resolve a Question Regarding the Consumer Protection Statute

26. As is the case with Complainants' second issue regarding the 1996-1997 timeframe, Complainants' "contracting with" issue is now law of the case that cannot be re-litigated here. The Washington Court of Appeals and the Washington Supreme Court both held that the question of liability under RCW 80.36.520 rests absolutely on whether the Commission's implementing rule, WAC 480-120-141, was violated. *Judd*, 116 Wash. App. at 770-71, 66 P.3d at 107 (Ex. S), *aff'd* 152 Wash. 2d at 203, 95 P.3d at 341 (Ex. T). The statute itself does not support a claim independently. *Id.*

27. The Initial Order deals with this issue as a matter of collateral estoppel. Initial Order ¶¶ 112-116. The doctrine of collateral estoppel is a very close cousin to the law of the case doctrine, but for the fact that it requires "final judgment on the merits" to have been entered. *Id.* ¶ 112. Under either doctrine, however, litigants are barred from re-litigating settled matters. As such, ALJ Friedlander's refusal to consider the "contracting with" issue was not error. Because review of an Initial Order is conducted *de novo*, the Commission has the authority to affirm the Initial Order based on the law of the case doctrine. *E.g.*, *SEATAC Shuttle*, Docket No. TC-072180, 2008 WL 4824352, at *1–2 (upholding Initial Order and denying Petition for Review).

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[10] The law of the case doctrine, however, would bar re-litigating this issue. *See* Section II.B, *infra*.

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28. Complainants are plainly attempting "to get a second bite at the apple." *Preview Properties*, 148 Wash. App. 1046, 2009 WL 429891, at *5. They were told by both the Court of Appeals and the Washington Supreme Court that RCW 80.36.520 does not independently support their claim, and yet they continue to raise the "contracting with" clause here at the Commission in order to establish liability. That argument has no place in this proceeding.

29. For this additional reason, the Commission should not disturb ALJ Friedlander's refusal to accept the "contracting with" argument. Initial Order ¶¶ 112-116.

CONCLUSION

30. For all these reasons, the Commission should reject all four challenges in Complainants' Petition.

DATED this 26th day of May, 2010.

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CERTIFICATE OF SERVICE

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Courtesy copy to:

Marguerite Friedlander
Washington Utilities and Transportation Commission
1300 S Evergreen Park Drive SW
PO Box 47250
Olympia WA 98504-7250

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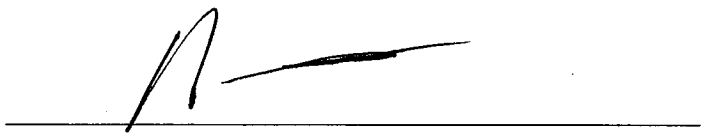

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