BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

SANDRA JUDD, et al., Complainants, v. AT&T COMMUNICATIONS OF THE PACIFIC NORTHWEST, INC.; and T-NETIX, INC., Respondents.	DOCKET NO. UT-042022 COMPLAINANTS' MOTION TO FILE A REPLY IN FURTHER SUPPORT OF THEIR PETITION FOR ADMINISTRATIVE REVIEW

1. Complainants request that they be permitted to file a reply in further support of their petition for administrative review. This reply is necessary because T-NETIX' answer to the petition raises new and unforeseen issues and because AT&T cites new authority in support of its argument for collateral estoppel that has not been previously cited by AT&T or the ALJ.

2. T-NETIX argues that the complainants' request to overturn the order denying T-NETIX' motion for summary determination should be denied on a new theory: that only intraLATA calls were made by the complainants before 1997 and that it does not matter who the OSP was during that time because the Court of Appeals ruled that calls during that time were exempt from rate disclosure. This issue was not addressed by the ALJ in her initial order. Further, T-NETIX also argues that our petition should be denied under the doctrine of "law of the case." This argument was not made in its motions for summary determination nor was it considered by the ALJ, and we had

no reason to believe that either of these arguments would be made in response to our petition. Complainants need the opportunity to respond to both of these arguments.

3. Further, AT&T has now cited new authority in support of its argument for collateral estoppel. It cites *State v. Dorsey*, 40 Wash. App. 459, 464-465, 698 P.2d 1109, 1112-1113 (Wash. Ct. App. 1985), which was not cited in prior submissions or by the ALJ. Complainants need to address this case especially given the other assertions by AT&T, including claims that it "won" a decision in Superior Court.

4. A copy of the proposed reply is attached to this motion.

DATED: June 1, 2010.

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I. INTRODUCTION

1. Complainants submit this reply in further support of their petition for administrative review. This reply addresses new arguments made by T-Netix in its answer and case authority not previously cited by AT&T or the ALJ pertaining to the claim of collateral estoppel.

II. COMPLAINANTS' PETITION FOR ADMINISTRATIVE REVIEW SHOULD BE GRANTED

A. The order granting T-Netix' motion for summary determination should be reversed

2. If the commission upholds the ALJ's conclusion that ownership of the PIII platform determines who the OSP is, our petition for review seeks reversal of the order granting T-Netix' motion for summary determination because it is the owner of the PIII platform up to the date of the 1997 contract that the ALJ determined

transferred ownership to AT&T. T-Netix does not contest that it is the owner of the platform prior to the date of the 1997 contract. Instead, it contends that the ownership of the PIII platform prior to the date of its 1997 contract with AT&T is irrelevant because the class representatives allegedly did not make interLATA calls during that time. T-Netix is incorrect.

3. T-Netix argues that complainants Tara Herival and Sandy Judd only received intraLATA calls prior to 1997, which T-Netix claims were "handled" by LECs. T-Netix then argues that since the definition of OSP prior to 1997 excluded LECs, that calls "handled" by the LECs are exempt from rate disclosure regardless of who was serving as the OSP. T-Netix claims that these exemptions have been a matter of "settled law" in this case since 2006.

4. T-Netix' suggestion that a call may be exempt from rate disclosure because it was "handled" by an LEC was at least implicitly rejected by the ALJ. The initial order notes that waivers granted to LECs are irrelevant unless the LEC is actually serving as the OSP. *See* Initial Order ¶109 ("thus, the waivers establish only that the companies involved were attempting to protect themselves in case they were the OSP.") Here, it is uncontested that the LECs did not serve as the OSP for inmate calls.

5. The regulations place rate disclosure obligations on whoever serves as OSP, not a party "handling" the call. The dispositive question is not who "carried" or transmitted a call or whether a "call" is exempt, but rather who provided operator services.

6. The 1991 regulatory exemption and any waivers obtained from the Commission, applied only to specific companies. T-Netix cannot "piggyback" on the waivers or exemptions of other companies by claiming that simply because an exempt company carried a particular call that all entities involved in the call are exempt.

7. This conclusion flows directly from the terms of the statute and regulations. Under RCW 86.30.520, it is a "telecommunications company, operating as or contracting with an alternate operator services company," that must "assure appropriate disclosure to consumers." The 1991 regulation requires an "alternate operator services company" to disclose rates "immediately, upon request, and at no charge to the consumer." WAC 480-120-141(5)(a)(iv) (1991) (emphasis added). And the 1999 regulation requires "the OSP" to "verbally advise the consumer how to receive a rate quote." WAC 480-120-141(2)(b) (1999) (emphasis added). From a functional point of view, this makes perfect sense. It is the OSP that controls the consumer interface and the equipment that is capable of providing rate information to the end user.

8. An LEC is not responsible for rate disclosure unless the LEC is also operating as an OSP. But if the OSP at a particular prison is not an LEC, then the LEC's exemption or waiver cannot insulate the OSP from its disclosure obligations. Nonetheless, T-Netix argues that the intraLATA calls made in this case are exempt from rate disclosure under a summary judgment issued by the superior court and the Court of Appeals' decision reversing that summary judgment.

9. T-Netix' reliance on the summary judgment order and the Court of Appeals decision reversing that order is baffling. First, there is no indication in the summary judgment order that the trial court agreed with T-Netix that the calls were somehow exempt because they were at some point handled by an LEC. Nothing in the order addresses this issue. Further, it makes no difference what the trial court may have thought about T-Netix' argument since the summary judgment order was reversed on appeal.

10. In reversing the summary judgment, the Court of Appeals determined that calls could be exempt from the disclosure requirements when "LECs ***served as OSPs***." Opinion at 1 (emphasis added). T-Netix argued in the Court of Appeals that the LECs served as the OSPs, but the Court of Appeals refused to make that finding and ordered this matter to be referred back to the Commission to determine who the OSP was for the calls at issue.

11. Thus, T-Netix is flatly wrong when it states that a decision was made in its favor that in the OSP is exempt from making rate disclosures if the OSP is not an LEC that can claim the exemption or a company that obtained a waiver of the OSP requirements. Thus, there is no exemption for disclosure obligations for intraLATA calls when the OSP was not an LEC and did not have a waiver. Further, T-Netix can point to no factual finding made by the ALJ to support its argument. Nor has it sought any such finding.

12. Accordingly, T-Netix' argument that our request to overturn the decision granting T-Netix' motion for summary determination should be denied.

B. The "contracting with" issue is not barred by either collateral estoppel or "law of the case"

13. The initial order concluded that collateral estoppel precluded the complainants from raising the issue of whether AT&T could be liable under RCW 80.36.520, which requires that rate disclosures be made "by any telecommunications company, operating as ***or contracting with*** an [OSP]." RCW 80.36.520 (emphasis added).

14. T-Netix first argues that this issue was not part of the referral from the superior court and should not be decided one way or the other by the Commission. Instead, T-Netix states that if the Commission finds that a violation of the disclosure regulations occurred, that the matter should then be referred back to the superior court to determine whether the liability extends to other parties under the "contracting with" language of RCW 80.36.520. This argument is consistent with our request that the Commission vacate the finding of collateral estoppel but suggests that the issue should not be considered by the Commission as part of the referral from the court.

15. The reason for raising the issue here, however, is that both AT&T and T-Netix argue that there can be no "contracting with" liability unless the Commission's regulations specifically state that parties "contracting with" OSPs can be liable as provided by the statute. AT&T and T-Netix contend that since regulations issued by the Commission do not expressly extend liability to parties "contracting with" OSP's that the Commission intended to exclude such liability. We believe that the Commission did not intend to extinguish potential liability under this provision, and

we raised this as an issue in the motions for summary determination. The ALJ, however, ruled that the issue could not be considered because of collateral estoppel.

16. T-Netix, like AT&T, argues that this issue has already been decided by the courts. T-Netix does not address the requirements for collateral estoppel, however, but instead argues that the issue is barred under the doctrine of "the law of the case." This doctrine was not raised in any of the prior motions nor considered by the ALJ. The "law of the case" doctrine is described as follows:

> Where there has been a determination of the applicable law in a prior appeal, the law of the case doctrine ordinarily precludes re-deciding the same legal issues in a subsequent appeal.
>
> > It is also the rule that questions determined on appeal, or which might have been determined had they been presented, will not again be considered on a subsequent appeal if there is no substantial change in the evidence at a second determination of the cause. The Supreme Court is bound by its decision on the first appeal until such time as it might be authoritatively overruled.
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> *Adamson v. Traylor,* 66 Wash.2d 338, 339, 402 P.2d 499 (1965) (citations omitted); *Greene v. Rothschild,* 68 Wash.2d 1, 7, 402 P.2d 356, 414 P.2d 1013 (1965).
>
> The court has held that the law of the case doctrine is discretionary, not mandatory. *Greene,* at 6, 8, 402 P.2d 356, 414 P.2d 1013. This rule has been codified as RAP 2.5(c)(2).

Folsom v. County of Spokane, 111 Wash. 2d 256, 263-264, 759 P.2d 1196, 1200 (1988).[1]

17. T-Netix does not specifically identify where the Washington Supreme Court or the Court of Appeals ruled on the issue of whether AT&T or T-Netix could be liable under the "contracting with" provision of RCW 80.36.520. Even if the "law of the case" doctrine should be considered at this stage, and by the Commission rather than the trial court, T-Netix has not adequately shown that the issue decided by the Court of Appeals is the same as the issue now being raised. Thus, T-Netix's arguments fail for many of the same reasons that AT&T's argument for collateral estoppel fail: there is no identity of issues and no decision actually reached regarding the applicability of the "contracting with" issue to AT&T and T-Netix.

18. T-Netix, like AT&T, continues to mistakenly claim that the Supreme Court decision in *Judd v. Am. Tel. & Tel. Co.*, 152 Wash. 2d 195, 95 P.3d 337, 339 (2004), forecloses any "contracting with" liability. The court in *Judd* examined whether RCW 80.36.510 created an independent cause of action under the Consumer Protection Act separate from the regulations promulgated by the Commission. *Id.* at 203. There is no

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[1] TM also cites an unpublished Court of Appeals opinion, *Preview Properties*, 2009 WL 429891, in support of its "law of the case" argument.. This is improper: "[W]e note with displeasure that Allstate ignored our longstanding prohibition against citing unpublished opinions, and we strongly admonish Allstate to cease this practice of submitting unpublished opinions to the trial court in the guise of "noncontrolling authority." We long ago held that unpublished opinions are not part of Washington's common law. We do not consider unpublished opinions in the Court of Appeals, and they should not be considered in the trial court." *Johnson v. Allstate Ins. Co.*, 126 Wash. App. 510, 519, 108 P.3d 1273, 1278 (2005).

discussion or decision of how the "contracting with" clause interfaces with the disclosure regulations promulgated pursuant to RCW 80.36.520.

19. The ALJ's decision below, however, was not based on "law of the case" but on the doctrine of collateral estoppel, which was briefly argued in AT&T's reply memorandum in support of its motion for summary determination. In its attempt to further support its claim of collateral estoppel, AT&T cites new authority that is unhelpful to its cause.

20. AT&T surprisingly cites *State v. Dorsey*, 40 Wash. App. 459, 464-465, 698 P.2d 1109, 1112-1113 (Wash. Ct. App. 1985), in support of its argument. In *Dorsey*, the court ruled that the doctrine of collateral estoppel did not apply to bar an issue raised against a criminal defendant. The court was concerned regarding whether the issue had truly been determined in the prior proceeding, a concern raised in our petition.

21. As noted by the case cited by AT&T:

> The requirement of a valid and final judgment lies at the heart of the doctrine. Collateral estoppel is intended to prevent relitigation of already *determined* causes. A valid and final judgment is necessary to permit the requisite inquiry in any subsequent proceeding to ascertain whether or not the prior action necessarily determined an ultimate fact or issue in the subsequent prosecution. *See State v. Harris*, 78 Wash.2d 894, 480 P.2d 484 (1971). *See also State v. McMains*, 7 Wash.App. 75, 497 P.2d 962 (1972). The reviewing court must have before it a "reasoned opinion" of the earlier court so as to determine not only whether the earlier litigation was complete but whether the facts or issues which are sought to be precluded from relitigation have in fact been determined. *See United States ex rel. DiGiangiemo v. Regan*, 528 F.2d 1262 (2d Cir.1975).

State v. Dorsey, 40 Wash. App. 459, 464-465, 698 P.2d 1109, 1112-1113 (Wash. Ct. App. 1985) (emphasis in original).

22. AT&T now argues that it "won" the "contracting with" argument in state court. If, in fact, AT&T had "won" this argument then it would have been dismissed from the case or, at a minimum, a notation of its victory would have been stated in the order. Instead, the order states that AT&T cannot be held liable for interstate calls (an issue not present in this case) and that the question of whether it is an OSP is referred to the WUTC. Ex. A-3. There is no discussion or even mention of the "contracting with" issue in that order. *Id.* In fact, AT&T has been unable to point to any order or opinion from the trial court or an appellate court that holds that AT&T or any other party could not be held liable under the "contracting with" language of the statute.

23. These failings demonstrate the merit of the holding in *Dorsey* that the reviewing court must have a reasoned opinion to determine whether the issue sought to be precluded was in fact determined. Here, there is no such order or opinion.

24. Because there has been no showing that this issue was actually litigated and necessarily determined when the court granted the motions to dismiss, the portion of the initial order holding that the issue of "contracting with" liability was barred by collateral estoppel should be reversed. Further, the Commission should not bar this issue on the grounds of "law of the case."

III. CONCLUSION

25. Complainants respectfully request that the Commission grant the relief requested in the complainants petition for administrative review.

DATED: June 1, 2010.

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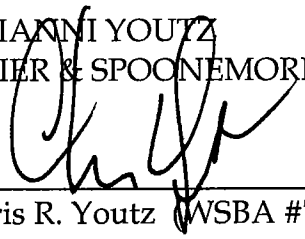

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