

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 RESPONSE TO T-NETIX, INC.’S MOTION TO STRIKE
OR, IN THE ALTERNATIVE, MOTION FOR LEAVE TO RESPOND**

AT&T Communications of the Pacific Northwest, Inc. (“AT&T”), by its attorneys, respectfully submits this response to T-Netix’s Motion to Strike Portion of AT&T Reply or, in the Alternative, Motion for Leave to Respond (“T-Netix’s Motion to Strike”).

DISCUSSION

1. T-Netix’s Motion to Strike essentially makes two assertions. First, it asserts that AT&T has allegedly submitted “new” evidence in its reply papers that the Commission may not, as a legal matter, consider. Second, T-Netix’s Motion seeks to respond to AT&T’s reply with more *post hoc* attempts by T-Netix to undo its admissions that it owned the P-III Premise platform. AT&T submits that the Commission should have all the facts necessary to make a fair and reasoned decision. To that end, AT&T provides this response to T-Netix’s Motion to Strike.

I. The Law and Commission Precedent Clearly Permit AT&T to Submit and Discuss the Matters Provided in its Reply.

A. Contrary to T-Netix’s Legal Arguments, Washington Statutes and Commission Rules and Precedent Allow All of AT&T’s Reply.

2. With respect to this agency and others in Washington “[e]vidence, including hearsay evidence, is admissible if in the judgment of the presiding officer it is the kind of

evidence on which reasonably prudent persons are accustomed to rely in the conduct of their affairs.” RCW 34.05.452. In fact, the Commission’s rules provide, in relevant part:

All relevant evidence is admissible if the presiding officer believes it is the best evidence reasonably obtainable, considering its necessity, availability, and trustworthiness. The presiding officer will consider, but *is not required to follow*, the rules of evidence governing general civil proceedings in nonjury trials before the Washington superior courts when ruling on the admissibility of evidence.

WAC 480-07-495 (emphasis added).

3. Furthermore, Commission Rule WAC 480-07-825(5)(a) gives AT&T the right to reply to new challenges to the ALJ’s Initial Order raised in the Complainants’ answer to AT&T’s petition. AT&T’s reply in paragraphs 34 through 44, including those paragraphs and exhibits T-Netix wants to strike (¶¶ 38, 40 & 44 with Exhibits 39 to 41) go to the heart of the Complainants’ challenge to the ALJ’s Initial Order asking the Commission to find that T-Netix only owned the P-III Premise platform from June 1996 through June 1997. Each paragraph discusses Complainants’ challenges and the exhibits likewise address those challenges. All the paragraphs and exhibits T-Netix seeks to strike are relevant to the Complainants’ challenges to the ALJ’s Initial Order and AT&T’s due process right to reply about why the Commission should reject those challenges.

4. The court decisions cited by T-Netix are irrelevant and cannot, as a matter of law, overrule WAC 480-07-825(5)(a). If, on the other hand, T-Netix’s primary concern is that it has no opportunity to respond because AT&T is addressing the Complainants’ challenge (*see* T-Netix Motion at 3 n.2), then it could move to reply as suggested by WAC 480-07-825(5)(b), but the proper response here is not to eliminate AT&T’s due process right in favor of T-Netix’s unwarranted request to strike.

5. Moreover, even the Commission precedent cited in T-Netix's Motion to Strike demonstrates that AT&T may offer the exhibits it did in its reply. In the *Puget Holdings* decision the Commission considered Public Counsel's challenge to a settlement regarding the transfer of ownership and control of Puget Energy, Inc. and its subsidiary Puget Sound Energy, Inc.¹ There, Public Counsel asked to reopen the record for the purpose of receiving the twelve new news articles and press releases. Consistent with WAC 480-07-495 the Commission granted that request. The Commission, however, denied Public Counsel's attempt to add further data beyond the articles and releases because Public Counsel had not asked to reopen the record to receive such additional data.

6. Here, Exhibits 39 and 41 are already a part of the record and no request to reopen is necessary.² Furthermore, AT&T asked to reopen the record to receive T-Netix's response to Data Request No. 7 in its Petition. AT&T Petition for Review at 11, n.4. Exhibit 40 is just the most recent version of T-Netix's response to Data Request no. 7.³ With respect to all three exhibits there can be no prejudice to T-Netix as, unlike news articles and press releases offered in the *Puget Holdings* case, T-Netix has long had in its possession each of these exhibits. In short, the exhibits, including and especially Exhibit 40, demonstrate another admission by T-

¹ *Puget Holdings LLC*, Order No. 8 Approving and Adopting Settlement Stipulation; Authorizing Transaction Subject to Conditions, Docket No. U-072375 (Dec. 30, 2008).

² RCW 34.05.476(2)(c)&(i). Tab 39 is the ALJ's order granting AT&T's motion to compel, which was cited in the Initial Order. *See* Initial Order at 9 n.27. Tab 41 is T-Netix's own Amended Motion for Summary Determination brief, which AT&T specifically relied on in its Petition. *See* AT&T's Petition for Administrative Review at ¶6.

³ To the extent the Commission believes that an additional motion is required to admit the most recent version of T-Netix's response to Data Request No. 7, AT&T hereby makes that motion. Consideration of T-Netix's most recent response to that data request is now essential to a fair determination, particularly in light of Complainants (and T-Netix's) attempt, in their response to AT&T's petition, to disavow T-Netix's prior admission that T-Netix owned the P-III Premise platform at the relevant prisons throughout the relevant time period.

Netix that it would prefer that the Commission ignore. The Commission's Rules, however, say that "all" relevant evidence is admissible, and these exhibits are certainly relevant. In the end, the Commission should make its ultimate decision based upon a complete record with full knowledge of all the facts, which include T-Netix's response to Data Request No. 7 (Exhibit 40) and Exhibits 39 and 41 along with the paragraphs discussing those exhibits.

B. AT&T's Reply Correctly Addresses Complainants' Challenges.

7. The key question raised by the Administrative Law Judge's Initial Order is "*who owned T-Netix's P-III Premise platform⁴ at the relevant prisons during the relevant time period?*" That question was specifically asked in discovery and T-Netix unequivocally answered and admitted "*T-Netix owned*" and "*held legal title to*" the platform. Tab 17, Ex. A-32 (T-Netix's Amended and First Supplemental Response to AT&T's Data Request No. 7). T-Netix's ownership of the platform at the relevant prisons throughout the relevant time period has always been clear and undisputed, so much so that when AT&T asserted that T-Netix owned the platform and cited T-Netix's discovery answers in response to T-Netix's motion for summary determination (Tab 18, Ex. A-22HC at ¶32 (AT&T 's Response to T-Netix's Amended Motion For Summary Determination)), in its reply T-Netix did not take issue with or call into question AT&T's assertion (Exhibit 1 hereto, Ex. T-29 (T-Netix's Reply in Support of Its Amended Motion for Summary Determination)), recognizing that T-Netix did in fact own the platform as it admitted in discovery. In short, T-Netix's ownership was and should remain an undisputed fact.

⁴ T-Netix's platform has been interchangeably referred to as the P-III platform, the Premise platform, the P-III Premise platform, or the P-III Premise call platform. *See, e.g.*, Initial Order at ¶18 & n.19 (identifying T-Netix's name for its "P-III Premise call platform"). The name sometimes includes "Premise" because the platform is premise-based, or based on the premises of the relevant prison as opposed to a remote location.

8. The ALJ's Initial Order, however, overlooked and failed to address T-Netix's admissions of ownership and mistakenly found that AT&T owned the P-III Premise platform based on a misinterpretation of a 1997 general contract between AT&T and T-Netix. Although that 1997 general contract provided a means for T-Netix to transfer ownership of equipment to AT&T through, for example, purchase orders and bills of sale, the contract *did not*, in and of itself, transfer ownership of any equipment. If T-Netix had actually transferred ownership of the P-III Premise platform to AT&T for the relevant prisons in Washington, at the very least there would have been specific purchase orders and bills of sale evidencing such transactions as required under the contract. There were no such purchase orders, bills of sale, or other documents, which of course is perfectly consistent with T-Netix's admissions that it owned and held legal title to the platform, and therefore did not transfer ownership to AT&T.

9. AT&T petitioned for administrative review of the Initial Order, among other reasons, because: (1) the Initial Order overlooked T-Netix's admissions that it owned the P-III Premise platform throughout the relevant time period; and (2) the Initial Order misinterpreted the 1997 general contract between AT&T and T-Netix as transferring ownership of equipment when the contract, by its own terms, only provided a means to initiate such a sale if AT&T issued a separate purchase order, which it never did. AT&T's Petition for Administrative Review at ¶¶14-20. All of the evidence related to these points, including T-Netix's admissions in discovery that it "owned" and "held legal title to" the P-III Premise platform, was properly in the record before the ALJ for consideration of the motions for summary determination.

10. In response to AT&T's petition for administrative review, both T-Netix and Complainants addressed the question of who owned the P-III Premise platform. In addition, Complainants separately challenged the ALJ's Initial Order and asked the Commission for

administrative review, raising four issues including the time period when T-Netix owned the platform. Complainants' Answer to AT&T's Petition for Administrative Review and Petition for Administrative Review at ¶¶46-47. Specifically, Complainants asked the Commission to find that T-Netix owned the P-III Premise platform *only* from June 1, 1996 through June 3, 1997. *Id.* Consistent with Commission Rule WAC 480-07-825(5)(a), AT&T responded to that portion of Complainants' petition by pointing out that T-Netix did not own the platform *only* from June 1, 1996 through June 3, 1997, but instead owned the platform *throughout* the relevant time period, as the undisputed record shows. AT&T's Reply in Support of its Petition for Administrative Review at ¶¶36-45.

11. In light of T-Netix's prior admissions that it owned the P-III platform at all relevant times, additional evidence regarding that ownership should have been unnecessary. However, because Complainants' separate petition attempted to disavow T-Netix's prior admissions and to present an incomplete and inaccurate rendition of the facts, AT&T correctly responded to Complainants' petition by filling in the important details that Complainants left out. Specifically, Complainants (and T-Netix) have tried to leave the Commission with the impression that, in this proceeding, the question has not already been answered whether T-Netix actually transferred ownership of the P-III Premise platform to AT&T for the relevant prisons in Washington. That question *has* already been answered, and it is well settled and undisputed that T-Netix *did not* transfer ownership of the platform to AT&T. T-Netix admitted in discovery that it owned the platform at the relevant prisons throughout the relevant time period, those admissions were included in the summary determination record, AT&T referred to them in its response to T-Netix's motion for summary determination, and T-Netix did not dispute its admissions of ownership in its reply.

12. The question of any transfer of ownership only arose after the Initial Order misread the record, overlooked T-Netix's admissions of ownership of the platform, and mistakenly attributed ownership and control to AT&T. After that, of course, AT&T petitioned for administrative review to correct the Initial Order's error. Both Complainants and T-Netix responded to AT&T's petition by attempting to take advantage of the ALJ's oversight. In short, both Complainants and T-Netix attempted to pretend that no one had ever inquired about whether T-Netix transferred ownership of the P-III Premise platform to AT&T for the relevant prisons in Washington. That is flatly incorrect and the Commission should seek all relevant information as its Rules allow.

13. Because Complainants attempted to disregard T-Netix's prior admissions and instead present this incomplete and inaccurate picture in their petition for administrative review, AT&T had a right to respond. It is this important information that had been left out by Complainants (and T-Netix), and subsequently provided by AT&T, which T-Netix now hopes to strike so that the Commission will not see, much less focus on, the fact that T-Netix admitted not only that it owned the P-III Premise platform, but also that it had no evidence of any transfers of ownership to AT&T.⁵

14. Complainants (and T-Netix) have attempted to cloud the issue of ownership of the platform — Complainants motive is apparently to keep AT&T in this lawsuit while T-Netix apparently hopes to shift its liability to AT&T. AT&T believes that the Commission should have the full story. Accordingly, AT&T respectfully requests that T-Netix's Motion to Strike be denied. If the Commission believes it would be helpful to receive the response brief that T-Netix appended to its Motion to Strike, AT&T does not oppose that so long as the Commission

⁵ Because T-Netix seeks to strike portions of AT&T's response to *Complainants'* petition for administrative review, T-Netix should not have standing to file its Motion to Strike.

considers the full story, including the important information that Complainants and T-Netix have left out and that AT&T has filled in.

II. T-Netix Continues Its *Post Hoc* Attempt to Undo Its Admissions.

15. In its Motion to Strike, T-Netix reiterates its arguments that its clear admissions somehow did not really mean what they said. T-Netix's Motion to Strike at ¶¶11-12. Moreover, T-Netix seeks to strike additional discovery answers in which it admitted that it had no evidence of any transfers of ownership of the P-III Premise platform by T-Netix to AT&T. *Id.* at ¶¶3-7 (moving to strike ¶¶38 & 44 and Exs. 39 & 40 of AT&T's filing, which present T-Netix's admissions that it had no documents such as purchase orders and bills of sale that evidence any transfers of ownership). In short, T-Netix seeks to prevent the Commission from even looking at the evidence that demonstrates why T-Netix's attempt to disavow its prior admissions is fundamentally misleading.

16. AT&T urges the Commission to review for itself T-Netix's admissions and take with a grain of salt T-Netix's *post hoc* attempts to change their meaning and minimize their significance. The discovery questions and answers, and T-Netix's admissions, are clear and unequivocal, and require no interpretation (or after-the-fact re-interpretation, which is what T-Netix is now attempting to do). The documents speak for themselves, as follows:

Data Request No. 7: T-Netix's Admissions of Ownership

17. In its Data Request No. 7 to T-Netix, AT&T asked T-Netix to:

Identify as specifically as possible all equipment . . . provided by T-Netix relating to telephone service at Washington state prisons during the relevant period, including for each particular piece of equipment . . . the person or entity that owned the equipment at the time

Tab 16, Ex. A-33 (T-Netix's Response to AT&T Data Request No. 7).

18. In its initial response to this data request, T-Netix identified the equipment by referring to documents it had produced, such as manuals, describing the P-III Premise platform:

. . . T-Netix refers AT&T to TNXWA00001-599, TNXWA01052-1125, TNXWA01126-1239, and TNXWA01528-1652 for detailed descriptions of the equipment, software, and products provided by T-Netix to AT&T in Washington State. ***T-Netix owned the premise-based equipment*** described in these documents and provided that equipment . . . as a subcontractor to AT&T. . . . T-Netix premise-based equipment was utilized at [three of the four prisons at issue throughout the relevant time period]. . . .

Id. (emphasis added).

19. In its first supplemental response to Data Request No. 7, T-Netix added the admission: “T-Netix believes that it held legal title to the premise-based equipment described in these documents.” T-Netix further clarified that “T-Netix premise-based equipment was utilized at [the fourth of the four relevant prisons throughout the relevant time period].” Tab 17, Ex. A-32 (T-Netix’s Amended and First Supplemental Response to AT&T’s Data Request No. 7).

20. In its second supplemental response to Data Request No. 7, T-Netix further clarified its admissions:

. . . T-Netix further refers AT&T to TNXWA00001-599, TNXWA01052-1239, and TNXWA01528-1652 [the same documents previously identified] for detailed and complete descriptions of the equipment, software, and products provided by T-Netix at the four institutions identified by Complainants as originating the inmate collect calls at issue in this proceeding. The material listed above includes PIII system drawings, system diagrams, system engineering documents, system specifications, performance documents, system architecture documents, marketing material in the form of product documents and other material relating to the PIII systems. . . . The PIII platform was installed on or about the following dates: [dates preceding the relevant time period for each of the four relevant prisons]. . . .

T-Netix's Amended and Second Supplemental Response to AT&T's Data Request No. 7, attached as Exhibit 2 hereto (Exhibit A-31 in support of AT&T's Response to T-Netix's Amended Motion for Summary Determination).

21. In its Motion to Strike, T-Netix again attempts to claim — despite its clear admissions in these data request responses that “T-Netix owned the premise-based equipment described in these documents” and “T-Netix believes that it held legal title to the premise-based equipment described in these documents” — that these somehow are not really admissions that T-Netix owned the P-III Premise platform. T-Netix's Motion to Strike at ¶12. T-Netix asserts two arguments.

22. First, T-Netix argues that the four Bates-number ranges listed in its responses to Data Request No. 7 — TNXWA00001-599, TNXWA01052-1125, TNXWA01126-1239, and TNXWA01528-1652 — do not include the 1997 general contract between AT&T and T-Netix. T-Netix's Motion to Strike at ¶12. Of course not. As T-Netix explained in its second supplemental response to Data Request No. 7, it listed these four Bates-number ranges in order to provide “detailed and complete descriptions of the equipment, software, and products provided by T-Netix at the four institutions identified by Complainants as originating the inmate collect calls at issue in this proceeding.” Exhibit 2 hereto. The 1997 general contract, as the Commission will see when it reviews that document, does not describe, or even refer to, T-Netix's equipment used at the four Washington prisons at issue, namely the P-III Premise platform. So, naturally, T-Netix did not refer AT&T to the 1997 general contract in answer to a data request asking T-Netix about the equipment it provided at these prisons and who owned that equipment.

23. T-Netix's point actually undercuts its position: the fact that T-Netix omitted the 1997 general contract from its answer to Data Request No. 7 demonstrates that T-Netix knew that contract had nothing to do with who owned the P-III Premise platform. If it did, in the data request response T-Netix would not have admitted "T-Netix owned" and "held title to" the P-III Premise platform, but instead would have said AT&T owned the platform, citing the 1997 general contract. In short, T-Netix's first argument is simply a *non sequitur* and another attempt to distract and misdirect away from T-Netix's clear admissions.

24. Second, T-Netix argues that its responses to Data Request No. 7 uses variations of the word "provide." T-Netix's Motion to Strike at ¶12. T-Netix refers to this language in its initial response: "detailed descriptions of the equipment, software, and products *provided to AT&T in Washington State.*" T-Netix suggests that this means "T-Netix gave, or handed over, the P-III to AT&T" and, therefore, "the data request responses do not 'admit' that T-Netix took title to the P-III." *Id.* That suggestion cannot be taken seriously in light of the very next clause in the data request response: "*T-Netix owned* the premise-based equipment." If by "provided" T-Netix really meant it transferred ownership of and title to the P-III Premise platform to AT&T, why would and how could T-Netix in the very next breath have unequivocally stated, "*T-Netix owned* the premise-based equipment"? Moreover, in its first supplemental response to the data request, T-Netix added the admission: "T-Netix believes that *it held legal title* to the premise-based equipment described in these documents." If "provided" meant transferred ownership to AT&T, T-Netix would not have added "that *it held legal title.*" Finally, in its second supplemental response to the data request, T-Netix changed the initial language from "detailed descriptions of the equipment, software, and products *provided to AT&T in Washington State*" to "detailed and complete descriptions of the equipment, software, and products *provided by T-*

Netix at the four institutions identified by Complainants as originating the inmate collect calls at issue in this proceeding.” Exhibit 2 hereto. T-Netix removed the “provided to AT&T” language on which it now hangs its hat. In short, T-Netix’s second argument, relying on the word “provide,” does not withstand scrutiny and is simply not credible.

Data Request No. 15: T-Netix’s Admissions of No Transfer of Ownership

25. T-Netix seeks to strike and prevent the Commission from reviewing and considering documents and information relating to T-Netix’s response to AT&T’s Data Request No. 15 to T-Netix. In that data request, AT&T 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 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 Data Request No. 15).

26. In its initial response to this data request, T-Netix stated “that it lack[ed] sufficient information at [that] time . . . to determine with precision whether or not there was a transfer from T-Netix to AT&T, or vice versa, of title to or ownership interests in any of the hardware or software ‘relating to telephone service’ in Washington State.” *Id.*

27. In its first supplemental response to Data Request No. 15, T-Netix simply withdrew an irrelevant objection. Tab 40 (T-Netix’s First Suppl. Resp. to Second Data Request No. 15).

28. In between T-Netix’s first supplemental response and second response to Data Request No. 15, the ALJ issued Order No. 14 granting AT&T’s motion to compel and directing T-Netix to produce any documents responsive to Data Request No. 15 relating to transfers of ownership of the P-III Premise platform. Tab 39 at ¶46 (Order 14 Granting AT&T’s Motion to Compel).

29. After that, T-Netix served its second supplemental response to Data Request No. 15, in which it admitted that “it has no responsive documents.” Tab 40 (T-Netix’s Second Suppl. Resp. to Second Data Request No. 15). In other words, paired with the data request, T-Netix admitted that “it has no documents” “relating to the transfer from T-Netix to AT&T of ownership of any equipment relating to telephone service at Washington state prisons during the relevant period, including any bills of sale, transfers of title, or sales receipts.” *Id.*

30. Also in its second supplemental response, T-Netix stated that it “does not contend, for purposes of this [WUTC] proceeding, that legal title to the PIII or other premises equipment is relevant to the issue of which entity, if either, was responsible under the Commission’s definitions of OSP for compliance with the rate disclosure regulations.” *Id.* In other words, recognizing that it owned and held title to the P-III Premise platform, that it had admitted this in response to Data Request No. 7, that it did not transfer ownership of or title to the platform to AT&T, that it had no evidence of any such transfers, and that it had admitted in response to Data Request No. 15 that it had no such evidence — recognizing all of that — T-Netix attempted to abandon any notion that ownership of the P-III Premise platform determined who was the OSP.

31. Only after the Initial Order overlooked T-Netix’s admissions of ownership of the P-III Premise platform, and mistakenly identified AT&T as the owner of the platform based on a misreading of the 1997 general contract, did T-Netix embrace ownership of the platform as the touchstone for determining who was the OSP. In the hope of perpetuating that error in the Initial Order, T-Netix now seeks to strike and keep the Commission from reviewing and considering the documents and information related to T-Netix’s answer to Data Request No. 15, including its admission that it has no documents evidencing any actual transfers of ownership of the P-III Premise platform to AT&T for the relevant prisons in Washington.

32. If the 1997 general contract itself actually evidenced a transfer, then T-Netix would have identified the contract and said so in its response to Data Request No. 15. T-Netix claims it did not reference the contract in response to the data request because it had previously produced it. That makes no sense. In other data request responses (*e.g.*, No. 7 discussed above), T-Netix repeatedly identified by Bates number responsive documents it had already produced. The fact that it did not do this in response to Data Request No. 15 demonstrates that T-Netix did not believe the 1997 general contract actually evidenced a transfer of ownership of the P-III Premise platform. T-Netix did not state in response to Data Request No. 15 that it “has produced one responsive document evidencing a transfer of ownership — the 1997 general contract”; instead, T-Netix admitted it “has *no* responsive documents” relating to the transfer of ownership.

33. AT&T believes the Commission should have the full story, especially because Complainants and T-Netix provide an incomplete and inaccurate account. Accordingly, AT&T respectfully asks that the Commission deny T-Netix’s request to strike and exclude documents and information relating to T-Netix’s response to AT&T’s Data Request No. 15.

CONCLUSION

34. For the foregoing reasons AT&T requests that the Commission deny T-Netix’s Motion to Strike. AT&T recognizes that the procedural history, factual record, and numerous arguments over years of briefing at various stages are complex and difficult to digest in a short amount of time. If the Commission believes a hearing would better facilitate its consideration of the pending petitions for administrative review, and the issues related to them such as T-Netix’s Motion to Strike and AT&T’s reply papers, then AT&T would welcome the opportunity to discuss any issues and answer any questions that would aid the Commission.

Dated: June 7, 2010

SUBMITTED BY:

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CERTIFICATE OF SERVICE

Pursuant to WAC 480-07-150, I hereby certify that I have this day, June 7, 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, June 7, 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, June 7, 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: June 7, 2010

/s/Charles H.R. Peters _____
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