# EXHIBIT 1

[Service date: *September 24, 2009* ]

BEFORE THE
WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION

COPY

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| SANDY JUDD and TARA HERIVEL,<br><br>Complainants,<br><br>v.<br><br>AT&T COMMUNICATIONS OF THE PACIFIC NORTHWEST, INC., and T-NETIX, INC.,<br><br>Respondents. | Docket No. UT-042022<br><br>**T-NETIX, INC'S REPLY IN SUPPORT OF ITS AMENDED MOTION FOR SUMMARY DETERMINATION** |

Respondent T-Netix, Inc. ("T-Netix"), through counsel, submits this reply memorandum in support of its Amended Motion for Summary Determination in the above-captioned primary jurisdiction proceeding.[1] This reply responds to "Complainants' Memorandum in Opposition to T-Netix's Motion for Summary Determination and AT&T's Motion for Summary Determination" ("Complainants' Opposition" or "Compl. Opp.") and to "AT&T's Response to T-Netix's Amended Motion for Summary Determination" ("AT&T's Opposition" or "AT&T Opp.").

[1] T-Netix, Inc.'s Amended Motion for Summary Determination, filed August 27, 2009 "(T-Netix Am. Mot.").



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1. T-Netix seeks a summary determination by the Commission that it was not the Operator Services Provider ("OSP") for collect calls from inmates at four correctional institutions from which the Complainants allegedly received calls. This memorandum wades through an unfortunate array of smoke screens and non-sequiturs offered by Complainants' and AT&T what is best characterized as a self-serving strategy to confuse the issues. When the smoke clears, it should be apparent to the Commission, based upon the undisputed facts, that for the calls relevant to this primary jurisdiction referral, T-Netix was not an OSP, not a common carrier, and, indeed, not even an entity subject to the jurisdiction of the WUTC. T-Netix did not provide telecommunications services, T-Netix did not provide a "connection" to local or long-distance service, and the Washington Department of Corrections ("DOC") was not a call aggregator. For any and all of these reasons, the Court should now terminate this proceeding with a summary determination that T-Netix was not the OSP and therefore did not violate the commission's disclosure requirements applicable to OSPs.

2. Complainants' Opposition reveals their desperate attempt to keep both Respondents in this litigation. Contrary to the assertion of their expert that there can be only one OSP for any call from a payphone (Wilson Depo. Tr. at 56:22-57:16 (Exh. 5)), Complainants now argue – for the first time, without notice, and contrary to all their prior positions – that "AT&T and T-Netix are jointly liable for the calls in issue in this case" (Compl. Opp. ¶ 20.). Surely the Commission did not intend for there to be more than one entity responsible for the multiple requirements imposed upon "the OSP" in the Commission's rules. Likewise, the Commission surely did not intend for the OSP to be merely a provider of some "piece parts" of a



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collect call from a call aggregator.[2] For any telecommunication service, including operator services, there is and can be only one provider (the carrier) to which the Commission looks for regulations compliance.

3. Indeed, as AT&T has previously recognized, the Commission's OSP rules are designed in part to address the "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." AT&T's Comments, Docket No. U-88-1882-R, December 21, 1988 (T-Netix Am. Mot. Exh. 8). The Commission's OSP rules, among other things, ensure that the parties paying for these calls are given the option to learn what they will pay for the call before they choose to accept or reject the call. The Commission placed the responsibility on a single entity to ensure that this goal is met and nothing supports Complainants view that there can be different entities responsible for different aspects of the OSP rule for the same calls or AT&T's myopic view that the carrier for the calls – responsible for branding and rate-setting – is different from the OSP. The Commission sought to place regulatory compliance responsibility with the entity that actually has the authority to ensure the rules were met, by its relationship to both its customer (the call aggregator with whom the entity contracts) and the consumer (the called party in a collect call that pays the entity's rates). There can be no doubt that T-Netix is not that entity for the calls at issue in this matter.

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[2] See Section II.B. below and Pollman Depo. Tr. at 20:7-21:18 (Exh. 1).



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## ARGUMENT

### I. COMPLAINANTS AND AT&T'S "CONNECTION" ARGUMENTS ARE MISLEADING, FLAWED AND CONTRARY TO THE COMMISSION'S REGULATIONS

4. Complainants and AT&T both argue that T-Netix was the OSP for the calls at issue, in part, because its platform provided the "connection" described in the WUTC definition of Operator Services Provider ("OSP"). The Commission defines an OSP as "any corporation, company, partnership, or person providing a connection to intrastate or interstate long-distance or to local services from locations of call aggregators." WAC 480-120-121 (1999) (AT&T Exh. 5). Complainants and AT&T offer different rationales, both nonsensical, to yield the strained conclusion that T-Netix provided the requisite "connection."

#### A. Complainants' Theory Improperly Substitutes The Term "Completion" For "Connection" As The Definition Of OSP

5. Complainants argue that a the "connection" contemplated by the WUTC's OSP definition "is finally made when the call is complete from end to end." Compl. Opp. ¶ 43 (citing Wilson Depo. Tr. at 42:7-19). They suggest that "the logical meaning of the word 'connection' is when the call is completed and the parties to the call are able to communicate with each other." Compl. ¶ 44. They argue, in essence, that because T-Netix's platform allows the caller to speak to the called party only after validating the call, it must be T-Netix that provided the "connection." But this over-simplified rationale is simply absurd.

6. First, the "connection" contemplated by the rule is **to** "intrastate or interstate long-distance or to local services" and **from** "locations of call aggregators."[3] Under Complainants'

[3] As set forth fully in T-Netix's Amended Motion, as a matter of law the OSP rules do not apply to entities providing service to inmate-only phones at correctional institutions because



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formulation, however, the T-Netix platform "connects" the call from the caller to the called party only when it "completes" the call, after the called party accepts the call, by establishing an "end-to-end" call path to the called party. Such an end-to-end connection is not what the rule intends, because the rule plainly limits the scope of the call path to which the "connection" applies; that is, from locations of call aggregators to intrastate or interstate long-distance or local services.

7. Second, the connection to "intrastate or interstate long-distance or to local services" must obviously occur prior to the called party answering the call. It makes no sense that the called party could receive the call before the call is switched and routed to "intrastate or interstate long-distance or to local services" because it is those services that would allow the verbal announcement from T-Netix's call platform to be transported to the called party. Further, as a network engineering matter, connection to a long-distance service always occurs before call completion. That is why unanswered calls and calls to busy phone numbers are not "completed" although they have been "connected" to a long-distance provider.

8. Third, if "connection" were actually "completion" of a call, then there could be no OSP for incomplete call attempts, even where the called party answered the call and listened to the recorded announcement. We can be sure that the Commission did not intend for this because its rules expressly prohibited OSPs from billing for "calls that are not completed." See WAC 480-120-141(5)(b) (1999) (AT&T Exh. 5). Under Complainants' theory, if the OSP is the company providing a connection, and there is no "connection"/"completion," then there could be no OSP for which that rule would apply. That is patently absurd. To the contrary, OSPs surely

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prisons do not fall within the definition of "call aggregator" in situations in which they provide inmate-only phones. T-Netix. Am. Mot. ¶¶ 27-34. See Section III below.



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remain OSPs even for incomplete, busy, and other call attempts, whether or not an end-to-end connection is established to the called party.

9. Fourth, the Commission could easily have used the word "completion" if that is what it intended. If it intended for connection to mean completion, it could have said "providing for completion of a call to the called party." Indeed, it is clear what the Commission meant when it referred to "calls that are not completed" in WAC 480-120-141(5)(b) (1999), just as Congress required that OSPs to remit payphone compensation for "each and every completed intrastate and interstate call" from a payphone. 407 U.S.C. §2076(b)(1)(A).

10. Lastly, Complainants' attempt to derive meaning for "connection" from a separate provision that used the word "connected" is unavailing. Compl. Opp. ¶ 45. The term "connected" in WAC 480-120-141(2)(b) (1999) was not intended to have the same meaning as the term "connection" in the OSP definition. The former rule requires that an OSP must verbally advise a called party how to receive a rate quote prior to the call being connected. Indeed, it is simply not possible for an OSP to provide "a connection to intrastate or interstate long distance or to local services" **after** the call has already been answered by the called party. Therefore, the term "connected" cannot have the same meaning as "connection" in the OSP definition. The single judicial decision cited by Complainants[4] is not inconsistent with this interpretation because, as that case provides, "there is something in the context or the nature of things to indicate that [the Commission] intended a different meaning" when it referred to the call being "connected" in WAC 480-120-141(2)(b) (1999). Accordingly, Complainants' theory regarding the definition of "connection" and its application to T-Netix should be rejected.

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[4] Complainants quote and rely upon an excerpt from *East v. King County*, 22 Wn. App. 247, 254 (1978). Compl. Opp. ¶45.



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### B. AT&T's Theory That A "Connection" Is Merely A Connection To The PSTN Ignores The Language Of The Rule And Cannot Be Correct

11. Opposite to Complainants' argument that the "connection" contemplated by the OSP definition is at the very end of the call path, AT&T contends the connection is near the beginning. Specifically, AT&T argues that the "connection" is between the T-Netix platform and the Public Switched Telephone Network ("PSTN"). AT&T Opp. ¶ 8. But, this theory is inconsistent with the testimony of AT&T's own expert and cannot possibly be reconciled with the language used in the Commission's OSP definition.

12. While it is true that the T-Netix platform was interconnected with each inmate phone over a separate plain old telephone service ("POTS") line to the central office of serving local exchange carrier ("LEC"), it was not T-Netix's platform that connected any call to local and long-distance service. *See* T-Netix Am. Mot. ¶ 11. Rather, the LECs made the "connection" to local exchange services by switching local calls onto their own local exchange facilities/services and 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. *Id.* Indeed, AT&T's own expert, Mark Pollman, testified at his deposition that there are multiple so-called "connections" at various points in the call flow: [5]

> Q Without regard to how Mr. Schott described the call flow, in your view, having conducted your analysis, at what point in the initiation to the final completion of a collect call from Washington DOC facilities was a connection to intrastate long distance services made?

[5] Pollman, also rejected Complainants' argument that "connection" means "completion" of a call. He testified that a call did not need to go all the way to the called party to connect to a long distance service. Pollman Depo. Tr. at 59:2-7 (T-Netix Am. Mot. Exh. 3).



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. . .

A You use the term "final connection." In a call such as this, there are multiple connections performed at various points in the call flow. In the context of this particular item here where we look at the WUTC definition, there is a connection when the OSP has decided to connect the call to the LEC **to provide access to the local service provider, the intrastate or the interstate provider**, has made that decision to provide that connection to that next step. That is not the final connection. The final connection is the point a lot further on down the line. That's why I consider it ambiguous.

Pollman Depo. Tr. at 57:1-22 (T-Netix Am. Mot. Exh. 3) (emphasis added). Mr. Pollman acknowledges here that it is the LEC that "provides access to the local service provider, the intrastate or the interstate provider." *Id.* So too must he acknowledge that it is AT&T that provides the "connection" to long-distance services. Yet, AT&T now argues that the step in the call flow **prior to** the connection to local and long distance service must be what the Commission means by "connection." The rule does not equate connection to a "long-distance service" with connection for the PSTN. Otherwise, every end user would be an OSP because the local loop line, which they order and control, connects their calls to the LEC (and thus PSTN).

13. As AT&T concedes, we must give meaning to the words provided in the WUTC's rules. The Commission therefore must have had a reason to use the terms "intrastate or interstate long-distance or to local services." If it simply intended for the connection to be to the PSTN, then it could have said so. A connection to "intrastate or interstate long-distance or to local services" is more than merely a connection to the LEC central office or the PSTN. Therefore, AT&T's theory must be rejected.



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## II. BY THEIR EXPRESS LANGUAGE AND OPERATION OF LAW, THE WUTC'S OSP RULES APPLY ONLY TO COMMON CARRIERS THAT PROVIDE OPERATOR SERVICES AS DEFINED IN THE RULE

14. AT&T argues that the WUTC did not define OSPs as, or limit them to, common carriers. AT&T Opp. ¶¶ 21-28. AT&T acknowledges that the FCC's definition of OSP explicitly provides that an OSP is a common carrier but maintains, in essence, that the fact that the WUTC did not include the same language in its rule means that it did intend to include it. AT&T Opp. ¶ 23. This contention is wrong for several reasons.

15. First, AT&T ignores express language of the WUTC's OSP rules, which make clear that those rules apply only to common carriers. Specifically, in both its 1991 and 1999 rules, the WUTC defined "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 through a method other than (1) automatic completion with billing to the telephone from which the call originated, or (2) completion through an access code use by the consumer with billing to an account previously established by the consumer with the carrier.

WAC 480-120-021 (1991) (emphasis added) (AT&T Exh. 4); WAC 480-120-021 (1999) (same) (AT&T Exh. 5). Since an OSP, an operator "services" provider, must, *a fortiori,* provide "operator services," it is plain that the first sentence of WAC 480-120-021 cannot be read, as AT&T incorrectly (but *sub silentio*) suggests, without reference to its second sentence.[6] Further, both the 1991 and 1999 versions of the OSP rules specifically provide that "[a]ll

[6] As explained in Section I above, Complainants and AT&T both employ a garbled and unsubstantiated construction of the definition of OSP in order to point a finger at T-Netix as having provided "operator services" for the inmate calls originating at the DOC. AT&T Opp. ¶ 5, 12, 13; Compl. Opp. ¶ 43-47, 50-52. This analysis inappropriately ignores the fact that the Commission specifically defined "operator services" and should be rejected out of hand.



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**telecommunications companies** providing alternate operator services" must "comply with this and all other rules relating to telecommunications companies not specifically waived by order of the commission." WAC 480-120-141 (1991) and (1999) (AT&T Exh. 4 and Exh. 5, respectively.)

16. "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." Accordingly, to be a provider of "operator service" subject to the WUTC's rules, an entity must not only meet the first sentence of the definition ("providing a connection") but **also** provide to end users an intrastate "telecommunications service" that includes the assistance of an operator to arrange for billing or completion of an intrastate call.

17. "Telecommunications" is defined in RCW 80.04.010 as "the transmission of information," and "telecommunications service" is defined as "the offering of telecommunications for a fee directly to the public, or to such classes of users to be effectively available to the public, regardless of the facilities used." Thus, it is only entities that qualify as telecommunications companies, *i.e.*, those that provide transmission services to the public, that qualify as an OSP and must comply with the OSP rate quote requirements. And these are entities that are known under federal law as common carriers.

18. A "telecommunications carrier" is defined in the federal Telecommunications Act of 1996[7] as "any provider of telecommunications services." 47 U.S.C. § 153(44). The definition further provides that "A telecommunications carrier shall be treated as a common carrier under

[7] 110 Stat. 56, Pub. L. 104-104 (Feb 8, 1996).



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this Act only to the extent that it is engaged in providing telecommunications services . . ." *Id.* "Telecommunications service" is defined as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." 47 U.S.C. § 153(46). Finally, "telecommunications" is defined as "the **transmission**, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." 47 U.S.C. § 153(43) (emphasis added). For all purposes relevant to this case, these definitions are essentially identical to the Washington intrastate definitions.

19. It follows, then, that the WUTC's OSP rules apply only to common carriers.

20. Second, AT&T contends that the WUTC did not intend to "adopt" or "mirror" the federal definition of an OSP, and, by implication, that the WUTC intended to cover a completely different class of entities. *Compare* AT&T Opp. ¶¶ 22-24 *with* T-Netix Am. Mot. ¶¶ 18-20 *and* T-Netix Opp. ¶¶ 4, 22-24. Again, this is wrong. AT&T ignores express statements in the orders adopting the OSP rules that the WUTC intended to mirror the federal rules to the extent that local conditions would permit. For example, in its order adopting the 1991 OSP rules the Commission emphasized that "[t]he 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. WAC 480-120-021."[8] This definition was not changed in any relevant respect in the 1999 rules. Further, the WUTC in its order adopting the 1999 rules stated that it "adopts the FCC's verbal disclosure requirement on an intrastate basis." T-Netix Mot. ¶ 19.

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[8] Order R-345, Docket No. UT-900726, filed June 18, 1991, WSR 91-13-078, at 106 (AT&T Exh. 4).



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21. AT&T argues that this says nothing about, and has no effect on, the definition of an OSP. AT&T Opp. ¶ 24. AT&T again is wrong.

22. An integral part of any disclosure requirement is the entity on which that requirement is imposed. It would make no sense to say, as here, that the Commission intends to "adopt" the FCC verbal disclosure requirement but apply it to a completely different class of entities. In any case, that order makes indisputably clear in the next paragraph that the WUTC's intent was to adopt rules that were consistent with the FCC's: "Staff's intent is that the WUTC rules be as consistent with the FCC as local conditions permit."[9] AT&T's argument is simply without merit. There is nothing in the language of the WUTC's OSP rules or the history of their adoption that at all supports a conclusion that the Commission intended to adopt a federal verbal disclosure requirement but make a fundamentally different determination of who would be responsible for providing that verbal disclosure.

23. It follows that the *Nucleonics Alliance* case[10] cited by AT&T is inapposite. AT&T Opp. ¶ 24. This is not an instance where a party is arguing that an entirely separate provision of a federal statute or rule be engrafted onto a state rule where the Commission saw fit not to include such provision. In *Nucleonics Alliance*, the court was asked to determine, absent an employer's voluntary consent, whether a union can be certified as the representative of employees in a bargaining unit of guards if the union represents, or is affiliated with, a union which represents employees other than guards. The declared purpose of the Washington Public

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[9] Order No. R-452, Docket No. UT-970301, filed Dec. 29, 1998, WSR 99-02-020, at 9 (AT&T Exh. 5).

[10] *Nucleonics Alliance v. Wash. Pub. Power Supply System*, 101 Wn. 2d 24, 34, 677 P.2d 113 (Wash. 1984).



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Employees' Collective Bargaining Act, RCW 41.56, was implementation of the right of **public** employees to join and be represented by labor organizations of their own choosing. The court noted that RCW 41.56 is substantially similar to the National Labor Relations Act (NRLA), 29 U.S.C. § 151-169 (1976), which governs labor relations in the private sector, and that the court has ruled that decisions construing the NLRA are persuasive in interpreting state labor acts which are similar or based upon the NLRA. *Nucleonics Alliance, supra*, 101 Wn. 2d at 32-33. However, there was one major distinction between RCW 41.56 and the NLRA. The federal statute expressly prohibits the inclusion of guards and nonguards in the same bargaining unit. In the court's words, that "provision is conspicuously absent from RCW 41.56." *Id.* at 33. Thus, the court held that "[w]hile interpretation of the NLRA may be used to assist in interpreting [RCW 41.56], a provision of the federal statute cannot be engrafted onto the state statute where the Legislature saw fit not to include such provision." *Id.* at 33-34. Accordingly, the court concluded that absent state legislation to the contrary, a union can be certified to represent public employees in a bargaining unit of both guards and nonguards.

24. In sharp contrast, in this proceeding the provisions of the federal and state rules are essentially the same, and the agency has expressly stated in its orders adopting the OSP rules that it intended the requirements to be as consistent as possible with the FCC's regulations. There is no provision in the federal rules that is "conspicuously absent" from the WUTC's rules or that the WUTC saw fit not to include. The WUTC's rules talk of OSPs as being "telecommunications companies," whereas the federal rules provide that they be "common carriers." But the two terms mean the same thing: entities that provide transmission services to the public. T-Netix does not qualify as either at the Washington DOC correctional facilities, because it did not provide any transmission services to the public at those facilities.



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25. In paragraph 25 of its Opposition, AT&T argues that the cases cited by T-Netix at pages 12-13 n.5 of its Amended Motion do not support the proposition that Washington statutes or regulations must adopt and incorporate similar provisions contained in federal statutes or regulations. According to AT&T, those cases stand for the proposition that where a Washington statue is substantially similar to a federal statute, Washington court may look to federal law for guidance regarding the construction and interpretation of the Washington statute. That is not what the cases say. For example, in State v. Bobic, 140 Wn.2d 250, 264, 996 P.2d 610 (2000), the court said:

26. As we noted in State v. Carroll, 81 Wash.2d 95, 109, 500 P.2d 115 (1972), "[the former] RCW 9.22.040 was taken directly from the federal statute. 18 U.S.C.A. §371, which has been the law for many years." Because our law was taken "substantially verbatim" from the federal statute, it carries the same construction as the federal law. Id. ("The identical question has been litigated many times in the federal courts. It is the rule that a statute adopted from another jurisdiction will carry the construction placed upon such statute by the other jurisdiction.")

27. AT&T next argues that the definition of an OSP is unambiguous, therefore no construction or interpretation is to be done. The arguments of the parties about the meaning of that definition show how ridiculous that argument is. Resort to the construction of the federal rules to determine the proper construction of the state rules is entirely appropriate here.

### A. T-Netix Did Not Operate As A Common Carrier Or Telecommunications Company For The Calls At Issue In This Case And Did Not Provide Transmission Services

28. AT&T asserts, incorrectly and without any evidentiary or other record support, that T-Netix transmitted information for a fee directly to the public. AT&T Opp. ¶ 27. T-Netix



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provided no transmission services; nor did it provide access or switching.[11] Transmission services were provided by the LECs and the interexchange carriers; *i.e.*, local and intraLATA long-distance calling in the case of the LECs and interLATA long-distance calling in AT&T's case. Nor has AT&T cited (because it cannot) my evidence even suggesting that T-Netix set the rates for or was paid by end users except as a billing agent for AT&T – an activity that is not regulated and has long been preempted by federal law. T-Netix simply did not operate as a telecommunications company or a common carrier, as those terms are defined in state and federal law, for the calls that are at issue in this case.[12] AT&T and the LECs did, and they fell within the definition of an OSP under the Commission's OSP rules. Accordingly, they are the entities that had the regulatory responsibility of complying with those regulations.

29. Complainants argue that T-Netix is more than simply an equipment provider because it agreed to be the station provider and received commissions for local calls at DOC facilities where PTI had previously contracted as the LEC. Compl. Opp. ¶ 53. Although T-Netix agreed to be the station provider at the PTI facilities, there are no local calls from PTI facilities at issue in this matter. The only PTI facility from which Complainants contend they received calls was Clallam Bay Corrections Center ("Clallam Bay"). The only calls that they contend they received from Clallam Bay were intraLATA calls. Neither Complainants' nor AT&T contend

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[11] T-Netix Opp. ¶ 15; Rae Decl., Dec. 12, 2008 ¶ 9 (Exh. 4); Rae Depo. Tr. at 289:4-291:8 T-Netix Am. Mot. (Exh. 2); Pollman Depo. Tr. at 89:22-90:3-9 (T-Netix Am. Mot. Exh. 3 and T-Netix Opp. Exh. B).

[12] Although T-Netix may have been a telecommunications carrier under certain contracts, its status for calls unrelated to this matter is irrelevant because the Telecommunications Act of 1996 provides that "[a] telecommunications carrier shall be treated as a common carrier under this Act only to the extent that it is engaged in providing telecommunications services . . . ." 47 U.S.C. § 153(44).



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that T-Netix provided intraLATA (or even interLATA) calling at Clallam bay (or any other facility).[13] Therefore, T-Netix was not an OSP for the calls at issue in this matter.

### B. AT&T And Complainants Continue To Improperly Apply An Operator Services "Function" Analysis Rather Than Recognize It Was AT&T That "Provided" All Telecommunications Services To The DOC And To End Users

30. Complainants and AT&T would like to ignore the definition of "operator services" under WAC 480-120-021 and point the finger at T-Netix as the OSP (or perhaps one of the OSPs, see Compl. Opp. ¶ 20) at the DOC. Compl. Opp. ¶¶ 50-52; AT&T Opp. ¶¶ 5, 12, 13. In essence, they contend that because T-Netix provided operator "functions," it must be the operator service provider.[14] This analysis completely ignores the fact that the Commission defined "operator services," not "operator functions," and that the specific language of the OSP definition clearly applies to AT&T, not T-Netix (*see* Section I above). And neither Complainants nor AT&T can escape this fatal quandary by pretending that their arguments have any conceivable textual basis in the wording of the Commission's regulations.

31. T-Netix agrees that the "term 'operator services' in the definition of OSP must be given meaning." AT&T Opp. ¶ 13. But, obviously the term should be given the meaning that

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[13] As noted in T-Netix's Opposition, T-Netix Opp. ¶ 12, Teleport Communications Group ("TCG") became the provider of intraLATA long-distance calling at the facilities formerly served by PTI; TCG was bought by AT&T and later branded as AT&T Local Services ("ALS"). Rose Depo. Tr. at 138:8-139:24 (T-Netix Opp. Exh. A).

[14] AT&T's footnote (AT&T Opp. ¶ 13 n.3) shows that AT&T fundamentally misunderstood T-Netix's brief and argument. T-Netix agrees that the WUTC defined "operator services" and not "operator functions." It is AT&T and Complainants that seek to avoid the definition of "operator services" by improperly equating it with "operator functions." T-Netix Opp. ¶ 7, 18. Although T-Netix provided certain operator functions, it provided them to AT&T (not to the public or to any end users) and did not provide any "operator services" as that term is defined by the Commission.



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the Commission provided. The applicable WUTC rule states that "[t]he term 'operator services' in this rule **means any intrastate telecommunications service** provided to a call aggregator location . . . ." WAC 480-120-021 (1999) (identical in substance to the earlier definition in WAC 480-120-021 (1991)) (emphasis added) (AT&T Exh. 4 and 5). Complainants and AT&T cannot be allowed to write out of the rule the element of the definition that "operator services" mean "telecommunications services." As explained above at Section II.A., T-Netix was not providing telecommunications services or acting as a telecommunications company for the calls at issue in this matter. Because T-Netix did not provide telecommunications services to the DOC, it could not possibly have been the provider of "operator services." Rather, it was AT&T that "provided" such services by subcontracting with T-Netix for the equipment and maintenance of an automated call control platform and by offering those facilities and services for resale to the DOC and called parties.[15]

32. Instead of applying the facts of this matter to the OSP definition, AT&T and Complainants obscure the facts by isolating one entity performing certain "piece parts" of the contract with the DOC. AT&T's expert, Mark Pollman, is an AT&T employee and was personally involved with the DOC contract. He was involved in ensuring that each "piece part" within the network was in place. Pollman Depo. Tr. at 20:7-21:18 (Exh. 1). He described these "piece parts" at his deposition:

> 9 Q You refer to "piece parts" in that answer
> 10 and in a prior answer as well, what do you mean by
> 11 "piece parts"?

[15] Indeed, the only term that should be subject to a plain meaning analysis is the term "provided." One can "provide" a service through subcontractors. Clearly, a reseller provides telecommunications services in that manner; AT&T has resold T-Netix's operator "functionalities" to "provide" operator services at the DOC facilities.



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12 Various, each company has certain parts
13 within the network that when assembled together met
14 the requirements of the Washington DOC, depending
15 upon, shall we say, the type of call that was being
16 placed. And it was those piece parts, those
17 entities, which would process the calls, as I said,
18 dependent upon the type of call that was placed.

Pollman Depo. Tr. at 21:9-18 (Exh. 1). He also explained:

3 . . . My responsibilities
4 were to ensure that those piece parts were indeed in
5 place so that we knew who to get ahold of. And my
6 job was also to make sure that that was passed on to
7 other people within my organization, that
8 information.

Pollman Depo. Tr. at 21:3-8 (Exh. 1). While AT&T contends the OSP is T-Netix, which performed some piece parts of the prime contract and sold those services to AT&T, it ignores the fact that it was AT&T, as the prime contractor and telecommunications company, that put all of these piece parts together under the terms of the DOC contract and that actually "provided" the telecommunications services.

33. Moreover, the contention by AT&T and Complainants that a subcontractor which provides some operator functions must be an OSP is simply not workable. Taken to its extreme, it would mean that every subcontractor providing a "piece part" of the operator functions would be an OSP subject to all the rules pertaining to OSPs. And, any time a subcontractor in turn subcontracted all or part of the operator functions that it agreed to perform, those subcontractors would also be deemed OSPs and would be subject to all of the OSP rules. Thus, instead of two OSPs, anomalous enough under this theory, there would be as many OSPs as there are vendors for the carrier of record. This is not a reasonable interpretation of the Commission's rules.

## III. THE DOC WAS NOT AN "AGGREGATOR" FOR THE CALLS AT ISSUE IN THIS PROCEEDING



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### A. Complainants' Myriad Efforts To Avoid The Conclusion That Prisons Are Not Call Aggregators For Inmate Calling Are Unavailing

34. As set forth fully in T-Netix's Amended Motion, as a matter of law carriers providing service to inmate-only phones at correctional institutions do **not** fall under the definition of provider of operator services as such service is not provided at a "call aggregator" location with respect to inmate-only phones. T-Netix. Am. Mot. ¶¶ 27-34. This conclusion follows from application of the well-established principle that when a state statute or rule is identical or substantially similar to a federal law, Washington law will carry the same construction and the same interpretation as the federal law. *Id.*

35. In 1991 the FCC adopted rules addressing OSP practices, which, among other things, required OSPs to provide immediate quotes as to the cost of a call. Carriers providing service to inmate-only phones at correctional institutions were not subject to these requirements, the FCC reasoning that prisons were not call aggregators with respect to inmate-only phones.[16] In 1998 the FCC adopted a separate rule governing operator services provided to inmate-only phones that required that providers of operator services for interstate calls initiated by inmates disclose to the party to be billed how such party could obtain rate information without having to make a separate call.[17] But in doing so, the FCC did not change its prior conclusion that prisons are not "call aggregators" in situations where they provide inmate-only phones and did not subject prisons to the general OSP rules in those situations.

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[16] *Policies and Rules Concerning Operator Service Providers*, Report and Order, 6 FCC Rcd 2744, 2752 (1991).

[17] *Billed Party Preference for InterLATA 0+ Calls*, Second Report and Order and Order on Reconsideration, 13 FCC Rcd 6122, 6157 (1998) (T-Netix Am. Mot. Exh. 7).



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36. Because the WUTC's OSP rules adopted in 1991 and 1999 mirrored the FCC rules, it follows that correctional institutions are not "call aggregators" under those state rules either. And since the WUTC has never adopted a rule that specifically applies to services provided to inmate-only phones, there is no state rate disclosure requirement applicable to those situations.

37. The Complainants now seek to avoid the impact of this conclusion by raising a number of misguided arguments. First, they argue that T-Netix's argument that prisons are not "call aggregators" with respect to inmate-only phones is inconsistent with its prior analysis in its original motion. Specifically, Complainants point to a sentence in the original T-Netix motion that says, "In this instance, Washington correctional facilities are the call aggregators." But that sentence was simply an explanation of the Complainants' theory of the case. It did not reflect any "analysis" of and was not a statement of T-Netix's position on the legal question of whether prisons are "call aggregators" with respect to inmate-only phones under the Commission's rules. Complainants' suit depends on prisons being "call aggregators" in such circumstances.[18] If they are not, Complainants' suit fails.

38. Second, Complainants point to references to "prisons" in the WUTC's OSP rules as an example of a call aggregator. According to Complainants, this establishes that the OSP requirements applied to inmate phones. It does not. Complainants ignore the fact that in its 1991 order adopting the federal OSP rules, the FCC specifically determined that a carrier that provides service to phones at correctional institutions that are made available to the public or to transient users -- and not exclusively to inmates -- would have to comply with the requirements of the

[18] In *any* event, arguments of counsel and not evidence, which is the basis on which the Commission must dispose of the pending matters. See note 27 below.



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FCC's rules.[19] In those instances, the prison would be a call aggregator. Thus, a reference to a prison being an example of a call aggregator in the WUTC's rules is entirely consistent with the federal rules and their construction by the FCC. Again, Complainants' argument fails.

39. Third, Complainants point to a 1993 request for a waiver of certain regulatory requirements applicable to OSPs in conjunction with an application for registration as a telecommunications company by Tele-Matic (later T-Netix) as an acknowledgment that (a) it was an OSP subject to the OSP rules, and (b) the WUTC's OSP rules applied to inmate phone systems. However, a request for registration as a telecommunications company and a waiver of certain regulatory requirements in order to provide "telecommunications services to inmates of correctional institutions and mental facilities" does not have the import the Complainants would like to assign to it. The application clearly refers to situations where Tele-Matic would operating as a telecommunications company and providing the long-distance services, unlike the present case. Also, some of the anticipated customers would not be prisons, and, therefore, the OSP rules would apply. In any case, the fact that an applicant files a registration application and request for waiver of regulatory requirements has no effect on whether, as a matter of law, the rules actually apply in a particular circumstance. It is axiomatic that private parties lack the power to adopt, modify, or repeal rules of the Commission.

40. Fourth, Complainants claim that it is significant that the WUTC defines a "call aggregator" as someone who "makes telephones available to the public or to users of its premises," whereas the FCC defines a "call aggregator" as a person that "makes telephones

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[19] *Policies and Rules Concerning Operator Service Providers*, Report and Order, 6 FCC Rcd 2744, 2752 (1991) (T-Netix Am. Mot. Exh. 11).



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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).

41. The fact that the FCC's rules apply to interstate calls and the WUTC's rules apply to intrastate calls is not surprising, since those facts reflect the extent of their respective jurisdictional authority. And the fact that the WUTC's rules do not include the word "transient" is of no moment. The reference to "the public or to users of its premises" in the WUTC rules and to "the public or to transient user" in the FCC rules are essentially the same thing; both refer to outsiders. No special significance can be drawn from the fact that the word "transient" was left out of the WUTC definition of a call aggregator. The WUTC did not mention, draw any attention to or rely upon that linguistic difference in the orders in which it adopted its 1991 or 1999 rules.

42. The Complainants, like AT&T, as discussed above, ignore express statements in the orders adopting the OSP rules that the WUTC intended to mirror the federal rules to the extent that local conditions would permit. In fact, in its order adopting the 1991 OSP rules the Commission emphasized that "[t]he definition of operator services is changed to more closely reflect federal definitions . . ."[20] Further, the WUTC in its order adopting the 1999 rules stated that it "adopts the FCC's verbal disclosure requirement on an intrastate basis."[21] It would make no sense to say, as the Complainants do, that the Commission intends to "adopt" the FCC verbal disclosure requirement but apply it to a completely different set of circumstances. In any case,

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[20] Order R-345, Docket No. UT-900726, filed June 18, 1991, WSR 91-13-078, at 106 (AT&T Exh. 4).

[21] Order No. R-452, Docket No. UT-970301, filed Dec. 29, 1998, WSR 99-02-020, at 9 (AT&T Exh. 5).



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that order makes indisputably clear in the next paragraph that the WUTC's intent was to adopt rules that were consistent with the FCC's: "Staff's intent is that the WUTC rules be as consistent with the FCC as local conditions permit."[22]

43. Complainants' argument is simply without merit. There is nothing in the language of the WUTC's 1991 OSP rules or the history of their adoption that at all supports a conclusion that the Commission intended to mirror federal rules and adopt federal definitions but make a fundamentally different determination of whether those general OSP requirements would apply to correctional institutions in situations where they make available inmate-only phones. And, the fact that in its 1991 rules the WUTC expressly stated that it intended to adopt rules that were consistent with the FCC's rules means that the WUTC rules cannot be interpreted to apply to services provided to inmate-only phones when the FCC's rule excludes them. What is significant is the fact that in 1999, or at any time later, the WUTC did not follow the FCC's lead and adopt a separate and specific rule requiring rate disclosures for inmate-only phones.

44. Fifth, Complainants' argument that FCC did not intend to preclude states from adopting greater safeguards or more stringent rules regarding OSP services or aggregator practices does not help them. As just discussed, the WUTC clearly expressed its intent to adopt rules that were "consistent with federal requirements"[23] and to adopt "the FCC's verbal disclosure requirement on an intrastate basis."[24] In light of these clear expressions of intent, one cannot

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[22] *Id.*

[23] Order No. R-452, Docket No. UT-970301, filed Dec. 29, 1998, WSR 99-02-020, at 6 (AT&T Exh. 5).

[24] *Id.*, at 9.



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conclude that the WUTC was intending to adopt requirements that cannot be found in, and would deviate in their essential scope from, the corresponding FCC rules.

### B. The WUTC Did Not Eliminate The Requirement That An OSP Be The Entity That Contracts With A Call Aggregator

45. AT&T also argues incorrectly that the WUTC rejected the proposition that only an entity that contracts directly with a call aggregator can be classified as an OSP. AT&T Opp. ¶ 28. AT&T points to the elimination of language from the definition of AOSC in the 1991 rules that "[a]lternate operator services companies are those with which a hotel, motel, hospital, campus, or customer-owned pay telephone, etc., contracts to provide operator services to its clientele." That is misleading and reflects an unfortunate lack of candor by counsel for AT&T.

46. The Commission did not reject the proposition that an AOS provider is the entity that contracts with a call aggregator; it simply moved reference to that requirement to other locations in the rules. Specifically, 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." WAC 480-120-021 (1989) (AT&T Exh. 3). The reference to "contracts" was dropped from the definition in later versions of the rule, but other provisions of those later rules still define the aggregator/AOS relationship (and definition) by way of contract. 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(3) (1991) (emphasis added) (AT&T Exh. 4); *See also* WAC 480-120-141(1)(c) (1999) (providing substantially the same language) (AT&T Exh. 5). 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.



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WAC 480-120-141(2), (2)(a) (1991) (AT&T Exh. 4); *See also* WAC 480-120-141(1)(b) (1999) (AT&T Exh. 5). An AOS could not do that if it was not the entity contracting with the aggregator.

47. As T-Netix has pointed out, the objective of OSP regulation has always been to protect consumers from the high charges assessed by some carriers for calls from public phones at aggregator locations. T-Netix Opp. ¶ 21. 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. AT&T was the entity contracting with the alleged call aggregator for interLATA calls in this case, the Department of Corrections; therefore, only it could be the OSP for those calls.

## IV. THE COMMISSION SHOULD DISREGARD THE SMOKESCREENS AND STRAW MAN ARGUMENTS DESIGNED BY COMPLAINANTS AND AT&T TO DISTRACT FROM THE ISSUES AT HAND

48. Both Complainants and AT&T raise issues in their oppositions that are completely irrelevant to T-Netix's motion, prejudicial and transparently designed to attack T-Netix's reputation. This Commission should disregard those impermissible and immaterial arguments.

### A. Complainants Improperly Argue And Describe T-Netix's Purported Violations Of WUTC Regulations

49. The Superior Court referred two issues to the Commission: (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). Only the first of these issues is presented by the motions for summary determination.



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50. Although T-Netix disputes that it violated the WUTC disclosure regulations, T-Netix did not raise the issue in its Motion or Amended Motion because there are material facts in dispute concerning that issue. Moreover, raising such an issue would be unnecessary because, if the Commission summarily determines that T-Netix was not an OSP, then it must conclude that T-Netix did not violate the WUTC rate disclosure requirements because those requirements apply only to OSPs. *See* Compl. Opp. ¶ 8 (acknowledging that OSP must provide rate quotes and citing relevant rules). For no legitimate reason, however, Complainants raise irrelevant arguments regarding the second issue. *See, e.g.*, Compl. Opp. ¶¶ 12-14, 24-28.

51. These improper arguments appear designed to tarnish the Commission's view of T-Netix and to distract from the valid legal basis for summary determination in favor of T-Netix. For example, Complainants contend that T-Netix did not provide rate quotes during the relevant time period and that "it was clear that T-Netix was unwilling to do the work needed to add intrastate rate quoting unless it was paid additional money." Compl. Opp. ¶ 12-14, 25. These arguments are not relevant to whether T-Netix was an OSP. They are also factually unsubstantiated and incorrect. They must be disregarded.

**B. Complainants And AT&T Improperly Imply That T-Netix Is A Bad Actor**

52. Further, both Complainants and AT&T attempt to improperly villanize T-Netix for requiring payment from common carriers with whom they contract to provide equipment when those companies demand additional equipment or changes to be made to existing equipment. For example, AT&T contends that when US West changed its name to Qwest and asked T-Netix to change out the voice chips to reflect the change in the verbal announcements, "T-Netix demanded that Qwest, not AT&T, pay for the work required to make the change, and when Qwest declined, T-Netix refused to change the announcements." AT&T Opp. ¶ 36.



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53. That contention (which is wrong) has no bearing whatsoever on whether T-Netix was an OSP. It is also grossly misleading.[25] Complainants make a similar irrelevant claim at paragraph 59 of their opposition. At best, these arguments serve only to make T-Netix's point that, under contracts such as the contracts in this matter, T-Netix is merely a vendor. It requires payment for equipment under its contracts with telecommunications companies. When those companies demand new equipment, such as voice chips need to provide verbal announcements, not covered by the original contract and work orders, T-Netix generally requires payment. Gross Depo. Tr. at 104:13-105:8 (AT&T Exh. 16). That is hardly an unusual or suspect commercial practice.

54. Here, AT&T contracted with the DOC to provide telephone service to inmates. AT&T subcontracted with T-Netix for the provision of certain equipment and the operation of that equipment. Now, AT&T and Complainants suggest that even though T-Netix is not a telecommunications company for purposes of the calls from DOC facilities, T-Netix should in some way be responsible for bearing the cost of any additional or alternative equipment needs of AT&T. That is preposterous.

55. The bold claims by both AT&T and Complainants that T-Netix refused to comply with regulatory requirements in order to extort money from a prime contractor are flatly incorrect, irrelevant and prejudicial; they should not be tolerated. *See* Compl. Opp. ¶ 25, 59; AT&T Opp. ¶ 36. Indeed, if and when it ever considers liability, the Commission should reject AT&T's attempt to shift blame for regulatory deficiencies, if any, to its subcontractor where that

[25] As explained in Section IV.C. below, there is no evidence that Qwest made such a request for announcements at DOC facilities. For that matter, there is no evidence that AT&T was even a carrier at the sites for which Qwest requested the change.



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subcontractor merely refused to provide **additional** equipment or service without pay. These are inappropriate and libelous efforts to divert the Commission's attention from the actual arguments at issue in T-Netix's motion; that is, whether T-Netix was an OSP, not whether T-Netix violated its duties as an OSP. These improper and prejudicial arguments should be ignored and the corresponding portions of Complainants' and AT&T's opposition briefs stricken from the record.

### C. AT&T's Manufactured Argument Regarding T-Netix's Strategic And Contractual Relationships With The LECs Is False And Should Be Disregarded

56. AT&T baselessly claims that "T-Netix installed and operated its P-III Premise platform at the prisons at issue pursuant to its contracts with the LECs, not AT&T." AT&T Opp. ¶ 37. This contention is nothing more than a vague theory conjured up by AT&T. It is not based upon the record and has no evidentiary support. It is not based upon any *actual* contracts between AT&T and T-Netix. As Washington law makes clear, arguments of counsel are always insufficient, absent genuine issues of material fact, to avoid summary judgment.[26] Without a factual basis, indeed an **undisputed** factual basis, for this argument, AT&T is not entitled to summary determination and cannot defeat T-Netix's own motion for summary.

57. AT&T contends that T-Netix had "contractual and strategic relationships with LECs" (Compl. Opp. ¶ 35.) and that "T-Netix dealt directly with the LECs, not through AT&T, to provide them with operator services" (Compl. Opp. ¶ 36). No such contracts are part of the

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[26] "[A]rguments of counsel are not evidence." *Bricker v. Jackpot Convenience Stores, Inc.*, 98 Wash. App. 1034, Not Reported in P.3d, 1999 WL 1211452 * (1999) (citing *Watts v. United States*, 703 F.2d 346, 353 (9th Cir. 1983)). See also, *Turngren v. King Cy.*, 33 Wash. App. 78, 84, 649 P.2d 153 (1982) ("Conclusory allegations, speculative statements or argumentative assertions that unresolved factual matters remain are not sufficient to preclude an order of summary judgment."); *Peterick v. State*, 22 Wn. App. 163, 181, 589 P.2d 250 (1977).



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record, and it is clear that AT&T contracted with the LECs for Washington correctional facilities, not T-Netix. AT&T cites to documents and testimony that do not at all support a finding that T-Netix entered into such contracts or in any way (other than ordering local loops on behalf of AT&T) dealt directly with the LECs for inmate calling at the DOC facilities. In fact, the evidence cited by AT&T merely suggests that T-Netix worked with LECs all over the country and had contracts with them for that work, which **by definition has nothing at all to do with Washington state or this Commission's jurisdiction.** *See, e.g.*, Clements Depo. Tr. at 233:22-235:2 (AT&T Opp. Exh. 17).

58. AT&T furthers its misleading argument by citing, out of context, to the deposition testimony of Dan Gross, a T-Netix employee, related to a dispute between T-Netix and a LEC. *See* AT&T Opp. ¶ 36. When US West changed its name to Qwest, it asked T-Netix to change out the voice chips to reflect the change in the verbal announcements. Gross Depo. Tr. at 104:6-105:23 (AT&T Opp. Exh. 16). When T-Netix sought payment for Qwest's request, Qwest opted to leave the announcements as they were. Gross Depo. Tr. at 105:10-13 (AT&T Opp. Exh. 16). AT&T falsely suggests that this issue relates to the facilities at question in this case. *Id.* Not only is there is no evidence that the demand by Qwest was related to announcements at Washington DOC facilities, the evidence is to the contrary.[27] AT&T has not come forward with a contract between Qwest and T-Netix for the DOC facilities. In fact, Mr. Gross's testimony referred broadly to the State of Washington rather than specifically to the Washington DOC. Gross Depo. Tr. at 104:6-105:23 (AT&T Opp. Exh. 16) And, the only evidence of a specific jail

[27] In any event, as discussed above in Section IV.B., that T-Netix required additional payment from its common carrier customers for performing additional work on their behalf is hardly surprising and of no evidentiary significance in this proceeding



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where this issue arose with Qwest was at "Multnomah Juvenile in Portland." Gross Depo. Tr. at 105:10-19 (AT&T Opp. Exh. 16). Indeed, T-Netix contracted with Qwest for inmate calling-related equipment at facilities all over the country and had contracts with them for that work. *See, e.g.*, Clements Depo. Tr. at 234:19-235:12 (AT&T Opp. Exh. 17). AT&T's unsupported assumption that Qwest made such a request of T-Netix for the branding of calls from inmates at Washington DOC sites is simply disingenuous and should be ignored.

## V. T-NETIX'S STATUS AS AN OSP IN OTHER STATES AND IN OTHER WASHINGTON LOCATIONS, WHETHER OR NOT CORRECT, IS COMPLETELY IRRELEVANT

### A. T-Netix Has Not "Recognized" That It Is An OSP Under The WUTC's OSP Rules

59. AT&T argues that T-Netix served as an OSP for calls from the four prisons at issue because (a) Gateway Technologies, Inc. ("Gateway"), which merged with T-Netix, had been certified as an OSP in Washington and provided operator services for calls from ***other*** Washington prisons, not the four at issue here; (b) Gateway's OSP certification had been transferred to T-Netix; and (c) Gateway was a competitor of T-Netix. AT&T Opp. ¶ 41. This is a complete non sequitur. Whatever T-Netix did or did not do in other states or at other locations in Washington state has no bearing at all upon, and is thus irrelevant to, the Commission's determination as to the four Washington DOC facilities in question.[28]

60. When a company registers as an OSP, it files a tariff or price list that contains the rates it intends to charge consumers for the long-distance services it intends to provide. Often true OSPs are resellers, but they can be facilities-based carriers as well. Gateway, when it

[28] Even Complainants' expert recognized that fact. Wilson Depo. Tr. at 261:10-262:9 (Exh. 2).



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operated as an OSP, did so as a reseller of long-distance calling service. It charged and quoted its own rates for the long-distance calls from the facilities it served as an OSP.

61. The federal Communications Act provides that a telecommunications carrier "shall be treated as a common carrier . . . only to the extent that it is engaged in providing telecommunications services." 47 U.S.C. § 153(44). As the federal courts have observed, since it is clearly possible for a given entity to carry on many types of activities, one can be a common carrier with regard to some activities but not others. *See, e.g., National Association of Regulatory Util. Comm'rs v. FCC*, 533 F.2d 601, 608 (D.C. Cir. 1976). The same is obviously true for an OSP—it is possible, indeed common, to act as an OSP in some contexts and not in others.

62. T-Netix did not operate as an OSP at the four prisons at issue in this case because it was a vendor of hardware and software service to AT&T. It did not charge its own rates; it did not act as a reseller of long-distance services; it did not hold itself out to the public as a carrier and provided no transmission services (*see* Section II above). In short, T-Netix did not act as a telecommunications company or a common carrier for purposes of the calls at issue in this matter. So the purported "facts" cited by AT&T about Gateway simply have no relevance to this case. Indeed, Complainants (who do not join this argument) proffer as a expert witness an industry veteran who had no difficulty in rejecting this silly conclusion.

> Q There have been references in this case in the past, mainly by lawyers, to questions of whether T-Netix held a certification in Washington as a long distance carrier or an operator service provider at any time during the relevant period.
>
> Are those facts material to your analysis of whether at the Washington DOC facilities T-Netix was the OSP?
>
> MR. PETERS: I'll object to the form.



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19 A I think you'd have to show me the fact and
20 I'd have to look at it with respect to my opinions,
21 but I -- on the face of it, I don't believe so.
22 Q (By Mr. Manishin) Okay. So
23 hypothetically just assume the following: Assume
24 that T-Netix also provided operator services to
25 truck stops on an interstate highway in the state of

262

1 Washington and it was registered and certified and
2 had filed an informational tariff and took all the
3 other steps required by the regulations. That
4 function of T-Netix for the truck stops doesn't say
5 one thing or another about whether T-Netix would
6 have been an OSP for the inmate calls at issue in
7 this case, does it?
8 A Sitting here now, I wouldn't see how it
9 would.

Wilson Depo. Tr. at 261:10-262:9 (Exh. 2).

*63.* AT&T next argues that because T-Netix petitioned the FCC for a waiver from the federal inmate rate quote rule, T-Netix must be considered to be the OSP under the WUTC's rules in this case. AT&T Opp. ¶ 42. This is wrong for a number of reasons. First, the FCC rule referenced is a rule that applies specifically to inmate calling services;[29] it is not the general OSP rule. The WUTC has never adopted a rule that applies directly to inmate operator services like the FCC has. *Id.*

64. Second, like its general OSP rule, the FCC's inmate OSP rule applies only to entities that are operating at prisons as common carriers.[30] While nationally T-Netix has

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[29] 47 C.F.R. § 64.710, discussed at T-Netix Opp. ¶¶ 23. Exhibit 20 to AT&T's Opposition addresses the history of the FCC's adoption of separate rules for OSPs and inmate operator services and the fact that carriers providing service to inmate-only phones at correctional institutions were not subject to the rate quote rules that applied to OSPs.

[30] *Id.*



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operated as a common carrier at some correctional facilities, it did not operate as a common carrier at others. In fact, the quotation included in AT&T's Opposition states explicitly that T-Netix was addressing situations where "it [was] the sole service provider in each of these facilities." It did not operate as a common carrier (or telecommunications company) at the four institutions at issue here. There is nothing inconsistent between T-Netix's position in this case and the 2002 petition it filed with the FCC seeking a waiver of the change to the FCC's rate disclosure rule applicable to providers of inmate operator services.

65. AT&T's reference to language in a 1995 national contract between AT&T and T-Netix is also inapposite. AT&T Opp. ¶ 43. It does not address any ultimate regulatory responsibility, and it does not address any term defined in either a WUTC or FCC rule. In fact, the description of "operator services" included in the quoted passage indicates clearly that Netix would not qualify as an OSP under either the federal or state OSP rules, nor would it qualify as a provider of inmate operator services, because in the AT&T situations T-Netix was clearly not acting as a common carrier. Again, AT&T was. T-Netix was agreeing to supply certain services to AT&T or on its behalf. At most, the passage may reflect a private contract obligation, which, in turn, may or may not provide a basis for a private remedy. It is irrelevant to this Commission's task.



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66. The same is true of the email string between J.R. Roth,[31] then a T-Netix employee, and various Verizon employees attached to AT&T's Opposition as Exhibit 18. AT&T Opp. ¶ 40. The emails demonstrate that Verizon considered itself to be the entity with the regulatory responsibility of complying with the WUTC's OSP rule insofar as it applied to intraLATA calls from prisons located in Verizon territory, and T-Netix was the underlying equipment and service provider that would enable Verizon to do so. It does not demonstrate that T-Netix is the OSP for purposes of the rule.

**B. Complainants' Argument Regarding T-Netix's Waiver Is Duplicitous**

67. Like AT&T, counsel for Complainants appear to have no difficult asserting directly contradictory arguments before this Commission. On the one hand, Complainants contend that the fact that Qwest and Verizon sought and obtained waivers from the disclosure regulations "does not mean that they were acting as OSPs at **every** such facility where they had a presence." Compl. Opp. ¶ 57 (emphasis in original). And on the other hand they maintain that Tele-Matic's waiver request in 1993[32] with respect to various provisions unrelated to rate disclosures "shows that in 1993 T-Netix clearly understood . . . it was an OSP subject to the rules contained in WAC 480-120-141" Compl. Opp. ¶ 66.

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[31] There has been no showing that J. R. Roth qualifies as a "speaking agent" for T-Netix; therefore, any statements he made would not be admissible as an admission against interest under Wash. Rules of Evidence 801(d)(2). It is well-established that statements made by a party's agent are not admissible unless the speaker had authority to make such a statement. *Codd v. Stevens Pass, Inc.*, 45 Wash. App. 393, 404-05, 725 P.2d 1008 (1986). The burden of establishing a principal-agency relationship is on the one who asserts it. *O'Brien v. Hafer*, 122 Wn. App. 279, 284, 93 P.3d 930 (2004), *review denied*, 153 Wn. 2d 1022 (2005). Whether a declarant is a speaking agent for purposes of ER 801(d)(2) is a question of preliminary fact governed by ER 104(a). *See Condon Bros. v. Simpson Timber Co.*, 92 Wash. App. 275, 285, 966 P.2d 355 (1998).

[32] Discussed at Compl. Opp. ¶¶ 64-66 and attached as Youtz Exh. J.



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68. These completely contradictory assertions cannot be reconciled. Tele-Matic's waiver, like Qwest's and Verizon's, says nothing about the particular locations; therefore, as Complainants recognize, the waiver "do[es] not address, much less serve as conclusive evidence for," the question of whether T-Netix served as an OSP at the four institutions at issue. Compl. Opp. ¶ 58; Youtz Exh. J.[33] Moreover, Tele-Matic's waiver request was made in conjunction with its application for registration as a telecommunications company (Youtz Exh. J), and, as explained above at Section II.A., T-Netix was not acting as a telecommunications company for the calls at issue in this matter.

## CONCLUSION

For all the reasons stated above, and in T-Netix's Opposition brief, T-Netix, Inc.'s Motion for Summary Determination should be GRANTED.

DATED this 24th day of September, 2009.

T-NETIX, INC.

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[33] Even Complainants' own expert recognized that OSP registration for certain facilities within a state would have no bearing on whether an entity was an OSP at a different facility in that state. Wilson Depo. Tr. at 261:10-262:9 (Exh. 2).

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## CERTIFICATE OF SERVICE

I hereby certify that I have this 24th day of September, 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 24th day of September 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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