SERVICE DATE

MAR 31 2011

BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION

SANDY JUDD AND TARA HERIVEL,	)	DOCKET UT-042022
Complainants,	)	ORDER 25
v.	)	
AT&T COMMUNICATIONS OF THE PACIFIC NORTHWEST, INC., AND T-NETIX, INC.,	)	FINAL ORDER AFFIRMING ORDER 23 IN PART ON OTHER GROUNDS AND RESPONDING TO QUESTIONS REFERRED FROM SUPERIOR COURT
Respondents.	)	

1 ***SYNOPSIS.*** *This is a Final Order of the Commission that affirms Order 23, in part, on grounds other than those stated on that order. The Commission clarifies the application of its operator services rules to explain that an operator services provider (OSP), like other telecommunications service providers, is the company that has the direct business relationship with the consumers who use the services. The Commission finds that AT&T Communications of the Pacific Northwest, Inc. (AT&T), was the OSP for all intrastate collect calls placed from the four correctional facilities at issue in this proceeding for which AT&T provided operator-assisted toll services. The Commission affirms the conclusion in Order 23 that AT&T was not exempt from the definition of OSP in effect prior to 1999. The Commission also finds based on undisputed facts that the automated operator services platform used at the prisons during the relevant period did not make rate quotes available to consumers as required by Commission rules. Based on this finding, the Commission concludes that by using that platform to provide operator services, AT&T violated Commission rules for each collect call for which AT&T provided operator services. The Commission defers to the Superior Court for any additional fact-finding and for the ultimate disposition of the Complainants' claims.*

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2 **NATURE OF PROCEEDING.** This proceeding involves a formal complaint filed with the Washington Utilities and Transportation Commission (Commission) by Sandy Judd and Tara Herivel (Complainants)[1] against AT&T Communications of the Pacific Northwest, Inc. (AT&T), and T-Netix, Inc. (T-Netix) (AT&T and T-Netix collectively referred to as Respondents). Complainants request that the Commission resolve certain issues under the doctrine of primary jurisdiction and pursuant to the referral by the Superior Court.

3 **APPEARANCES.** Chris R. Youtz, Sirianni Youtz Spoonemore, Seattle, Washington, represents Complainants. Letty Friesen, AT&T Law Department, Austin, Texas, and Charles H. R. Peters, Schiff Hardin, LLP, Chicago, Illinois, represent AT&T. Arthur A. Butler, Ater Wynne LLP, Seattle, Washington, and Stephanie A. Joyce, Arent Fox LLP, Washington, D.C., represent T-Netix.

4 **PROCEDURAL HISTORY.** Order 23 summarizes the extensive history of this proceeding, and we adopt that summary for purposes of this Order.[2] In brief, Complainants filed a complaint in Superior Court in June 2000, alleging that they received collect calls from inmates in Washington State correctional facilities, that Respondents provided operator services to those correctional facilities,[3] and that Respondents were operator service providers (OSPs)[4] that violated RCW 80.36.520

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[1] Zuraya Wright filed suit, in conjunction with Ms. Judd and Ms. Herivel, against Respondents in the Superior Court of Washington for King County (Superior Court or Court). *See* Ex. A-2. Ms. Wright's claim is restricted to interstate inmate telephone calls, and our jurisdiction extends only to intrastate telephone calls. Accordingly, we do not address Ms. Wright's claim.

[2] Order 23 ¶¶ 4-23. Similarly, we adopt those portions of Order 23 that summarize the governing law, undisputed facts, and party positions. *Id.* ¶¶ 25-39 and 41-88.

[3] Complainants originally named five telecommunications companies in their suit in Superior Court. In addition to Respondents, Complainants also filed suit against Verizon Northwest, Inc., f/k/a GTE Northwest, Inc. (Verizon), Qwest Corporation, f/k/a U S West Communications, Inc. (Qwest), and CenturyTel Telephone Utilities, Inc., f/k/a CenturyTel Telephone Utilities, Inc. and Northwest Telecommunications, Inc., d/b/a PTI Communications, Inc. (CenturyTel). The trial court dismissed Verizon, Qwest, and CenturyTel, and the appellate courts affirmed those dismissals. *Judd v. Am. Tel. & Tel. Co.*, 152 Wn.2d 195, 198, 95 P.3d 337 (2004).

[4] The statute and original Commission rule refer to entities that provide connections from call aggregators to local and interexchange carriers (IXCs) as "alternate operator services companies, but WAC 480-120-021 (1999) changed the term for these entities to OSP, which is the term the

by failing to assure rate disclosures for the collect calls Complainants received. The Superior Court held the complaint in abeyance and referred two questions to the Commission under the doctrine of primary jurisdiction:[5]

1) Whether AT&T or T-Netix were OSPs under the contracts at issue; and
2) If so, if the Commission's regulations were violated. [6]

5 On November 17, 2004, Complainants filed a formal complaint with the Commission pursuant to the court's referral. Complainants claim that Respondents are OSPs and that they violated the Commission's rule requiring that OSPs provide rate quote information to consumers.[7] Both Respondents denied the allegations in the Complaint and filed motions and amended motions for summary determination requesting that the Commission find they were not OSPs during the period in question and did not violate the Commission's regulations applicable to OSPs.

6 On April 21, 2010, following extensive proceedings in both the courts and the Commission, the Administrative Law Judge issued Order 23, Initial Order Denying in Part AT&T's Amended Motion for Summary Determination and Granting T-Netix's Motion and Amended Motion for Summary Determination (Order 23). That Order concludes AT&T was an OSP during the relevant time period, T-Netix was not an OSP, and the Commission should schedule a prehearing conference to address the procedural steps to address the issue of whether AT&T violated Commission rules.

7 AT&T filed a petition for administrative review of Order 23 on May 11, 2010. On May 21, 2010, T-Netix and the Complainants filed answers opposing AT&T's petition. The Complainants also filed their own petition for administrative review of certain conclusions and findings in Order 23.

Superior Court uses. To minimize potential confusion, we will refer to these entities as OSPs in this Order.

[5] Primary jurisdiction is a doctrine that requires issues within an agency's special expertise be decided by the appropriate agency. *E.g., Tenore, v. AT&T Wireless Servs.*, 136 Wn.2d 322, 345, 962 P.2d 104 (1998).

[6] Ex. A-3 at 2.

[7] *See* WAC 480-120-141 (1991) and (1999). For ease of reference, copies of the applicable Commission rules as they were in effect in 1991 and in 1999 are included in Appendix A to this Order.

8 On May 26, 2010, AT&T filed a reply in support of its petition and in opposition to the Complainants' petition, and T-Netix filed its response to the Complainants' petition. On June 1, 2010, Complainants filed a motion for leave to reply to AT&T's response to the Complainants' petition, and T-Netix filed a motion to strike AT&T's response or in the alternative to reply to that response. AT&T filed a response to each of these motions on June 7, 2010, and on June 8, 2010, T-Netix filed a motion for leave to file a reply in support of its prior motion.

9 The Commission reopened the record and issued Bench Requests Nos. 7-10 to the parties on October 6, 2010. The parties filed responses to those requests on October 20, 2010. On October 27, 2010, AT&T and the Complainants filed responses to other parties' Bench Request responses, and T-Netix filed a motion to strike a portion of the Complainants' response to Bench Request No. 7. On November 3, 2010, Complainants filed their response to T-Netix's motion to strike, and T-Netix filed a motion for leave to reply to Complainants' response to other parties' bench request responses. On November 9, 2010, T-Netix filed a motion for leave to file a reply in support of its motion to strike. On November 10, 2010, AT&T filed a motion for leave to reply to Complainants' response to T-Netix's motion to strike. Also on November 10, 2010, Complainants filed a response to T-Netix's motion for leave to file a reply in Complainants' response to other parties' bench request responses. On November 17, 2010, Complainants filed a response to AT&T's motion for leave to reply to Complainants' response to T-Netix's motion to strike.

10 On November 30, 2010, the Commission issued Bench Requests Nos. 11-15 to AT&T and T-Netix. Those parties filed responses on December 8, 2010. On December 15, 2010, Complainants, AT&T, and T-Netix filed responses to these Bench Request responses, and AT&T filed a supplemental response to Bench Request No. 13. On December 20, 2010, AT&T filed a motion to file a surreply to the replies to AT&T's response to Bench Request Nos. 12, and T-Netix filed motions to reply to (1) Complainants' replies to AT&T's and T-Netix's Bench Request responses; (2) AT&T's supplemental response to Bench Request No. 13, and (3) AT&T's reply to T-Netix's response to Bench Request No. 14. Complainants filed their opposition to AT&T's December 20 motion on December 29, 2010.

DISCUSSION

11 Complainants allege that they and a putative class of other consumers received operator-assisted collect calls between June 20, 1996, and December 31, 2000, from the Washington State Reformatory (a/k/a Monroe Correctional Complex), Airway Heights, McNeil Island Penitentiary, and Clallam Bay state correctional facilities (collectively Correctional Facilities) and were not given the option of hearing rate quotes before accepting the collect calls. Complainants further allege the Respondents were the OSPs for these calls and thus each is responsible for violation of the Commission's regulations requiring disclosure of the rates applicable to the calls. The Complainants make these allegations in a complaint filed with the Commission as a result of a referral from the Superior Court in which the Court seeks a Commission response to two questions: (1) whether AT&T or T-Netix were OSPs during the relevant time period, and (2) if so, whether they violated the Commission regulations governing OSPs. In response, we find that (1) AT&T was the OSP for the intrastate calls placed from the Correctional Facilities for which AT&T provided the operator-assisted toll service, and (2) AT&T violated Commission regulations requiring OSPs to disclose the rates for those calls.

A. AT&T was the OSP for the Intrastate Calls Placed from the Correctional Facilities for which AT&T Provided the Operator-Assisted Toll Service.

1. An OSP is the Entity with the Direct Business Relationship with the Consumers of Operator Services.

12 We first examine the history and meaning of the Commission's definitions of "operator services" and OSPs. From 1991 to 1999, WAC 480-120-021defined an OSP as:

> any corporation, company, partnership, or person other than a local exchange company providing a connection to intrastate or interstate long-distance or to local services from locations of call aggregators. The term 'operator services' in this rule means any intrastate telecommunications service provided to a call aggregator location that includes as a component any automatic or live assistance to a consumer to arrange for billing or completion, or both, of an intrastate telephone call through a method other than: (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.[8]

13 The Commission modified WAC 480-120-021 in 1999. The modified rule no longer included the exemption of local exchange carriers (LECs) from the definition of an OSP, but the remainder of the language largely remained unchanged. Both versions of the rule defined an OSP as an entity "providing a connection to intrastate or interstate long-distance or to local services from the locations of call aggregators," and defined "operator services" as a service provided to such locations "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" except through certain specified methods.

14 AT&T interprets WAC 480-120-021 to establish the OSP as the company that provided the physical "connection" to the local or long distance service used to complete the calls. Order 23 accepted this view of the rule and concluded that AT&T owned the equipment used to provide that "connection" and thus was the OSP. We do not adopt this interpretation of the rule. Rather, we conclude that the OSP is the entity that has the direct business relationship with the consumer of the operator services, regardless of which company owns the physical facilities used to provide those services.

15 The definition of "OSP" in WAC 480-120-021 is virtually identical to the definition of "alternate operator services company" in RCW 80.36.520. The statute defines that term as "a person providing a connection to intrastate or interstate long-distance services from places including, but not limited to, hotels, motels, hospitals, and customer-owned pay telephones." This language requires that an OSP be "providing a connection" but does not specify *to whom* the OSP is providing that connection. Viewed in the light of the context and intent of both the statute and the Commission rule, we interpret this language to establish that the OSP is the entity that provides the connection *to the consumers* who are the parties to the call, particularly the called party who accepts and pays for the service or "connection" provided.

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[8] WAC 480-120-021 (1991).

16 The statute includes an expression of legislative intent, stating that "a growing number of companies provide, in a nonresidential setting, telecommunications services necessary to long distance service without disclosing the services provided or the rate, charge or fee. The legislature finds that provision of these services without disclosure *to consumers* is a deceptive trade practice."[9] The legislature directed the Commission to require that "any telecommunications company, operating as or contracting with an alternate operator services company, assure appropriate disclosure *to consumers* of the provision and the rate, charge or fee of services provided by an alternate operator services company."[10] The legislature was expressly concerned with companies that provide services to consumers without disclosing to those consumers the services the companies are providing and the rates those companies are charging.

17 The Commission's rules reflect that concern. The Commission consistently has 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" except under certain circumstances.[11] A "consumer" for purposes of the OSP rules is "the party initiating and/or paying for a call using operator services."[12] Operator services by definition are provided to consumers, and to state the obvious, an OSP provides operator services.[13] An OSP, therefore, is an entity that provides *to consumers* a connection to intrastate or interstate long distance or to local services from locations of call aggregators, and that entity must disclose *to those same consumers* both the service it is providing and the rates charged for the service and the call.

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[9] RCW 80.36.510 (emphasis added).

[10] RCW 80.36.520 (emphasis added).

[11] WAC 480-120-021 (1991 & 1999) (emphasis added).

[12] WAC 480-120-141(1)(c) (1999). The prior version of the rule similarly defined "consumer" as "the party initiating and/or paying for an interexchange or local call." WAC 480-120-141(3) (1991).

[13] AT&T correctly observes, "By defining 'operator services' within the definition of an OSP, the WUTC recognized that, under pure common sense, an Operator Service *Provider* is a *provider* of operator services." Ex. A-22HC ¶ 13 (emphasis in original).

18 This consumer-centric approach to determining which company is responsible for complying with our rules governing OSPs is fully consistent with the Commission's treatment of other telecommunications service providers. Resellers of local or long distance services, for example, are the service providers for the consumers of that service, even though the underlying facilities – or the entire service itself – are physically provisioned by another company. As the service provider, the reseller, not the company that owns and operates the physical infrastructure used to provide the service, has the direct business relationship with its customers and is responsible for all billing of, notifications to, and other communications with, the end users of that service, as well as for complying with all Commission rules governing the provision of those services to consumers.

19 We see no reason to identify OSPs any differently. The objective of the statute and Commission rules governing OSPs is to ensure that consumers are aware that they are using operator services and know or can request the rates they are paying for calls using those services. As with other telecommunications services, the company that charges, communicates with, and otherwise is identified as the service provider to, the consumer is obligated to make such disclosures.

20 Rather than focus on which company had the direct business relationship with the consumers of the operator services, the parties have disputed whether AT&T or T-Netix owned or controlled the equipment or facilities that were used to provide those services. That dispute is largely irrelevant. A company is no more an OSP solely because it owns and maintains some or all of the equipment used to provision operator services than a company could be considered a local exchange carrier simply because it supplies the switch used to originate and terminate telephone calls. Only the company that has the direct business relationship with the consumers who use operator services is an OSP.

21 T-Netix recognizes this requirement even while fully engaging in the debate over which company owned the underlying facilities. T-Netix's expert witness, Robert Rae, provided testimony that, based on "common practice," the term "connection" in the Commission's rules refers to the service provided to the consumer using and paying for that service:

> I think the best way I can describe it is in the general sense of the carrier that is the – basically integrating the services of telecommunications, which could mean anything from purchasing hardware, purchasing software, procuring network connectivity and more importantly, even if they aren't doing any of those things, at a higher order, **providing the face to the customer in branding the calls, branding the billing, taking the responsibility for those elements being pulled together to deliver service to the customer and, therefore, representing to the customer that complex process behind it to make sure that the customer is serviced appropriately.**[14]

T-Netix contended that AT&T provided these functions for the consumers of the operator-assisted toll services that AT&T provided, and thus AT&T was the OSP:

> T-Netix supplied equipment and services to AT&T; the LECs and AT&T provided the long-distance services of which operator services were a component. As such, under this Commission's precedent, AT&T was reselling the services it purchased from T-Netix to its own end users (call recipients), which makes AT&T and not T-Netix the common carrier for the operator services at issue.[15]

22 Complainants also take issue with the conclusion that the OSP is the owner of the equipment used to provide the service and suggest that the company responsible for providing operator services should be considered the OSP.[16] By "responsible," the Complainants mean the company with a contractual obligation to the DOC to make operator services available. The DOC, however, was the "customer," not the "consumer" of the operator services at issue in this proceeding.[17] The customer does

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[14] Ex. A-24HC at 172, line 23 through 173, line 10 (emphasis added). Although the quoted language is in a transcript that is marked "highly confidential" in its entirety, we find no basis for treating this language as highly confidential and accordingly do not afford it such treatment.

[15] Ex. T-25 ¶ 25 at 15. T-Netix further notes, "In its 1998 Order adopting the verbal rate quote requirement, the Commission made clear that it is the OSP serving end users and holding itself out to the public, rather than a carrier or other service provider whose services the OSP is reselling, that is responsible for regulatory compliant [*sic*]." *Id.*, n.11.

[16] *E.g.*, Complainants 1) Answer to AT&T's Petition for Administrative Review and 2) Petition for Administrative Review ¶¶ 24-40.

[17] Commission rules distinguish "consumers" from "customers" of operator services. The "customer" is "the call aggregator or pay phone service provider, i.e., the hotel, motel, hospital,

not use or purchase the operator services. The consumers do. The contractual relationship the DOC had with AT&T and T-Netix, while potentially one indication of which entity is the OSP, does not in itself determine whether either Respondent was an OSP.[18] The Complainants nevertheless appear to agree that the OSP is the company that provides operator services to the persons who use that service.

23 AT&T, on the other hand, adheres to its view that the facilities owner is the OSP based on AT&T's interpretation of the word "connection" in the Commission rule. AT&T's primary argument is that the language of the rule identifies the OSP as the entity that provides the connection from the call aggregator location to the local or toll service provider, which necessarily, in AT&T's view, is the physical link between those locations. As we discussed above, however, the proper focus is on the entity "providing" the connection to the consumer of the service, regardless of which company supplies the physical facilities used to make that connection.

24 AT&T contends that such an interpretation of the rule "results in complete ambiguity as to who actually is the OSP."[19] We find no such ambiguity. To the contrary, defining the OSP as the company that has the direct business relationship with the consumer is clear and unambiguous and avoids the protracted disputes over the nature and ownership of the network facilities used to provide the service that have been litigated so extensively in this proceeding.

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correctional facility/prison, or campus contracting with an OSP for service." WAC 480-120-141(1)(c) (1999) (emphasis added); accord WAC 480-120-141(3) (1991); see WAC 480-120-021 (1991) (defining "call aggregator" as "a person who, in the ordinary course of its operations, makes telephones available for intrastate service to the public or to users of its premises, including but not limited to hotels, motels, hospitals, campuses, and pay telephones"); accord WAC 480-120-021 (1999) (revising the prior rule remove the phrase "for intrastate service" and to add "for telephone calls using a provider of operator services" after "premises"). The customer, in conjunction with the OSP, has certain specified obligations to the consumers who use the telephones on the customer premises.

[18] AT&T correctly notes that prior to the period at issue in this proceeding, the Commission amended its definition of an OSP to delete the provision stating that an OSP is the entity that contracts with a call aggregator to provide operator services to its clientele. Ex. A-22HC ¶ 28.

[19] *Id.* ¶ 16 at 12.

25 AT&T nevertheless asserts that such an approach "essentially equates the OSP with the local or long-distance provider, which would be the common carrier for the call. . . . Had the WUTC wanted that outcome, it would *not* have defined an OSP as the entity providing the connection *to* local or long-distance services."[20] That argument, however, ignores the definition of operator services as "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."[21] The Commission rules thus expressly contemplate that the OSP and the local or toll service provider may be one and the same.[22] Neither logic nor the Commission rule precludes the same entity from providing local and long-distance services as well as the connection between those services and a call aggregator location.

26 AT&T similarly maintains that an OSP cannot be the company that bills the consumer because the Commission "repeatedly recognized that the OSP may very well be separate from the entity that billed the call."[23] AT&T claims that rule provisions requiring OSPs to provide call detail to the billing company would be unnecessary and nonsensical if the OSP were the company that bills for the services. AT&T misunderstands our rules in this regard.

27 The Commission rules recognize that the OSP may not directly bill consumers largely because in 1991 when the Commission first promulgated the rule, the LECs billed their customers not just for the LECs' services but for toll and related services that other carriers provided to those same consumers. Even after the LECs discontinued billing on behalf of other carriers, some companies have continued to use a billing agent to bill consumers in the companies' names, rather than undertake that responsibility themselves. The Commission rules were designed to ensure that any OSP that used a LEC or other billing agent provide sufficient detail to enable accurate billing. Whether an entity bills consumers directly or through another company, however, the entity that actually charges consumers for the services provided is the

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[20] *Id.* ¶ 26 (emphasis in original).

[21] WAC 480-120-021 (1991) (emphasis added).

[22] Indeed, as discussed below, the undisputed record evidence demonstrates that the toll service provider for the collect calls at issue in this proceeding was also the OSP.

[23] Ex. A-22HC ¶ 46 at 28.

OSP, regardless of which company collects or transmits the call detail for billing purposes.

28 We conclude under RCW 80.36.520 and the rules promulgated pursuant to that statute that an OSP is the entity with the direct business relationship with the consumers who use the operator services, not necessarily the company that owns the facilities used to provision that service.

2. The Undisputed Record Evidence Demonstrates that AT&T Was the OSP for the Intrastate Operator-Assisted Toll Calls AT&T Carried.

29 We determine which entity is the OSP by looking at indicia of a direct business relationship with the consumers using the operator services. Such indicia include evidence that the company holds itself out to consumers as the service provider, such as through "providing the face to the [consumer] in branding the calls, branding the billing, [and] taking the responsibility for those elements being pulled together to deliver [operator] service to that [consumer]."[24]

30 The parties in their prior submissions focused on which company owned and maintained the automated operator services platform, rather than on the extent to which AT&T or T-Netix had any direct business relationship with the consumers who used the operator services at issue in this proceeding. Accordingly, the Commission reopened the record and issued Bench Requests numbers 7-15 to obtain additional evidence. The information the parties provided in response to those requests and in reply to other parties' responses, in conjunction with evidence previously admitted into the record, provides sufficient undisputed facts to determine whether AT&T or T-Netix was an OSP in conjunction with the collect calls from the Correctional Facilities during the time period at issue in this proceeding.

31 As an initial matter, AT&T objects to these Bench Requests "to the extent that they are addressed to matters other than identifying which party actually connected the prison collect calls received by the Complainants at issue in this proceeding to local or long distance providers."[25] AT&T "suggests that deviating from the express OSP

[24] Ex. A-24HC at 173, lines 5-8.

[25] AT&T's Responses to October 6, 2010 Bench Requests at 2; *accord* AT&T's Responses to the November 30, 2010 Bench Requests.

definition raises concerns regarding due process, fundamental fairness, prior notice, improper jurisdiction, and other constitutional and legal issues."[26]

32 We overrule AT&T's objections. As explained above, the Commission rejects the view that WAC 480-120-021 ever defined an OSP on the basis of which entity owns or maintains the physical connection to the local or long-distance provider. The Bench Requests address the factual issues at the heart of the appropriate inquiry required in this proceeding, and we find no deviation from the express definition of "OSP" or any legitimate legal concerns in obtaining the information we requested. We therefore admit into the record the responses to Bench Requests Nos. 7-15 and the responses to those Bench Request responses.[27]

33 The Bench Request responses largely confirm the evidence that was previously in the record. T-Netix provided copies of Complainants' bills, and those bills demonstrate that Verizon and Qwest billed Complainants for the operator-assisted collect calls those companies carried. The Verizon bills have a separate category for "Operator Assisted Calls," which include charges for prison-originated collect calls. The Qwest bills identify specific calls as "collect" from a correctional institution. Neither company's bills reflect a separate charge for operator services or expressly identify Verizon or Qwest as the provider of operator services. The applicable Commission rule, however, expressly 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."[28] Verizon and Qwest each included operator services as a component of its operator-assisted toll service and imposed a single charge for this service.

34 Both Verizon and Qwest, moreover, acknowledged that they provided operator services to correctional institutions when each sought (and received) a temporary waiver of the Commission rule requiring OSPs to disclose rate information as part of

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[26] *Id.*

[27] As we explain below, we deny T-Netix's motion to strike a portion of Complainants' response to Bench Request No. 7. We also deny the motions for surreplies to Bench Request response replies, all of which are extraneous or merely repeat the parties' prior arguments and positions.

[28] WAC 480-120-021 (1991 & 1999) (emphasis added).

any collect call.[29] This undisputed record evidence is also fully consistent with the DOC-AT&T Agreement, which states that Verizon and Qwest "shall also provide local and intraLATA telephone service and operator service to the [Verizon and Qwest] Public Telephones."[30]

35 Based on the undisputed record evidence, we find that Verizon and Qwest provided operator services as a component of the intrastate toll telecommunications services they provided from the public telephones located at the Correctional Facilities between June 20, 1996, and December 31, 2000. These companies, however, were not "OSPs" or required to make rate quotes available under our rules in effect during the relevant time period because they either were excluded from the definition of "OSP" or received temporary waivers of this OSP requirement.

36 Verizon and Qwest, however, were not the only operator-assisted toll providers carrying collect calls from the Correctional Facilities during that time. In response to Bench Request No. 7, Complainants provided excerpts of two AT&T bills that include call detail for "Operator Handled – Domestic" collect calls to a Seattle consumer from the correctional facilities in Gig Harbor and Spokane in early 2000. These bills, like the Verizon and Qwest bills, show that AT&T billed consumers for operator services as a component of the intrastate collect toll calls it carried from the Correctional Facilities.[31] AT&T concedes as much in response to Bench Request No. 13, stating "with respect to operator-assisted collect calls placed from the four correctional institutions at issue in this proceeding, for the period between June 20, 1996 and December 31, 2000, AT&T provided operator-assisted ('0+') interLATA, intrastate service." AT&T also does not dispute that the automated operator

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[29] Exs. A-13 through A-15.

[30] Ex. A-8 § 4.A & C.

[31] Indeed, the AT&T bill notes, "An Operator Service Charge will apply when the customer has the capability of dialing the called number, but elects to have the operator dial the called number." The tariff excerpts AT&T provided in response to Bench Request No. 13 confirm that AT&T bills consumers a single charge for all toll calls that include operator assistance. AT&T, like Verizon and Qwest, thus included charges for operator services in its rates for operator assisted collect calls from inmates at the Correctional Facilities because the calling party did not have the capability to dial the called number.

assistance platform in place at the correctional facilities branded the operator-assisted calls AT&T carried as AT&T calls.[32]

37 T-Netix moved to strike or exclude the AT&T bill excerpts Complainants provided. T-Netix contends that these are bills to a third party, not to either of the Complainants, and thus the bill excerpts are untimely, irrelevant, and an improper attempt to reopen the record and expand the scope of this case to include additional parties.[33] Complainants respond that the Commission reopened the record and that this information is responsive to Bench Request No. 7.

38 We deny T-Netix's motion to strike or exclude these bill excerpts.[34] We agree with Complainants that the Commission reopened the record for receipt of additional evidence, and this document is responsive to Bench Request No. 7. Nor do we find that bills to consumers other than the Complainants are irrelevant or beyond the scope of our jurisdiction pursuant to the Superior Court's referral. The Court asked the Commission to determine "whether AT&T or T-Netix were OSPs under the contracts at issue," which is a broader question than whether either company provided operator services to the Complainants. Indeed, we make no findings on the latter issue, leaving that determination to the Superior Court.[35] Our charge is to determine whether AT&T or T-Netix was an OSP for collect calls placed during the relevant

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[32] Ex. T-25 ¶ 29.

[33] AT&T seeks leave to make similar arguments in a Reply to Complainants' Response to T-Netix's Motion to Strike. The Commission's procedural rules, however, do not authorize replies to evidentiary motions or even contemplate such a reply from a party who is not the original moving party. AT&T could have filed its own motion to strike or joined T-Netix's motion. AT&T did neither. We deny AT&T's motion for leave to file its proffered reply.

[34] We also deny T-Netix's and AT&T's motions for leave to reply to Complainants' response to this motion. The proffered replies are largely repetitive of the arguments both parties have made in prior filings and provide no assistance to the Commission in rendering a decision on the merits of that motion. In addition, AT&T's proffered reply raises issues that AT&T should have raised in its response to Complainants' response to Bench Request number 7. Accordingly, we have not considered either proposed reply.

[35] The parties dispute whether Ms. Herival accepted an interLATA collect call in Seattle from the Airway Heights correctional facility near Spokane, with each side providing declarations in support of its position. We make no finding on this issue, both because it is a contested factual issue that cannot be resolved through summary determination and because the Superior Court is the appropriate forum for resolving such issues.

time period from the Correctional Facilities. Bills to any consumers who accepted those calls are relevant to that inquiry.

39 We similarly disagree with AT&T's contention that our consideration of billing information "raises concerns about due process, fundamental fairness, inadequate notice, and the lack of opportunity to be fully heard."[36] T-Netix first asserted that an OSP is the company that interfaces with the consumer of operator services – including billing for those services – and AT&T fully responded to that position.[37] AT&T also had the opportunity to respond to Bench Request Nos. 7 and 13 and to reply to other parties' responses. No party, including AT&T, questions the accuracy of the bill excerpts the Complainants provided, and AT&T provided the response to Bench Request No. 13. AT&T's interpretation of the rule governing OSPs differs from that of the Commission, but that difference does not constrain us from making findings on undisputed facts pursuant to the correct interpretation.

40 AT&T also argues that Verizon and Qwest had the express responsibility under the DOC-AT&T Agreement to provide operator services from the public telephones they provided, while the Agreement imposes no such duty on AT&T. As discussed above, however, the business relationship with the consumer, not a contract between a service provider and the call aggregator, determines whether a company is an OSP under Commission rules. Even to the extent that such a contract can be one indication of such a relationship, the entire DOC-AT&T Agreement is not included in the record. The Agreement expressly incorporates the DOC's request for proposal for a telephone system and AT&T's responsive proposal,[38] but AT&T failed to provide those documents.[39] We cannot accept AT&T's argument that the Agreement does not obligate AT&T to provide operator services when the entire Agreement is not before us – particularly when an amendment to the Agreement contemplates that AT&T would be responsible for providing operator services under certain circumstances.[40]

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[36] AT&T's Response to Bench Request No. 13.

[37] Ex. A-22HC ¶¶ 16-17, 26-27 & 44-46.

[38] Ex. A-8 §§ 1 & 24.

[39] AT&T stated in response to Bench Request No. 11 that "AT&T has not located these documents in its possession, custody, or control."

[40] Ex. A-8, Amendment No.2, Attachment B ("In the event AT&T is unable to provide [Inmate Calling Service (ICS)] as of the effective date of this Agreement, then AT&T will provide its

41 We further observe that AT&T's interpretation of the Agreement conflicts with the undisputed record evidence. The bills from AT&T, Verizon, and Qwest, as well as AT&T's tariff provisions, consistently include operator services as a component of the intrastate service provided at the Correctional Facilities and billed in a single charge per call for "operator-assisted" or "operator handled" toll service. There is no evidence in the record that any company imposed a charge solely for operator services, either to a consumer or to the toll service provider, despite the Commission's request for such information.[41] AT&T thus cannot reasonably contend that Verizon and Qwest not only provided and billed for operator services as part of the toll service they provided consumers, but those companies provided the operator services – without compensation or attribution – used in connection with AT&T's operator-assisted toll service. AT&T, moreover, offers no explanation for why it would charge consumers for "operator handled" toll service if AT&T was not also providing operator service as a component of those toll services. AT&T's position simply is not credible.

42 Finally, AT&T maintains that T-Netix, not AT&T, had the direct contact with the consumers of the operator services through the facilities those consumers physically used to connect to AT&T's toll service. This is the case in all telecommunications resale circumstances. The company that provides the actual service has direct physical contact with the subscribers, but the reseller is the company the consumer identifies as the service provider. AT&T identified itself as the service provider through its branding of, and bills for, the operator-assisted collect calls. There is no evidence that any consumers knew or had reason to know that T-Netix was involved in those calls. AT&T, not T-Netix, had the direct business relationship with those consumers.

43 Based on the undisputed record evidence, we find that AT&T provided operator services as a component of the operator-assisted intrastate toll telecommunications services it provided from the public telephones located at the Correctional Facilities

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standard live operator services to connect the inmate's call to the called party until it is able to provide ICS."). AT&T responded to Bench Request No. 12 that to the best of AT&T's knowledge, the company did not provide its standard live operator services to any of the Correctional Facilities.

[41] *See* Bench Request No. 7.

during the time period at issue in this proceeding. AT&T, therefore, was the OSP for these calls.

44 There is no evidence in the record, however, that T-Netix billed consumers for operator services or operator-assisted calls, was identified to consumers as the provider of those services, or otherwise had any direct business relationship with the consumers of the collect calls at issue in this proceeding. To the contrary, T-Netix asserts that it had no such relationships,[42] and no party offered contradictory evidence. Accordingly, we agree with the conclusion in Order 23 that T-Netix was not the OSP for these calls.[43]

3. AT&T Was Not Exempt from the Definition of "OSP."

45 AT&T claims that it could not have been an OSP for any of the collect calls at issue between 1997 and 1999 because AT&T was registered to provide local exchange services and the version of WAC 480-120-021 in effect at that time expressly excluded LECs from the definition of OSPs.[44] We disagree.

46 Order 23 concluded that the LEC exemption from the OSP definition in the 1991 rule does not apply to AT&T, a carrier that was registered as both an interexchange carrier[45] and a LEC beginning in 1997,[46] because AT&T was not acting as a LEC in connection with the collect calls at issue. The order observes that in the rule adoption order, the Commission stated that the reason for the LEC exemption in WAC 480-120-021 was that "[c]onsumers often expect that they are using their LEC when they use a pay phone; requirements that apply to [a] non-LEC compan[y] to inform the

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[42] T-Netix Responses to Bench Request Nos. 7 & 14.

[43] This conclusion, however, is based on the record before the Commission and should not be interpreted to preclude a finding in the Superior Court that T-Netix was an OSP if evidence is produced in the judicial proceeding sufficient to demonstrate that T-Netix had a direct business relationship with any consumers who accepted collect operator-assisted calls from any of the Correctional Facilities during the relevant time period.

[44] AT&T's argument is limited to this time period because AT&T was not registered as a LEC prior to 1997, and the Commission amended the rule in 1999 to remove the LEC exemption.

[45] *See* AT&T's Response to Bench Request No. 2 at 1.

[46] *Id.* at 2.

consumer that it is not the LEC are reasonable."[47] Order 23 concluded, "AT&T was not acting as a LEC in the correctional facilities in question and the consumers would, therefore, have no reason to believe that they were using AT&T's services absent disclosure.[48]

47 AT&T seeks Commission review of this determination. AT&T contends that the rule expressly states that LECs are excluded from the definition of "OSP," and AT&T was registered as a LEC. The rule does not state that a LEC is not an OSP only if the LEC is acting as a LEC, and serious due process concerns result, according to AT&T, if the Commission now interprets the rule to include additional conditions that are not part of its plain language.[49]

48 AT&T also observes that in addition to the justification quoted in Order 23, the Commission explained when it adopted the rule in 1991 that "[u]nlike LECs, [OSPs] can be seen as entering and [exiting] markets at will." AT&T argues that the Commission recognized that OSPs were less stable than LECs and thus required greater regulation. AT&T maintains that if an applicant for registration as a telecommunications company "has sufficient financial resources and stability to qualify as a LEC, then the justification for giving the exemption is achieved, regardless of what kind of traffic the applicant might be handling at any particular time."[50]

49 We affirm Order 23 on this issue. As discussed above, both the legislature's and the Commission's concern with OSPs is to ensure that consumers know the identity of the company providing the service they are using and the rates they are being charged. The 1991 rule adoption order demonstrates that the Commission initially exempted LECs from the definition of OSPs primarily because consumers either assumed or were already aware that the LEC serving that area provided the operator services.[51] The intent of the rule, therefore, was to exclude LECs only to the extent

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[47] *Id.* at 107.

[48] Order 23 ¶ 121.

[49] AT&T Petition for Administrative Review ¶¶ 39-42.

[50] *Id.* ¶ 43.

[51] The Commission also expressed the concern that OSP rates are often higher than the rates LECs charged for operator services. We observe that the rates reflected in AT&T's bills for

that they were providing the local exchange service as well as the operator service for the calls placed from the call aggregator location.

50 AT&T's arguments to the contrary ignore the historic context of the 1991 rule. Only incumbent LECs (ILECs) were LECs when the exemption was included in the rule. Indeed, the Commission at that time interpreted Washington statutes to grant exclusive service territories to ILECs and refused to authorize any other company to provide competing local exchange service.[52] There was no need to state in the rule in 1991 that LECs were not OSPs if they also provided the local exchange service used in connection with operator-assisted calls because those were the only circumstances that existed when the rule was enacted. Not surprisingly, the Commission revised the rule to remove the LEC exemption shortly after competitive LECs (CLECs) such as AT&T began entering the local exchange market. CLECs, too, could enter and exit markets at will and as competitively classified companies were subject to reduced regulation of their service rates, terms, and conditions.

51 Nor do we give any credence to AT&T's claim that interpreting our rule as we have would deprive AT&T of settled expectations in its status as a LEC in violation of due process. AT&T presented no evidence that it was aware of the exemption while it was in effect or that AT&T relied in any way on its status as a LEC to fulfill its obligations with respect to collect calls from the Correctional Facilities. Indeed, AT&T entered into the initial contract with the DOC long before AT&T registered as a CLEC, and none of the amendments to the contract in the record reference AT&T's subsequent registration to provide local exchange services, much less indicate that registration had any impact whatsoever on AT&T's rights or responsibilities with respect to operator services.

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operator-assisted toll service included in Exhibit A to Complainants' response to Bench Request No. 7 are significantly higher – in some cases several times higher – than the rates in the Verizon and Qwest bills for comparable calls.

[52] *See In re Consolidated Cases Concerning the Registration of Electric Lightwave, Inc., and Registration and Classification of Digital Direct of Seattle, Inc.*, 123 Wn.2d 530, 869 P.2d 1045 (1994). Congress rendered the issue moot in the Telecommunications Act of 1996 when it opened all local exchange markets to competition. *See* 47 U.S.C. §§ 251, *et seq.*

52 Because AT&T was not the provider of local exchange services at any of the Correctional Facilities, AT&T cannot claim the LEC exemption from the Commission rules governing OSPs.

B. AT&T Violated Commission Rules Requiring OSPs to Make Rate Quotes Available to Consumers of Operator-Assisted Collect Calls.

53 The Superior Court's second question to the Commission is whether any Commission rules were violated during the relevant time frame if AT&T or T-Netix was an OSP.[53] Order 23 did not reach that question, concluding that the Administrative Law Judge had "yet to hear evidence on whether AT&T, as the OSP, violated our disclosure regulations."[54] We disagree with this aspect of Order 23 and find sufficient undisputed evidence in the record to enable us to respond to the Court's question at this time.

54 The Commission rules in effect between June 20, 1996, and December 30, 2000, required an OSP to make available rate information to consumers of operator-assisted calls. Specifically, the rule in effect until 1999 stated that during each such call,

> The [OSP] shall immediately, upon request and at no charge to the consumer, disclose to the consumer:
>
> (A) A quote of the rates or charges for the call, including any surcharge;
>
> (B) The method by which the rates or charges will be collected; and
>
> (C) The methods by which complaints about the rates, charges, or collection practices will be resolved.[55]

The revised rule that became effective in 1999 was even more specific:

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[53] In the context of this proceeding and the case before the Court, we construe this question as asking whether either company violated the Commission rules requiring OSPs to disclose rate quotes to consumers of operator-assisted calls.

[54] Order 23 ¶ 129.

[55] WAC 480-120-141(5)(a)(iv) (1991).

> Verbal disclosure of rates. Before an operator-assisted call from an aggregator location may be connected by a presubscribed OSP, the OSP must verbally advise the consumer how to receive a rate quote, such as by pressing a specific key or keys, but no more than two keys, or by staying on the line. This message must precede any further verbal information advising the consumer how to complete the call, such as to enter the consumer's calling card number. This rule applies to all calls from pay phones or other aggregator locations, including prison phones, and store-and-forward pay phones or "smart" telephones. After hearing an OSP's message, a consumer may waive their rights to obtain specific rate quotes for the call they wish to make by choosing not to press the key specified in the OSP's message to receive such information or by hanging up. The rate quoted for the call must include any applicable surcharge. Charges to the user must not exceed the quoted rate.[56]

55 All toll providers, including AT&T, used the P-III Premise software platform to provide automated operator services in conjunction with the operator-assisted toll services they provided at the Correctional Facilities between June 20, 1996, and December 31, 2000.[57] Indeed, the DOC-AT&T contract required the use of such an automated operator services platform,[58] and AT&T confirmed that it did not provide its standard live operator services that the contract required if an automated platform was not in place.[59] No party contests these facts.

56 Similarly, no party disputes that the P-III Premise software platform did not make rate information available to consumers. The record includes a detailed call flow of an inmate-initiated operator-assisted collect call from the Correctional Facilities, and at no time during that call flow is there any indication that either the inmate or the party receiving the call was notified of the ability to obtain a quote of the rates or charges for that call.[60] Correspondence between AT&T and T-Netix confirms that as of

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[56] WAC 480-120-141(2)(b) (1999).

[57] *E.g.*, AT&T Response to Bench Request No. 12 and record citations therein.

[58] Ex. A-8, Amendment No. 2, Attachment B.

[59] AT&T Response to Bench Request No. 12.

[60] Ex. A-20HC ¶ 14; Ex. A-19HC ¶ 18.

August 2000, T-Netix had not implemented the platform's capability to make rate quote information available to consumers.[61] As late as September 2000, Verizon and Qwest sought and received temporary waivers of the Commission rule requiring OSPs to provide rate quotes from automated operator services platforms, specifically including the platforms in use at state correctional facilities. Verizon and Qwest explained that the waivers were necessary because the companies were "still in the process of developing the technology to allow the receiving party but not the originating party access to verbal rate disclosure."[62]

57 The Commission orders granting Qwest and Verizon waivers of WAC 480-120-141 make abundantly clear the Commission's position that an OSP violates Commission rules when it fails to provide rate quotes to consumers of operator-assisted collect calls.[63] Indeed, the Commission in those orders initiated investigations into Verizon's and Qwest's compliance with that requirement, and both companies agreed to pay penalties for the rule violations uncovered as a result of those investigations.[64]

58 We observe that the revised rule governing rate disclosures promulgated in 1999 uses different language than the prior rule. The 1999 rule required the OSP not just to provide a rate quote upon request but to "verbally advise the consumer how to receive a rate quote." The 1991 rule mandated only that the OSP provide rate quotes "upon request and at no charge to the consumer." This discrepancy is a distinction without a difference under the circumstances of this case. The P-III Premise software platform in use at the Correctional Facilities did not advise the consumer how to receive a rate quote, which is a violation of WAC 480-120-141(2)(b) (1999). That platform, however, also was not able to receive a consumer request and provide a rate quote, which violated both the 1999 rule and WAC 480-120-141(5)(a) (iv) (1991). Operator

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[61] Ex. C-4C.

[62] *In re Request for a Waiver of Certain Provisions of WAC 480-120-141(2)(b)*, Docket UT-990043, Qwest Amendment to Petition for Waiver at 3, lines 11-12 (September 20, 2000); *accord id.*, Order Granting Full and Partial Temporary Waiver of WAC 480-120-141(2)(b) at 2 ("The waiver is necessary in order for the Company to deploy the technology in the correctional facilities throughout the state.") (included in the record as Ex. A-14).

[63] Exs. A-13 through A-15.

[64] *WUTC v. Qwest*, Docket UT-990043, Commission Order Accepting Settlement Agreement; *WUTC v. Verizon*, Docket UT-990401, Commission Order Accepting Settlement Agreement. Neither order is in the record in this proceeding, but the Commission takes administrative notice of these orders.

services provided using the P-III Premise software platform, therefore, failed to comply with Commission rules both before and after 1999.

59 In sum, Commission rules have consistently required OSPs to make rate quotes available to consumers of operator-assisted calls. AT&T used the P-III Premise software platform to provide operator services as a component of the intrastate toll services AT&T provided to the Correctional Facilities between June 20, 1996, and December 31, 2000. During that time period, the platform did not provide consumers of collect calls the ability to request or receive a rate quote for those calls. AT&T, therefore, violated WAC 480-120-141 each time AT&T used the P-III Premise software platform in conjunction with an operator-assisted collect call that AT&T carried.

60 Our conclusion, however, is necessarily a broad one. We have made no attempt to quantify the number of AT&T's violations or to identify any affected calls or consumers. Such a factual inquiry is beyond the scope of the Superior Court's referral. The court, not the Commission, is the appropriate forum for determining the extent of AT&T's violations and the resulting harm, if any, to Complainants or other consumers. Accordingly, we leave those determinations to the Superior Court.

FINDINGS OF FACT

61 Having discussed above in detail the evidence received in this proceeding concerning all material matters, and having stated findings upon issues in dispute among the parties and the reasons therefore, the Commission now makes and enters the following summary of those facts, incorporating by reference pertinent portions of the preceding detailed discussion:

62 (1) In 1992, AT&T Communications of the Pacific Northwest, Inc., entered into a contract with the State of Washington Department of Corrections to provide telecommunication services and equipment for various inmate correctional institutions and work release facilities.

63 (2) The original contract was amended in 1995 to require AT&T to arrange for the installation of call control features for intraLATA, interLATA, and international calls through its subcontractor, Tele-Matic Corporation.

64 (3) In 1995, the Commission recognized the acquisition of Tele-Matic Corporation by T-Netix, Inc.

65 (4) The P-III Premise software platform T-Netix installed at the Washington State Reformatory (a/k/a Monroe Correctional Complex), Airway Heights, McNeil Island Penitentiary, and Clallam Bay correctional facilities provided call control services including automated operator services.

66 (5) AT&T provided operator-assisted toll services to consumers of collect calls originated by inmates at the Washington State Reformatory (a/k/a Monroe Correctional Complex), Airway Heights, McNeil Island Penitentiary, and Clallam Bay correctional facilities between June 20, 1996, and December 31, 2000.

67 (6) AT&T had the direct business relationship with the consumers of operator-assisted collect calls AT&T carried that were originated by inmates at the Washington State Reformatory (a/k/a Monroe Correctional Complex), Airway Heights, McNeil Island Penitentiary, and Clallam Bay correctional facilities between June 20, 1996, and December 31, 2000.

68 (7) AT&T was not providing local exchange service or otherwise acting as a local exchange company in connection with any of the operator-assisted calls originated by inmates at the Washington State Reformatory (a/k/a Monroe Correctional Complex), Airway Heights, McNeil Island Penitentiary, and Clallam Bay correctional facilities between June 20, 1996, and December 31, 2000.

69 (8) All toll providers, including AT&T, used the P-III Premise software platform to provide automated operator services in conjunction with the operator-assisted toll services they provided at the Washington State Reformatory (a/k/a Monroe Correctional Complex), Airway Heights, McNeil Island Penitentiary, and Clallam Bay correctional facilities between June 20, 1996, and December 31, 2000.

70 (9) During the period from June 20, 1996 through December 31, 2000, the P-III Premise software platform did not allow the consumer receiving an operator-assisted collect call from an inmate at the Washington State Reformatory (a/k/a Monroe Correctional Complex), Airway Heights, McNeil Island Penitentiary, and Clallam Bay correctional facilities to request or obtain the rates applicable to the call, nor did that platform verbally advise the consumer how to receive a rate quote.

CONCLUSIONS OF LAW

71 Having discussed above all matters material to this decision, and having stated its findings, the Commission now makes the following summary conclusions of law, incorporating by reference pertinent portions of the preceding detailed conclusions:

72 (1) Summary judgment is properly entered if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. In resolving a motion for summary judgment, a court must consider all the facts submitted by the parties and make all reasonable inferences from the facts in the light most favorable to the nonmoving party.

73 (2) With regard to AT&T's and T-Netix's Amended Motions for Summary Determination, none of the nonmoving parties raised questions of material fact as to whether AT&T or T-Netix were operator services providers for the operator-assisted collect calls originated by inmates at the Washington State Reformatory (a/k/a Monroe Correctional Complex), Airway Heights, McNeil Island Penitentiary, and Clallam Bay correctional facilities between June 20, 1996, and December 31, 2000.

74 (3) No party raised questions of material fact as to whether there were violations of Commission rules governing disclosure of rate quotes to consumers of operator-assisted collect calls originated by inmates at the Washington State Reformatory (a/k/a Monroe Correctional Complex), Airway Heights, McNeil Island Penitentiary, and Clallam Bay correctional facilities between June 20, 1996, and December 31, 2000.

75 (4) An operator services provider under the Commission rules in effect between June 20, 1996, and December 31, 2000, was an entity that provided operator services to consumers. More specifically, the operator services provider was the entity that had the direct business relationship with the consumer who used and/or paid for the operator services.

76 (5) AT&T was the operator services provider for all collect calls from inmates at the Washington State Reformatory (a/k/a Monroe Correctional Complex), Airway Heights, McNeil Island Penitentiary, or Clallam Bay correctional facilities for which AT&T provided operator-assisted toll service between June 20, 1996, and December 31, 2000.

77 (6) AT&T was not entitled to the exclusion of local exchange companies from the definition of an operator services provider under WAC 480-120-021 (1991) because AT&T did not provide local exchange services in conjunction with any of the collect calls from inmates at the Washington State Reformatory (a/k/a Monroe Correctional Complex), Airway Heights, McNeil Island Penitentiary, and Clallam Bay correctional facilities between June 20, 1996, and December 31, 2000.

78 (7) AT&T violated WAC 480-120-141(5)(a)(iv) (1991) for each collect call from an inmate at the Washington State Reformatory (a/k/a Monroe Correctional Complex), Airway Heights, McNeil Island Penitentiary, or Clallam Bay correctional facilities for which AT&T used the P-III Premise software platform to provide automated operator services in conjunction with the operator-assisted toll service AT&T provided from June 20, 1996, until the rule was amended in 1999 by failing to allow the consumers to request or obtain the rates or charges for the call.

79 (8) AT&T violated WAC 480-120-141(2)(b) (1999) for each collect call from an inmate at the Washington State Reformatory (a/k/a Monroe Correctional Complex), Airway Heights, McNeil Island Penitentiary, or Clallam Bay correctional facilities for which AT&T used the P-III Premise software platform to provide automated operator services in conjunction with the operator-assisted toll service AT&T provided from the effective date of the rule until December 31, 2000, by failing to verbally advise the consumers how

to receive a rate quote or allow the consumers to request or obtain the rates or charges for the call.

ORDER

THE COMMISSION ORDERS:

80 (1) The Commission denies AT&T Communications of the Pacific Northwest, Inc.'s Amended Motion for Summary Determination.

81 (2) The Commission grants T-Netix, Inc.'s Amended Motion for Summary Determination.

82 (3) The Commission grants or denies all other motions filed since entry of Order 23 as stated in this Order or in Order 24. All motions not expressly granted in this Order are denied.

83 (4) The Commission responds to the Superior Court's first question as follows: AT&T was the operator services provider for all collect calls from inmates at the Washington State Reformatory (a/k/a Monroe Correctional Complex), Airway Heights, McNeil Island Penitentiary, or Clallam Bay correctional facilities for which AT&T provided operator-assisted toll service between June 20, 1996, and December 31, 2000.

84 (5) The Commission responds to the Superior Court's second question as follows: AT&T violated WAC 480-120-141(5)(a)(iv) (1991) or WAC 480-120-141(2)(b) (1999) for each collect call from an inmate at the Washington State Reformatory (a/k/a Monroe Correctional Complex), Airway Heights, McNeil Island Penitentiary, or Clallam Bay correctional facilities for which AT&T used the P-III Premise software platform to provide automated operator services in conjunction with the operator-assisted toll service AT&T provided by failing to verbally advise the consumer how to receive a rate quote and/or failing to allow the consumers to request or obtain the rates or charges for the call.

85 (6) The Commission refers further factual inquiry and the ultimate disposition of Complainants' claims to the Superior Court. Because Complainants initiated this proceeding in response to the Superior Court's referral, we direct them to file this Order with the Court and to serve the Commission with a copy of that filing.

86 (7) This docket is closed.

Dated at Olympia, Washington, and effective March 31, 2011.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

JEFFREY D. GOLTZ, Chairman

PATRICK J. OSHIE, Commissioner

PHILIP B. JONES, Commissioner

NOTICE TO PARTIES: This is a Commission Final Order. In addition to judicial review, administrative relief may be available through a petition for reconsideration, filed within 10 days of the service of this order pursuant to RCW 34.05.470 and WAC 480-07-850, or a petition for rehearing pursuant to RCW 80.04.200 and WAC 480-07-870.

Appendix A

Component	Zone I	Zone II
Opaque Envelope Minimum Nominal R Value		
Roof/Ceilings	R-30	R-30
Exterior Walls	R-11	R-11
Floors over Unconditioned Space	R-11	R-11
Below Grade Walls[1]	R-4	R-5
Slab on Grade Floors[2]	((~~R-8~~)) R-7	R-10
Glazing		
Type	Double	Double
Maximum Total Area (Percent of Gross Exterior Wall)	32%	22%

shall be water-resistant material manufactured for this

WSR 89-04-044
ADOPTED RULES
UTILITIES AND TRANSPORTATION COMMISSION

[Order R-293, Docket No. U-88-1882-R—Filed January 31, 1989]

In the matter of amending WAC 480-120-021, 480-120-041 and 480-120-106; and adopting WAC 480-120-141 relating to alternate operator services.

This action is taken pursuant to Notice No. WSR 88-23-043 filed with the code reviser on November 10, 1988. The rule change hereinafter adopted shall take effect pursuant to RCW 34.04.040(2).

This rule-making proceeding is brought on pursuant to RCW 80.01.040 and chapter 91, Laws of 1988, and is intended administratively to implement these statutes.

This rule-making proceeding is in compliance with the Open Public Meetings Act (chapter 42.30 RCW), the Administrative Procedure Act (chapter 34.04 RCW), the State Register Act (chapter 34.08 RCW), the State Environmental Policy Act of 1971 (chapter 43.21C RCW), and the Regulatory Fairness Act (chapter 19.85 RCW).

Pursuant to Notice No. WSR 88-23-043 the above matter was scheduled for consideration at 9:00 a.m., Wednesday, January 18, 1989, in the Commission's Hearing Room, Second Floor, Chandler Plaza Building, 1300 South Evergreen Park Drive S.W., Olympia, WA, before Chairman Sharon L. Nelson and Commissioners Richard D. Casad and A. J. Pardini.

Under the terms of said notice, interested persons were afforded the opportunity to submit data, views, or arguments to the commission in writing prior to December 23, 1988, and orally at 9:00 a.m., Wednesday, January 18, 1989, in the commission's hearing room above noted. At the January 18, 1989, meeting the commission considered the rule change proposal. Written comments were received from American Operator Services, Inc., d/b/a National Telephone Services, Inc., AT&T Communications of the Pacific Northwest, Inc. (AT&T), GTE Northwest, Inc. (GTE), International Telecharge, Inc. (ITI), Military Communications Center, Inc., Payline Systems, Inc., US West Communications, and Whidbey Island Telephone Company. Oral comments were presented by Mr. Robert Snyder on behalf of Whidbey Island Telephone Company, Ms Gretchen Hoover for International Telecharge, Inc., Mr. Carrington Phillip for the Public Counsel Division of the Office of the Attorney General, Mr. Dean Randall for GTE Northwest, Mr. Laddie Taylor for AT&T, Mr. Robert Saucier for International Pacific, Mr. Mike Moran for US West Communications, Mr. Jamie Bryant for National Telephone Services, Inc., and Mr. Roger Pease for Payline Systems, Inc.

The rule change affects no economic values.

In reviewing the entire record herein, it has been determined that WAC 480-120-021, 480-120-041 and 480-120-106 should be amended; and WAC 480-120-141 should be adopted to read as set forth in Appendix A shown below and by this reference made a part hereof. WAC 480-120-021, 480-120-041 and 480-120-106 as amended; and WAC 480-120-141 as adopted will assure appropriate disclosure to consumers of the rates, fees, and charges for services provided by alternative operator service companies, as contemplated by chapter 91, Laws of 1988.

ORDER

WHEREFORE, IT IS ORDERED That WAC 480-120-021, 480-120-041, 480-120-106 and 480-120-141 as set forth in Appendix A, be amended and adopted rules of the Washington Utilities and Transportation Commission to take effect pursuant to RCW 34.04.040(2).

IT IS FURTHER ORDERED That the order and the annexed rules, after first being recorded in the order register of the Washington Utilities and Transportation Commission, shall be forwarded to the code reviser for filing pursuant to chapter 34.04 RCW and chapter 1-12 WAC.

DATED at Olympia, Washington, this 31st day of January, 1989.

Washington Utilities and Transportation Commission
Sharon L. Nelson, Chairman
Richard D. Casad, Commissioner
A. J. Pardini, Commissioner

APPENDIX "A"

AMENDATORY SECTION (Amending Order R-250, Cause No. U-85-58, filed 5/12/86, effective 7/31/86)

WAC 480-120-021 GLOSSARY. Alternate operator services company - any corporation, company, partnership, or person providing a connection to intrastate or interstate long-distance or to local services from places including but not limited to, hotels, motels, hospitals, campuses, and customer-owned pay telephones. Alternate 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.

Applicant – any person, firm, partnership, corporation, municipality, cooperative organization, governmental agency, etc., applying to the utility for new service or reconnection of discontinued service.

Automatic dialing–announcing device – any automatic terminal equipment which incorporates the following features:

(1)(a) Storage capability of numbers to be called; or

(b) A random or sequential number generator that produces numbers to be called; and

(c) An ability to dial a call; and

(2) Has the capability, working alone or in conjunction with other equipment, of disseminating a prerecorded message to the number called.

Base rate area or primary rate area – the area or areas within an exchange area wherein mileage charges for primary exchange service do not apply.

Central office – a switching unit in a telephone system having the necessary equipment and operating arrangements for terminating and interconnecting subscribers' lines, farmer lines, toll lines and interoffice trunks. (More than one central office may be located in the same building or in the same exchange.)

Commission – the Washington utilities and transportation commission.

Competitive telecommunications company – a telecommunications company which is classified as such by the commission pursuant to RCW 80.36.320.

Competitive telecommunications service – a service which is classified as such by the commission pursuant to RCW 80.36.330.

Customer – user not classified as a subscriber.

Exchange – a unit established by a utility for communication service in a specific geographic area, which unit usually embraces a city, town or community and its environs. It usually consists of one or more central offices together with the associated plant used in furnishing communication service to the general public within that area.

Exchange area – the specific area served by, or purported to be served by an exchange.

Farmer line – outside plant telephone facilities owned and maintained by a subscriber or group of subscribers, which line is connected with the facilities of a telecommunications company for switching service. (Connection is usually made at the base rate area boundary.)

Farmer station – a telephone instrument installed and in use on a farmer line.

Interexchange telecommunications company – a telecommunications company, or division thereof, that does not provide basic local service.

Outside plant – the telephone equipment and facilities installed on, along, or under streets, alleys, highways, or on private rights–of–way between the central office and subscribers' locations or between central offices.

Station – a telephone instrument installed for the use of a subscriber to provide toll and exchange service.

Subscriber – any person, firm, partnership, corporation, municipality, cooperative organization, governmental agency, etc., supplied with service by any utility.

Toll station – a telephone instrument connected for toll service only and to which message telephone toll rates apply for each call made therefrom.

Utility – any corporation, company, association, joint stock association, partnership, person, their lessees, trustees or receivers appointed by any court whatsoever, owning, controlling, operating or managing any telephone plant within the state of Washington for the purpose of furnishing telephone service to the public for hire and subject to the jurisdiction of the commission.

AMENDATORY SECTION (Amending Order R-[illegible], Cause No. U-85-56, filed 11/[illegible]/85)

WAC 480-120-041 AVAILABILITY OF INFORMATION. Each utility shall make known to applicants for service and to its subscribers such information as is needed to assist in obtaining adequate and efficient service.

Information relative to the rates, and rules and regulations (filed tariffs and/or price lists) of the telecommunications company shall be made available to the public upon request and at any of its listed business offices. In addition, each telecommunications company shall publish in its directory a consumer information guide which details the rights and responsibilities of a utility customer. Such guide shall describe processes for establishing credit and determining the need and amount for deposits, the procedure whereby a bill becomes delinquent, the steps which must be taken by the utility to disconnect service, and the right of the customer to pursue any dispute with the utility first by procedures within the utility and then to the commission by formal or informal complaint.

A copy of these rules (chapter 480-120 WAC) shall also be kept on file in each of the utility's listed business offices and made available to its subscribers or their representatives upon request.

AMENDATORY SECTION (Amending Order R-233, Cause No. U-85-35, filed 8/23/85)

WAC 480-120-106 FORM OF BILLS. Bills to subscribers shall be rendered regularly and clearly list all charges. Each bill shall indicate the date it becomes delinquent and notice of means by which a subscriber can contact the nearest business office of the utility.

The portion of a bill rendered by the local exchange company on behalf of itself and other companies shall clearly specify the provider of the service or its authorized billing agent, and a toll free telephone number the consumer can call to question that portion of the bill and, if appropriate, receive credit. Consumers requesting an address where they can write to question that portion of the bill shall be provided that information.

A local exchange company shall not provide billing and collection services for telecommunications service to any company not properly registered to provide service within the state of Washington, except to a billing agent that certifies to the local exchange carrier that it will submit charges only on behalf of properly registered companies.

All bills for telephone service shall identify and set out separately any access or other charges imposed by order of or at the direction of the Federal Communications Commission. In addition, all bills for telephone service within jurisdictions where taxes are applicable will clearly delineate the amount, or the percentage rate at which said tax is computed, which represents municipal occupation, business and excise taxes that have been levied by a municipality against said utility, the effect of which is passed on as a part of the charge for telephone service.

Subscribers requesting by telephone, letter or office visit an itemized statement of all charges shall be furnished same. An itemized statement is meant to include separately, the total for exchange service, mileage charges, taxes, credits, miscellaneous or special services and toll charges, the latter showing at least date, place called and charge for each call. In itemizing the charges of information providers, the utility shall furnish the name, address, telephone number and toll free number, if any, of such providers. Any additional itemization shall be at a filed tariff charge.

Upon a showing of good cause, a subscriber may request to be allowed to pay by a certain date which is not the normally designated payment date. Good cause shall include, but not be limited to, adjustment of the payment schedule to parallel receipt of income. A utility may be exempted from this adjustment requirement by the commission.

NEW SECTION

WAC 480-120-141 ALTERNATE OPERATOR SERVICES. All telecommunications companies providing alternate operator services shall conform to this and all other rules relating to telecommunications companies not specifically waived by order of the commission. Alternate operator services companies (AOS) are those with which a hotel, motel, hospital, prison, campus, customer-owned pay telephone, etc., contracts to provide operator services to its clientele.

For purposes of this section the "consumer" means the party billed for the completion of an interstate/intrastate or local call. "Customer" means the hotel, motel, hospital, prison, campus, customer-owned pay telephone, etc., contracting with an AOS for service.

(1) An alternate operator services company shall require, as a part of the contract with its customer, that the customer:

(a) Post on the telephone instrument in plain view of anyone using the telephone, in eight point Stymie Bold type, the following notice:

> SERVICES ON THIS INSTRUMENT MAY BE PROVIDED AT RATES THAT ARE HIGHER THAN NORMAL. YOU HAVE THE RIGHT TO CONTACT THE OPERATOR FOR INFORMATION REGARDING CHARGES BEFORE PLACING YOUR CALL. INSTRUCTIONS FOR DIALING THROUGH THE LOCAL TELEPHONE COMPANY ARE ALSO AVAILABLE FROM THE OPERATOR

(b) Post and maintain in legible condition on or near the telephone:

(i) The name of the alternate operator services company, as registered with the commission.

(ii) Dialing directions so that a consumer may reach the AOS operator so as to receive specific rate information; and

(iii) Dialing directions to allow the consumer to dial through the local telephone company and to make it clear that the consumer has access to the other providers.

(2) The alternate operator services company shall:

(a) Identify the AOS company providing the service or its authorized billing agent at the beginning of every call, including those handled automatically; and

(b) Provide to the local exchange company such information as may be necessary for billing purposes, as well as an address and toll free telephone number for consumer inquiries.

(3) The alternate operator services company shall assure that consumers are not billed for calls which are not completed. For billing purposes, calls shall be itemized, identified, and rated from the point of origination to the point of termination. No call shall be transferred to another carrier by an AOS which cannot or will not complete the call, unless the call can be billed in accordance with this subsection.

(4) For purposes of emergency calls, every alternate operator services company shall have the following capabilities:

(a) Automatic identification at the operator's console of the location from which the call is being made.

(b) Automatic identification at the operator's console of the correct telephone numbers of emergency service providers that serve the telephone location, including, but not limited to, police, fire, ambulance, and poison control;

(c) Automatic ability at the operator's console of dialing the appropriate emergency service with a single keystroke;

(d) Ability of the operator to stay on the line with the emergency call until the emergency service is dispatched.

No charge shall be imposed on the caller from the telephone company or the alternate operator services company for the emergency call.

If the alternate operator services company does not possess these capabilities, all calls in which the caller dials zero (0) and no other digits within five seconds shall be routed directly to the local exchange company operator, or to an entity fully capable of complying with these requirements. AOS companies lacking sufficient facilities to provide such routing shall cease operations until such time as the requirements of this section are met.

(5) Consumer complaints and disputes shall be treated in accordance with WAC 480-120-101, Complaints and disputes.

(6) Charges billed to a credit card company (e.g., American Express or Visa) need not conform to the call detail requirements of this section. However, the AOS shall provide consumers with specific call detail in accordance with WAC 480-120-106 upon request.

Date of Intended Adoption: July 26, 1991.

June 17, 1991
David H. Rodgers
Chief Deputy
Insurance Commissioner

AMENDATORY SECTION (Amending Order R 88-4, filed 3/25/88)

WAC 284-91-025 PLAN OF OPERATION APPROVED. Pursuant to RCW 48.41.040(4) and after public hearing, the commissioner has determined that the Plan of Operation, as set forth in WAC 281-91-027, provides a sound basis for the fair, reasonable and equitable administration of the pool and provides for the sharing of pool losses on an equitable, proportionate basis among the members of the pool. It is ((hereby)) approved: PROVIDED HOWEVER, That if the plan of operation of the pool or any policy issued by the pool contains any condition or provision that does not conform to the requirements of chapter 48.41 RCW or this chapter, the plan of operation or any policy issued by the pool shall be construed and applied in accordance with such conditions and provisions as would have applied had the plan of operation or policy issued by the pool been in full compliance with chapter 48.41 RCW and this chapter.

NEW SECTION

WAC 284-91-050 INVOLUNTARY TERMINATIONS FOR OTHER THAN NONPAYMENT OF PREMIUMS. (1) For purposes of RCW 48.41.100, coverage under prior health insurance shall be deemed to have been involuntarily terminated for a reason other than nonpayment of premium, except where the insured person voluntarily ceased paying required premiums while otherwise eligible to continue such prior coverage. Therefore, as an example, loss of eligibility for group health insurance because of voluntary termination of employment by a person covered by an employer's group health insurance policy will not be deemed voluntary termination of the prior insurance coverage.

(2) For purposes of RCW 48.41.140(3), coverage under any prior health insurance will be deemed to have been involuntarily terminated for a reason other than nonpayment of premium, if the premium required to continue coverage under such insurance exceeds by one-third or more the premium required to cover the individual under the pool's one hundred dollar deductible plan.

WSR 91-13-077
PERMANENT RULES
UTILITIES AND TRANSPORTATION COMMISSION

[Order R-346, Docket No. TV-900716—Filed June 18, 1991, 12:02 p.m.]

In the matter of amending WAC 480-12-003 relating to motor freight carriers.

This action is taken pursuant to Notice No. WSR 91-10-081 filed with the code reviser on April 30, 1991. The rule change hereinafter adopted shall take effect pursuant to RCW 34.05.380(2).

This rule-making proceeding is brought on pursuant to RCW 80.01.040 and is intended administratively to implement that statute.

This rule-making proceeding is in compliance with the Open Public Meetings Act (chapter 42.30 RCW), the Administrative Procedure Act (chapter 34.05 RCW), the State Register Act (chapter 34.08 RCW), the State Environmental Policy Act of 1971 (chapter 43.21C RCW), and the Regulatory Fairness Act (chapter 19.85 RCW).

Pursuant to Notice No. WSR 91-10-081 the above matter was scheduled for consideration at 9:00 a.m., Wednesday, June 5, 1991, in the Commission's Hearing Room, Second Floor, Chandler Plaza Building, 1300 South Evergreen Park Drive S.W., Olympia, WA, before Chairman Sharon L. Nelson and Commissioners Richard D. Casad and A. J. Pardini.

Under the terms of said notice, interested persons were afforded the opportunity to submit data, views, or arguments to the commission in writing prior to May 28, 1991, and orally at 9:00 a.m., Wednesday, June 5, 1991, in the commission's hearing room above noted. At the June 5, 1991, meeting the commission considered the rule change proposal. No written or oral comments were received.

The rule change affects no economic values.

In reviewing the entire record herein, it has been determined that WAC 480-12-003 should be amended to read as set forth in Appendix A shown below and by this reference made a part hereof. WAC 480-12-003 will now reflect the proper reference to the rules pertaining to practice and procedure before the commission.

ORDER

WHEREFORE, IT IS ORDERED That WAC 480-12-003 as set forth in Appendix A, be amended as a rule of the Washington Utilities and Transportation Commission to take effect pursuant to RCW 34.05.380(2).

IT IS FURTHER ORDERED That the order and the annexed rule, after first being recorded in the order register of the Washington Utilities and Transportation Commission, shall be forwarded to the code reviser for filing pursuant to chapter 34.05 RCW and chapter 1-21 WAC.

DATED at Olympia, Washington, this 17th day of June, 1991.

Washington Utilities and Transportation Commission
Sharon L. Nelson, Chairman
Richard D. Casad, Commissioner
A. J. Pardini, Commissioner

APPENDIX "A"

AMENDATORY SECTION (Amending Order R-24, filed 4/16/71)

WAC 480-12-003 PROCEDURE. Except as otherwise provided in this chapter, the commission's rules relating to procedure, chapter ((~~480-08~~)) 480-09 WAC shall govern the administrative practice and procedure in and before the commission in proceedings involving motor freight carriers.

WSR 91-13-078
PERMANENT RULES
UTILITIES AND TRANSPORTATION COMMISSION

[Order R-345, Docket No. UT-900726—Filed June 18, 1991, 12:05 p.m.]

In the matter of amending WAC 480-120-021, 480-120-106, 480-120-138, and 480-120-141 and adopting

WAC 480-120-143 relating to telecommunications companies.

This action is taken pursuant to Notice No. WSR 91-03-122 filed with the code reviser on January 23, 1991. The rule change hereinafter adopted shall take effect pursuant to RCW 34.05.380(2).

This rule-making proceeding is brought on pursuant to RCW 80.01.040 and chapter 80.36 RCW and is intended administratively to implement these statutes.

This rule-making proceeding is in compliance with the Open Public Meetings Act (chapter 42.30 RCW), the Administrative Procedure Act (chapter 34.05 RCW), the State Register Act (chapter 34.08 RCW), the State Environmental Policy Act of 1971 (chapter 43.21C RCW), and the Regulatory Fairness Act (chapter 19.85 RCW).

Pursuant to Notice No. WSR 91-03-122 the above matter was scheduled for consideration at 9:00 a.m., Wednesday, May 1, 1991, in the Commission's Hearing Room, Second Floor, Chandler Plaza Building, 1300 South Evergreen Park Drive S.W., Olympia, WA, before Chairman Sharon L. Nelson and Commissioners Richard D. Casad and A. J. Pardini.

Under the terms of said notice, interested persons were afforded the opportunity to submit data, views, or arguments to the commission in writing prior to March 6, 1991, with reply comments due on March 27, 1991, and orally at 9:00 a.m., Wednesday, May 1, 1991, in the commission's hearing room above noted. At the May 1, 1991, meeting, on the record, the commission continued the matter to the May 8, 1991, weekly meeting at the same time and place.

At the May 8, 1991, meeting, the commission considered the rule change proposal, and took oral comment. Decisions regarding adoption of the amendments were made, and the matter was continued on the record to the May 15, 1991, weekly meeting for final adoption.

Written comments have been received from various persons in this docket, under the above notice and under prior notices, including: U.S. Long Distance, Bettye Horn, Joan Addington, Intellical, Inc., ITI, Eric Torrison, GTE Northwest, Inc., MCI Telecommunications Corp., U.S. West Communications, Public Counsel, International Pacific, National Technical Associates, Operator Assistance Network, Zero Plus Dialing, Inc., Northwest Payphone Association, Fone America, AT&T Communications of the Pacific Northwest, Inc., David Fluharty, United Telephone Co., Bruce Bennett, F.G. Hazeltine, M.D., Lisa Bergman, Douglas Syring, Elaine Britt, James H. Culler, Dean S. Johnson, William J. Clancy, Warren Bover, Jim Lazar, The Friedrich Group, Public Communications of America, Inc., The Park Lane Motel & R.V. Park, Norwest Marketing, James R. Redfield, Holiday Inn, Crowne Plaza-Seattle, Holiday Lodge-Wenatchee, Anacortes Inn, The Evergreen Inn-Leavenworth, Tower Inn-Richland, The Westin Hotel, Northwest Lodging, Inc., Travelers Inns, Washington State Hotel & Motel Association, The Inn at Friday Harbor, The Westwater Inn, Sheraton-Seattle, The Inn at Virginia Mason, Guenther Management Company, The Salish Lodge, Holiday Inn-Bellevue, A.M. Vendettuoli, Patricia's Enterprise, Sheraton-Tacoma, Mt. Rainier Guest Services, Semi-ah-moo, Comfort Inn at Sea-Tac, Robin Bloomgarden, Hyatt Regency-Bellevue, Washington Independent Telephone Association, Public Communications of America, Sheraton-Spokane, Four Seasons, Integretel, Inc., Whidbey Telephone Co., Telesphere Limited, Inc., Central Telephone, CSI Pay Telephone Investors, Raymond Ruhlen, and Robert P. Dick.

Oral comments were also received from various persons in this docket, at the May 8 and May 15 meetings, as well as at meetings under prior notices in this docket. Oral comments have been received in this docket from: Dean Randall, GTE-NW; Ray Ohrme, Paytel NW; Doug Owens, Paytel NW and CSI; Mark Hargenbrite, Fone America; Bill Eigles and Jim McAllum, AT&T; Robert Snyder, Whidbey Telephone; Clyde MacIver, NW Payphone & MCI; Jim Wright, International Pacific; Arthur Butler, TRACER; Michael Dohen, Fone America; William Garling, Public Counsel; Kay Godfrey, Steven Kennedy, TRACER; Cliff Webster, Washington State Hotel & Motel Association; Tom Kent, Red Lion; David Thompson, Westin Hotels; Jack Doyle, Pacific Telecom; Mike Miran, U.S. West; Jim Lazar; James Cadu; George Vinyl, Telesphere, Inc.; Reid Preston, Telecall, Inc.; Richard Finnigan, Terry Vann, WITA; Glenn Harris, United Telephone; and Jim Ray, International Pacific.

The rule change affects no economic values.

In reviewing the entire record herein, it has been determined that WAC 480-120-021, 480-120-106, 480-120-138, and 480-120-141 should be amended and WAC 480-120-143 should be adopted to read as set forth in Appendix A shown below and by this reference made a part hereof. These rules, as amended and adopted, establish requirements for alternative operator services companies and connection of pay telephones to the network of exchange telecommunications companies.

Some changes were made between the text of the amendments issued pursuant to Notice No. WSR 91-03-122 and the text finally adopted by the commission. Pursuant to RCW 34.05.340(3) these changes are explained as follows:

Changes from noticed draft: Definitions: The definition of operator services is changed to more closely reflect federal definitions, and to emphasize that the alternative operator services, AOS, rules apply only to operator services, as defined. WAC 480-120-021.

Commission as a sum paid to an aggregator or location owner is defined to distinguish from the WUTC. Id.

Location surcharge and operator service charge are defined as separate elements to distinguish them from other charges and to exclude per-call fees assessed and collected directly by aggregators. Id.

Person is defined for clarity. Id.

Local exchange telephone companies LECs, are removed from the definition of alternate operator services company, consistent with the draft initially noticed in this docket. LECs may still be considered aggregators under the terms of the rule, if their conduct meets that definition. Unlike LECs, AOS companies can be seen as entering and existing markets at will. AOS companies were the subject of specific legislative enactment. AOS

companies often charge higher rates than LECs, leading to consumer complaints. Consumers often expect that they are using their LEC when they use a pay phone; requirements that apply to non-LEC companies to inform the consumer that it is not the LEC are reasonable. Id.

Changes from noticed draft: Form of Bills: The local exchange company, LEC, must provide a copy of a billing agent's customer list to the commission only when a carrier is added to or deleted from the list in order to reduce unnecessary administrative effort. WAC 480-120-106.

Pay phone rule changes from noticed draft: Coinless pay telephones are defined to exclude in-room phones provided by hotels, hospitals, campuses and similar facilities for use of guests or residents. Jurisdictional issues were presented which are resolved by this exclusion. WAC 480-120-138(b).

For directory assistance, pay phones may charge the prevailing rate for comparable directory services. The intent is that a pay phone may, when pertinent, charge the consumer the prevailing charges for credit card use and for intraLATA or interLATA directory assistance calls. A location surcharge is not permitted on directory assistance calls. WAC 480-120-138(4).

Requirements for posting information to consumers are changed; instead of specifying in the rule the mechanics for securing rate information, the rule now allows the aggregator to post its preferred method for obtaining without-charge information regarding all charges including fees, so that the consumer will be able to be informed about the charges it will pay. This allows flexibility for an aggregator to use the method compatible with its system. Id.

A provision which would have limited charges for local calls and for access to 1-800 numbers and preferred interexchange carriers to twenty-five cents was deleted in light of federal/state jurisdictional issues; the unsettled nature of comparable provisions in federal regulation; and possible adverse economic effect. Id.

Concerns were expressed regarding fraud resulting from the use of 10XXX dialing codes to reach an interexchange carrier. Selective blocking is increasingly available from local exchange companies to allow calls to go through an operator, but to block direct-dialed calls which could be billed to the aggregator rather than the consumer. That sort of selective blocking will reduce fraudulent billing to the pay phone while allowing access to the consumer's preferred carrier. Outgoing and incoming call screening are features which provide information to operators that billing should not be made to the screened line. WAC 480-120-130(10) requires the local exchange company to provide these selective blocking and screening services upon request when the technology to provide them is available in the central office serving the requesting line. The change from the noticed draft is to describe and makes specific reference to the different services. WAC 480-120-138(10). WAC 480-120-141(12) provides for allocation of risk of loss when fraud occurs despite subscription to call screening.

Local exchange company field visits to pay phone locations shall be charged pursuant to tariff when a tariff applies. This acknowledges and restates the general rule that tariffed rates must be charged for services provided WAC 480-120-138(18).

References to adjudications are clarified to note that a range of adjudicative process is available to deal with complaints pursuant to pertinent administrative rules and law. WAC 480-120-138(19).

Changes from noticed draft: AOS rule: Prison service waivers can be accomplished on a case-by-case basis, so no express provision is required. WAC 480-120-141.

The list of operator service customers of each AOS is to be filed. The rule is changed to acknowledge that the list is proprietary, to protect confidential information, when the AOS complies with pertinent existing rules for identifying proprietary information. WAC 480-120-141(1).

The rule is clarified to state that AOS companies are required to secure compliance with their tariff provisions, as are other public service companies. Specific procedures to reduce disputes are identified for clarity. Existing pertinent commission adjudicative procedures are identified for completeness. To aid enforcement, when the commission has found that a customer/aggregator has knowingly and repeatedly violated commission AOS rules, it is to be refused AOS service until the commission finds the customer/aggregator will comply. Withholding of compensation is also required, consistent with federal requirements, on a location-by-location basis. WAC 480-120-141(2).

The consumer may be either, or both, the person initiating a call through an AOS company or the person paying for that call. The change is made to assure the availability of pertinent information and protections to the persons who may need them. WAC 480-120-141(3).

New posting requirements may be implemented later than initially proposed for practical considerations. Current posting rules must be complied with until then, for transition purposes. It is not feasible to require different notices for locations whose presubscribed AOS carrier exceeds prevailing rates and those which do not. WAC 480-120-141(4).

Notice to consumers of rates must include notice of the existence, nature and amount of location surcharges and other fees to better inform consumers. This provision is moved from noticed subsection 10(c). Id.

Proposed provisions to limit location charges to tariffed surcharge rates and to restrict local call, 1-800 and interexchange carrier access were deleted because of likely adverse economic effect on small business and because of potential interjurisdictional issues noted above. Id.

Audible notice, or branding, is required no later than, rather than "at" the beginning of the call, to allow compliance by reasonable notices either before or after the signal to enter billing information. WAC 480-120-141(5).

The branding message must use the carrier's name as registered with the commission, although the proposal is modified to allow the commission to grant a waiver to abbreviate or omit portions of the registered name if the full term is not necessary for clear consumer identification of the service provider. Id.

The proposed requirement to use specific branding language was deleted in light of difficulties in distinguishing between intrastate and interstate calls and because carriers demonstrated varying ways to provide adequate consumer notice of the carrier's identity. Id.

AOS carriers must maintain adequate facilities for a blockage rate not exceeding one percent in the time consistent busy hour, rather than a given busy hour, consistent with industry standards. If the AOS carrier provides facilities for access to consumers' preferred carriers, those facilities must also meet the stated adequacy standard. Id.

Location surcharges are allowed in AOS company tariffs, and can be waived by aggregators or may be established at a higher level for locations with demonstrably higher costs. This will help mitigate multi-tiered surcharges which may be discriminatory and confusing and may lead to unjustly high rates; will allow flexibility in pricing; and will avoid the need to spread the support of high-cost locations. WAC 480-120-141(10).

The section headings are changed to refer to variable rates and surcharges, the present subject of subsection (c). Id.

Clarification is added that the relevant rates for consideration are those which consumers are charged and that the relevant market means interLATA or intraLATA. Id.

The proposed cap upon location charges, fees or surcharges exceeding twenty-five cents for any call, above tariffed rates, was deleted because of potential adverse economic effect. The posting requirement related to such charges was moved to subsection (4) of this rule for proximity to other posting requirements, for clarity.

Departure from prevailing rates can be supported by an AOS. Such a demonstration can include evidence from aggregators about the economic necessity for location surcharges. This will assist AOS companies to support the economic need for charges paid to their customers. Id.

Subsection (12) is added in order to allocate risk of loss from fraud on toll traffic when loss from fraud occurs even through the local exchange company offers and an aggregator subscribes to call screening.

Local service to aggregators: A new section is added which requires LEC tariffs to provide that all aggregators who offer local calls on a per-call basis must provide without-charge access to 911, where available, and to the local exchange company operator. The requirement was noticed in WAC 480-120-141 (4)(c) as a condition required through AOS providers, but refers to a local services and is more appropriately associated with the provision of local exchange service. The requirement will assure that there is no impediment to dealing swiftly with emergency conditions affecting health or safety. WAC 480-120-143.

ORDER

WHEREFORE, IT IS ORDERED That WAC 480-120-021, 480-120-106, 480-120-138, and 480-120-141 as set forth in Appendix A, be amended and adopted as rules of the Washington Utilities and Transportation Commission to take effect pursuant to RCW 34.05.380(2).

IT IS FURTHER ORDERED That the order and the annexed rule, after first being recorded in the order register of the Washington Utilities and Transportation Commission, shall be forwarded to the code reviser for filing pursuant to chapter 34.05 RCW and chapter 1-21 WAC.

DATED at Olympia, Washington, this 17th day of June, 1991.

Washington Utilities and Transportation Commission
Sharon L. Nelson, Chairman
Richard D. Casad, Commissioner
A. J. Pardini, Commissioner

APPENDIX "A"

AMENDATORY SECTION (Amending Order R-[illegible], filed 1/31/89)

WAC 480-120-021 GLOSSARY. Alternate operator services company - any corporation, company, partnership, or person other than a local exchange company providing a connection to intrastate or interstate long-distance or to local services from ((~~places including but not limited to, hotels, motels, hospitals, campuses, and customer-owned pay telephones. Alternate 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~~)) locations of call aggregators. The term "operator services" in this rule means any intrastate telecommunications service provided to a call aggregator location that includes as a component any automatic or live assistance to a consumer to arrange for billing or completion, or both, of an intrastate telephone call through a method other than (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.

Applicant - any person, firm, partnership, corporation, municipality, cooperative organization, governmental agency, etc., applying to the utility for new service or reconnection of discontinued service.

Automatic dialing-announcing device - any automatic terminal equipment which incorporates the following features:

(1)(a) Storage capability of numbers to be called; or

(b) A random or sequential number generator that produces numbers to be called; and

(c) An ability to dial a call; and

(2) Has the capability, working alone or in conjunction with other equipment, of disseminating a prerecorded message to the number called.

Billing agent - A person such as a clearing house which facilitates billing and collection between a carrier and an entity such as a local exchange company which presents the bill to and collects from the consumer.

Base rate area or primary rate area - the area or areas within an exchange area wherein mileage charges for primary exchange service do not apply.

Call aggregator – a person who, in the ordinary course of its operations, makes telephones available for intrastate service to the public or to users of its premises, including but not limited to hotels, motels, hospitals, campuses, and pay telephones.

Central office – switching unit in a telephone system having the necessary equipment and operating arrangements for terminating and interconnecting subscribers' lines, farmer lines, toll lines and interoffice trunks. (More than one central office may be located in the same building or in the same exchange.)

Commission (agency) – in a context meaning a state agency, the Washington utilities and transportation commission.

Commission (financial) – in a context referring to compensation for telecommunications services, a payment from an AOS company to an aggregator based on the dollar volume of business, usually expressed as a percentage of tariffed message toll charges.

Competitive telecommunications company – a telecommunications company which is classified as such by the commission pursuant to RCW 80.36.320.

Competitive telecommunications service – a service which is classified as such by the commission pursuant to RCW 80.36.330.

((~~Customer~~)) Consumer – user not classified as a subscriber.

Exchange – a unit established by a utility for communication service in a specific geographic area, which unit usually embraces a city, town or community and its environs. It usually consists of one or more central offices together with the associated plant used in furnishing communication service to the general public within that area.

Exchange area – the specific area served by, or purported to be served by an exchange.

Farmer line – outside plant telephone facilities owned and maintained by a subscriber or group of subscribers, which line is connected with the facilities of a telecommunications company for switching service. (Connection is usually made at the base rate area boundary.)

Farmer station – a telephone instrument installed and in use on a farmer line.

Interexchange telecommunications company – a telecommunications company, or division thereof, that does not provide basic local service.

Location surcharge – a flat, per-call charge assessed by an alternate operator services company on behalf of a call aggregator in addition to message toll charges, local call charges, and operator service charges. A location surcharge is remitted, in whole or in part, to the call aggregator-customer.

Operator service charge – a charge, in addition to the message toll charge or local call charge, assessed for use of a calling card, a credit card or for automated or live operator service in completing a call.

Outside plant – the telephone equipment and facilities installed on, along, or under streets, alleys, highways, or on private rights-of-way between the central office and subscribers' locations or between central offices.

Person – unless the context indicates otherwise, any natural person or an entity such as a corporation, partnership, municipal corporation, agency, or association.

Station – a telephone instrument installed for the use of a subscriber to provide toll and exchange service.

Subscriber – any person, firm, partnership, corporation, municipality, cooperative organization, governmental agency, etc., supplied with service by any utility.

Toll station – a telephone instrument connected for toll service only and to which message telephone toll rates apply for each call made therefrom.

Utility – any corporation, company, association, joint stock association, partnership, person, their lessees, trustees or receivers appointed by any court whatsoever, owning, controlling, operating or managing any telephone plant within the state of Washington for the purpose of furnishing telephone service to the public for hire and subject to the jurisdiction of the commission.

Reviser's note: RCW 34.05.395 requires the use of underlining and deletion marks to indicate amendments to existing rules. The rule published above varies from its predecessor in certain respects not indicated by the use of these markings.

AMENDATORY SECTION (Amending Order R-293, filed 1/31/89)

WAC 480-120-106 FORM OF BILLS. Bills to subscribers shall be rendered regularly and shall clearly list all charges. Each bill shall indicate the date it becomes delinquent and notice of means by which a subscriber can contact the nearest business office of the utility.

The portion of a bill rendered by the local exchange company on behalf of itself and other companies shall clearly specify the alternate operator service company's billing agent and, where feasible, within ninety days after the effective date of this rule, the provider of the alternate operator service ((~~or its authorized billing agent;~~)) and a toll free telephone number the consumer can call to question that portion of the bill and, if appropriate, receive credit. A number may be used on this portion of the bill only if it connects the subscriber with a firm which has full authority to investigate and, if appropriate, to adjust disputed calls including a means to verify that the rates charged are correct. Consumers requesting an address where they can write to question that portion of the bill shall be provided that information.

A local exchange company shall not provide billing and collection services for telecommunications service to any company not properly registered to provide service within the state of Washington, except to a billing agent that certifies to the local exchange carrier that it will submit charges only on behalf of properly registered companies. As a part of this certification the local exchange company shall require that the billing agent provide to it a current list of each telecommunications company for which it bills showing the name (as registered with the commission) and address. This list shall be updated and provided to the local exchange company as changes occur. The local exchange company shall in turn, upon receiving it, provide a copy of this list to the

commission for its review whenever a carrier is added or deleted.

All bills for telephone service shall identify and set out separately any access or other charges imposed by order of or at the direction of the Federal Communications Commission. In addition, all bills for telephone service within jurisdictions where taxes are applicable will clearly delineate the amount, or the percentage rate at which said tax is computed, which represents municipal occupation, business and excise taxes that have been levied by a municipality against said utility, the effect of which is passed on as a part of the charge for telephone service.

Subscribers requesting by telephone, letter or office visit an itemized statement of all charges shall be furnished same. An itemized statement is meant to include separately, the total for exchange service, mileage charges, taxes, credits, miscellaneous or special services and toll charges, the latter showing at least date, place called and charge for each call. In itemizing the charges of information providers, the utility shall furnish the name, address, telephone number and toll free number, if any, of such providers. Any additional itemization shall be at a filed tariff charge.

Upon a showing of good cause, a subscriber may request to be allowed to pay by a certain date which is not the normally designated payment date. Good cause shall include, but not be limited to, adjustment of the payment schedule to parallel receipt of income. A utility may be exempted from this adjustment requirement by the commission.

AMENDATORY SECTION (Amending Order R-316, filed 3/23/90)

WAC 480-120-138 PAY TELEPHONES—LOCAL AND INTRASTATE. Every telecommunications company operating an exchange within the state of Washington may allow pay telephones to be connected to the company's network for purposes of interconnection and use of registered devices for local and intrastate communications. Every such telecommunications company offering such service shall file tariffs with the commission setting rates and conditions applicable to the connection of pay telephones to the local and intrastate network under the following terms and conditions. Local exchange companies that do not have a public access line tariff on file with the commission shall not be subject to these rules.

For purposes of these rules "pay telephone" is defined as equipment connected to the telephone network in one of the following modes:

(a) Coin operated: A telephone capable of receiving nickels, dimes, and quarters to complete telephone calls. Credit card or other operator-assisted billing may be used from a coin-operated instrument.

(b) Coinless: A pay telephone where completion of calls, except emergency calls, must be billed by an alternative billing method such as credit card, calling cards, collect, third-party billing, or billed in connection with the billing of meals, goods, and/or services. These pay phones include, but are not limited to, charge-a-call, cordless, tabletop, and credit card stations. The term does not include in-room telephones provided by hotels, motels, hospitals, campuses or similar facilities for the use of guests or residents.

For purposes of these rules, the term "subscriber" is defined as a party requesting or using a public access line for the purpose of connecting a pay telephone to the telephone network.

(1) Pay telephones connected to the company network must comply with Part 68 of the Federal Communications Commission rules and regulations and the ((current)) National Electric Code and National Electric Safety Code as they existed on January 1, 1991, and must be registered with the Federal Communications Commission, or installed behind a coupling device which has been registered with the Federal Communications Commission.

(2) All pay telephones shall provide dial tone first to assure emergency access to operators without the use of a coin.

(3) The caller must be able to access the operator and 911 where available without the use of a coin.

(4) ((~~The subscriber shall pay the local directory assistance charge currently in effect for each pay telephone and may charge the user for directory assistance calls.~~)) The charge for each directory assistance call paid by the ((~~user~~)) consumer shall not exceed the ((~~current~~)) prevailing per call charge ((~~paid by the subscriber~~)) for comparable directory assistance. In the absence of persuasive contrary evidence, the charge of U S WEST Communications for intraLATA directory assistance or AT&T for interLATA directory assistance shall be accepted as the prevailing charge. A location surcharge is not permitted.

(5) Emergency numbers (e.g., operator assistance and 911) must be clearly posted on each pay telephone.

(6) Information consisting of the name, address, telephone number of the owner, or the name of the owner and a toll-free telephone number where a caller can obtain assistance in the event the pay telephone malfunctions in any way, and procedures for obtaining a refund from the subscriber must be displayed on the front of the pay telephone.

The following information shall also be posted on or adjacent to the telephone instrument:

(a) ~~"An accurate quotation of all rates and surcharges is available to the user by dialing '0' and requesting costs"~~ The method by which the consumer may obtain without charge an accurate quotation of rates, fees and surcharges; and

(b) The notices required by WAC 480-120-141((~~(1)~~)) (4).

In no case will the charges to the user exceed the quoted costs.

(7) The telephone number of the pay telephone must be displayed on each instrument.

(8) The subscriber shall ensure that the pay telephone is compatible for use with hearing aids and its installation complies with all applicable federal, state, and local laws and regulations concerning the use of telephones by disabled persons.

(9) The pay telephone, if coin operated, must return the coins to the caller in the case of an incomplete call

and must be capable of receiving nickels, dimes, and quarters. Local exchange company pay telephones shall not be subject to the requirements of this subsection.

(10) All pay telephones must ((~~be capable of providing~~)) provide access to all interexchange carriers where such access is available. If requested by the subscriber, the local exchange company providing the public access line shall supply, where available, (a) restriction ~~where available,~~ which prevents fraud ~~to the~~ by selective blocking of 10XXX 1+ codes and (b) call screening to identify the line as one to which charges may not be billed, at appropriate tariffed rates.

(11) Except for service provided to hospitals, libraries, or similar public facilities in which a telephone ring might cause undue disturbance, or upon written request of a law enforcement agency, coin-operated pay telephones must provide two-way service, and there shall be no charge imposed by the subscriber for incoming calls. This subsection will not apply to pay telephones arranged for one-way service and in service on May 1, 1990. Should an existing one-way service be disconnected, change telephone number, or change financial responsibility, the requirements of this subsection shall apply. All pay telephones confined to one-way service shall be clearly marked on the front of the instrument.

(12) Pay telephones shall be connected only to public access lines in accordance with the approved tariffs offered by the local exchange company. Local exchange company pay telephones are not subject to this requirement.

(13) A subscriber must order a separate pay telephone access line for each pay telephone installed. Extension telephones may be connected to a pay telephone access line when the instrument:

(a) Prevents origination of calls from the extension station; and

(b) Prevents third party access to transmission from either the extension ((~~of~~)) or the ((~~coin-operated~~)) pay telephone instrument.

Local exchange companies are exempted from (b) of this subsection.

(14) Credit card operated pay telephones shall clearly identify all credit cards that will be accepted.

(15) Involuntary changes in telephone numbers upon conversion of pay telephones from local exchange company-owned to privately-owned pay telephones are prohibited.

(16) No fee shall be charged for nonpublished numbers on a public access line.

(17) Cordless and tabletop pay telephones shall not be connected to the telephone network except under the following conditions:

(a) The bill for usage is tendered to the user before leaving the premises where the bill was incurred or alternatively billed at the customer's request; and

(b) The user is notified verbally or on the instrument that privacy on cordless and tabletop telephones is not guaranteed; and

(c) When other electrical devices are equipped with filters, as necessary, to prevent interference with the pay telephone.

(18) Violations of the tariff, commission rules pertaining to pay telephone service, or other requirements contained in these rules, including interexchange carrier access requirements, will subject the pay telephone to disconnection of service if the deficiency is not corrected within five days from date of written notification to the subscriber. WAC 480-120-081 (4)(g) shall not apply to such disconnections. Local exchange company field visits shall be charged to the subscriber if the charge is required by a pertinent local exchange company tariff.

It shall be the responsibility of every local exchange company to assure that any subscriber taking service pursuant to these rules and to tariffs filed pursuant to these rules meets all of the terms and conditions contained within these rules and the tariffs so filed. It shall be the duty of the local exchange company to enforce the terms and conditions contained herein.

It shall be the responsibility of the local exchange company to provide free of charge one current telephone directory each year for each public access line. It shall be the responsibility of the subscriber to make a reasonable effort to assure a current directory is available at every pay telephone location.

Public access lines will be charged at rates according to the relevant tariff as approved by the commission.

(19) Disconnection of, or refusal to connect, a pay telephone for violation of these rules may be reviewed by the commission in a formal complaint under WAC 480-09-420(5) through an adjudicative or a brief adjudicative proceeding under the provisions of chapters 34.05 RCW and 480-09 WAC.

Reviser's note: RCW 34.05.395 requires the use of underlining and deletion marks to indicate amendments to existing rules. The rule published above varies from its predecessor in certain respects not indicated by the use of these markings.

AMENDATORY SECTION (Amending Order R-193, filed 1/31/89)

WAC 480-120-141 ALTERNATE OPERATOR SERVICES. All telecommunications companies providing alternate operator services (AOS), as defined in WAC 480-120-021, shall ((~~conform to~~)) comply with this and all other rules relating to telecommunications companies not specifically waived by order of the commission. ((~~Alternate operator services companies (AOS) are those with which a hotel, motel, hospital, prison, campus, customer-owned pay telephone, etc., contracts to provide operator services to its clientele.~~))

(1) Each alternate operator services company shall file with the commission at least every six months a current list of operator services customers which it serves and the locations and telephone numbers to which such service is provided to each customer. A customer list provided pursuant to this rule is proprietary information and, if identified when filed as required in WAC 480-09-015, is subject to the protections of that rule.

(2) Each AOS company is responsible for assuring that each of its customers complies fully with contract and tariff provisions which are specified in this rule. Failure to secure compliance constitutes a violation by the AOS company.

(a) The AOS company shall withhold on a location-by-location basis the payment of compensation, including commissions, from a call aggregator, if the AOS company reasonably believes that the call aggregator is blocking access to interexchange carriers in violation of these rules.

(b) Violations of tariff, contract or other statements of conditions of service, in commission rules pertaining to AOS company service, or of other requirements contained in these rules, including interexchange carrier access requirements, will subject an aggregator to termination of alternate operator services if the deficiency is not corrected within five days from date of written notification to the aggregator. WAC 480-120-081 (4)(g) shall not apply to such terminations.

(c) AOS company actions in furtherance of this rule may be reviewed by the commission in a formal complaint under WAC 480-09-420 through an adjudicative or a brief adjudicative proceeding under the provisions of chapters 34.05 RCW and 480-09 WAC.

(d) An AOS company shall refuse to provide operator services to a call aggregator who the commission has found to have knowingly and repeatedly violated commission rules regarding the provision of alternate operator service until the commission has found that the call aggregator will comply with relevant law and rule.

(3) For purposes of this section ((~~the~~)), "consumer" means the party ((~~billed for the completion of~~)) initiating and/or paying for an ((~~interstate/intrastate~~)) interexchange or local call. "Customer" means the call aggregator, i.e., the hotel, motel, hospital, prison, campus, ((~~customer-owned~~)) pay telephone, etc., contracting with an AOS for service.

((~~(1)~~)) (4) An alternate operator services company shall require, as a part of ((~~the~~)) any contract with its customer and as a term and condition of service stated in its tariff, that the customer:

(a) Post on the telephone instrument in plain view of anyone using the telephone, in eight point or larger Stymie Bold type, the information provided in the following notice:

> SERVICE ON THIS INSTRUMENT MAY BE PROVIDED AT RATES THAT ARE HIGHER THAN NORMAL. YOU HAVE THE RIGHT TO CONTACT THE OPERATOR FOR INFORMATION REGARDING CHARGES BEFORE PLACING YOUR CALL. INSTRUCTIONS FOR ((~~DIALING THROUGH THE LOCAL TELEPHONE COMPANY~~)) REACHING YOUR PREFERRED CARRIER ARE ALSO AVAILABLE FROM THE OPERATOR.

(b) Post and maintain in legible condition on or near the telephone:

(i) The name, address, and without-charge number of the alternate operator services company, as registered with the commission;

(ii) Dialing directions so that a consumer may reach the AOS operator ((~~so as~~)) without charge to receive specific rate information; and

(iii) ~~Dialing d~~ Directions to allow the consumer to ((~~dial through the local telephone company~~)) reach the consumer's preferred carrier and to make it clear that the consumer has access to the other providers.

(c) Provide access from every instrument to 1-800 services and all available interexchange carriers; and

(d) Shall post, on or near the instrument, a notice stating whether a location surcharge or any other fee is imposed for telecommunications access through the instrument, the amount of any fee or location surcharge, and the circumstances when it will apply.

(e) Posting under these rules shall begin no later than October 1, 1991, and shall be completed no later than January 31, 1992. In the interim, posting in compliance with the immediate prior posting provisions of WAC 480-120-141 is required and shall constitute compliance with this rule.

((~~(2)~~)) (5) The alternate operator services company shall:

(a) Identify the AOS company providing the service ((~~or its authorized billing agent~~)) audibly and distinctly at the beginning of every call, and again before the call is connected, including ((~~those handled automatically, and~~)) an announcement to the called party on calls placed collect.

(i) For purposes of this rule the beginning of the call is no later than immediately following the prompt to enter billing information on automated calls and, on live and automated operator calls, when the call is initially routed to the operator.

(ii) The message used by the AOS company shall state the name of the company as registered with the Commission whenever referring to the AOS company. Terms such as "company", "communications", "incorporated", "of the northwest", etc., when not necessary to clear consumer identification of the entity providing service may be omitted when authorized by letter from the secretary of the commission.

(iii) The consumer shall be permitted to terminate telephone [illegible] at no charge before the call is [illegible].

(iv) The AOS company shall immediately, upon request, and at no charge to the consumer, disclose to the consumer:

(A) a quote of the rates or charges for the call, including any surcharge;

(B) the method by which the rates or charges will be collected; and

(C) the methods by which complaints about the rates, charges, or collection practices will be resolved.

(b) Provide to the local exchange company such information as may be necessary for billing purposes, as well as an address and toll free telephone number for consumer inquiries.

(c) Reoriginate calls to another carrier upon request and without charge, when equipment is in place which will accomplish reorigination with screening and allow billing from the point of origin of the call. If reorigination is not available, the AOS company shall give dialing instructions for the consumer's preferred carrier.

(d) Assure that a minimum of ninety percent of all calls shall be answered by the operator within ten seconds from the time the call reaches the carrier's switch.

(e) Maintain adequate facilities in all locations so the overall blockage rate for lack of facilities, including as pertinent the facilities for access to consumers' preferred interexchange carriers, does not exceed one percent in the time consistent busy hour. Should excessive blockage occur, it shall be the responsibility of the AOS company to determine what caused the blockage and take immediate steps to correct the problem. This subsection does not apply to blockage during unusually heaving traffic, such as national emergency, local disaster, holidays, etc.

((~~(3)~~)) (6) The alternate operator services company shall assure that ((~~consumers~~)) persons are not billed for calls which are not completed. For billing purposes, calls shall be itemized, identified, and rated from the point of origination to the point of termination. No call shall be transferred to another carrier by an AOS which cannot or will not complete the call, unless the call can be billed in accordance with this subsection.

((~~(4)~~)) (7) For purposes of emergency calls, every alternate operator services company shall have the following capabilities:

(a) Automatic identification at the operator's console of the location from which the call is being made;

(b) Automatic identification at the operator's console of the correct telephone numbers of emergency service providers that serve the telephone location, including but not limited to, police, fire, ambulance, and poison control;

(c) Automatic ability at the operator's console of dialing the appropriate emergency service with a single keystroke;

(d) Ability of the operator to stay on the line with the emergency call until the emergency service is dispatched.

No charge shall be imposed on the caller ((from)) by the telephone company or the alternate operator services company for the emergency call.

If the alternate operator services company does not possess these capabilities, all calls in which the ((~~caller~~)) consumer dials zero (0) and no other digits within five seconds shall be routed directly to the local exchange company operator, or to an entity fully capable of complying with these requirements. AOS companies lacking sufficient facilities to provide such routing shall cease operations until such time as the requirements of this section are met.

((~~(5) Consumer~~)) (8) Complaints and disputes shall be treated in accordance with WAC 480-120-101, Complaints and disputes.

((~~(6)~~)) (9) Charges billed to a credit card company (e.g., American Express or Visa) need not conform to the call detail requirements of this section. However, the AOS shall provide ((~~consumers with~~)) specific call detail in accordance with WAC 480-120-106 upon request.

(10) "Public convenience and advantage"; surcharges; variable rates.

(a) For services, public convenience and advantage means at a minimum that the provider of alternate operator services offers operator services which equal or exceed the industry standards in availability, technical quality and response time and which equal or exceed industry standards in variety or which are particularly adapted to meet unique needs of a market segment. In the absence of other persuasive evidence, a demonstration that operator service equals or exceeds that provided by U S WEST Communications for intraLATA services or AT&T for interLATA services will be accepted as demonstrating public convenience and advantage.

(b) Charges no greater than the prevailing operator service charges in the relevant market - intraLATA or interLATA - will be accepted as demonstrating that charges are for the public convenience and advantage. In the absence of persuasive contrary evidence, the charges for U S WEST for intraLATA service and AT&T for interLATA service will be accepted as the prevailing charges.

(c) Surcharges; variable rates. No location surcharge may be added to without-charge calls nor to a charge for directory assistance. No tariff may provide for rate levels which vary at the option of a call aggregator, provided, that an aggregator may waive application of the surcharge to calls from its instruments, and provided further, that an AOS company may establish a tariff rate for high-cost locations if the conditions for application of the rate confine it to locations with substantially higher than average operating costs.

(11) Rates to the consumer for the provision of alternate operator services, including directory assistance, shall not exceed the prevailing rates for such services in the relevant market - intraLATA or interLATA - unless need for the excess to produce rates which are fair, just and reasonable is demonstrated to the satisfaction of the commission. In the absence of persuasive contrary evidence, rate levels of U S WEST for intraLATA service and AT&T for interLATA service will be considered the prevailing rate.

(12) Fraud prevention.

(a) A company providing interexchange telecommunications service may not bill a call aggregator for charges billed to a line for calls which originated from that line through the use of 10XXX+0; 10XXX+01; 95-XXXX; or 1-800 access codes, or when the call originating from that line otherwise reached an operator position, if the originating line subscribed to outgoing call screening and the call was placed after the effective date of the outgoing call screening order.

(b) A company providing interexchange telecommunications service may not bill to a call aggregator any charges for collect or third number billed calls, if the line serving to which the call was billed was subscribed to incoming call screening and the call was placed after the effective date of the call screening service order.

(c) Any calls billed through the local exchange carrier in violation of subparagraphs (a) or (b) above must be removed from the call aggregator's bill by the local exchange company upon identification. If investigation by the local exchange company determines that the pertinent call screening was operational when the call was made, the local exchange company may return the charges for the call to the interexchange telecommunications company as not billable.

(d) Any call billed directly by an alternate operator service company, or through a billing method other than the local exchange company, which is billed in violation of subparagraphs (a) and (b), above, must be removed

from the call aggregator's bill. The telecommunications company providing the service may request an investigation by the local exchange company. If the local exchange company, after investigation, determines that call screening which would have protected the call, which is offered by the LEC and was subscribed to by the call aggregator, was not operational at the time the call was placed, the AOS company shall bill the LEC for the call.

Reviser's note: RCW 34.05.395 requires the use of underlining and deletion marks to indicate amendments to existing rules. The rule published above varies from its predecessor in certain respects not indicated by the use of these markings.

Reviser's note: The typographical error in the above section occurred in the copy filed by the agency and appears in the Register pursuant to the requirements of RCW 34.08.040.

NEW SECTION

WAC 480-120-143 LOCAL SERVICE TO AGGREGATORS. The local exchange company's tariff shall provide that every aggregator offering local calls on a per-call basis must provide without-charge access to 911, where available, and to the local exchange company operator.

WSR 91-13-079
PERMANENT RULES
DEPARTMENT OF ECOLOGY
[Order 90-62—Filed June 18, 1991, 1:40 p.m., effective September 18, 1991]

Date of Adoption: June 18, 1991.

Purpose: Regulate the discharge of toxic pollutants from new pollution sources and certain existing sources in order to prevent air pollution, reduce emissions to the extend reasonably possible and maintain such levels of air quality as will protect human health and safety.

Statutory Authority for Adoption: RCW 70.94.331.

Pursuant to notice filed as WSR 91-01-083 on December 18, 1990.

Changes Other than Editing from Proposed to Adopted Version: WAC 173-460-010 Purpose.

Subsection (1) was revised to clarify that ecology will use the lists in WAC 173-460-150 and 173-460-160 to define toxic air pollutant. This change was made to insure consistency with the definition of toxic air pollutant.

WAC 173-460-020 Definition.

"Acceptable source impact level (ASIL)" was revised to clarify that the rule does not apply to restricted or controlled areas. This change was made in response to public comment requesting clarification.

"Reasonably available control technology for toxics (T-RACT)" was added. This technology category was added for two reasons. Changes to the Washington Clean Air Act restrict applicability of new source review and T-BACT to pollutant increases. Public comments recommended that T-BACT apply only to sources increasing toxic pollutants.

WAC 173-460-030 Requirements, applicability, and exemptions.

Subsection (1) was deleted. This change was made in response to comment that it was duplicative and inconsistent with requirements in WAC 173-460-040.

Subsection (3)(a) relabeled subsection (2)(a) and was modified by deleted all text after the word "devices." This change was made in response to public comment that the section was confusing and incorrect grammar.

Subsection (3)(e) was added to exempt "process vents subject to 40 CFR Parts 264 and 265, Subpart AA." This was added in response to comment that regulation of these vents is duplicative with federal rule.

WAC 173-460-040 New source review.

Subsection (1), the explanation of notice of construction in subsection (1)(a) was moved to this section for clarity.

Subsection (1)(a), this subsection was rewritten to clarify. The phrase "unless conditions in subsections (c) and (d) of this subsection apply to the new source" was deleted and a second sentence used to explain when notification and notice of construction are not required. The term "application" was added to clarify that all new toxic sources must provide information to the authority. This change is made because of change of applicability of new source review to toxic increases, only. An application will be used to evaluate pollutant changes as increases or decreases.

Subsection (c) was deleted because the notice of construction requirements were consolidated in subsection (1)(a). A new requirement becomes subsection (c). This limits new source review of modifications and "the air contaminants whose emissions may increase as a result of the modification." This change is made for consistency with change made to the Washington Clean Air Act and because of public comment requesting that new source review be limited to toxic pollutant increases.

Subsection (d) was deleted and rewritten as subsection (2)(a)(b)(c). Subsection (2) is the same as subsection (d). Subsection (2)(a) is the same as subsection (d)(i). Subsection (d)(ii) was relabeled subsection (2)(b) and changed by deleting the phrase "does not increase toxic air pollutant emissions significantly." Change was made based on public comment that this phrase was ambiguous in how it related to the small quantity emission tables. Subsection (d)(iii) was relabeled subsection (2)(c) and simplified to relate all minor material changes to the small quantity emission tables. The requirement for demonstrating no overall toxicity increase was dropped. This was changed because of public comment that this section was ambiguous. Subsection (d)(iv) was dropped because it was duplicative with the nonprocess fugitive emission exemption in WAC 173-460-030.

Subsection (2) is relabeled subsection (3).

Subsection (3)(a) is relabeled subsection (4)(a) and changed to add "and authority" after "state." Change is made to clarify that sources must be in accord with applicable local authority rules. Change is made in response to public comment recommending this addition.

Subsection (3)(b) is relabeled subsection (4)(b) and modified by adding "for the toxic air pollutants which are likely to increase." Change is made for consistency with the Washington Clean Air Act and because of

postmark is the date of submission for documents you send by mail. For documents you transmit by other means, the date we receive the document is the date of submission.

NEW SECTION

WAC 296-27-21045 **What are the requirements related to movable equipment?** (1) For serious, repeat, and willful violations involving movable equipment, you must attach a warning tag or a copy of the citation to the operating controls or to the cited component of equipment if the violation has not already been abated. You must do this for hand-held equipment immediately after you receive the citation, and you must do this for other equipment before moving it within the worksite or between worksites.

(2) You must use a warning tag that properly warns employees about the nature of the violation involving the equipment and that tells them where the citation is posted. Nonmandatory Appendix A contains a sample tag that you may use to meet this requirement.

(3) For the construction industry, a tag designed and used in accordance with WAC 296-155-300(8) and 296-24-14011 meets the requirements of this section when the information required by subsection (2) of this section is included on the tag.

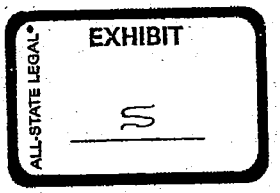
(4) You must make sure that the tag or copy of the citation attached to movable equipment is not altered, defaced, or covered by other material.

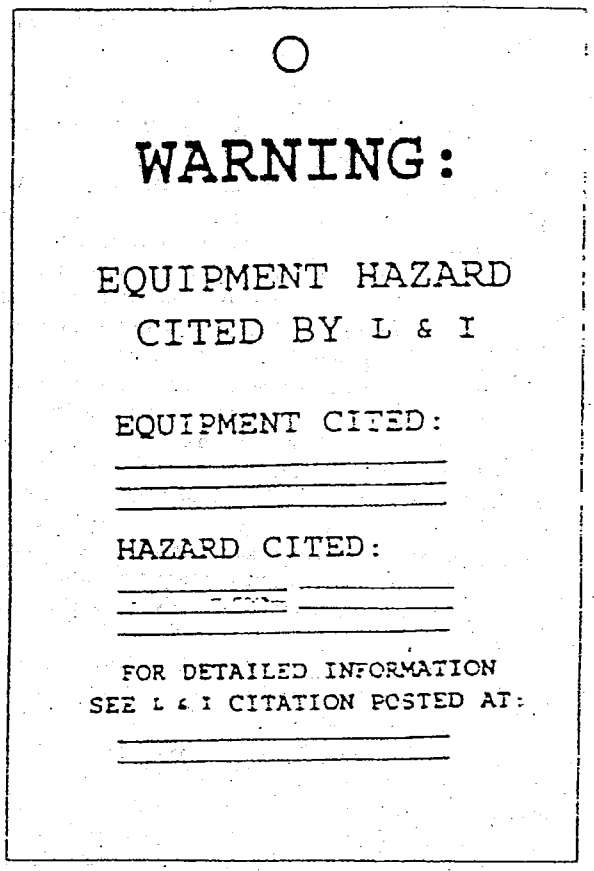
(5) You must make sure that the tag or copy of the citation attached to movable equipment remains attached until:

- You have abated the violation and you have submitted all abatement verification documents required by this regulation to us;
- You have permanently removed the cited equipment from service;
- You no longer have control over the cited equipment; or
- A final order vacates the violation.

NEW SECTION

WAC 296-27-21050 Appendix A (Nonmandatory). **What can a warning tag for movable equipment involved in serious, repeat, or willful violations look like?** You may use a warning tag similar to the sample shown below. You must make sure the warning tag meets the requirements of and is used in accordance with the requirements of WAC 296-27-21045.





BACKGROUND COLOR—ORANGE
MESSAGE COLOR—BLACK

PERMANENT

WSR 99-02-020
PERMANENT RULES
UTILITIES AND TRANSPORTATION COMMISSION

[General Order No. R-452, Docket No. UT-970301—Filed December 29, 1998, 3:42 p.m.]

In the matter of amending WAC 480-120-021, 480-120-138 and 480-120-141; and repealing WAC 480-120-137, 480-120-142 and 480-120-143, relating to pay phone and operator services providers.

STATUTORY OR OTHER AUTHORITY: The Washington Utilities and Transportation Commission (commission or WUTC) takes this action under Notice No. WSR 98-17-068, filed with the code reviser on August 17, 1998. This commission brings this proceeding pursuant to RCW 80.04.160, 80.36.520, and 80.01.040.

STATEMENT OF COMPLIANCE: This proceeding complies with the Open Public Meetings Act (chapter 42.30 RCW), the Administrative Procedure Act (chapter 34.05 RCW), the State Register Act (chapter 34.08 RCW), the State Environmental Policy Act of 1971 (chapter 34.21C RCW), and the Regulatory Fairness Act (chapter 19.85 RCW).

DATE OF ADOPTION: The commission adopted this rule on October 28, 1998.

CONCISE STATEMENT OF PURPOSE AND EFFECT OF THE RULE: The proposal requires pay phone service providers and operator service providers to provide a consistent level of service and to meet intrastate standards that are consistent with federal requirements. The rules will also preserve, to the extent possible, continued consumer protections in a largely-deregulated environment by measures including adequate disclosure to consumers at the pay phone itself, at the time of a call. The rules recognize federal mandates lifting economic regulation from pay telephones and operator services. Rule amendments delete provisions that are no longer applicable or are unduly burdensome, maintain a minimum level of service, provide a means to obtain limitations on service when needed for public purposes, impose consumer protections through disclosure at the pay phone, and inform consumers of their rights as pay phone users. The rules also reduce the level of bureaucratic involvement in this business to the minimum consistent with adequate consumer protection. Rules revisions are designed to meet standards set out in Executive Order 97-02.

REFERENCE TO AFFECTED RULES: This rule repeals, amends, or suspends the following sections of the Washington Administrative Code:

Amends WAC 480-120-021 Glossary, 480-120-138 Pay telephones—Local and intrastate and 480-120-141 Alternate operator services; and repeals WAC 480-120-137 Customer-owned pay telephones—Interstate, 480-120-142 Alternate operator services—Enforcement, and 480-120-143 Local service to aggregators.

PREPROPOSAL STATEMENT OF INQUIRY AND ACTIONS THEREUNDER: The commission filed a preproposal statement of inquiry (CR-101) on March 27, 1998, at WSR 97-08-036.

ADDITIONAL NOTICE AND ACTIVITY PURSUANT TO PREPROPOSAL STATEMENT: The statement advised interested persons that the commission was considering entering a rule making relating to pay telephones and alternate operator service providers. The commission also informed persons of the inquiry into this matter by providing notice of the subject and the CR-101 to all persons on the commission's list of persons requesting such information pursuant to RCW 34.05.320(3), by sending notice to all registered telecommunications companies, and by providing notice to the commission's list of telecommunications attorneys.

Pursuant to the notice, the commission held a workshop on May 5, 1997. The commission on July 3, 1997, wrote interested persons, summarizing the workshop and requesting comments. On September 12, 1997, the commission staff circulated a draft of possible rule changes, based on the discussions and comments, to interested persons, requesting further comments. Commission staff received comments, and prepared and sent a second draft of possible rules to interested persons on April 28, 1998, and requested comments on the possible changes.

Staff convened a meeting of interested persons on June 2, 1998, to discuss the economic impact of this rule making. Representatives from the Northwest Payphone Association, local and long distance telephone companies, and public counsel were invited to attend. Commission staff also circulated a questionnaire to gain more information about the cost impacts of the rule. Five companies responded to the questionnaire. This information and their participation in the discussion led to the results summarized in the small business economic impact statement.

NOTICE OF PROPOSED RULE MAKING: The commission filed a notice of proposed rule making (CR-102) on August 17, 1998, at WSR 98-17-068. The commission scheduled this matter for oral comment and adoption under Notice No. WSR 98-17-068 at 9:30 a.m., Wednesday, October 28, 1998, in the Commission's Hearing Room, Second Floor, Chandler Plaza Building, 1300 South Evergreen Park Drive S.W., Olympia, WA. The notice also provided interested persons the opportunity to submit written comments to the commission.

COMMENTERS (WRITTEN COMMENTS): The commission received written comments from Fullers of Chehalis and Centralia, Jeffrey D. Glick of Seattle, GTE Northwest Inc. (GTE-NW), McDonalds in Vancouver, the Northwest Payphone Association (NWPA), William Paine of Maple Valley, the Public Counsel section of the Washington Attorney General (public counsel), the City of Seattle, Sentury Market in Goldendale, United Telephone Company of the Northwest (Sprint), Teltrust Communications Services, Inc. (Teltrust), US WEST Communications, Inc. (US WEST), the Washington Independent Telephone Association (WITA), and Washington State Representative Philip E. Dyer.

Based on the comments received, commission staff suggested revised language without changing the intent or ultimate effect of the proposed rule.

RULE-MAKING HEARING: The rule changes were considered for adoption, pursuant to the notice, at the commission's regularly scheduled open public meeting on October 28, 1998, before Chairwoman Anne Levinson and Commissioner Richard Hemstad. The commission heard oral comments from Suzanne Stillwell, representing commission staff; Brooks Harlow, representing the NWPA; Matt Steuerwalt, representing public counsel; and Theresa Jensen, representing US WEST. Oral commenters repeated concerns that were stated in their previous written comments.

SUGGESTIONS FOR CHANGE THAT ARE REJECTED: Although all participants worked diligently to achieve consensus, the participants and commission staff did not reach complete agreement on some topics. A summary of those areas follows.

1. Jurisdictional issues. Several commenters assert that the commission does not have jurisdiction over pay phones at all because, they argue, the Telecommunications Act of 1996 removed all regulation from the state. Commenters believe that the proposed rules are inconsistent with federal law and regulation and that the incumbent local exchange companies (LECs) will be disadvantaged in the competitive market. The commission rejects these arguments. While FCC rules ended state regulation of the local coin rate, it left to the states the authority to regulate other aspects of the pay phone industry, especially in the area of consumer protection. The rules are consistent with the intent of Congress and the FCC, and are competitively neutral as it relates to incumbent LECs.

2. Disclosure at the pay phone. Commenters argued that the disclosure that the rules require from both the pay phone service provider and operator service provider is unnecessary and costly, that too many numbers must be posted, and that

technical limitations may affect their ability to offer on-demand verbal rate quotes. The commission strongly believes that adequate disclosure at the pay phone site is essential to promote effective competition and to inform and protect users appropriately of pay phone services. The amount of posting will be nearly the same as prior rule language (adding one telephone number while removing other language). Adding the commission's compliance number is a necessary consumer protection measure. The commission will consider requests for waivers of the rules pursuant to WAC 480-120-141 (2)(b) if technical limitations reasonably prevent offering on-demand verbal rate quotes on request.

3. Compensation for incoming calls. Commenters argued that pay phone providers should be allowed to charge customers for calls made to pay phones (incoming calls), and that the rules' prevention of such charges violates federal law. The commission rejects this argument. Federal statute and FCC orders are at most ambiguous about the existence of an obligation to compensate incoming calls, and the commission finds no legal or policy reason to allow such charges.

4. Restrictions on call length. Some pay phone providers (PSPs) and/or location providers want the authority to restrict the length of local calls. These PSPs argue that all customers should have reasonable access to a phone. The rules require that a basic local call be a minimum of fifteen minutes, which will allow persons ample time to conduct business, wait on "hold," or deal with exceptional circumstances. Public counsel urges that there be no restrictions on length of local calls, except to meet needs due to illicit activity. The rule does not require the restriction of calls to fifteen minutes, but offers a balance between customer turnover and individual callers' needs. The requirement does not affect the rate for a local call, which pursuant to federal requirements is not regulated.

Other specific comments that the commission rejected in adopting the rules include the following:

WAC 480-120-138 Pay phone service providers (PSPs)

WAC 480-120-138 (3)(d), required access to telecommunications relay service calls for the hearing impaired. Public counsel urged retaining the broader language of the existing rule, WAC 480-120-138(8), to require that "...installation complies with all applicable federal, state, and local laws and regulations concerning the use of telephones by disabled persons." Although the commission does not support other violations of law, and if it learns of such violations will report them appropriately, it has no jurisdiction to act upon such violations. Other agencies have the responsibility for ensuring compliance with other federal, state and local laws.

WAC 480-120-138 (4)(a), posting of rates. The rule requires that the rate and any call length limitations be clearly and legibly posted on or near the front of the pay phone. Public counsel asks that all placards bear the rate in thirty-point or larger type and contrasting color. Contrasting colors can be an effective means of highlighting the local call charge, as well as larger type, and either one is reasonable.

WAC 480-120-138 (4)(c), notice that no change is provided. GTE argues that it is a commonly known fact that pay phones do not make change and that it needlessly uses space on an already overloaded placard. The commission rejects the argument; virtually all contemporary-technology coin-operated devices offer change, and there is no technological reason why the telephone instrument cannot be provisioned to do so. GTE can avoid the disclosure requirement by providing instruments that make change.

WAC 480-120-138 (4)(g) and (k), posting requirements. Subsection (4)(g) requires the PSP to post the name, address, and without-charge telephone number of all presubscribed operator service providers serving the instrument, and that the placard be updated within thirty days after a change. GTE argues that the thirty-day requirement will be burdensome in parts of its rural territory. In some areas, the company may only maintain telephones on an "as needed" basis. As to WAC 480-120-138 (4)(k), requiring updated placarding within sixty days after the effective date of a rule change, GTE asks that it be amended to permit change at the time of the next regularly scheduled visit to the pay phone. The commission rejects the suggestion that the time periods be extended. The trade-offs here are between consumer information and PSP convenience and expense. From the time of the change until the correct information is posted, consumers will not have on-site access to accurate information. The commission recognizes that an "immediate change" requirement would impose hardships on PSPs and sizeable expense. The time periods set in the rule appropriately balance the affected interests. PSP information shows that the time periods will allow changes to be made during "routine" site visits in the vast majority of instances. Thirty days is appropriate to change out placards when there has been a change in a presubscribed operator service provider, and sixty days is a reasonable time period to change out placards as a result of this or comparable rule changes.

WAC 480-120-138 (4)(j), commission toll-free number. This subsection requires posting, in contrasting colors, the commission's consumer complaint compliance number, to include a statement that, "If you have a complaint about service from this pay phone and are unable to resolve it with the pay phone owner/operator, please call the WUTC at 1-888-333-WUTC (9882)." NWPA, US WEST, and GTE object to printing a Washington-specific placard that puts another number in very limited space. They contend that the public may become confused and fail to follow instructions for routine calls. They fear that this will lead to a costly level of misdirected complaints that should be managed by the PSP. The commission rejects this view. The commission compliance number is necessary to support its compliance efforts and to get information from consumers about pay phone problems.

Public counsel suggests retaining the existing rule language of WAC 480-120-138(14) that requires credit-card operated phones to identify all credit cards accepted. The commission believes that in today's market this is not critical for consumer protection, and the marketplace will address this issue.

WAC 480-120-138 (5)(c), one line per instrument. This subsection requires that a PSP obtain a separate pay phone access line (PAL) for each pay phone instrument. Pay phone providers oppose this, suggesting that it may stifle innovation and prevent PSPs from obtaining the most efficient and cost-effective service. The problem addressed by this rule is assuring that the pay phone is available for service - if a single line serves more than one instrument, the line cannot be

available for both instruments at the same time. The rule was modified in response to this objection and now specifically provides for commission waiver if a company demonstrates that technology accomplishes the same result as the rule's requirement.

WAC 480-120-138 (5)(d) and (e), extension, cordless or tabletop telephones. US WEST argues that the WUTC should not regulate the operational characteristics of extension telephones, cordless, or tabletop telephones because such phones, as customer provided equipment (CPE), are deregulated. We reject this argument. The rule does not regulate CPE. It does not prohibit such equipment, set a rental rate for such equipment, or regulate the dimensions, color, form, or style of the equipment. The rule regulates the services provided to the customer, a matter that remains within the commission's jurisdiction.

WAC 480-120-138 (5)(f), keypad restriction. The rule requires that a pay phone may not restrict the number of digits or letters that may be dialed. US WEST argues that the restriction is inconsistent with marketplace demands, and that whether or not to apply keypad restriction should be a decision between the PSP and location providers. The commission rejects US WEST's arguments. In today's environment, consumers need keypad access after dialing the number to enter billing codes, to retrieve voice messages, use pagers, access bank accounts and credit card accounts, call offices that use automated menus, etc. Keypad restrictions often mean that the cost of a call is wasted and the consumer has no means to conduct her or his activities. Keypad restriction is of little value in preventing professional crime, because portable tone generators are readily available to persons who know they will need them. If location-specific problems call for keypad restrictions, waiver is available under subsection (6) of the rule.

WAC 480-120-138 (5)(g), coin and credit operation. Pay phones may provide credit-only service, or coin and credit service. US WEST again states that it is inconsistent with marketplace demands, and should be a decision between the PSP and location providers to determine type of restrictions. A company may apply for waiver of the rules if necessary.

WAC 480-120-138(6), authorizing restrictions. This provision allows the commission to direct limitations on pay phone service upon request of local governing jurisdictions to support their efforts to prevent or limit criminal or illicit activities. Restrictions may include, but are not limited to, blocking of incoming calls, limiting touch tone capabilities, and imposing coin restriction during certain hours. US WEST argues that this is beyond the commission's jurisdiction and inconsistent with federal law; it argues that PSPs will implement such restrictions appropriately and willingly at the request of local communities, property owners, neighborhood groups, or others at the discretion of the company. The commission rejects the suggestion that such restrictions must be available without commission oversight. The commission does have the jurisdiction and the authority to ensure consumer protection and the minimum service and quality standards provided from pay phones. While the commission should not be an impediment to effective local police and safety regulation, interests of consumers must be a factor in the process.

WAC 480-120-138(7), telephone directories. The PAL provider must furnish without charge one current directory each year and the PSP must ensure that a current directory is available at every pay phone. GTE argues that this is costly and burdensome, and suggested that the PSP need only make "a reasonable effort" to make a current directory available at every pay phone location. We disagree. Providing a directory is a part of pay phone service. Consumers should not be forced to use directory assistance for numbers that are readily available in a local directory.

WAC 480-120-138(8), correcting malfunctions and rule violations. The rule imposes a five-day limit for correcting reported malfunctions or rule violations. US WEST argues that "Malfunction" aspect should be removed because it is beyond the WUTC's jurisdiction since pay phones are deregulated. As noted repeatedly in this order, the commission disagrees sharply with US WEST's limited view of our jurisdiction. Public counsel suggests retaining provisions of the existing WAC 480-120-138(18) that make a LEC responsible to ensure that its PSP customers comply with rules regarding the use of its PAL line. We reject this suggestion: in today's competitive marketplace it is inappropriate to require the LEC to police the activities of a competitor. Each company is independently responsible for compliance with WUTC rules.

WAC 480-120-141 Operator service providers (OSPs)

WAC 480-120-141 (2)(a), posting - rates. Public counsel asks the commission to retain the language from the prior rule that "Service on this instrument may be provided at rates that are higher than normal. You have the right to contact the operator for information regarding charges before placing your call..." The commission rejects the request. The adopted disclosures provide needed notice, especially coupled with the opportunity to receive an on-demand verbal rate quote.

GTE, NWPA, US WEST expressed the same concerns discussed above in WAC 480-120-138(4) on disclosure requirements for pay phone service providers. The commission notes that disclosure is reasonably required for consumer protection, and resolves these concerns in the same way.

WAC 480-120-141 (2)(b), verbal disclosure of rates. Before an operator-assisted call from an aggregator location may be connected by a presubscribed OSP, the OSP must verbally advise the caller how to receive a rate quote, such as by pressing a specific key or keys, but no more than two keys, or by staying on the line. The rate quoted for the call must include any applicable surcharge, and charges must not exceed the quote.

Teltrust argues that the proposal is premature in light of the FCC's reconsideration of the parallel federal rule, which is subject to change. It argues that the rule is burdensome and expensive and that it threatens to harm OSPs as well as consumers by leading to rate increases. GTE states that it does not have the technology to comply, but that it should be able to do so by late 1999. The NWPA does not object to the verbal requirement as long as it is consistent with federal requirements both in substance and in the timing of imple-

mentation. US WEST argues that the WUTC should postpone adoption of rule language concerning this issue until the FCC adopts its final rule, stating that the needed technology is not currently available for US WEST, and will take about fifteen months to implement once a final decision is made to use it. US WEST also argues that the rule generates costs and expenses to the company that they do not face today. Public counsel argues that provisions of existing rules, WAC 480-120-141 (10)(b) and (11) containing limits on OSP rates should be retained.

The commission adopts the FCC's verbal disclosure requirement on an intrastate basis. Staff recognizes that the FCC granted limited waivers and extensions of time to come into compliance to several specific petitioners for automated calls, collect call and inmate services (October 31, 1998, and December 31, 1998, for collect call and inmate services, respectively). Further, the FCC permitted OSPs that use store-and-forward technology, until October 1999, to come into compliance with its rules. The federal rule is stayed only as it applies to interstate intraLATA operator services until sixty days after release of the FCC's reconsideration order.

The verbal rate disclosure option is necessary to better inform consumers, fosters a more competitive environment, and it serves the public interest. Petitioners to the FCC rule have indicated they can use live operators for rate quotes during the interim period. Staff's intent is that the WUTC rules be as consistent with the FCC as local conditions permit. If there are significant changes to the FCC rule resulting from the FCC's review and resulting order, the commission will do an expedited rule making at that time to consider changes needed for consistency. Waivers will be considered during the interim period, consistent with the FCC approach.

WAC 480-120-141 (6)(b), operational capabilities - adequate facilities. This rule requires the OSP to determine cause of excessive blockage and take steps to correct the problem. US WEST argues this is not enforceable, stating that the responsible party is the Interexchangee Carrier (IXC), since the IXC is provisioning trunking. The commission believes that the OSP needs to pursue any service problem directly with the IXC or other responsible party to resolve a blocking problem.

WAC 480-120-141 (6)(c), operator service standards. US WEST asks the commission to reject this language as ambiguous and not measurable. The commission believes that the language as stated is a reasonable public expectation and that it is stated with sufficient clarity.

WAC 480-120-141 (6)(d), operational capabilities - reorigination. The rule requires an OSP to reoriginate calls to another carrier upon request and without charge when equipment that will accomplish reorigination with screening and allow billing from the point of origin of the call, is in place. If reorigination is not available, the OSP must give dialing instructions for the consumer's preferred carrier. US WEST asks the commission to eliminate this provision because its operators do not have dialing instructions for customers who wish to reoriginate a call to another carrier. Customers are transferred to directory assistance to learn their preferred carrier's access number. The company argues that OSPs should not have to incur the expense of increased call handling time. The commission notes that this is not new rule language and that it requires no new technology. The required service is appropriate and should continue to be required.

WAC 480-120-141(9), enforcement. Public counsel asks the WUTC to retain language from WAC 480-120-142, which includes specific RCWs and WACs detailing minimum service levels. The commission rejects the proposal because revised rule incorporates needed references.

COMMISSION ACTION: After considering all of the information regarding this proposal, the commission repealed the three rules proposed for repeal and adopted the proposed rule amendments, with the changes described and discussed in this order. Appendix A of this order sets out the rule as adopted.

CHANGES FROM PROPOSAL: The commission adopted the proposal with the following changes from the text noticed at WSR 98-17-068. Note that the changes described below are in addition to nonsubstantive grammatical, editorial, and minor clarifying changes.

WAC 480-120-021 Glossary

Pay phone services definition was changed to "provision of pay phone equipment to the public for placement of local exchange, interexchange, or operator service calls." This amendment was offered by the NWPA. We adopt it for the reasons advocated in its support.

WAC 480-120-138 Pay phone service providers (PSPs)

WAC 480-120-138 (4)(b) is changed to state that "notice must be posted that directory assistance charges may apply, and to ask the operator for rates," rather than the proposed requirement to state the rate. Public counsel asks that the commission retain a rate cap at dominant carrier's rates. The FCC requirement appears to be clear that PSPs, if charged for directory assistance, may pass those costs on to the consumer/caller. The adopted language is consistent with the intent of the rule and the need for appropriate disclosure from pay phones.

WAC 480-120-138 (5)(h), one way call restriction. Many commenters want the flexibility to deal on their own with the question of whether or not to ban incoming calls. They argue that pay phone owners and location providers should be allowed to restrict phones against incoming calls whenever they choose. The commission believes that, generally, two-way service should be available from pay phones. However, the commission proposed exceptions to this policy to meet concerns that were expressed. Present exceptions allowing restricting incoming calls in libraries and hospitals, where quiet is necessary for the operation of the institution, would continue. The commission proposed a new exception, inside the building of a private business, where the pay phone provider and the location owner may decide whether to restrict against incoming calls. Phones located outside such private business locations, and in or on premises where people have access to public transportation such as airports, bus and train stations, must provide two-way service unless the commission grants a waiver. Adopted language addresses concerns heard in the comments, and it is consistent with the intent of the rule and appropriate consumer protection.

WAC 480-120-138(6) is revised to remove repetitive and unnecessary language, to correctly identify the appropriate subsection for requesting a waiver, and to shorten the

comment period from thirty to twenty days when there has been a request to restrict a pay phone, as the City of Seattle suggests. It is consistent with the intent of the rule and with appropriate consumer protection.

STATEMENT OF ACTION; STATEMENT OF EFFECTIVE DATE: In reviewing the entire record, the commission determined that WAC 480-120-021, 480-120-138, and 480-120-141 should be amended to read as set forth in Appendix A, as rules of the Washington Utilities and Transportation Commission, and WAC 480-120-137, 480-120-142, and 480-120-143 should be repealed, to take effect pursuant to RCW 34.05.380(2) on the thirty-first day after filing with the code reviser.

Number of Sections Adopted in Order to Comply with Federal Statute: New 0, amended 3, repealed 3; Federal Rules or Standards: New 0, amended 0, repealed 0; or Recently Enacted State Statutes: New 0, amended 0, repealed 0.

Number of Sections Adopted at Request of a Nongovernmental Entity: New 0, amended 0, repealed 0.

Number of Sections Adopted on the Agency's Own Initiative: New 0, amended 0, repealed 0.

Number of Sections Adopted in Order to Clarify, Streamline, or Reform Agency Procedures: New 0, amended 3, repealed 3.

Number of Sections Adopted Using Negotiated Rule Making: New 0, amended 0, repealed 0; Pilot Rule Making: New 0, amended 0, repealed 0; or Other Alternative Rule Making: New 0, amended 0, repealed 0.

ORDER

THE COMMISSION ORDERS:

1. WAC 480-120-021, 480-120-138, and 480-120-141 are amended to read as set forth in Appendix A, as rules of the Washington Utilities and Transportation Commission, and WAC 480-120-137, 480-120-142, and 480-120-143 are repealed, to take effect on the thirty-first day after the date of filing with the code reviser pursuant to RCW 34.05.380(2).

2. This order and the rule set out below, after being recorded in the register of the Washington Utilities and Transportation Commission, shall be forwarded to the code reviser for filing pursuant to chapters 80.01 and 34.05 RCW and chapter 1-21 WAC.

3. The commission adopts the commission staff memoranda, presented when the commission considered filing a preproposal statement of inquiry, when it considered filing the formal notice of proposed rule making, and when it considered adoption of this proposal in conjunction with the text of this order, as its concise explanatory statement of the reasons for adoption of the proposed changes, as required by RCW 34.05.025.

DATED at Olympia, Washington, this 28th day of December 1998.

Washington Utilities and Transportation Commission

Anne Levinson, Chair

Richard Hemstad, Commissioner

William R. Gillis, Commissioner

APPENDIX "A"

AMENDATORY SECTION (Amending Order R-384, Docket No. UT-921192, filed 2/26/93, effective 3/29/93)

WAC 480-120-021 Glossary. Access line - a circuit between a subscriber's point of demarcation and a serving switching center. Access code - sequence of numbers that, when dialed, connect the caller to the provider of operator telecommunication services associated with that sequence.

Aggregator - is referenced in these rules as a call aggregator, defined below.

Alternate operator services company - ((~~any corporation, company, partnership, or person other than a local exchange company providing a connection to intrastate or interstate long distance or to local services from locations of call aggregators. The term "operator services" in this rule means any intrastate telecommunications service provided to a call aggregator location that includes as a component any automatic or live assistance to a consumer to arrange for billing or completion, or both, of an intrastate telephone call through a method other than: Automatic completion with billing to the telephone from which the call originated; or completion through an access code used by the consumer with billing to an account previously established by the consumer with the carrier~~)) is referenced in these rules as an operator service provider (OSP), defined below.

Applicant - any person, firm, partnership, corporation, municipality, cooperative organization, governmental agency, etc., applying to the utility for new service or reconnection of discontinued service.

Automatic dialing-announcing device - any automatic terminal equipment which incorporates the following features:

(1)(a) Storage capability of numbers to be called; or

(b) A random or sequential number generator that produces numbers to be called; and

(c) An ability to dial a call; and

(2) Has the capability, working alone or in conjunction with other equipment, of disseminating a prerecorded message to the number called.

Automatic location identification/data management system (ALI/DMS) - ALI/DMS is a feature that forwards to the public safety answering point (PSAP) a caller's telephone number, the name and service address associated with the telephone number, and supplementary information as defined in the DMS for automatic display at the PSAP. The DMS is a combination of manual procedures and computer programs used to create, store, manipulate, and update data required to provide selective routing, ALI, emergency service numbers, and other information associated with the calling party's telephone number.

Billing agent - a person such as a clearing house which facilitates billing and collection between a carrier and an entity such as a local exchange company which presents the bill to and collects from the consumer.

Base rate area or primary rate area - the area or areas within an exchange area wherein mileage charges for primary exchange service do not apply.

Call aggregator - ((a)) any corporation, company, partnership, or person, who, in the ordinary course of its operations, makes telephones available ((~~for intrastate service~~)) to the public or to users of its premises for telephone calls using a provider of operator services, including but not limited to hotels, motels, hospitals, campuses, and pay ((~~telephones~~)) phones (see also pay phone service provider).

Centrex - a telecommunications service providing a subscriber with direct inward dialing to telephone extensions and direct outward dialing from them.

Central office - a switching unit in a telephone system having the necessary equipment and operating arrangements for terminating and interconnecting subscribers' lines, farmer lines, toll lines and interoffice trunks. (More than one central office may be located in the same building or in the same exchange.)

Commission (agency) - in a context meaning a state agency, the Washington utilities and transportation commission.

Commission (financial) - in a context referring to compensation for telecommunications services, a payment from an AOS company to an aggregator based on the dollar volume of business, usually expressed as a percentage of tariffed message toll charges.

Competitive telecommunications company - a telecommunications company which is classified as such by the commission pursuant to RCW 80.36.320.

Competitive telecommunications service - a service which is classified as such by the commission pursuant to RCW 80.36.330.

Consumer - user not classified as a subscriber.

Customer premises equipment (CPE) - telecommunications terminal equipment, including inside wire, located at a subscriber's premises on the subscriber's side of the standard network interface point of demarcation (excluding pay telephones provided by the serving local exchange company).

Emergency calling - the ability to access emergency services by dialing 911, or dialing a local number to police and/or fire where 911 is not available, without the use of a coin or the entering of charge codes. Where enhanced 911 is operational, the address displayed to the public safety answering point (PSAP) shall be that of the phone instrument if different from the public access line demarcation point and the phone number must be that of the pay phone.

Exchange - a unit established by a ((~~utility~~)) telecommunications company for communication service in a specific geographic area, which unit usually embraces a city, town or community and its environs. It usually consists of one or more central offices together with the associated plant used in furnishing communication service to the general public within that area.

Exchange area - the specific area served by, or purported to be served by an exchange.

Farmer line - outside plant telephone facilities owned and maintained by a subscriber or group of subscribers, which line is connected with the facilities of a telecommunications company for switching service. (Connection is usually made at the base rate area boundary.)

Farmer station - a telephone instrument installed and in use on a farmer line.

Foreign exchange service - a communications exchange service that uses a private line to connect a subscriber's local central office with a distant central office in a community outside the subscriber's local calling area.

Interexchange telecommunications company - a telecommunications company, or division thereof, that does not provide basic local service.

Interoffice facilities - facilities connecting two or more telephone switching centers.

Local coin call - a connection from a pay phone within the local calling area of not less than fifteen minutes.

Location surcharge - a flat, per-call charge assessed by an ((~~alternate operator services company~~)) operator service provider (OSP) on behalf of a call aggregator/pay phone service provider in addition to message toll charges, local call charges, and operator service charges. A location surcharge is remitted, in whole or in part, to the call ((~~aggregator customer~~)) aggregator/pay phone service provider.

Operator service charge - a charge, in addition to the message toll charge or local call charge, assessed for use of a calling card, a credit card, or for automated or live operator service in completing a call.

Operator service provider (OSP) - any corporation, company, partnership, or person providing a connection to intrastate or interstate long-distance or to local services from locations of call aggregators. The term "operator services" in this rule means any intrastate telecommunications service provided to a call aggregator location that includes as a component any automatic or live assistance to a consumer to arrange for billing or completion, or both, of an intrastate telephone call through a method other than: Automatic completion with billing to the telephone from which the call originated; or completion through an access code used by the consumer with billing to an account previously established by the consumer with the carrier.

Outside plant - the telephone equipment and facilities installed on, along, or under streets, alleys, highways, or on private rights-of-way between the central office and subscribers' locations or between central offices.

Pay phone or pay telephone - any telephone made available to the public on either a fee-per-call basis, independent of any other commercial transaction, for the purpose of making telephone calls, whether the telephone is coin-operated or is activated by calling collect or using a calling card.

Pay phone access line, public access line, pay telephone access line, pay station service, pay phone service (PAL) - is referenced in these rules as an access line, see above.

Pay phone services - provision of pay phone equipment to the public for placement of local exchange, interexchange, or operator service calls.

Pay phone service provider (PSP) - any corporation, company, partnership, or person who owns or operates and makes pay phones available to the public.

Presubscribed provider of operator services - the provider of operator services to which the consumer is connected when a call is placed without dialing an access code.

Person - unless the context indicates otherwise, any natural person or an entity such as a corporation, partnership, municipal corporation, agency, or association.

Private branch exchange (PBX) - customer premises equipment installed on the subscriber's premises that functions as a switch, permitting the subscriber to receive incoming calls, to dial any other telephone on the premises, to access a tie trunk leading to another PBX or to access an outside trunk to the public switched telephone network.

Private line - a dedicated, nonswitched telecommunications channel provided between two or more points.

Public safety answering point (PSAP) - an answering location for enhanced 911 (E-911) calls originating in a given area. PSAPs are designated as a primary or secondary. Primary PSAPs receive E-911 calls directly from the public; secondary PSAPs receive E-911 calls only on a transfer or relay basis from the primary PSAP. Secondary PSAPs generally serve as centralized answering locations for a particular type of emergency call.

Reverse search of ALI/DMS data base - a query of the automatic location identification (ALI/DMS) data base initiated at the public safety answering point (PSAP) to obtain electronically the ALI data associated with a known telephone number for purposes of handling an emergency call when the searched telephone line is not connected to the PSAP.

Special circuit - an access line specially conditioned to give it characteristics suitable for handling special or unique services.

Standard network interface (SNI) - the point of interconnection between telecommunications company communications facilities and terminal equipment, protective apparatus, or wiring at a subscriber's premises. The network interface or demarcation point is located on the subscriber's side of the telecommunications company's protector, or the equivalent thereof in cases where a protector is not employed.

Station - a telephone instrument installed for the use of a subscriber to provide toll and exchange service.

Subscriber - any person, firm, partnership, corporation, municipality, cooperative organization, governmental agency, etc., supplied with service by any utility.

Toll station - a telephone instrument connected for toll service only and to which message telephone toll rates apply for each call made therefrom.

Trunk - a single or multichannel telecommunications medium between two or more switching entities which may include a PBX.

Utility - any corporation, company, association, joint stock association, partnership, person, their lessees, trustees or receivers appointed by any court whatsoever, owning, controlling, operating or managing any telephone plant within the state of Washington for the purpose of furnishing telephone service to the public for hire and subject to the jurisdiction of the commission.

AMENDATORY SECTION (Amending Order R-422, Docket No. UT-940049, filed 9/22/94, effective 10/23/94)

WAC 480-120-138 ~~(Pay telephones—Local and intrastate.)~~ Pay phone service providers (PSPs). ~~Every telecommunications company operating an exchange within the state of Washington may allow pay telephones to be connected to the company's network for purposes of interconnection and use of registered devices for local and intrastate communications. Every such telecommunications company offering such service shall file tariffs with the commission setting rates and conditions applicable to the connection of pay telephones to the local and intrastate network under the following terms and conditions. Local exchange companies that do not have a public access line tariff on file with the commission shall not be subject to these rules.~~

~~For purposes of these rules "pay telephone" is defined as equipment connected to the telephone network in one of the following modes:~~

~~(a) Coin operated. A telephone capable of receiving nickels, dimes, and quarters to complete telephone calls. Credit card or other operator assisted billing may be used from a coin operated instrument.~~

~~(b) Coinless. A pay telephone where completion of calls, except emergency calls, must be billed by an alternative billing method such as credit card, calling cards, collect, third party billing, or billed in connection with the billing of meals, goods, and/or services. These pay phones include, but are not limited to, charge-a-call, cordless, tabletop, and credit card stations. The term does not include in-room telephones provided by hotels, motels, hospitals, campuses or similar facilities for the use of guests or residents.~~

~~For purposes of these rules, the term "subscriber" is defined as a party requesting or using a public access line for the purpose of connecting a pay telephone to the telephone network.~~

~~(1) Pay telephones connected to the company network must comply with Part 68 of the Federal Communications Commission rules and regulations and the National Electric Code and National Electric Safety Code as they existed on January 1, 1991, and must be registered with the Federal Communications Commission, or installed behind a coupling device which has been registered with the Federal Communications Commission.~~

~~(2) All pay telephones shall provide dial tone first to assure emergency access to operators without the use of a coin.~~

~~(3) The caller must be able to access the operator and 911 where available without the use of a coin.~~

~~(4) The charge for each directory assistance call paid by the consumer shall not exceed the prevailing per call charge for comparable directory assistance. In the absence of persuasive contrary evidence, the charge of U S WEST Communications for intraLATA directory assistance or AT&T for interLATA directory assistance shall be accepted as the prevailing charge. A location surcharge is not permitted.~~

~~(5) Emergency numbers (e.g., operator assistance and 911) must be clearly posted on each pay telephone.~~

~~(6) Information consisting of the name, address, telephone number of the owner, or the name of the owner and a toll free telephone number where a caller can obtain assistance in the event the pay telephone malfunctions in any way, and procedures for obtaining a refund from the subscriber must be displayed on the front of the pay telephone.~~

~~The following information shall also be posted on or adjacent to the telephone instrument.~~

~~(a) The method by which the consumer may obtain without charge an accurate quotation of rates, fees and surcharges; and~~

~~(b) The notices required by WAC 480-120-141(4).~~

~~In no case will the charges to the user exceed the quoted costs.~~

~~(7) The telephone number of the pay telephone must be displayed on each instrument.~~

~~(8) The subscriber shall ensure that the pay telephone is compatible for use with hearing aids and its installation complies with all applicable federal, state, and local laws and regulations concerning the use of telephones by disabled persons.~~

~~(9) The pay telephone, if coin operated, must return the coins to the caller in the case of an incomplete call and must be capable of receiving nickels, dimes, and quarters. Local exchange company pay telephones shall not be subject to the requirements of this subsection.~~

~~(10) All pay telephones must provide access to all interexchange carriers where such access is available. If requested by the subscriber, the local exchange company providing the public access line shall supply, where available, (a) restriction which prevents fraud by selective blocking of 10XXX 1+ codes and (b) call screening to identify the line as one to which charges may not be billed, at appropriate tariffed rates.~~

~~(11) Except for service provided to hospitals, libraries, or similar public facilities in which a telephone ring might cause undue disturbance, or upon written request of a law enforcement agency, coin-operated pay telephones must provide two-way service, and there shall be no charge imposed by the subscriber for incoming calls. This subsection will not apply to pay telephones arranged for one-way service and in service on May 1, 1990. Should an existing one-way service be disconnected, change telephone number, or change financial responsibility, the requirements of this subsection shall apply. All pay telephones confined to one-way service shall be clearly marked on the front of the instrument.~~

~~(12) Pay telephones shall be connected only to public access lines in accordance with the approved tariffs offered by the local exchange company. Local exchange company pay telephones are not subject to this requirement.~~

~~(13) A subscriber must order a separate pay telephone access line for each pay telephone installed. Extension telephones may be connected to a pay telephone access line when the instrument:~~

~~(a) Prevents origination of calls from the extension station; and~~

~~(b) Prevents third party access to transmission from either the extension or the pay telephone instrument.~~

~~Local exchange companies are exempted from (b) of this subsection.~~

~~(14) Credit card operated pay telephones shall clearly identify all credit cards that will be accepted.~~

~~(15) Involuntary changes in telephone numbers upon conversion of pay telephones from local exchange company-owned to privately-owned pay telephones are prohibited.~~

~~(16) No fee shall be charged for nonpublished numbers on a public access line.~~

~~(17) Cordless and tabletop pay telephones shall not be connected to the telephone network except under the following conditions:~~

~~(a) The bill for usage is rendered to the user before leaving the premises where the bill was incurred or alternatively billed at the customer's request; and~~

~~(b) The user is notified verbally or on the instrument that privacy on cordless and tabletop telephones is not guaranteed; and~~

~~(c) When other electrical devices are equipped with filters, as necessary, to prevent interference with the pay telephone.~~

~~(18) Violations of the tariff, commission rules pertaining to pay telephone service, or other requirements contained in these rules, including interexchange carrier access requirements, will subject the pay telephone to disconnection of service as follows. When the local exchange company becomes aware of a violation, prior to disconnection of service, it shall immediately send written notification to the subscriber outlining all deficiencies. If any deficiency is not corrected within five days from the date of written notification to the subscriber, the local exchange company shall discontinue service. Prior to effecting the disconnection of service, the local exchange company shall make two bona fide attempts to reach the subscriber by telephone to advise the subscriber of the impending disconnection. WAC 480-120-084 shall not apply to such disconnections. The local exchange company shall ensure that any costs associated with the field visits for public access lines services be recovered from the subscriber of the public access line service in question.~~

~~It shall be the responsibility of every local exchange company to assure that any subscriber taking service pursuant to these rules and to tariffs filed pursuant to these rules meets all of the terms and conditions contained within these rules and the tariffs so filed. It shall be the duty of the local exchange company to enforce the terms and conditions contained herein.~~

~~It shall be the responsibility of the local exchange company to provide free of charge one current telephone directory each year for each public access line. It shall be the responsibility of the subscriber to make a reasonable effort to assure a current directory is available at every pay telephone location.~~

~~Public access lines will be charged at rates according to the relevant tariff as approved by the commission.~~

~~(19) Disconnection of, or refusal to connect, a pay telephone for violation of these rules may be reviewed by the commission in a formal complaint under WAC 480-09-420(5) through an adjudicative or a brief adjudicative proceeding under the provisions of chapters 34.05 RCW and 480-09 WAC.))~~ (1) General. This section sets out the standards applicable to providing pay phone service in the state of Washington. All pay phone service providers (PSPs) must comply with this and all other rules relating to pay phone services.

Every local exchange company within the state of Washington must allow pay phones to be connected to its network, and must file a tariff or price list with the commission to include the rates and conditions applicable to providing service to pay phones via its network.

The absence from these rules of specific requirements of the Americans with Disabilities Act and of other local, state or federal requirements does not excuse PSPs from compliance with those requirements.

(2) **Registration and application of rules.**

(a) Pay phone service providers (PSPs) operating a pay phone within the state of Washington must register by:

(i) Submitting a master business application to the master license service, department of licensing; and

(ii) Obtaining a unified business identifier (UBI) number. A PSP that already has a UBI number need not reapply.

(b) Except where pay phone services or PSPs are specifically referenced, the rules of general applicability to public service companies or telecommunications companies do not apply to pay phone services. This does not exempt pay phone service providers from rules applicable to remedies or sanctions for violations of rules applicable to PSP operations.

(3) Access. Pay phones must provide access to:

(a) Dial tone;

(b) Emergency calling;

(c) Operator;

(d) Telecommunications relay service calls for the hearing impaired;

(e) All available subscriber toll-free services; and

(f) All available interexchange carriers, including the local exchange company.

Access to services (a) through (e) of this subsection must be provided at no charge to the calling party.

(4) Disclosure - What must be posted. The following information must be clearly and legibly posted on or near the front of the pay phone, and must not be obstructed by advertising or otherwise:

(a) The rate for local calls, including any restrictions on the length of calls. Clear and legible posting of the rate can be accomplished by using 30 point or larger type print, or contrasting color;

(b) Notice that directory assistance charges may apply, and to ask the operator for rates;

(c) Notice that the pay phone does not make change, if applicable;

(d) The emergency number (911);

(e) The name, address, phone number, and unified business identifier (UBI) number of the owner or operator;

(f) A without-charge number to obtain assistance if the pay phone malfunctions, and procedures for obtaining a refund;

(g) The name, address, and without-charge number of all presubscribed operator service providers, as registered with the commission. This information must be updated within thirty days of a change in the OSP.

(h) Notice to callers that they can access other long distance carriers;

(i) The phone number including area code of the pay phone. When the pay phone is in an area that has had an area code change, that area code change must be reflected on the pay phone within thirty days of the area code conversion;

(j) In contrasting colors, the commission compliance number for consumer complaints, to include the following information: "If you have a complaint about service from this pay phone and are unable to resolve it by calling the repair/refund number or operator, please call the commission at 1-888-333-WUTC (9882); and

(k) Placarding shall be in place within sixty days after the effective date of an applicable rule change.

(5) Operation and functionality.

(a) The pay phone, if coin operated, must return coins to the caller in the case of an incomplete call and must be capable of receiving nickels, dimes, and quarters.

(b) Pay phone keypads must include both numbers and letters.

(c) A PSP must order a separate pay phone access line (PAL) for each pay phone installed. The commission may waive this requirement if a company demonstrates that technology accomplishes the same result as one to one ratio by means other than through a PAL, that the service provided to consumers is fully equivalent, and that all emergency calling requirements are met. This PAL must pass the appropriate screening codes to the connecting carrier to indicate that the call is originating from a pay phone.

(d) Extension telephones may be connected to a pay phone access line for the purpose of monitoring emergency use only. An extension phone must be activated only when 911 is dialed from the pay phone, and the extension phone must be equipped with a "push to talk" switch or other mechanism to prevent inadvertent interruption of the caller's conversation with the public safety answering point. The pay phone must be clearly labeled to indicate that "911 calls are monitored locally."

(e) Cordless and tabletop pay phones may be connected to the telephone network only when the bill is presented to the user before leaving the premises where the bill was incurred, unless the consumer requests that the call be alternatively billed.

(f) The pay phone may not restrict the number of digits or letters that may be dialed.

(g) Pay phones may provide credit-only service, or coin and credit service.

(h) Pay phones must provide two-way service, and no charge may be imposed by the PSP for incoming calls. Exceptions to two-way service are allowed under the following circumstances:

(i) Service provided to hospitals and libraries where a telephone ring might cause undue disturbance;

(ii) Service provided within a building on the premises of a private business establishment, in the discretion of the business owner. For purposes of this section, premises where people have access to public transportation such as airports, bus and train stations are not considered private business establishments; and

(iii) Service at locations where local governing jurisdictions or law enforcement find that incoming calls may be related to criminal or illicit activities and have obtained an order under subsection (6) of this section. Each pay phone confined to one-way service must be clearly marked on or near the front of the pay phone.

(6) Restrictions. A PSP must limit the operational capabilities of pay phones only when directed by the commission. The commission may direct such limitations upon request of local governing jurisdictions (or other governmental agencies) in their efforts to prevent or limit criminal or illicit

activities. Restrictions may include, but are not limited to, blocking of incoming calls, limiting touch tone capabilities and coin restriction during certain hours.

Requests for a commission order directing the restriction of a pay phone (or pay phones in a certain geographic area) must be made by petition to the commission for waiver of subsection (5) of this section to allow one or more specific restrictions and for an order directing restriction of the phone. The petition may be made on a form provided by the commission. The petition must include a request for the restriction signed by an agent of the local government jurisdiction in which the pay phone is located who has authority from the jurisdiction to submit the request and must state the jurisdiction's reasons for the request.

The petitioner must serve a copy of the petition on the pay phone service provider no later than the date the petition is filed with the commission. The petitioner must post a notice prominently visible at the pay phone(s) of the proposed restriction, no later than the day it is filed with the commission, and maintain it at the location until the commission acts on the petition. The notice must explain what is proposed and how to file an objection to the petition with the commission. The petition is for an administrative, and not an adjudicative, decision and will be processed administratively.

If no objection is made by any person or by commission staff within the twenty-day comment period, the commission will enter an order directing the restriction. If an objection is filed, the commission will hear the petition after notice to the objector and the petitioner.

Once restrictions are in place at the telephone, the PSP must post on or near each pay phone so limited, in legible and prominent type, a description of each limitation in effect, times when the restrictions will be in effect, and the name and without-charge number of the governmental agency that recommended the restriction.

(7) Telephone directories. The provider of the pay phone access line must furnish without charge one current telephone directory each year for each pay phone access line (PAL).

The PSP must ensure that a current directory is available at every pay phone.

(8) Malfunctions and rule violations. Malfunctions of the pay phone, or rule violations reported to the repair/refund number or the commission, must be corrected within five days.

(9) Complaints and disputes. Complaints and disputes regarding pay phone service providers shall be treated in accordance with WAC 480-120-101.

AMENDATORY SECTION (Amending Order R-430, Docket No. UT-950134, filed 4/28/95, effective 5/29/95)

WAC 480-120-141 ~~((Alternate operator services.))~~ Operator service providers (OSPs). ~~((All telecommunications companies providing alternate operator services (AOS), as defined in WAC 480-120-021, shall comply with this and all other rules relating to telecommunications companies not specifically waived by order of the commission.~~

~~(1) Each alternate operator services company shall maintain, revise and provide to the commission upon request a current list of operator services customers which it serves and the locations and telephone numbers to which such service is provided to each customer. A customer list provided pursuant to this rule is proprietary information and, if identified when filed as required in WAC 480-09-015, is subject to the protections of that rule.~~

~~(2) Each AOS company is responsible for assuring that each of its customers complies fully with contract and tariff provisions which are specified in this rule. Failure to secure compliance constitutes a violation by the AOS company.~~

~~(a) The AOS company shall withhold on a location-by-location basis the payment of compensation, including commissions, from a call aggregator, if the AOS company reasonably believes that the call aggregator is blocking access to interexchange carriers in violation of these rules.~~

~~(b) Violations of tariff, contract or other statements of conditions of service, in commission rules pertaining to AOS company service, or of other requirements contained in these rules, including interexchange carrier access requirements, will subject an aggregator to termination of alternate operator services as follows. When the AOS becomes aware of a violation, prior to disconnection of service, it shall immediately send written notification to the aggregator outlining all deficiencies. If any deficiency is not corrected within five days from the date of written notification to the aggregator, the AOS shall terminate service. Prior to effecting the termination of service, the AOS company shall make two bona fide attempts to reach the subscriber by telephone to advise the subscriber of the impending termination. WAC 480-120-06[illegible] shall not apply to such terminations.~~

~~(c) AOS company actions in furtherance of this rule may be reviewed by the commission in a formal complaint under WAC 480-09-420 through an adjudicative or a brief adjudicative proceeding under the provisions of chapters 34.05 RCW and 480-09 WAC.~~

~~(d) An AOS company shall refuse to provide operator services to a call aggregator who the commission has found to have knowingly and repeatedly violated commission rules regarding the provision of alternate operator service until the commission has found that the call aggregator will comply with relevant law and rule.~~

~~(3) For purposes of this section, "consumer" means the party initiating and/or paying for an interexchange or local call. "Customer" means the call aggregator, i.e., the hotel, motel, hospital, prison, campus, pay telephone, etc., contracting with an AOS for service.~~

~~(4) An alternate operator services company shall require, as a part of any contract with its customer and as a term and condition of service stated in its tariff, that the customer:~~

~~(a) Post on the telephone instrument in plain view (if any) one using the telephone, in eight point or larger Style Bold type, the information provided in the following notice:~~

~~SERVICE ON THIS INSTRUMENT MAY BE PROVIDED AT RATES THAT ARE HIGHER THAN NORMAL. YOU HAVE THE RIGHT TO CONTACT THE OPERATOR FOR INFORMATION REGARDING CHARGES BEFORE PLACING YOUR CALL. INSTRUCTIONS FOR REACHING YOUR PREFERRED CARRIER ARE ALSO AVAILABLE FROM THE OPERATOR.~~

(b) Post and maintain in legible condition on or near the telephone:

(i) The name, address, and without charge number of the alternate operator services company, as registered with the commission;

(ii) Dialing directions so that a consumer may reach the AOS operator without charge to receive specific rate information; and

(iii) Directions to allow the consumer to reach the consumer's preferred carrier and to make it clear that the consumer has access to the other providers.

(c) Provide access from every instrument to 1-800 services and all available interexchange carriers; and

(d) Shall post, on or near the instrument, a notice stating whether a location surcharge or any other fee is imposed for telecommunications access through the instrument, the amount of any fee or location surcharge, and the circumstances when it will apply.

(e) Posting under these rules shall begin no later than October 1, 1991, and shall be completed no later than January 31, 1992. In the interim, posting in compliance with the immediate prior posting provisions of WAC 480-120-141 is required and shall constitute compliance with this rule.

(5) The alternate operator services company shall:

(a) Identify the AOS company providing the service audibly and distinctly at the beginning of every call, and again before the call is connected, including an announcement to the called party, on calls placed collect.

(i) For purposes of this rule the beginning of the call is no later than immediately following the prompt to enter billing information on automated calls and, on live and automated operator calls, when the call is initially routed to the operator.

(ii) The message used by the AOS company shall state the name of the company as registered with the commission whenever referring to the AOS company. Terms such as "company," "communications," "incorporated," "of the northwest," etc., when not necessary to clear consumer identification of the entity providing service may be omitted when authorized by letter from the secretary of the commission.

(iii) The consumer shall be permitted to terminate the telephone call at no charge before the call is connected.

(iv) The AOS company shall immediately, upon request and at no charge to the consumer, disclose to the consumer:

(A) A quote of the rates or charges for the call, including any surcharge;

(B) The method by which the rates or charges will be collected; and

(C) The methods by which complaints about the rates, charges, or collection practices will be resolved.

(b) Provide to the local exchange company such information as may be necessary for billing purposes, as well as an address and toll free telephone number for consumer inquiries.

(c) Reoriginate calls to another carrier upon request and without charge, when equipment is in place which will accomplish reorigination with screening and allow billing from the point of origin of the call. If reorigination is not available, the AOS company shall give dialing instructions for the consumer's preferred carrier.

(d) Assure that a minimum of ninety percent of all calls shall be answered by the operator within ten seconds from the time the call reaches the carrier's switch.

(e) Maintain adequate facilities in all locations so the overall blockage rate for lack of facilities, including as pertinent the facilities for access to consumers preferred interexchange carriers, does not exceed one percent in the time consistent busy hour. Should excessive blockage occur, it shall be the responsibility of the AOS company to determine what caused the blockage and take immediate steps to correct the problem. This subsection does not apply to blockage during unusually heavy traffic, such as national emergency, local disaster, holidays, etc.

(6) The alternate operator services company shall assure that persons are not billed for calls which are not completed. For billing purposes, calls shall be itemized, identified, and rated from the point of origination to the point of termination. No call shall be transferred to another carrier by an AOS which cannot or will not complete the call, unless the call can be billed in accordance with this subsection.

(7) For purposes of emergency calls, every alternate operator services company shall have the following capabilities:

(a) Automatic identification at the operator's console of the location from which the call is being made;

(b) Automatic identification at the operator's console of the correct telephone numbers of emergency service providers that serve the telephone location, including but not limited to, police, fire, ambulance, and poison control;

(c) Automatic ability at the operator's console of dialing the appropriate emergency service with a single keystroke;

(d) Ability of the operator to stay on the line with the emergency call until the emergency service is dispatched.

No charge shall be imposed on the caller by the telephone company or the alternate operator services company for the emergency call.

If the alternate operator services company does not possess these capabilities, all calls in which the consumer dials zero (0) and no other digits within five seconds shall be routed directly to the local exchange company operator, or to an entity fully capable of complying with these requirements. AOS companies lacking sufficient facilities to provide such routing shall cease operations until such time as the requirements of this section are met.

(8) Complaints and disputes shall be treated in accordance with WAC 480-120-101, Complaints and disputes.

(9) Charges billed to a credit card company (e.g., American Express or Visa) need not conform to the call detail requirements of this section. However, the AOS shall provide specific call detail in accordance with WAC 480-120-106 upon request.

(10) "Public convenience and advantage"; surcharges; variable rates.

(a) For services, public convenience and advantage means at a minimum that the provider of alternate operator services offers operator services which equal or exceed the industry standards in availability, technical quality and response time and which equal or exceed industry standards in variety or which are particularly adapted to meet unique needs of a market segment. In the absence of other persuasive

~~evidence, a demonstration that operator service equals or exceeds that provided by US WEST Communications for intraLATA services or AT&T for interLATA services will be accepted as demonstrating public convenience and advantage.~~

~~(b) Charges no greater than those prevailing charges in the relevant market - intraLATA or interLATA - will be accepted as demonstrating that charges are for the public convenience and advantage. In the absence of persuasive contrary evidence, $0.25 higher per call than AT&T daytime charges for intraLATA and interLATA service will be accepted as the prevailing charges.~~

~~(c) Surcharges; variable rates. No location surcharge may be added to without charge calls nor to a charge for directory assistance. No tariff may provide for rate levels which vary at the option of a call aggregator, provided, that an aggregator may waive application of the surcharge to calls from its instruments, and provided further, that an AOS company may establish a tariff rate for high cost locations if the conditions for application of the rate confine it to locations with substantially higher than average operating costs.~~

~~(11) Rates to the consumer for the provision of alternate operator services, including directory assistance, shall not exceed the prevailing rates for such services in the relevant market - intraLATA or interLATA - unless need for the excess to produce rates which are fair, just and reasonable is demonstrated to the satisfaction of the commission. In the absence of persuasive contrary evidence, $0.25 higher per call than AT&T daytime charges for intraLATA and interLATA service will be considered the prevailing rate.~~

~~(12) Fraud prevention.~~

~~(a) A company providing interexchange telecommunications service may not bill a call aggregator for charges billed to a line for calls which originated from that line through the use of 10XXX+0, 10XXX+01, 950-XXXX, or 1-800 access codes, or when the call originating from that line otherwise reached an operator position, if the originating line subscribed to outgoing call screening and the call was placed after the effective date of the outgoing call screening order.~~

~~(b) A company providing interexchange telecommunications service may not bill to a call aggregator any charges for collect or third number billed calls, if the line serving to which the call was billed was subscribed to incoming call screening and the call was placed after the effective date of the call screening service order.~~

~~(c) Any calls billed through the local exchange carrier in violation of subparagraphs (a) or (b) above must be removed from the call aggregator's bill by the local exchange company upon identification. If investigation by the local exchange company determines that the pertinent call screening was operational when the call was made, the local exchange company may return the charges for the call to the interexchange telecommunications company as not billable.~~

~~(d) Any call billed directly by an alternate operator service company, or through a billing method other than the local exchange company, which is billed in violation of subparagraphs (a) and (b), above, must be removed from the call aggregator's bill. The telecommunications company providing the service may request an investigation by the local exchange company. If the local exchange company, after investigation, determines that call screening which would have protected the call, which is offered by the LEC and was subscribed to by the call aggregator, was not operational at the time the call was placed, the AOS company shall pay the LEC for the call.))~~ (1) General. This section gives information to operator service providers (OSPs) that provide operator services from pay phones and other aggregator locations within Washington. All telecommunications companies providing operator services (both live and automated) must comply with this and all other rules relating to telecommunications companies not specifically waived by order of the commission. The absence from these rules of specific requirements of the Americans with Disabilities Act and/or other local, state or federal requirements does not excuse OSPs from compliance with those requirements.

(a) Each operator service provider (OSP) must maintain a current list of the customers it serves in Washington and the locations and telephone numbers where the service is provided.

(b) No OSP may provide service to a PSP that is not fully in compliance with the rules.

(c) For purposes of this section, "consumer" means the party initiating and/or paying for a call using operator services. In collect calls, both the originating party and the party on the terminating end of the call are consumers. "Customer" means the call aggregator or pay phone service provider, i.e., the hotel, motel, hospital, correctional facility/prison, or campus, contracting with an OSP for service.

(2) Disclosure.

(a) What must be posted. The following information must be clearly and legibly posted on or near the front of a pay phone, and must not be obstructed by advertising or other messages:

(i) The name, address, and without-charge number of all presubscribed operator service providers, as registered with the commission. This information must be updated within thirty days after a change of OSPs;

(ii) Notice to consumers that they can access other long distance carriers;

(iii) In contrasting colors, the commission compliance number for consumer complaints, to include the following information: "If you have a complaint about service from this pay phone and are unable to resolve it by calling the repair/refund number or operator, please call the commission at 1-888-333-WUTC (9882)"; and

(iv) Placarding as a result of rule changes shall be in place within sixty days after the effective date of the rule change.

(b) Verbal disclosure of rates. Before an operator-assisted call from an aggregator location may be connected by a presubscribed OSP, the OSP must verbally advise the consumer how to receive a rate quote, such as by pressing a specific key or keys, but no more than two keys, or by staying on the line. This message must precede any further verbal information advising the consumer how to complete the call, such as to enter the consumer's calling card number. This rule applies to all calls from pay phones or other aggregator locations, including prison phones, and store-and-forward pay phones or "smart" telephones. After hearing an OSP's message, a consumer may waive their right to obtain specific

rate quotes for the call they wish to make by choosing not to press the key specified in the OSP's message to receive such information or by hanging up. The rate quoted for the call must include any applicable surcharge. Charges to the user must not exceed the quoted rate.

(3) Access. Pay phones must provide access to the services identified in WAC 480-120-138(3).

(4) Branding. The operator service provider must:

(a) Identify the OSP providing the service audibly and distinctly at the beginning of every call, including an announcement to the called party on calls placed collect.

(b) Ensure that the beginning of the call is no later than immediately following the prompt to enter billing information on automated calls and, on live and automated operator calls, when the call is initially routed to the operator.

(c) State the name of the company as registered with the commission (or its registered "doing business as" name) whenever referring to the OSP. Terms such as "company," "communications," "incorporated," "of the northwest," etc., may be omitted when not necessary to identify clearly the OSP.

(5) Billing. The operator service provider must:

(a) Provide to the billing company applicable call detail necessary for billing purposes, as well as an address and toll free telephone number for consumer inquiries.

(b) Ensure that consumers are not billed for calls that are not completed. For billing purposes, calls must be itemized, identified, and rated from the point of origination to the point of termination. No call may be transferred to another carrier by an OSP unless the call can be billed from the point of origin of the call.

(c) Charges billed to a credit card need not conform to the call detail requirements of this section. However, the OSP must provide specific call detail in accordance with WAC 480-120-106, Form of bills, upon request.

(6) Operational capabilities. The operator service provider must:

(a) Answer at least ninety percent of all calls within ten seconds from the time the call reaches the carrier's switch.

(b) Maintain adequate facilities in all locations so the overall blockage rate for lack of facilities, including as pertinent the facilities for access to consumers' preferred interexchange carriers, does not exceed one percent in the time-consistent busy hour. Should excessive blockage occur, it is the responsibility of the OSP to determine what caused the blockage and take immediate steps to correct the problem.

(c) Offer operator services that equal or exceed the industry standards in availability, technical quality, response time, and that also equal or exceed industry standards in variety or are particularly adapted to meet unique needs of a market segment.

(d) Reoriginate calls to another carrier upon request and without charge when the capability to accomplish reorigination with screening and allow billing from the point of origin the call, is in place. If reorigination is not available, the P must give dialing instructions for the consumer's preferred carrier.

(7) Emergency calls. For purposes of emergency calls, every OSP must have the following capabilities:

(a) Be able to transfer the caller into the appropriate E-911 system and to the public safety answering point (PSAP) serving the location of the caller with a single keystroke from the operator's console, to include automatic identification of the exact location and address from which the call is being made;

(b) Have the ability for the operator to stay on the line with the emergency call until the PSAP representative advises the operator that they are no longer required to stay on the call; and

(c) Be able to provide a without-charge number for direct access to public safety answering points should additional information be needed when responding to a call for assistance from a phone utilizing the provider's services. That emergency contact information must not be considered proprietary.

(8) Fraud protection.

(a) A company providing telecommunications service may not bill a call aggregator for the following:

(i) Charges billed to a line for calls which originated from that line through the use of carrier access codes (i.e., 10XXX+0, 10XXX+01, 950-XXXX), toll-free access codes, or when the call originating from that line otherwise reached an operator position, if the originating line subscribed to outgoing call screening or pay phone specific ANI coding digits and the call was placed after the effective date of the outgoing call screening or pay phone specific ANI coding digits order; or

(ii) Collect or third-number billed calls, if the line serving the call that was billed had subscribed to incoming call screening (also termed billed number screening) and the call was placed after the effective date of the call screening service order.

(b) Any calls billed through the access line provider in violation of (a)(i) or (ii) of this subsection must be removed from the call aggregator's bill by the access line provider. If investigation by the access line provider determines that the pertinent call screening or pay phone specific ANI coding digits was operational when the call was made, the access line provider may return the charges for the call to the telecommunications company as not billable.

(c) Any call billed directly by an OSP, or through a billing method other than the access line provider, which is billed in violation of (a)(i) and (ii) of this subsection, must be removed from the call aggregator's bill. The telecommunications company providing the service may request an investigation by the access line provider. If the access line provider determines that call screening or pay phone specific ANI coding digits (which would have protected the call) was subscribed to by the call aggregator and was not operational at the time the call was placed, the OSP must bill the access line provider for the call.

(9) Enforcement. Operator service providers are subject to all pertinent provisions of law.

(a) Suspension. The commission may suspend the registration of any company providing operator services if the company fails to meet minimum service levels or fails to provide disclosure to consumers of protection available under chapter 80.36 RCW and pertinent rules.

(i) Suspension may be ordered following notice and opportunity for hearing as provided in RCW 80.04.110 and the procedural rules of the commission.

(ii) No operator service provider may operate while its registration is suspended.

(iii) Except as required by federal law, no provider of pay phone access line service may provide service to any operator service provider whose registration is suspended.

(b) **Penalty.** The commission may assess a penalty as provided in RCW 80.36.522 and 80.36.524, upon any company providing operator services if the company fails to meet minimum service levels or fails to provide disclosure to consumers of protection available under chapter 80.36 RCW.

(c) **Alternatives.** The commission may take any other action regarding a provider of operator services as authorized by law.

(d) **Complaints.** Complaints and disputes will be treated in accordance with WAC 480-120-101.

REPEALER

The following sections of the Washington Administrative Code are repealed:

WAC 480-120-137	Customer-owned pay telephones—Interstate.
WAC 480-120-142	Alternate operator services—Enforcement.
WAC 480-120-143	Local service to aggregators.

WSR 99-02-023
PERMANENT RULES
DEPARTMENT OF
LABOR AND INDUSTRIES

[Filed December 30, 1998, 11:00 a.m., effective March 30, 1999]

Date of Adoption: December 30, 1998.

Purpose: Chapter 296-24 WAC, General safety and health standards.

Subject: First aid relating to longshore, stevedore, and related waterfront operations. State-initiated adopted amendments are made to delete a reference to chapter 296-56 WAC in WAC 296-24-06105, which exempts applicability of chapter 296-24 WAC first aid requirements to longshore, stevedore, and related waterfront industries. This exemption previously existed because first aid requirements were included in the vertical standard.

However, under a separate rule amendment adoption (see this Washington State Register for other WISHA rule adoptions), the department replaced existing first aid requirements in chapter 296-56 WAC with a reference to first aid requirements in chapter 296-24 WAC. Deletion of the exemption in chapter 296-24 WAC was necessary to make first aid requirements applicable to longshore, stevedore and related waterfront operations.

Both rules are adopted and become effective on March 30, 1999.

Citation of Existing Rules Affected by this Order: Amending WAC 296-24-06105 What workplaces does this rule apply to?

Statutory Authority for Adoption: RCW 49.17.040

Adopted under notice filed as WSR 98-20-079 on October 6, 1998.

Changes Other than Editing from Proposed to Adopted Version: No public comments were received on this proposal. Therefore, WISHA is adopting the rule as proposed.

Number of Sections Adopted in Order to Comply with Federal Statute: New 0, Amended 0, Repealed 0; Federal Rules or Standards: New 0, Amended 0, Repealed 0; or Recently Enacted State Statutes: New 0, Amended 0, Repealed 0.

Number of Sections Adopted at Request of a Nongovernmental Entity: New 0, Amended 0, Repealed 0.

Number of Sections Adopted on the Agency's Own Initiative: New 0, Amended 1, Repealed 0.

Number of Sections Adopted in Order to Clarify, Streamline, or Reform Agency Procedures: New 0, Amended 0; Repealed 0.

Number of Sections Adopted Using Negotiated Rule Making: New 0, Amended 0, Repealed 0; Pilot Rule Making: New 0, Amended 0, Repealed 0; or Other Alternative Rule Making: New 0, Amended 1, Repealed 0.

Effective Date of Rule: March 30, 1999.

December 30, 1998
Gary Moore
Director

AMENDATORY SECTION (Amending WSR 98-06-061, filed 3/2/98, effective 6/1/98)

WAC 296-24-06105 What workplaces does this rule apply to? This rule applies to all workplaces, except for the ones listed below. They are, instead covered by separate individual rules (vertical standards):

Rule Title	Chapter
• Agriculture	296-307 WAC
• Compressed Air Work	296-36 WAC
• Construction	296-155 WAC
• Fire Fighters	296-305 WAC
• Logging	296-54 WAC
((• ~~Longshoring/Stevedoring~~	~~296-56 WAC~~))
• Sawmills	296-78 WAC
• Shipbuilding and Repairing	296-304 WAC

WSR 99-02-024
PERMANENT RULES
DEPARTMENT OF
LABOR AND INDUSTRIES

[Filed December 30, 1998, 11:05 a.m., effective March 30, 1999]

Date of Adoption: December 30, 1998.

RETURN COPY

I certify under penalty of perjury under the laws of the State of Washington that on August 1, 2000, I served a copy of this document on all counsel of record in the manner shown at the addresses listed on the attached *Service List*.

Signed: Rhonda A. Losh

RECEIVED
00 AUG -1 PM 2:25
KING COUNTY
SUPERIOR COURT CLERK
SEATTLE, WA

HON. J. KATHLEEN LEARNED

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

SANDY JUDD, TARA HERIVEL and ZURAYA WRIGHT, for themselves, and on behalf of all similarly situated persons,

Plaintiffs,

v.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY; GTE NORTHWEST INC.; CENTURYTEL TELEPHONE UTILITIES, INC.; NORTH-WEST TELECOMMUNICATIONS, INC., d/b/a PTI COMMUNICATIONS, INC.; U.S. WEST COMMUNICATIONS, INC.; T-NETIX, INC.,

Defendants.

NO. 00-2-17565-5 SEA

FIRST AMENDED COMPLAINT —CLASS ACTION

VAL Bogues
2:55
by Andrew Siriani

I. PARTIES, JURISDICTION AND VENUE

1. Plaintiff Sandy Judd is a resident of Snohomish County, Washington. She has received and paid for intrastate long-distance collect calls from Washington State prison inmates.

2. Plaintiff Tara Herivel is a resident of King County, Washington. She has received and continues to receive and pay for intrastate long-distance collect calls from Washington State prison inmates.

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SEATTLE, WASHINGTON 98104-7032
(206) 223-0303

3. Plaintiff Zuraya Wright is a resident of Lake Worth, Florida. She received and paid for interstate long-distance collect calls from a Washington State prison inmate before rate disclosure was first offered to her in November of 1999.

4. Jurisdiction is appropriate in this court because the defendants do business in the state of Washington, and because the amount in controversy exceeds $300.00. Venue is proper because the non-resident defendants have been served in King County, Washington.

II. NATURE OF CASE

5. Since at least 1992, the Washington State Department of Corrections has contracted with private "operator service providers," also known as "alternate operator services companies," to provide "0+" operator services on the payphones used by prison inmates incarcerated in the State of Washington. Prison inmates are required to use the "0+" operator service provider assigned by contract to the prison from which the call is placed, and may place only collect calls.

6. Since at least 1988, telecommunications companies acting as or contracting with operator service providers have been required by state law to assure appropriate disclosure of rates charged to consumers for services provided while connecting both intrastate and interstate long-distance telephone calls. However, the defendants, all telecommunications companies and operator service providers, have failed to assure appropriate disclosure of rates to the plaintiffs and others similarly situated, and continue to fail to do so for intrastate long-distance telephone calls. The defendants have provided disclosure of rates for at least some interstate calls from Washington prison inmates only since November of 1999.

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III. CLASS ACTION ALLEGATIONS

7. *Definition of Class.* The class consists of all individuals who have received or will receive one or more long-distance intrastate or interstate collect calls from one or more Washington State prison inmates since June 20, 1996, except for those individuals who have received only interstate collect calls from Washington State prison inmates after November of 1999, and to whom timely disclosure of rates was offered.

8. *Class Representatives.* Named plaintiff Sandy Judd has received and paid for intrastate long-distance collect calls from Washington State prison inmates. Named plaintiff Tara Herivel has received and continues to receive and pay for intrastate long-distance collect calls from Washington State prison inmates. Named plaintiff Zuraya Wright received and paid for interstate collect calls from a Washington State prison inmate between June 20, 1996 and November of 1999.

9. *Size of Class.* There are approximately 14,000 prison inmates currently incarcerated in the State of Washington. Inmate are generally allowed access to prison payphones during daytime hours. Every person who is or has been called by any incarcerated person since July 20, 1996 is a potential class member, including family, friends, attorneys and news organizations. The class is expected to number in the tens or hundreds of thousands and is so large that joinder of all members is impracticable.

10. *Common Questions of Law and Fact.* This action requires a determination of whether the defendants have assured appropriate rate disclosure to the class member recipients of inmate-initiated intrastate and interstate long-distance collect telephone calls as required by RCW §80.36.520 and RCW §80.36.530.

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11. *Defendants Have Acted On Grounds Generally Applicable to the Class.* The defendants complete inmate-initiated collect telephone calls to call recipients, and have consistently failed to make proper disclosures. The defendants have acted on grounds generally applicable to the class. Certification is therefore proper under CR 23(b)(2).

12. *Questions of Law and Fact Common to the Class Predominate Over Individual Issues.* The claims of many individual class members are too small to justify filing and prosecuting the claims separately. Thus, any interest that individual members of the class may have in individually controlling the prosecution of separate actions is outweighed by the efficiency of the class action mechanism. This action can be most efficiently prosecuted as a class action in King County Superior Court, where the defendants do business. Issues as to the defendants' conduct towards members of the class predominate over questions, if any, unique to members of the class. Certification is therefore additionally proper under CR 23(b)(3).

13. *Class Counsel.* Plaintiffs have retained experienced and competent class counsel.

IV. FACTUAL BACKGROUND

14. The defendants are telecommunications companies. On March 16, 1992, all of the defendants except for T-Netix, Inc. contracted with the Washington Department of Corrections to provide operator services for inmate payphones. The parties have extended this contract through four amendments. The fourth amendment, which went into effect in March of 1999, adds T-Netix, Inc. as an operator service provider at some facilities.

15. Throughout the Class period, family members, attorneys and other persons have been unable to speak to Washington State prison inmates by

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telephone, except as recipients of operator-assisted collect calls. Recipients are billed for these calls by the operator service provider assigned by contract to the prison from which the call originates.

16. Rates for intrastate long-distance collect calls are not made available to recipients over the phone prior to the receipt of an inmate-initiated call, nor are recipients given a separate number to call in order to learn the rates charged.

17. Rates for at least some interstate calls have been made available over the phone starting sometime in November of 1999. Prior to that time, recipients of inmate-initiated interstate calls could not access rates prior to receipt of the call, and also were not provided with any information on how to obtain the applicable rates.

V. CLAIMS FOR RELIEF

FIRST CLAIM—VIOLATION OF THE WASHINGTON CONSUMER PROTECTION ACT, RCW 19.86 *et seq.*

18. Plaintiffs re-allege paragraphs 1 through 16, above.

19. The defendants' repeated violations of RCW §80.36.520 constitute per se violations of the Washington Consumer Protection Act, RCW §19.86 et seq., pursuant to RCW §80.36.530. The defendants have engaged in, and continue to engage in, unfair or deceptive acts or practices in trade or commerce in violation of the Washington State Consumer Protection Act. Such conduct affects the public interest, and has caused injury to the named plaintiffs and the plaintiffs' class.

20. Plaintiffs and the plaintiff class are entitled to damages as defined in RCW §80.36.530, and treble damages under RCW §19.86.090, along with costs of suit and attorney fees.

SECOND CLAIM—INJUNCTIVE RELIEF

21. Plaintiffs re-allege paragraphs 1 through 19, above.

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22. Plaintiffs and the plaintiff class are entitled to an injunction under RCW §19.86.090, under the common law, and under any other applicable laws, to enjoin further violations of RCW §80.36.520.

VI. DEMAND FOR RELIEF

WHEREFORE, plaintiffs request that this Court:

1. Enter judgment in favor of plaintiffs and the plaintiff class for damages in an amount to be proven at trial due to the defendants' failure to assure appropriate disclosure of rates charged under RCW §80.36 et seq. and RCW §19.86 et seq., including presumed damages under RCW §80.36.530 for each violation, and treble damages up to $10,000 to each class member for each violation;

2. Enter judgment in favor of plaintiffs and the plaintiff class, and against the defendants, enjoining the defendants from further violations of RCW §80.36.520;

3. Award plaintiffs and the plaintiff class their attorney fees; and

4. Award such other relief as is just and proper.

DATED: August 1, 2000.

SIRIANNI & YOUTZ

Chris R. Youtz (WSBA #7786)
Jonathan P. Meier (WSBA #19991)
Marie E. Gryphon (WSBA #29242)
Attorneys for Plaintiffs

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SERVICE LIST

Judd, et al. v. American Telephone and Telegraph Company, et al.
King County Superior Court Cause No. 00-2-17565-5 SEA

Kelly Twiss Noonan STOKES LAWRENCE, P.S. 800 Fifth Ave., Suite 4000 Seattle, WA 98104-3179 Attorneys for Defendant American Telephone and Telegraph Company	[x] By United States Mail [ ] By Legal Messenger [ ] By Federal Express [x] By Facsimile Fax: (206) 464-1496 Phone: (206) 626-6000
Timothy J. O'Connell STOEL RIVES LLP 600 University Street, Suite 3600 Seattle, WA 98101-4109 Attorneys for Defendant GTE Northwest, Inc.	[x] By United States Mail [ ] By Legal Messenger [ ] By Federal Express [x] By Facsimile Fax: (206) 386-7500 Phone: (206) 624-0900
Robert B. Mitchell Carol S. Arnold Athan E. Tramountanas PRESTON GATES & ELLIS LLP 701 Fifth Ave., Suite 5000 Seattle, WA 98104-7078 Attorneys for Defendants CenturyTel Telephone Utilities, Inc. and Northwest Telecommunications, Inc.	[x] By United States Mail [ ] By Legal Messenger [ ] By Federal Express [x] By Facsimile Fax: (206) 623-7022 Phone: (206) 623-7580
Julia L. Parsons PERKINS COIE LLP 1201 Third Ave., Suite 4800 Seattle, WA 98101-3099 Attorneys for Defendant U.S. WEST Communications, Inc.	[x] By United States Mail [ ] By Legal Messenger [ ] By Federal Express [x] By Facsimile Fax: (206) 583-8500 Phone: (206) 583-8888
Teresa Williams Gillespie U S WEST COMMUNICATIONS, INC. 1600 Seventh Ave., Room 3208 Seattle, WA 98191 Attorneys for Defendant U.S. WEST Communications, Inc.	[x] By United States Mail [ ] By Legal Messenger [ ] By Federal Express [ ] By Facsimile Fax: (206) Phone: (206) 398-2503
T-Netix, Inc. c/o CT Corporation System 520 Pike Street Seattle, WA 98101	[ ] By United States Mail [x] By Legal Messenger [ ] By Federal Express [ ] By Facsimile Fax: Phone:

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Honorable J. Kathleen Learned

FILED
KING COUNTY, WASHINGTON
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KING COUNTY

SUPERIOR COURT OF WASHINGTON IN AND FOR KING COUNTY

SANDY JUDD, TARA HERIVEL and ZURAYA WRIGHT, for themselves, and on behalf of all similarly situation persons,

Plaintiffs,

v.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, *et al.*

Defendants.

No. 00-2-17565-5-SEA

Denying in Part
ORDER ~~GRANTING~~ DEFENDANT T-NETIX, INC.'S MOTION TO DISMISS FIRST AMENDED COMPLAINT – CLASS ACTION and Granting in Part and Referring to WUTC.
~~(PROPOSED)~~

THIS MATTER having come before the undersigned judge of the above-entitled Court, and the Court having reviewed the Motion to Dismiss Complaint brought by Defendant T-Netix, Inc., and response, reply and Supplemental Memoranda of the parties the pleadings and records in this action, and the Court having heard oral argument of counsel and being otherwise fully informed with respect to this matter,

IT IS HEREBY ORDERED that Defendant T-Netix' Motion ~~to Dismiss is hereby GRANTED and the First Amended Complaint – Class Action is hereby DISMISSED with prejudice.~~ is granted in part only and the matter is referred to the Washington Utilities and Transportation Commission (WUTC) for further proceedings to determine if T-Netix has violated WUTC regulations. CPA claims and any award of monetary damages are stayed pending WUTC action.

ORDER OF DISMISSAL - 1

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ORIGINAL

Page 409

Further, T-Netix's motion to Dismiss claims related to interstate & inc are dismissed non-federal pre-empted, class action issues are stayed pending WUTC action

DONE IN OPEN COURT this 6 day of August, 2000.
November

The Honorable J. Kathleen Learned

Presented by:

BADGLEY ~ MULLINS LAW GROUP

By _____
Donald H. Mullins, WSBA #4966
Diana P. Danzberger, WSBA # 24818
Attorneys for Defendant T-Netix, Inc.

PATTON BOGGS LLP

Glenn B. Manishin
Stephanie A. Joyce
2550 M Street, N.W., Suite 2550
Washington, D.C. 20037
Attorneys for Defendant T-Netix, Inc.

Approved as to form;
Approved for entry:

SIRIANNI & YOUTZ

By _____
Chris R. Youtz, WSBA # _____
Attorneys for Plaintiffs

STOKES LAWRENCE, P.S.

By _____
Kelly Twiss Noonan, WSBA # _____
Attorneys for Defendant AT&T

STOEL RIVES LLP

By _____
Timothy J. O'Connell, WSBA # _____

HONORABLE J. KATHLEEN LEARNED

IN THE SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

SANDY JUDD, TARA HERIVEL and ZURAYA WRIGHT, for themselves, and on behalf of all similarly situated persons,

Plaintiffs,

v.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY; GTE NORTHWEST INC.; CENTURYTEL TELEPHONE UTILITIES, INC; NORTHWEST TELECOMMUNICATIONS, INC., d/b/a PTI COMMUNICATIONS, INC.; U.S. WEST COMMUNICATIONS, INC.; T-NETIX, INC.,

Defendants.

Case No.: 00-2-17565-5 SEA

~~[PROPOSED]~~ ORDER GRANTING AT&T CORP.'S MOTION TO DISMISS

THIS MATTER came on for hearing before the Court on October 6, 2000. Having heard argument of counsel and having considered the written submissions of the parties and all other documents on file in this matter, NOW THEREFORE:

IT IS ORDERED, ADJUDGED AND DECREED ~~that Plaintiffs' First Amended Complaint is hereby dismissed without prejudice for failure to state a claim. Plaintiffs shall have ___ days from the date of entry of this Order to file an amended complaint.~~

Furthermore, Plaintiffs' claims against Defendant AT&T Corp. ("AT&T") for damages premised on nondisclosure of interstate long distance rates are hereby dismissed with prejudice under the filed tariff doctrine.

Furthermore, Plaintiffs' claims against AT&T premised on nondisclosure of intrastate long distance rates ~~are hereby dismissed without prejudice and~~ are referred to the Washington Utilities and Transportation Commission under the primary jurisdiction doctrine for resolution in the first instance, if either or both they are considered by the agency to be one DSP under the contracts at issue herein, and if so if the regulations have been violated. CPA, class & damage issues are stayed pending WUTC action.

DATED this 6th day of November, 2000.

THE HONORABLE J. KATHLEEN LEARNED
KING COUNTY SUPERIOR COURT JUDGE

Presented by:

STOKES LAWRENCE, P.S.

By: _____
Kelly Twiss Noonan (WSBA #19096)
Laura J. Buckland (WSBA #16141)
Attorneys for Defendant AT&T Corp.

BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION

SANDRA JUDD AND TARA HERIVEL, Complainants, v. AT&T COMMUNICATIONS OF THE PACIFIC NORTHWEST, INC., AND T-NETIX, INC., Respondents.	DOCKET NO. UT-042022 ORDER NO. 05 ORDER DENYING T-NETIX'S MOTIONS FOR SUMMARY DETERMINATION AND TO STAY DISCOVERY; DENYING COMPLAINANTS' CONDITIONAL MOTION; DENYING, IN PART, T-NETIX'S MOTION TO STRIKE; GRANTING AT&T'S MOTION FOR LEAVE TO FILE RESPONSE

1 ***SYNOPSIS.*** *Consistent with the oral decision issued following oral argument, this Order denies T-Netix's motion for summary determination. The Commission may not dismiss the proceeding for lack of standing. The Superior Court has primary jurisdiction over this proceeding. The Order also denies T-Netix's Motion to Stay Discovery, denies Complainants' Conditional Motion, grants in part T-Netix's Motion to Strike, and grants AT&T's Motion for Leave to File a Response to the Supplemental Declaration of Kenneth L. Wilson.*

2 **NATURE OF PROCEEDING.** Docket No. UT-042022 is a complaint filed by recipients of inmate-initiated calls against AT&T Communications of the Pacific Northwest, Inc. (AT&T), and T-Netix, Inc. (T-Netix), alleging that AT&T and T-Netix failed to disclose rates for the calls, violating the Commission's rules governing disclosure. The complaint was filed with the Commission after the King County Superior Court referred the matter to the Commission under the

doctrine of primary jurisdiction to allow the Commission to complete an adjudication into certain issues of fact and law.

3 **PROCEDURAL HISTORY.** The complaint initiating this proceeding was filed with the Commission on November 17, 2004. On December 15, 2005, AT&T filed a Motion for Summary Determination, and on December 16, 2004, AT&T filed a response to the formal complaint.

4 During a prehearing conference held on February 16, 2005, before Administrative Law Judge Ann E. Rendahl, the parties agreed to a procedural schedule in the proceeding, including a schedule for discovery. The Commission adopted the schedule in Order No. 01 in this proceeding, a prehearing conference order.

5 On March 18, 2005, the Commission entered Order No. 02 in this proceeding, a protective order.

6 On April 21, 2005, T-Netix filed with the Commission a Motion for Summary Determination and a Motion to Stay Discovery.

7 Pursuant to the Commission's April 25, 2005, notice, AT&T and Complainants on May 6, 2005, filed responses to T-Netix's motions. AT&T joined in T-Netix's motions, and Complainants filed a number of declarations supporting their response, as well as a Conditional Motion to Postpone Consideration of T-Netix's Motion for Summary Determination Until Complainants Have Been Permitted Additional Discovery.

8 On May 10, 2005, T-Netix filed its Reply in Support of its Motions for Summary Determination and to Stay Discovery, a response to the Complainant's conditional motion, an affidavit in support of the Motion for Stay of Discovery, a Motion to Strike, and a declaration in support of the Motion to Strike.

9 Following a teleconference call held on May 10, 2005, the Administrative Law Judge learned of T-Netix's filing with the Commission and requested T-Netix's counsel to coordinate responsive pleading deadlines with counsel for Complainants.

10 The Administrative Law Judge issued a notice on May 11, 2005, establishing a schedule allowing parties to file additional responsive pleadings to address T-Netix' motion to strike, and scheduling oral argument on T-Netix's motions for June 7, 2005.

11 Pursuant to the May 11, 2005, notice, Complainants filed with the Commission on May 16, 2005, a response to T-Netix's Motion to Strike, with a supporting declaration, and a Reply to AT&T's response joining in T-Netix's motions, with supporting declarations.[1] On May 20, 2005, T-Netix filed a reply in support of its Motion to Strike, and AT&T filed a surreply in support of its response joining in T-Netix's motions.

12 On May 31, 2005, Complainants filed a Highly Confidential Motion for Leave to File Supplemental Declaration of Kenneth L. Wilson Dated May 27, 2005, and the Highly Confidential Supplemental Declaration of Kenneth L. Wilson in support of Complainants' response to T-Netix's motion for summary determination and Complainant's reply to AT&T's Response.

13 Also on May 31, 2005, T-Netix submitted by electronic mail an Emergency (1) Opposition to Complainants' Motion to File Supplemental Wilson Declaration and (2) Motion to Strike or, in the Alternative, for Right of Reply and Continuance of June 7 hearing.

---

[1] The May 11, 2005, notice provided for parties to submit electronic copies of the pleadings with the Commission by 5:00 pm on May 13, 2005, with paper copies to be filed on May 16. Complainants submitted electronic copies to all parties and the Commission at 7:51 and 7:54 p.m. on May 13.

14 On June 1, 2005, Complainants filed a Response to T-Netix's Emergency Motion and Motion to Strike.

15 In Order No. 04, entered on June 2, 2005, the Administrative Law Judge granted the Complainants' Motion for Leave to File a Supplemental Declaration, and denied T-Netix's Motion to Strike, allowing T-Netix and AT&T to file responses to the supplemental declaration. The Order also granted the Complainant's Motion to Continue the June 7, 2005, oral argument.

16 On June 6, 2005, the Commission issued a Notice rescheduling the oral argument until June 28, 2005.

17 On June 13, 2005, T-Netix filed with the Commission a Highly Confidential Affidavit of Alan Schott in Support of T-Netix, Inc.'s Motion for Summary Determination. On June 15, 2005, AT&T filed a Highly Confidential Motion for Leave to File Its Response to the Supplemental Declaration of Kenneth L. Wilson, as well as a Declaration of John D. Schell, Jr.

18 On June 20, 2005, Complainants filed a Highly Confidential Response to AT&T's Motion.

19 On June 24, 2005, T-Netix filed with the Commission a Highly Confidential Supplemental Affidavit of Alan Schott in Support of T-Netix, Inc.'s Motion for Summary Determination. On June 27, 2005, T-Netix filed a Supplemental Affidavit of Nancy Lee in Support of T-Netix, Inc.'s Motion for Summary Determination.

20 On June 28, 2005, the parties presented oral argument on the pending motions before Administrative Law Judge Rendahl. Following oral argument, the Administrative Law Judge issued an oral ruling denying T-Netix's Motions for

Summary Determination and to Stay Discovery, denying Complainant's conditional motion, granting, in part, T-Netix's Motion to Strike, and granting AT&T's Motion for Leave to File a Response to the Supplemental Declaration of Kenneth L. Wilson.

21 **APPEARANCES.** Jonathan P. Meier, Sirianni Youtz Meier & Spoonemore, Seattle, Washington, represents Sandra Judd and Tara Herivel, Complainants. Letty Friesen, AT&T Law Department, Austin, Texas, and Charles H.R. Peters and David C. Scott, Schiff Hardin, LLP, Chicago, Illinois, represent AT&T. Arthur A. Butler, Ater Wynne LLP, Seattle, Washington, and Glenn B. Manishin and Stephanie Joyce, Kelley Drye & Warren LLP, Washington, D.C., represent T-Netix.

MEMORANDUM

22 **A. T-Netix's Motion for Summary Determination.** T-Netix moves to dismiss the proceeding asserting that Complainants lack standing to pursue their claims before this Commission.[2] T-Netix asserts that documents recently produced in discovery show that Complainants suffered no "cognizable harm."[3] T-Netix asserts that all of the calls for which Complainants seek relief were carried by two local exchange carriers, US West, and GTE, and that both carriers were granted waivers from the Commission's rule.[4] T-Netix asserts that T-Netix did not carry any of the calls and that Complainants suffered no harm.[5]

23 T-Netix asserts that persons bringing a complaint before the Commission must demonstrate standing by showing injury in fact, *i.e.*, financial or other injury, and must have an interest within the "zone of interest" that the Commission's

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[2] T-Netix's Motion for Summary Determination, ¶ 2.
[3] *Id.*; *see also* Exhibits 9-11 to T-Netix's Motion for Summary Determination.
[4] *Id.*, ¶¶ 9-12.
[5] *Id.*, ¶¶ 2, 14, 16-21.

statutes or rules are designed to protect.[6] Relying on the exhibits to its motion and several affidavits, T-Netix asserts that Complainants have suffered no injury in fact as none of the calls involved T-Netix and that none of the calls identified on Complainants' phone bills were subject to rate disclosure.[7] T-Netix asserts that Complainants are not within the "zone of interest," as the local exchange companies, US West and GTE, did not owe Complainants a duty to disclose the rates for inmate-initiated local and intraLATA calls due to exemptions from the rule.[8] T-Netix asserts that it has met the standards for granting a motion for summary determination: The material facts are not in dispute and the Complainants have not demonstrated standing to pursue a claim before the Commission.[9]

24 T-Netix acknowledges that this matter has been referred to the Commission by the King County Superior Court under the doctrine of primary jurisdiction to determine whether T-Netix has violated the Commission's regulations.[10] T-Netix asserts, however, that the Commission need not reach that question if the Complainants lack standing.[11] T-Netix agrees with Complainants that the Commission has only "derivative" jurisdiction under the Superior Court's primary jurisdiction referral.[12] T-Netix asserts, however, that if the Superior Court would not have jurisdiction due to lack of standing, the Commission does not have jurisdiction to resolve the questions referred, and must dismiss the proceeding.[13] T-Netix asserts that the Commission has no further duty to assist

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[6] *Id.*, ¶ 13, *citing Stevens v. Rosario Utils.*, WUTC Docket No. UW-011320, Third Supplemental Order at 19 (July 12, 2002); *Save a Valuable Environment (SAVE) v. City of Bothell*, 89 Wn.2d 862, 576 P.2d 401, 403-404 (1978).

[7] *Id.*, ¶¶ 14-21; *see also* Exhibits 4 and 11 to T-Netix's Motion; June 13, 2005, Affidavit of Alan Schott; June 24, 2005, Supplemental Affidavit of Alan Schott; June 27, 2005, Supplemental Affidavit of Nancy Lee.

[8] T-Netix's Summary Determination Motion, ¶¶ 22-23.

[9] *Id.*, ¶¶ 3, 14-23.

[10] *Id.*, ¶ 24.

[11] *Id.*, ¶ 28.

[12] T-Netix's May 11, 2005, Reply, ¶ 11.

[13] T-Netix's Summary Determination Motion, ¶¶ 29-30; T-Netix's May 11, 2005, Reply, ¶ 11.

the Superior Court and must dismiss the proceeding.[14] T-Netix further asserts that continuing with the referral would be a waste of resources, and that disposing of the issue of standing would resolve the entire controversy.[15]

25 AT&T joins in T-Netix's Motion for Summary Determination, asserting that the information T-Netix presents also demonstrates that Complainants have no standing to pursue a claim against AT&T.[16]

26 Complainants dispute T-Netix's arguments that (1) T-Netix was not involved in any of the calls, and (2) the Commission may dismiss for lack of standing a matter referred under the doctrine of primary jurisdiction.[17] Complainants object to AT&T's "joinder," asserting that the pleading goes beyond the issues raised and seeks affirmative ruling for AT&T.[18] Complainants object that AT&T's joinder attempts to accelerate its own motion for summary determination and limit discovery the Commission ordered on AT&T's motion.[19]

27 Addressing the factual issues raised by T-Netix and AT&T, Complainants assert that the issue of whether a telephone call is subject to the rate disclosure requirements in WAC 480-120-141 does not depend on the carrier that "carried" the call, but upon who provided a "connection," *i.e.*, operator services.[20] Complainants assert that T-Netix is an operator service provider (OSP) and that the key question is whether T-Netix provided operator services on the phone calls in question, not whether an exempt carrier was involved with the phone

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[14] T-Netix's Summary Determination Motion, ¶ 30.
[15] T-Netix's May 11, 2005, Reply, ¶¶ 5, 13.
[16] AT&T Response Joining in T-Netix's Motions for Summary Determination and to Stay Discovery, ¶¶ 2, 6, 8, 12.
[17] Complainants' Response to T-Netix Motion for Summary Determination, ¶¶ 1-4.
[18] Complainants' Reply to AT&T's Response, ¶ 1.
[19] *Id.*
[20] Complainants' Response, ¶¶ 1, 20-21, 23-26; *see also* Complainants' Reply to AT&T's Response, ¶¶ 12, 19-21.

calls in question.[21] Complainants submit two declarations of Kenneth L. Wilson in support of its Response to T-Netix's motion.[22] Complainants assert that material facts remain in dispute, additional discovery is warranted, and the Commission should not dismiss the proceeding.[23] Complainants further assert that AT&T and T-Netix are liable under the statue governing operator services providers asserting that the statue focuses on companies operating as or contracting with an alternate operator services company.[24]

28 Complainants assert that the Commission may not dismiss the case for lack of standing. Complainants assert that the King County Superior Court did not relinquish jurisdiction over the proceeding when it referred to the Commission the question of whether T-Netix violated the Commission's rules.[25] Complainants assert that the Court referred only specific issues to the Commission due to the Commission's expertise concerning operator services companies, but retained jurisdiction to make the final decision in the proceeding.[26]

29 Complainants assert that an agency's role in a primary jurisdiction referral is strictly limited to the questions referred to the agency, and that primary jurisdiction does not invoke the independent jurisdiction of the agency.[27] Complainants assert that the Commission has statutory authority to resolve the issue of whether T-Netix violated the Commission's rules.[28] Complainants assert

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[21] Complainants' Response, ¶¶ 1-2, 6-7, 17-20.
[22] May 2, 2005, Declaration of Kenneth L. Wilson in Support of Complainants' Response; May 27, 2004, Supplemental Declaration of Kenneth L. Wilson.
[23] Complainants' Response, ¶¶ 21-26; *see also* Complainants' Reply to AT&T's Response, ¶¶ 4, 7-11.
[24] Complainants' Reply to AT&T's Response, ¶ 17.
[25] Complainants' Response, ¶ 27.
[26] *Id.*, ¶ 28, *quoting Jaramillo v. Morris*, 50 Wn. App. 822, 828, 750 P.2d 1301 (1988).
[27] *Id., citing Dioxin/Organochlorine Center v. Department of Ecology*, 119 Wn.2d 761, 837 P.2d 1007 (1992); *International Ass'n of Heat & Frost Insulators and Asbestos Workers v. United Contractors Ass'n, Inc.*, 483 F.2d 384, 401 (3d Cir. 1973).
[28] *Id.*, ¶ 33.

that the issue of standing is within the Superior Court's primary jurisdiction over the proceeding, an issue the court reserved for itself.[29] The Complainants assert that the Superior Court can address the issue of standing after the Commission resolves the questions in the referral.[30]

30 Finally, Complainants assert that if there is a problem with standing, the Commission should allow them to amend their complaint to include additional class representatives.[31] Complainants offer the declarations of Suzanne Elliott and Maureen Janega in support of this request.[32]

31 In reply, T-Netix moves to strike the declarations of Ms. Elliott and Ms. Janega as outside of the scope of the proceeding and as prejudicial to T-Netix.[33] The motion is discussed further below in Section II. C. T-Netix asserts that the Commission does not have jurisdiction to permit joinder in a primary jurisdiction referral.[34] T-Netix asserts the Commission cannot decide issues outside of the scope of the referral and requests the Commission deny Complainants' request for leave to amend to include new complainants.[35]

32 ***Discussion and Decision.*** Under WAC 480-07-380(2), the Commission's rules governing motions for summary determination, the Commission will consider the standards applicable to motions for summary judgment made under the civil rules. Under CR 56, a party may move for summary determination if the pleadings, together with any properly admissible evidentiary support, show that there is no genuine issue as to any material fact and the party is entitled to judgment as a matter of law. Summary judgment is properly entered if there is

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[29] *Id.*, ¶ 29.
[30] *Id.*, ¶ 35.
[31] Complainants' Reply to AT&T's Response, ¶¶ 36, 39.
[32] *Id.*, ¶¶ 38-39.
[33] T-Netix's Reply, ¶ 8.
[34] *Id.*, ¶ 15.
[35] *Id.*, ¶¶ 16-19.

no genuine issue as to any material fact, that reasonable persons could reach only one conclusion, and that the moving party is entitled to judgment as a matter of law.[36] In resolving a motion for summary judgment, a court must consider all the facts submitted by the parties and make all reasonable inferences from the facts in the light most favorable to the nonmoving party.[37]

33 After considering the numerous pleadings and affidavits presented by the parties and making all reasonable inferences from the facts in the light most favorable to the nonmoving party, T-Netix' motion for summary determination is denied. There is a genuine issue of material fact in dispute and T-Netix is not entitled to judgment as a matter of law.

34 The issue in this proceeding is whether T-Netix and AT&T provided service as operator service companies on the calls at issue in this proceeding. While T-Netix asserts that only US West and GTE carried the calls in question, Complainant's affidavits and pleadings raise questions as to the role of T-Netix and AT&T in connecting the calls between the correctional institutions and the Complainants. The parties' dueling and numerous affidavits identify several issues of fact concerning AT&T and T-Netix's network and their involvement in the calls in question.

35 Even if there were no genuine issue of material fact in dispute, as T-Netix asserts, T-Netix is not entitled to judgment as a matter of law. The law at issue here is not the law governing standing, but the doctrine of primary jurisdiction. Under the doctrine of primary jurisdiction, if a court finds that an issue raised in a dispute before the court is within the primary jurisdiction of an agency, the court will defer a decision in the action until the agency has addressed the particular issue within its primary jurisdiction, but retains jurisdiction over the dispute

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[36] *Tanner Electric Coop. v. Puget Sound Power & Light Co., 128 Wn.2d 656, 668 (1996).*
[37] *Id.*

itself and all other issues in dispute.[38] The doctrine of primary jurisdiction "'does not necessarily allocate power between courts and agencies, for it governs only the question whether court or agency will initially decide a particular issue, not the question whether court or agency will finally decide the issue'."[39] Thus, where a court refers issues to an agency under the doctrine of primary jurisdiction, the referral does not invoke the agency's jurisdiction over all issues in dispute, only those issues referred to the agency.

36 In this proceeding, King County Superior Court Judge Learned referred to the Commission under the primary jurisdiction doctrine the issues of (1) "whether or not [AT&T is] considered by the agency to be an OSP under the contracts at issue herein and if so if the regulations have been violated," and (2) "to determine if T-Netix has violated WUTC regulations."[40] Judge Learned stayed resolution of Complainants' Consumer Protection Act claims and any award of monetary damages pending the Commission's action on the issues.[41]

37 The issue of Complainants' standing to bring a complaint before the Commission is not within the issues referred to the Commission for consideration: Judge Learned reserved jurisdiction to resolve all other issues in the dispute. As this matter is on referral from the Superior Court and not a complaint filed initially with the Commission, the Commission does not have jurisdiction to decide the issue of standing. While resolving the issue of standing may avoid a waste of resources, as T-Netix asserts, it would be inappropriate for the Commission not to address the questions referred by the Superior Court.

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[38] 2 R. Pierce, Administrative Law Treatise, § 14.1.
[39] *In re Real Estate Brokerage Antitrust Litigation*, 95 Wn.2d 297, 301-302, 622 P.2d 1185 (1980), *quoting* 3 K. Davis, Administrative Law, § 19.01 (1958).
[40] *Judd, et al. v. AT&T, et al.*, King County Superior Court Case No. 00-2-17565-5 SEA, Order Granting AT&T Corp.'s Motion to Dismiss, 2 (Aug. 28, 2000); *Judd, et al. v. AT&T, et al.*, King County Superior Court Case No. 00-2-17565-5 SEA, Order Denying in Part Defendant T-Netix, Inc.'s Motion to Dismiss First Amended Complaint – Class Action and Granting in Part and Referring to WUTC, 2 (Nov. 9, 2000).
[41] *Id.*

38 For the same reasons this Order denies T-Netix's Motion for Summary Determination, the Order rejects Complainant's request to amend its complaint to include Ms. Elliott and Ms. Janega as complainants. The Commission's jurisdiction in this proceeding is limited to the issues referred by the Superior Court. The Superior Court retained jurisdiction over all other issues, including amending the complaint.

39 **B. T-Netix's Motion to Stay Discovery, and Complainants' Conditional Motion.** T-Netix filed a motion to stay discovery in the proceeding pending the resolution of its motion for summary determination. Because a motion for summary determination does not automatically stay the procedural schedule of a case, T-Netix requests the Commission enter an order staying discovery.[42] T-Netix asserts that an order staying discovery is warranted as discovery is burdensome and may lead to disclosure of "highly-sensitive commercial and security information" where there is the possibility the case may be dismissed.[43] T-Netix also asserts that there is no deadline for resolving the proceeding.[44]

40 AT&T asserts that it should not be required to disclose confidential information in discovery where there may be no basis for Complainants' claims.[45]

41 Complainants oppose T-Netix's motion to stay discovery asserting that AT&T and T-Netix have already refused to continue discovery until T-Netix's motion is resolved.[46] Complainant's object to T-Netix and AT&T's refusal to participate in further discovery and asserts that T-Netix has obstructed Complainants' efforts to obtain information.[47] Complainants identify specific responses by T-Netix and

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[42] T-Netix's Motion to Stay Discovery, ¶ 3.
[43] *Id.*, ¶ 4.
[44] *Id.*
[45] AT&T's Response, ¶ 14; AT&T's Surreply, ¶ 15.
[46] Complainants' Response, ¶ 1; Complainants' Reply to AT&T's Response, ¶ 28.
[47] Complainants' Response, ¶¶ 3, 5-9.

AT&T as examples of the parties' refusal to respond to discovery.[48] Complainants request that the Commission not condone T-Netix and AT&T's conduct in staying discovery contrary to WAC 480-07-380(d).[49]

42 Complainants further requests through a Conditional Motion that the Commission postpone consideration of T-Netix's motion for summary determination until T-Netix responds to discovery requests.[50] Complainants also request the right to discovery on issues raised in T-Netix's motion for summary determination.[51]

43 In reply, T-Netix denies that it has failed to cooperate in discovery.[52] T-Netix asserts that any objections to T-Netix's responses to data requests and conduct in discovery should be raised in a motion to compel rather than in a response to its motion to stay discovery.[53] T-Netix will treat the portion of Complainant's Response as an invitation to meet and confer and will address Complainants' counsel's concerns.[54]

44 T-Netix opposes Complainants' request for additional discovery to respond to the motion for summary determination.[55] T-Netix asserts that the facts supporting the motion are indisputable and that the Commission does not need additional information to decide the issue.[56] T-Netix objects to allowing new discovery to substantiate the claims in Ms. Elliott and Ms. Janega's declarations.[57]

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[48] *Id.*, ¶¶ 5-11.
[49] *Id.*, ¶ 14.
[50] *Id.*, ¶ 17.
[51] *Id.*, ¶ 18.
[52] T-Netix's Reply, ¶ 2.
[53] *Id.*, ¶ 7.
[54] *Id.*
[55] *Id.*, ¶¶ 8-13.
[56] *Id.*, ¶¶ 8, 11.
[57] *Id.*, ¶ 13.

45 ***Discussion and Decision.*** The Commission's procedural rules, specifically WAC 480-07-380(2)(d), provide that filing a motion for summary determination does not stay the procedural schedule in a case. T-Netix filed a motion to stay discovery, seeking to stay discovery until the Commission resolved the pending motion for summary determination. T-Netix's motion is denied. The numerous pleadings and affidavits in this matter indicate that there is a continuing need for discovery to resolve issues of material fact in the proceeding. Complainants' conditional motion is likewise denied. The parties must continue discovery to allow the Commission to address the issues referred by the King County Superior Court.

46 A matter of concern, however, is T-Netix and AT&T's actions in ceasing discussions with Complainants over outstanding data requests and refusing to provide answers to pending data requests until the Commission resolved the pending motions. Filing a motion to stay discovery does not allow the parties to stay discovery. T-Netix and AT&T did not wait for the Commission to resolve either motion before staying discovery on their own. Such conduct is not acceptable. The Commission expects the parties to follow the procedural rules in Chapter 480-07 WAC and will not tolerate such flagrant violations. The parties must meaningfully respond to Complainants' discovery requests. If T-Netix and AT&T are correct that they are not OSPs and had no role in the inmate-initiated calls in question, then they should be willing to disclose in discovery all relevant information in the proceeding.

47 **C. T-Netix's Motion to Strike.** T-Netix filed a motion to strike Complainants' responsive pleadings in their entirety, or in the alternative, paragraphs 1 through 9 of the response and the declarations of Ms. Elliott and Ms. Janega.[58] T-Netix asserts that Complainants did not timely file their response, serving the pleading on all parties and submitting it to the Commission at 7:51 p.m. on May 6, 2005,

[58] T-Netix's Motion to Strike, ¶¶ 1-15.

instead of the 5:00 p.m. filing deadline.[59] T-Netix asserts that Complainants did not seek an extension of time and that the Commission should not condone this disregard of Commission procedures.[60]

48 Should the Commission not strike the Complainants' responsive pleadings in their entirety, T-Netix requests the Commission strike a part of the Complainant's response as "irrelevant and prejudicial."[61] T-Netix objects to paragraphs 1 through 9 of Complainants' response concerning T-Netix's conduct in discovery.[62] T-Netix asserts that Complainants' response does not address whether discovery should be stayed, but seeks merely to impugn T-Netix's counsel and raises issues that should be addressed in a motion to compel.

49 T-Netix also requests that the Commission strike the declarations of Ms. Elliott and Ms. Janega.[63] T-Netix asserts that the declarations raise new allegations and new complainants, matters that are outside of the scope of the Superior Court's primary jurisdiction referral.[64] T-Netix further asserts that the new declarations are prejudicial as irrelevant to T-Netix' motion and because the time to propound discovery has ended.[65]

50 Complainants concede that they electronically submitted their responsive filing late on May 6, 2005, but assert that they timely filed their paper copy on Monday, May 9, 2005.[66] Complainants assert that counsel underestimated the time to comply with the confidentiality provisions of the protective order, and asserts that it will not happen again.[67] Complainants assert that the sanction T-Netix

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[59] *Id.*, ¶ 2.
[60] *Id.*, ¶ 3.
[61] *Id.*, ¶ 4.
[62] *Id.*, ¶¶ 5-7.
[63] *Id.*, ¶ 8.
[64] *Id.*, ¶¶ 9-11.
[65] *Id.*, ¶¶ 12-14.
[66] Complainants' Response to T-Netix's Motion to Strike, ¶¶ 1-2.
[67] *Id.*, ¶ 1.

requests is too harsh, as the parties received both electronic and paper copies and had the opportunity to reply.[68]

51 Complainants assert that issues raised in paragraphs 1 through 9 of their response, *i.e.*, whether T-Netix has engaged in a good-faith effort to resolve discovery disputes and respond to discovery and whether a party may halt discovery upon filing a motion for summary determination, are not irrelevant or prejudicial.[69] Complainants also assert that the two declarations should not be stricken, asserting that T-Netix will not be prejudiced if a new schedule in the proceeding allows additional discovery.[70] Complainants assert that T-Netix's objections address the Commission's authority to amend the complaint in this proceeding.[71]

52 **Discussion and Decision.** T-Netix's motion to strike Complainants' responsive pleading in its entirety is denied. T-Netix's requested sanction for late filing is too harsh, as T-Netix had ample opportunity to reply to the pleading. The Commission does not condone late filing of materials. Where the opposing party has not been prejudiced by the late filing, it is not appropriate to reject the pleading. Complainants' are on notice, however, that parties must submit all electronic submissions to the Commission by 5:00 p.m. of the date set for electronic submission, and send an electronic copy to the Administrative Law Judge. Any other late submissions will be dealt with appropriately.

53 T-Netix's alternative request to strike paragraphs 1 through 9 of the pleading is also denied. While some of the issues Complainants raise are appropriate for a motion to compel, Complainants are justified in complaining about discovery efforts in the proceeding in the context of responding to motions for summary

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[68] *Id.*, ¶ 3.
[69] *Id.*, ¶¶ 4-6.
[70] *Id.*, ¶¶ 9-10.
[71] *Id.*, ¶¶ 8-12.

determination and to stay discovery. Parties may not unilaterally halt discovery while motions for summary determination are pending, even if a motion to stay discovery is also pending.

54 The Commission expects parties to meaningfully respond to discovery requests. Should discovery disputes arise in this proceeding, the party seeking information should work directly with the responding party to address the dispute first, but should bring disputes to the Commission's attention promptly if the dispute is not resolved.

55 Finally, T-Netix's request to strike the declarations of Ms. Elliott and Ms. Janega is granted. Complainants included these declarations to support their request to amend the pleadings before the Commission. This Order rejects Complainants' request as outside of the scope of the Superior Court's primary jurisdiction referral to the Commission. The declarations are unnecessary to this proceeding and are stricken.

56 **D. AT&T's Motion for Leave to File Response.** In Order No. 04, the Administrative Law Judge allowed T-Netix to file a response to Complainants' Highly Confidential Supplemental Declaration of Kenneth L. Wilson. On June 16, 2005, AT&T requested leave to file a response to Mr. Wilson's supplemental declaration, attaching the Declaration of John D. Schell, Jr.

57 Complainants do not object to AT&T's motion, asserting that the statements in Mr. Schell's declaration support the need for additional discovery in the proceeding.[72]

58 **Discussion and Decision.** Consistent with the decision during oral argument, AT&T's motion is granted. Complainants do not object to the motion. Order No. 04 allowed T-Netix, AT&T's co-defendant, the opportunity to file a response to

Mr. Wilson's supplemental declaration. AT&T should be given the same opportunity.

FINDINGS OF FACT

59 (1) Complainants Sandra Judd and Tara Herivel received inmate-initiated calls and allege in a compliant filed in King County Superior Court that they did not receive the rate disclosures for those calls required by the Commission's rules.

60 (2) T-Netix, Inc., and AT&T of the Pacific Northwest, Inc., are classified as competitive telecommunications companies under RCW 80.36.310-330.

61 (3) King County Superior Court Judge Learned ordered several issues to be considered by the Washington Utilities and Transportation Commission through a primary jurisdiction referral.

62 (4) T-Netix filed a motion for summary determination and motion to stay discovery asserting that the Complainants lack standing to bring their complaint before the Commission.

63 (5) The parties filed numerous pleadings, attaching exhibits, affidavits, and declarations, to address the matters raised in T-Netix's motions.

64 (6) The Commission held oral argument on T-Netix's motions, as well as Complainants' conditional motion and AT&T's motion for leave to file a response to a supplemental declaration of Mr. Wilson.

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[72] Complainants' Response to AT&T's Motion, ¶¶ 1-9.

65 (7) The declarations of Ms. Elliott and Ms. Janega, attached to Complainants' Response, include new allegations to support a request to amend the pleadings.

66 (8) Complainants electronically submitted their responsive pleading to the Commission nearly three hours after the 5:00 p.m. deadline for electronic submission, but filed paper copies with the Commission in a timely manner.

CONCLUSIONS OF LAW

67 (1) Summary judgment is properly entered if there is no genuine issue as to any material fact, that reasonable persons could reach only one conclusion, and that the moving party is entitled to judgment as a matter of law. *Tanner Electric Coop. v. Puget Sound Power & Light Co., 128 Wn.2d 656, 668 (1996).* In resolving a motion for summary judgment, a court must consider all the facts submitted by the parties and make all reasonable inferences from the facts in the light most favorable to the nonmoving party. *Id.*

68 (2) Complainant's affidavits and pleadings raise questions of material fact as to the role of T-Netix and AT&T in connecting the calls in question between correctional institutions and the Complainants and identify several issues of material fact concerning AT&T's and T-Netix's networks and the carriers' involvement in the calls in question.

69 (3) The law at issue in T-Netix's motion for summary determination is the law governing the doctrine of primary jurisdiction, not the law governing standing.

70 (4) Where a court refers specific issues to an agency under the doctrine of primary jurisdiction, the court retains jurisdiction over all other issues in the proceeding and will defer a decision until the agency addresses the particular issues within its jurisdiction. *See 2 R. Pierce, Administrative Law Treatise, § 14.1.*

71 (5) T-Netix is not entitled to judgment as a matter of law, as the Commission does not have primary jurisdiction in this matter to address issues of standing, but is limited to applying its statutory authority to determine whether AT&T is an operator services provider under the Commission's rules and whether AT&T and T-Netix violated the Commission's rules governing operator services companies.

72 (6) The Commission does not have jurisdiction in this primary jurisdiction referral to determine whether the Complainants may amend their pleadings.

73 (7) Filing a motion for summary determination does not stay the procedural schedule in a proceeding, nor may a party unilaterally stay discovery after filing a motion for summary determination, even after filing a motion to stay discovery. *See WAC 480-07-380(2).*

74 (8) It is not appropriate to reject or strike a pleading for late filing if the opposing party has not been prejudiced by the late filing.

75 (9) The declarations of Ms. Elliott and Ms. Janega address matters outside of the scope of the Superior Court's primary jurisdiction referral.

76 (10) AT&T, as a co-defendant of T-Netix, should have the opportunity to file a response to the supplemental declaration of Mr. Wilson.

ORDER

THE COMMISSION ORDERS:

77 (1) T-Netix, Inc.'s, Motion for Summary Determination is denied.

78 (2) T-Netix, Inc.'s, Motion to Stay Discovery is denied.

79 (3) Complainants' Conditional Motion to Postpone Consideration of T-Netix, Inc.'s Motion for Summary Determination is denied.

80 (4) T-Netix, Inc.'s Motion to Strike the Declarations of Ms. Elliott and Ms. Janega is granted, while T-Netix's Motion to Strike the Complainants' Responsive Pleading in its entirety, or in the alternative paragraphs 1 through 9, is denied.

81 (5) The Motion of AT&T Communications of the Pacific Northwest, Inc., for Leave to Filed its Response to the Supplemental Declaration of Kenneth L. Wilson is granted.

82 **NOTICE TO PARTIES: This is an Interlocutory Order of the Commission. Administrative review may be available through a petition for review, filed within 10 days of the service of this Order pursuant to *WAC 480-07-810*.**

Dated at Olympia, Washington, and effective this 18th day of July, 2005.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

Ann E. Rendahl

ANN E. RENDAHL
Administrative Law Judge

BEFORE THE WASHINGTON STATE UTILITIES AND TRANSPORTATION COMMISSION

SANDY JUDD AND TARA HERIVEL,	)	DOCKET UT-042022
	)	
	)	ORDER 14
Complainant,	)	
	)	ORDER GRANTING IN PART AND
v.	)	DENYING IN PART
	)	COMPLAINANTS' MOTION TO
AT&T COMMUNICATIONS OF THE PACIFIC NORTHWEST, INC., AND T-NETIX, INC.,	)	COMPEL; ORDER GRANTING IN
	)	PART AND DENYING IN PART
	)	AT&T'S MOTION TO COMPEL;
	)	AND DENYING T-NETIX'S
Respondents.	)	MOTION FOR A PROTECTIVE
. . . . .	)	ORDER

1 ***Synopsis.*** *This order resolves a discovery dispute between Complainants, AT&T, and T-Netix. The order grants in part Complainants' and AT&T's motions to compel responses from T-Netix to data requests involving the four institutions from which Complainants received calls from 1996 to 2000, and denies Complainants' and AT&T's motions to compel responses from T-Netix to data requests concerning all other Washington institutions T-Netix served from 1996 to the present. This order specifically denies Complainants' motion to compel Complainants' Second Data Request No. 5 as over broad. This order also denies T-Netix's motion for a protective order regarding the expanded discovery sought by Complainants as the issue is not yet ripe.*

SUMMARY

2 **NATURE OF PROCEEDING.** Docket UT-042022 involves a formal complaint filed with the Washington Utilities and Transportation Commission (Commission) by Sandy Judd and Tara Herivel (Complainants) against AT&T Communications of the Pacific Northwest, Inc. (AT&T), and T-Netix, Inc. (T-Netix or the Company, collectively with AT&T, "Respondents"), requesting that the Commission resolve

certain issues of fact and law under the doctrine of primary jurisdiction and referred by the Superior Court of Washington for King County (Superior Court).

3 **APPEARANCES.** Chris R. Youtz, Sirianni Youtz Meier & Spoonemore, Seattle, Washington, represents Complainants (collectively with Respondents, "Parties"). Letty Friesen, AT&T Law Department, Austin, Texas, and Charles H. R. Peters, Schiff Hardin, LLP, Chicago, Illinois, represent AT&T. Arthur A. Butler, Ater Wynne LLP, Seattle, Washington, Joseph S. Ferretti, Duane Morris, LLP, Washington, D.C., and Glenn B. Manishin, Kelley Drye & Warren LLP, Washington, D.C., represent T-Netix.

MEMORANDUM

A. Procedural History

4 On November 17, 2004, Complainants filed a formal complaint with the Commission against Respondents under the court's referral.[1] The Superior Court had referred two questions to the Commission: 1) whether AT&T or T-Netix were Operator Service Providers (OSPs) and 2) whether they violated the Commission's disclosure regulations.[2]

5 On October 23, 2008, the Commission entered Order 10 granting T-Netix's Motion to Amend the Scheduling Order and extending the procedural schedule deadlines by approximately two weeks. The procedural schedule was again modified when, on November 12, 2008, the Commission entered Order 11 granting Complainants' Motion to Amend the Scheduling Order and extending the deadline for filing motions to compel by one week. Therefore, the motions to compel were due by November 26, 2008.

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[1] The procedural history in this matter is described more fully in Order 09 in this docket and is not repeated here.

[2] *Judd et. al., v. AT&T et. al.*, King County Superior Court, No. 00-2-17565-5 SEA, *Order Denying Plaintiffs' Motion to Vacate Orders Granting Defendants' Motions for Summary Judgment and Granting Motion to Reinstate Referral to WUTC* (March 21, 2008).

6 On November 26, 2008, Complainants filed a motion to compel discovery responses from T-Netix (Complainants' Motion) along with the Declarations of Chris Youtz and Kenneth Wilson; AT&T filed a motion to compel T-Netix to respond fully to AT&T's Second Set of Data Requests (AT&T's Motion); and T-Netix filed a motion for a protective order along with the Declaration of Arthur A. Butler (T-Netix's Motion, collectively with Complainants' Motion and AT&T's Motion, "Discovery Motions").

7 On December 5, 2008, the Commission entered Order 12 granting the Parties' motion to extend time to file oppositions to the Discovery Motions. Oppositions to the Discovery Motions were due by December 12, 2008.

8 On December 12, 2008, Complainants filed an opposition to T-Netix's Motion (Complainants' Opposition) and the Declaration of Chris Youtz, and T-Netix filed an opposition to Complainants' Motion (T-Netix's Opposition) and an opposition to AT&T's Motion (T-Netix's Opposition 2).

9 On December 16, 2008, the Parties filed a joint motion for permission to file replies (Joint Motion) in support of the various Discovery Motions. The Commission issued Order 13 on December 19, 2008, granting the Joint Motion and giving the Parties until December 24, 2008, to file any replies.

10 On December 24, 2008, AT&T filed a reply in support of its Motion (AT&T's Reply), Complainants filed a reply memorandum in support of Complainants' Motion (Complainants' Reply), and T-Netix filed a reply brief in support of its Motion (T-Netix's Reply).

B. Discovery Motions

11 First, the Commission addresses Complainants' and AT&T's request to expand the scope of discovery to include all Washington Department of Corrections (DOC) facilities for the time period from 1996 to the present, as well as T-Netix's Motion to protect against the discovery of such information. The Commission then turns to the specific information sought in Complainants' and T-Netix's Motions: (1) the services and products T-Netix provided to the DOC facilities and (2) rate disclosure

procedures including details surrounding a project that involved the replacement of chips in a telecommunications system in order to comply with the FCC rate disclosure regulations.

1. Expansion of Discovery

12 Complainants' argue that the Superior Court referral did not limit the scope of the Commission's review to the four institutions[3] from which Complainants received the calls in question.[4] According to Complainants, their suit in Superior Court is a class action, and potential class members exist in all persons who were incarcerated or were called by an incarcerated person in Washington.[5] Further, Complainants maintain that T-Netix has not followed its own discovery limitations with regard to AT&T, noting that T-Netix propounded data requests to AT&T seeking information regarding all Washington DOC facilities, not just the four institutions at issue in the Complaint.[6]

13 T-Netix, on the other hand, suggests that a protective order is necessary to prevent Complainants from "seek[ing] discovery well beyond [the four institutions from which and during the time period Complainants received their telephone calls]."[7] T-Netix alleges that Complainants' expansive discovery tactics "will continue to plague the discovery process without an appropriate order from the Commission."[8]

14 According to T-Netix, the Commission's jurisdiction over this matter is limited to the primary jurisdiction referral from the Superior Court and does not invoke the Commission's independent jurisdiction.[9] T-Netix also insists that the Superior Court never certified a class in this matter and has stayed all class issues.[10] Thus, T-Netix

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[3]The four facilities are listed as: Washington State Reformatory (a.k.a. Monroe Correctional Complex), Airway Heights, McNeil Island, and Clallum Bay. *Complainants' Motion*, at 1, ¶ 2, and at 2, fn 1.
[4] *Id.*, at 2, ¶ 3. If Complainants' Motion is granted, then AT&T requests that T-Netix supplement its responses to AT&T's data requests as well. T-Netix has agreed. *AT&T's Motion*, at 2, ¶ 5. *T-Netix's Opposition 2*, at 1, ¶ 2.
[5]*Complainants' Motion*, at 2, ¶ 4.
[6]*Complainants' Motion*, at 3, ¶ 6.
[7]*T-Netix's Motion*, at 8, ¶ 20.
[8]*Id.*.
[9]*See, T-Netix's Opposition*, at 4, ¶ 8 and *T-Netix's Motion*, at 3, ¶ 4.
[10]*T-Netix's Opposition*, at 3, ¶ 7.

recommends that the Commission limit discovery to the two Complainants and the events surrounding their complaint.[11]

15 Complainants argue that T-Netix has not proffered the necessary factual showing of a particular need for a protective order.[12] T-Netix, according to Complainants, only posits that Complainants' data requests are burdensome but does not actually show how the requests are burdensome.[13]

16 ***Discussion and decision.*** The Commission specifically determined in this proceeding that, "[t]he Commission's jurisdiction in this proceeding is limited to the issues referred by the Superior Court."[14] In its prior referral order, the Superior Court stayed the issue of class status pending Commission action on the referral questions.[15] The Commission's sole responsibility under the doctrine of primary jurisdiction is to answer the referral questions as they were posited by the Superior Court. Had class certification proceeded the referral to the Commission, Complainants' claim that discovery should include all of the Washington DOC facilities from 1996 to the present would have been more persuasive.

17 Complainants have not advanced a compelling legal argument that would support the Commission's ruling on the issue of class certification, effectively removing class certification from the jurisdiction of the Superior Court. The Commission, therefore, denies the Complainants' motion to compel discovery from T-Netix which goes beyond the scope of the two Complainants' claims. This determination, however, does not prevent the Superior Court from referring broader questions to the Commission should such a referral prove necessary.

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[11] *Id.*, at 2, ¶ 2. *See also, T-Netix's Motion*, at 12, ¶ 33.
[12] *Complainants' Opposition*, at 3, ¶ 7.
[13] *Id.*
[14] *Judd et. al., v. AT&T et. al.*, UTC Docket UT-042022, Order 05, at 12, ¶ 38. *See, Id.*, Order 07, at 5, ¶ 19 and *Id.*, Order 09, at 12-3, ¶ 50.
[15] *Judd et. al., v. AT&T et. al.*, King County Superior Court, No. 00-2-17565-5 SEA, *Order Denying in Part Defendant T-Netix, Inc.'s Motion to Dismiss First Amended Complaint – Class Action and Granting in Part and Referring to WUTC*, November 8, 2000.

18 Further, we deny T-Netix's Motion. The Company has not stated how Complainants' discovery requests or conduct warrant the Commission's protection of T-Netix from "annoyance, embarrassment, oppression, or undue burden or expense," as asserted in WAC 480-07-420. T-Netix has not demonstrated that Complainants' requests for information have created any of these difficulties. Additionally, it is hard to understand how the request for state-wide information would cause any of these problems for the Company when T-Netix has acknowledged that information sought by Complainants with regard to the additional institutions would be identical to the information sought for the uncontested institutions.

19 In addition, T-Netix's Motion is moot. This order denies Complainants' Motion to expand discovery. Moreover, T-Netix should give Complainants an opportunity to comply with this Order before a seeking a protective order.

2. Services and products T-Netix provided to DOC facilities

Complainants' Data Request Nos. 2 and 3 and AT&T's Data Request Nos. 7, 8, 9, 10, 18, 19, and 21

20 In their Second Data Request Nos. 2[16] and 3[17], Complainants seek information pertaining to the platforms, equipment, and services that T-Netix provided to each Washington DOC facility. Complainants argue that T-Netix's response to Data

[16]Complainants' Data Request No. 2 requests that, "[t]o the extent you have not already produced such documents, please produce all documents that describe or relate to platforms or other equipment or services that T-Netix provided with regard to each T-Netix Institution, including without limitation system drawings, trunking diagrams, trunking lists, configuration diagrams, systems engineering documents, systems specification documents, white papers, performance specification documents, performance analysis documents, systems architecture documents, marketing documents, and any other documents that describe or relate to the equipment or services that T-Netix provided with regard to each T-Netix Institution." (Emphasis deleted).

[17]Complainants' Data Request No. 3 asks that, "[f]or each T-Netix Institution, please produce all documents that describe or relate to the platform (including, but not limited to, Adjunct (TNXWA 00224), POP (TNXWA 00225) and Premise (TNXWA 00226)) used in that T-Netix Institution, including all documents that show where the main components of the platform were located, how trunking was configured from the T-Netix Institution to the platform location, how trunking was configured from the platform to the LEC or IXC switch, and, if the Adjunct configuration was used, which AT&T 5ESS was used, where it was located, and how trunking involving that switch was configured." (Emphasis deleted).

Request Nos. 2 and 3 does not provide any specific details regarding the platforms in use at each institution.[18]

21 Complainants claim that the specific details of T-Netix's platform and how it handled each collect call from the institutions at issue is relevant to show whether rate disclosures occurred.[19] Additionally, Complainants' witness, Kenneth L. Wilson, opines that diagrams of T-Netix's platform schematics would provide certainty as to how the platform is connected to the public switched telecommunications network.[20] Information regarding the platform connection, according to Mr. Wilson, would:

> answer such questions as who the lines and/or trunks were purchased or leased from, how they were connected to the P-III Platform, how many lines and/or trunks were in use, and other information that is highly relevant in determining who actually provided the operator services for an institution.[21]

22 Similarly, AT&T contends that T-Netix has failed to respond fully to its Data Request Nos. 7[22], 8[23], 9[24], 10[25], 18[26], 19[27]and 21[28]. AT&T seeks information relating to the

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[18] *Complainants' Motion*, at 5, ¶ 13.
[19] *Id.*, at 5-6, ¶¶13 and 14.
[20] *Declaration of Kenneth L. Wilson*, at 3, ¶ 8.
[21] *Id.*
[22] AT&T's Data Request No. 7 asks that T-Netix "[i]dentify as specifically as possible all equipment (including hardware and software) provided by T-Netix relating to telephone service at Washington state prisons during the relevant period, including for each particular piece of equipment the dates during which T-Netix provided the equipment, the Washington state prison at which the equipment was provided or for which it facilitated telephone service, the person or entity that owned the equipment at the time, and the person most knowledgeable about such equipment."
[23] AT&T's Data Request No. 8 seeks a description "in as much detail as possible the nature of and functions performed by each particular piece of equipment (including hardware and software) identified in your response to Data Request No. 7" from T-Netix.
[24] AT&T's Data Request No. 9 requests that T-Netix "[i]dentify as specifically as possible all services provided by T-Netix relating to telephone service at Washington state prisons during the relevant period, including for each particular service the dates during which T-Netix provided the service, the Washington state prison at which or for which it was provided, and the person most knowledgeable about such service."
[25] AT&T's Data Request No. 10 requires T-Netix to "[d]escribe in as much detail as possible the nature and purpose of each particular service identified in your response to Data Request No. 9."
[26] AT&T's Data Request No. 18 requests T-Netix "[d]escribe in as much detail as possible the process by which an intrastate, interLATA call from a payphone at a Washington state prison was

equipment, the function of that equipment, the services, and the nature of those services employed by T-Netix at the various Washington state prisons. AT&T asserts that the information sought is intended to "explain T-Netix's role with regard to inmate-initiated calls at issue, and in particular T-Netix's role in connecting and providing operator services and rate disclosures for such calls."[29] T-Netix's responses refer AT&T to documents that lack details regarding the specific equipment and services that T-Netix provided at the facilities at issue during the relevant time period.[30]

23 T-Netix disagrees, arguing that the information both AT&T and Complainants seek regarding T-Netix's platforms and network configuration are entirely irrelevant to the question of whether it was operating as an OSP for the calls in question.[31] It is the function of the carriers themselves, not the design of the networks, which determine the carriers' regulatory status.[32]

24 T-Netix argues that its role during the call process was "essentially holding the voice path while the call was verified and the called party queried for collect call acceptance."[33] T-Netix witness, Robert L. Rae, posits that the Company did not provide a "connection" as he defines the term from the Commission's regulation defining an OSP.[34] Mr. Rae argues that the question for the Commission to decide is whether the Local Exchange Carrier (LEC), by connecting to AT&T's switched access services, or AT&T, by connecting to its long distance network, provided the connection that would identify either as an OSP.[35] Mr. Rae contends that a literal interpretation of "connection" to identify an OSP would produce absurd results

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processed from caller to call-recipient, specifying in particular who connected the call from point of origin to the service provider and what hardware or software was used to process the call."

[27] AT&T's Data Request No. 19 asks T-Netix to "[d]escribe in as much detail as possible each and every change or revision to the process described in your response to Data Request No. 18."

[28] AT&T's Data Request No. 21 asks T-Netix to "[p]roduce all documents relating to or identifying the call control platform and architectural variant used at each Washington state prison during the relevant period."

[29] *AT&T's Motion*, at 4, ¶ 9.

[30] *Id.*, at ¶ 10.

[31] *T-Netix's Opposition*, at 9, ¶ 21.

[32] *Id.*, at 10, ¶ 22.

[33] *Declaration of Robert L. Rae*, at 3, ¶ 8.

[34] *Id.*, at 4, ¶¶ 8 and 9.

[35] *Id.*, at 4, ¶ 8.

including designation of a wholesale carrier as the OSP instead of the actual service provider.[36]

25 AT&T replies that the Commission's regulations define 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."[37] AT&T charges that this definition means that an entity which facilitates a call transfer from a call aggregator to a long distance service provider is an OSP.[38] Yet, T-Netix refuses to provide any details on the role it played in the connection process.[39]

26 Complainants state that the fact that T-Netix's witness, who is also a T-Netix employee, disagrees with Complainants' witness regarding the usefulness of the documents does not automatically render the information useless.[40] Further, Complainants indicate that the Commission's regulation defining an OSP "do[es] not limit liability to those who were required to provide operator services by contract; those regulations speak in terms of operator services provided by a party."[41]

27 ***Discussion and decision.*** The Commission's rules require that data requests must "seek only information that is relevant to the issues in the adjudicative proceeding or may lead to the production of information that is relevant."[42] Parties may not object to a data request on the grounds that information may be inadmissible, as the Commission will allow discovery if the information "appears reasonably calculated to lead to discovery of admissible evidence."[43]

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[36] *Id.*, at 5, ¶ 10.
[37] *AT&T's Reply*, at 2, citing WAC 480-120-021 (1999) and WAC 480-120-262(1) (current).
[38] *AT&T's Reply*, at 2.
[39] *Id.*, at 2.
[40] *Complainants' Reply*, at 8, ¶ 21.
[41] *Id.*, at 9, ¶ 22.
[42] WAC 480-07-400(4).
[43] *Id.*

28 Having considered the contested data requests, the parties' pleadings and arguments in light of the standards for resolving discovery disputes, Complainants' motion to compel responses to Data Request Nos. 2 and 3 and AT&T's motion to compel responses to Data Request Nos. 7, 8, 9, 10, 18, 19 and 21 are granted.[44]

29 The Commission has been given the task of resolving the two referral questions from the Superior Court: 1) whether AT&T or T-Netix were OSPs and 2) whether they violated the Commission's disclosure regulations. An OSP has been defined by the Commission 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.

30 Each Party has their own idea of how the term "connection" should be interpreted by the Commission. Complainants and AT&T interpret the term "connection" literally. Even though he disagrees with this interpretation, T-Netix's own witness acknowledges that there is more than one way to interpret the Commission's definition. Whether T-Netix provided a connection under the Commission's rule is the ultimate question in this proceeding, which will be decided following hearing. The issue before the Commission here is whether the information is relevant and should be provided through discovery. T-Netix's platform and network configuration may provide useful information about the Company's ability to provide a connection. These data requests are relevant to the issues in this proceeding and may lead to admissible evidence. Thus, T-Netix must respond completely to the data requests at issue.

Complainants' Data Request Nos. 5, 16, and 23 and AT&T's Data Request No. 15

31 **Data Request No. 5.** With regard to Data Request No. 5[45] of Complainants' Second Data Requests, Complainants ask for any documents containing the phrases

[44] As discussed above, these data requests are limited to the four institutions that Complainants received calls from and to the time period at issue in this case, namely 1996 to 2000.

[45] Complainants' Data Request No. 5 seeks, " ... all documents in which T-Netix uses the phrase 'operator service' or 'operator services' or 'alternative operator services' or 'automated operator' to describe any part of the services that it has provided, is providing, or will provide. This request for documents is not limited to T-Netix Institutions." (Emphasis deleted).

"operator service", "operator services", "alternate operator services", or "automated operator". Complainants did not limit this data request to documents pertaining to the DOC facilities. Complainants explain that, in consultation with T-Netix, they agreed to limit the scope of Data Request No. 5 to documents which contain "a substantive discussion" relating to operator services.[46] Complainants assert that they have narrowed their original request and that the Commission should direct T-Netix to produce the documents.[47]

32 T-Netix argues that the request is too broad.[48] The Company asserts that Complainants' data request would have T-Netix examine millions of pages of documents which had been created over the last twenty years in order to possibly locate documents containing the phrases, "operator service," "operator services," "alternative operator services," or "automated operator." T-Netix further disagrees with Complainants' as to the "agreement" the two parties reached narrowing the focus of this data request.[49] T-Netix states that discussions of compliance with the data request broke off before any agreement was reached.[50]

33 Complainants reiterate that they have already agreed to modify the data request so as to limit it to documents containing a substantive discussion regarding operator services.[51] Now, Complainants argue, the Commission should require T-Netix to respond to this narrowed request.

34 ***Discussion and Decision.*** T-Netix is correct that Complainants' Data Request No. 5 is overly broad. Even limiting the request to only those documents containing a substantive discussion of 'operator services' and which pertain to the four institutions during the relevant period still would have the Company searching a broad spectrum of documents that, while the documents may contain the phrase "operator services," have little to no relevance to the Complainants' circumstances. This request is too broad and is denied.

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[46] *Complainants' Motion*, at 6, ¶ 15.
[47] *Id.*
[48] *T-Netix's Opposition*, at 11, ¶ 24.
[49] *Id.*, at 11, ¶ 26.
[50] *Id.*, at 12, ¶ 26.
[51] *Complainants' Reply*, at 10, ¶ 26.

35 **Data Request No. 16.** In Data Request No. 16[52] of Complainants' Second Data Requests, Complainants seek documents relating to contracts and subcontracts in which T-Netix is a party and which involve inmate-initiated telephone calls. Complainants state that they have knowledge of a dispute between contracting parties AT&T and T-Netix over performance obligations.[53] The information Complainants' are requesting should determine who the OSP was for the calls handled under the contract and whether T-Netix agreed to be the OSP.[54]

36 T-Netix asserts that this data request is likewise overly broad as it seeks documents addressing the "negotiation, interpretation, implementation, or performance" of all T-Netix contracts relating to inmate-initiated phone calls.[55]

37 Complainants disagree, arguing that this request is very similar to Complainants' First Data Request No. 2, which T-Netix responded to without complaint.[56] Complainants assert that T-Netix agreed to supplement its response to Data Request No. 16 but only to a narrower data request.[57] Complainants posit that T-Netix clearly "recognizes that there is a subgroup of documents falling within this request that should be produced, but it refuses to produce those documents or describe what it determines to be the appropriate boundaries of production."[58]

38 ***Discussion and decision.*** In contrast to Complainants' Data Request No. 5, Data Request No. 16 is narrowly tailored to documents relating to T-Netix's contractual obligations with regard to inmate-initiated phone calls from the four institutions in question during the time period from 1996 to 2000. T-Netix's opposition to Data Request No. 16 asserts that the request "broadly refers to all aspects of the performance of a contract performed over the course of more than a decade."[59] The Commission has already limited the scope of discovery to a four and a half year

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[52]Complainants' Data Request No. 16 asks T-Netix to, "[p]lease produce all documents that relate to the negotiation, interpretation, implementation, or performance of any contracts or subcontracts in which T-Netix is a party and which relate to inmate-initiated calls." (Emphasis deleted).
[53]*Complainants' Motion,* at 6, ¶ 16.
[54]*Id.*, at 7, ¶ 16.
[55]*T-Netix's Opposition,* at 12, ¶ 27.
[56]*Complainants' Reply,* at 10, ¶ 27.
[57]*Id.*, at 10, ¶ 27.
[58]*Id.*, at 10-11, ¶ 27.
[59]*T-Netix's Opposition,* at 12-13, ¶ 28.

period (June 1996 through December 31, 2000) and only the four institutions at issue. T-Netix has not raised a significant argument as to why this narrowly-tailored data request is over broad. Thus, the Commission grants Complainants' motion to compel responses to Data Request No. 16.

39 **Data Request No. 23.** In Data Request No. 23[60] of Complainants' Second Data Requests, Complainants ask which T-Netix employee or agent has the best knowledge of T-Netix rate disclosure announcements. Complainants indicate that T-Netix has not answered this data request and has simply referred them back to previous data request responses.[61] Complainants entreat the Commission to order T-Netix to respond directly to this data request.[62]

40 T-Netix asserts that the passage of time and the multitude of corporate reorganizations that have taken place make this request impossible to fulfill.[63] There is no one currently employed by T-Netix, according to the Company, that has first-hand knowledge of T-Netix's operations for the time period in question.[64]

41 ***Discussion and decision.*** It is understandable that employees sometimes leave their employers in search of other work, and it is possible, as T-Netix claims, that no one currently on its payroll has any knowledge of the Company's rate disclosure announcements for the period 1996 to 2000. However, as the Commission reads Complainants' data request, it simply seeks the identity of the employee, who possesses the most knowledge relative to the Company's rate disclosure announcements for inmate-initiated calls. Although it would be best for the proponent of the data request to modify the request to seek the name of the "current or former" employee, rather than the "employee," with the most knowledge, we interpret the data request to also seek information about prior employees. It is the Company who is in the best position to know this. Given this information, Complainants and AT&T then have the option of whether they will seek to depose that individual. The

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[60]Complainants' Data Request No. 23 directs T-Netix to, "[p]lease identify your employee or agent with the most knowledge relating to rate disclosure announcements made by T-Netix for inmate-initiated calls." (Emphasis deleted).
[61]*Complainants' Motion*, at 7, ¶ 19.
[62]*Id.*
[63]*T-Netix's Opposition*, at 14, ¶ 32.
[64]*Id.*

Commission grants Complainants' motion to compel responses to Data Request No. 23.

42 To the extent T-Netix has not already provided the identity of the current or former T-Netix employee who possesses the most knowledge of the Company's rate disclosure policies, T-Netix is directed to do so.

43 **Data Request No. 15.** AT&T's Data Request No. 15[65] sought documents pertaining to T-Netix's transfer of ownership to AT&T of telephone service equipment at the four facilities during the specific time periods at issue.[66] T-Netix has failed to produce any bills of sale, title transfers, or receipts that would prove that the Company's involvement with inmate-initiated calls was limited to supplying the equipment.[67]

44 T-Netix asserts that AT&T has failed to show why these documents would be relevant.[68] T-Netix maintains that its platform functions the same regardless of ownership or trunking configurations, and the relationships between the parties and the DOC were all governed by the contract not ownership of the equipment.[69] T-Netix indicates that it provided the equipment to AT&T, and T-Netix never provided services or equipment to any DOC facilities or to any end users in Washington.[70] According to T-Netix, the Company does not know whether it held legal title to the equipment in question, so the Commission should deny AT&T's Motion as moot.[71]

45 AT&T counters that this information is relevant because T-Netix has argued in the past that the Company did not operate as an OSP, and that it only sold AT&T equipment.[72] AT&T asserts that it needs to be able to respond to that argument.[73]

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[65] AT&T's Data Request No. 15 seeks "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."
[66] *AT&T's Motion*, at 5, ¶ 13.
[67] *Id.*
[68] *T-Netix's Opposition 2*, at 4, ¶ 8.
[69] *Id.*, at 4, ¶ 9.
[70] *Id.*
[71] *Id.*, at 5, ¶ 10.
[72] *AT&T's Reply*, at 4.

AT&T contends that, if T-Netix has no sale documents, then it should say so for the record.[74]

46 ***Discussion and decision.*** T-Netix does not refute and indeed reiterates its claim that the Company never provided services or equipment to any institution or end user, but only provided equipment to AT&T pursuant to T-Netix's contract with AT&T. If this is correct, then evidence of such an arrangement would go far in proving that the Company's involvement was limited to non-OSP functions. The relevance of this data appears quite evident. The Commission grants AT&T's motion to compel responses to Data Request No. 15. To the extent that, as T-Netix argues, it does not have such data, the Company should state that in its response.

3. The "Project" to comply with the FCC's Rate Disclosure Regulations

47 In Data Request Nos. 21[75] and 22[76] of Complainants' Second Data Requests, Complainants allude to a "project" that they claim was brought to their attention by T-Netix.[77] T-Netix, according to Complainants, has admitted that the "project" involved the replacement of chips to comply with the FCC's rate disclosure requirements.[78] Complainants insist that, "[d]ocuments associated with this change may well provide information regarding whether this chip change could be used to satisfy both state and federal requirements."[79] Complainants contend that T-Netix has not provided Complainants with e-mails and correspondence from former T-Netix employees relative to the Company's disclosure of rates.[80] However, AT&T has produced

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[73] *Id.*
[74] *Id.*
[75] Complainants' Data Request No. 21 asks for, "all documents relating to the "Project" referred to in A000108-09, paragraph (b), and the subject matter of TNXWA 00785-87." (Emphasis deleted).
[76] Complainants' Data Request No. 22 posits that, "[i]f the "Project" referred to in A000108-09, paragraph (b), resulted in changes to the T-Netix platform at any T-Netix Institutions, please identify those T-Netix Institutions and state when the "Project" was completed with respect to each T-Netix Institution." (Emphasis deleted).
[77] *Complainants' Motion*, at 7, ¶ 17.
[78] *Id.*
[79] *Id.*, at 7, ¶ 18.
[80] *Id.*, at 4, ¶ 10.

emails from AT&T to T-Netix detailing the Company's obligations to provide rate disclosures.[81]

48 T-Netix maintains that documents already produced by AT&T demonstrate that the rate disclosures were provided for intrastate calls since 1998 and that the project was necessary to comply with federal requirements for interstate calls which are not at issue here.[82] Further, T-Netix concludes that information regarding the chip replacement has no probative value.[83]

49 T-Netix asserts that it was never asked to produce e-mails or correspondence by Complainants in their data requests.[84] In addition, T-Netix's witness Arlin Goldberg avers that e-mails and correspondence of former T-Netix employees were never archived after T-Netix merged with Evercom Systems, Inc., under the parent company, Securus Technologies, Inc., in 2004.[85] As such, T-Netix states that "emails sent or received by the T-Netix employees involved at the time are no longer within the possession or control of T-Netix."[86]

50 According to T-Netix, it has already provided supplemental responses to Complainants and so some of the requests made in Complainants' Motion are moot.[87]

51 Complainants dispute T-Netix's claim that Complainants never requested e-mails in their data requests.[88] Complainants argue that both their first and second set of data requests contained a request for documents defined to include e-mail and other correspondence.[89] Additionally, Complainants cite to the Federal Rules of Civil Procedure which specifically calls for the production of e-mails in the normal course of discovery.[90]

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[81] *Id.*
[82] *T-Netix's Opposition*, at 13, ¶ 30.
[83] *Id.*
[84] *Id.*, at 7-8, ¶ 17.
[85] *Declaration of Arlin Goldberg*, at 1-2, ¶¶ 3 and 4.
[86] *T-Netix's Opposition*, at 9, ¶ 20.
[87] *Id.*, at 2, ¶ 4.
[88] *Complainants' Reply*, at 2, ¶ 2.
[89] *Id.*
[90] *Id.*, at 2, ¶ 3.

52 Complainants counter that T-Netix "has engaged in discovery gamesmanship."[91] Complainants point out that T-Netix has already admitted that it did not conduct a search for e-mails and other responsive documents in answer to Complainants' data requests and that T-Netix destroyed e-mails that could have contained relevant information.[92]

53 Complainants contend that the declaration of Mr. Goldberg filed in support of T-Netix's Opposition acknowledges that T-Netix failed to preserve evidence while this case was pending in court.[93] Mr. Goldberg states that T-Netix failed to archive e-mails from its former employees when T-Netix merged with Securus in 2004, four years after this action was filed in Superior Court.[94] Complainants assert that Mr. Goldberg's efforts to locate the e-mails of the former T-Netix employees were insufficient.[95] Further, Complainants argue that T-Netix does not provide support for its claim that a search for the emails is too burdensome.[96]

54 ***Discussion and decision.*** Information regarding whether the Company implemented a chip replacement which would allow for rate disclosure appears relevant to the referral question of whether T-Netix violated the Commission's regulation requiring rate disclosure. Complainants' motion to compel responses to their Second Data Request Nos. 21 and 22 is granted.

55 The Commission is troubled by T-Netix's admission that it did not preserve potential evidence for litigation due to a merger four years after this action had been filed. A party may be responsible for spoliation of evidence without a finding of bad faith.[97] As T-Netix has admitted that the Company has failed to exhaust possible avenues in locating the missing e-mails and correspondence, T-Netix is instructed to continue to diligently and promptly pursue locating and providing copies of these documents relative to the chip replacement "project" referenced in T-Netix e-mails, as well as e-mail correspondence.

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[91] *Id.*, at 1, ¶ 1.
[92] *Id.*, at 1, ¶ 1.
[93] *Id.*, at 5, ¶ 10.
[94] *Id.*, at 4, ¶ 7.
[95] *Id.*, at 5, ¶ 8.
[96] *Id.*, at 5, ¶ 9.
[97] *Homeworks Const., Inc., v. Wells*, 133 Wash.App. 892, 138 P.3d 654 (2006).

56 With regard to AT&T's Data Request Nos. 11 and 12, AT&T argues that T-Netix fails to describe the actual process the Company employed to disclose rates pursuant to regulation.[98] Instead AT&T points out that T-Netix cryptically responds to its data requests with "T-Netix would have been able to configure the system to provide the rate quote via a voice recording."[99] This response, AT&T contends, does not provide information regarding how the system actually was configured or whether T-Netix's system did in fact provide the requisite rate disclosures.[100]

57 T-Netix claims that it responded as fully as is possible given the eight years that have passed since this action was initiated and the corporate mergers and reorganizations which T-Netix has experienced.[101] T-Netix no longer has employees with first-hand knowledge of these matters.[102]

58 AT&T explains that T-Netix has only partially described the process by which rate disclosures were made to end users of inmate-initiated calls.[103] Additionally, despite the changes to regulatory requirements over time, T-Netix has told AT&T that the Company is unaware of any revisions made to the rate disclosure process.[104] In answer to T-Netix's claim that it does not have any additional documents, AT&T argues that, if this is truly the case, T-Netix should be required to submit amended responses for the record.[105]

59 ***Discussion and decision.*** AT&T's Data Request Nos. 11 and 12 appear relevant and may lead to admissible evidence. T-Netix does not reply that these data requests are irrelevant to the instant proceeding, only that it no longer possesses any other documents which would fulfill these requests.

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[98] *AT&T's Motion*, at 4, ¶ 11.
[99] *Id.*, at 5, ¶ 12.
[100] *Id.*, at 5, ¶ 12.
[101] *T-Netix's Opposition 2*, at 3, ¶ 7.
[102] *Id.*, at 4, ¶ 7.
[103] *AT&T's Reply*, at 3-4.
[104] *Id.*, at 4.
[105] *Id.*, at 4.

60 That said, it is one thing for T-Netix to argue that a Company cannot be expected to retain its employees for the duration of a litigated case; it is quite another to maintain that the same company cannot be expected to retain documents relating to ongoing litigation.

61 T-Netix earlier stated, in Mr. Hopfinger's declaration, that the Company has not exhausted all sources from which documents it possesses may be located. As such, the Commission finds T-Netix's argument dubious. Therefore, not only is AT&T's motion to compel Data Request Nos. 11 and 12 granted, T-Netix is strongly encouraged to search all available sources of data, whether in its possession or in the possession of its parent company, before it responds to these data requests again.

ORDER

THE COMMISSION ORDERS:

62 (1) Sandy Judd and Tara Herivel's motion to compel responses by T-Netix, Inc., to Data Request Nos. 2, 3, 16, 21, 22, and 23 is granted to the extent these data requests seek information regarding the four institutions at issue from June 1996 to December 31, 2000.

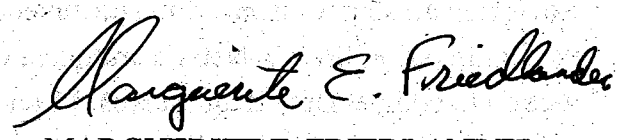
63 (2) Sandy Judd and Tara Herivel's motion to compel responses by T-Netix, Inc., to Data Request No. 5 is denied.

64 (3) AT&T Communications of the Pacific Northwest, Inc.'s motion to compel responses by T-Netix, Inc, to Data Request Nos. 7, 8, 9, 10, 11, 12, 15, 18, 19, and 21 is granted to the extent these data requests seek information regarding the four institutions at issue from June 1996 to December 31, 2000.

65 (4) T-Netix, Inc.'s motion for a protective order is denied.

Dated at Olympia, Washington, and effective January 9, 2009.

WASHINGTON STATE UTILITIES AND TRANSPORTATION COMMISSION



MARGUERITE E. FRIEDLANDER
Administrative Law Judge

BEFORE THE WASHINGTON STATE UTILITIES AND TRANSPORTATION COMMISSION

SANDY JUDD AND TARA HERIVEL, Complainants, v. AT&T COMMUNICATIONS OF THE PACIFIC NORTHWEST, INC., AND T-NETIX, INC., Respondents.	)	DOCKET UT-042022 ORDER 23 INITIAL ORDER DENYING IN PART AT&T'S AMENDED MOTION FOR SUMMARY DETERMINATION AND GRANTING T-NETIX'S MOTION AND AMENDED MOTION FOR SUMMARY DETERMINATION

1 ***SYNOPSIS.*** *This is an Administrative Law Judge's Initial Order that is not effective unless approved by the Commission or allowed to become effective pursuant to the notice at the end of this Order. This Order denies in part the Amended Motion for Summary Determination filed by AT&T Communications of the Pacific Northwest, Inc. , by finding that AT&T, and not T-Netix, was the operator service provider for Washington State Reformatory (a/k/a Monroe Correctional Complex), Airway Heights, McNeil Island Penitentiary, and Clallum Bay, from June 4, 1997 to December 31, 2000. AT&T's Amended Motion which requests that the Commission find AT&T did not violate any of the Commission's OSP rate disclosure regulations is held in abeyance pending further Commission proceedings. This Order grants the Motion and Amended Motion for Summary Determination filed by T-Netix, Inc.*

2 **NATURE OF PROCEEDING.** Docket UT-042022 involves a formal complaint filed with the Washington Utilities and Transportation Commission (Commission) by Sandy Judd and Tara Herivel (Complainants)[1] against AT&T Communications of

[1] Zuraya Wright filed suit, in conjunction with Ms. Judd and Ms. Herivel, against Respondents in the Superior Court of Washington for King County (Superior Court or Court). See, Exhibit A-2.

the Pacific Northwest, Inc. (AT&T), and T-Netix, Inc. (T-Netix, collectively with AT&T, Respondents).[2] Complainants request that the Commission resolve certain issues under the doctrine of primary jurisdiction and pursuant to the referral by the Superior Court.

3 **APPEARANCES.** Chris R. Youtz, Sirianni Youtz Meier & Spoonemore, Seattle, Washington, represents Complainants. Letty Friesen, AT&T Law Department, Austin, Texas, and Charles H. R. Peters, Schiff Hardin, LLP, Chicago, Illinois, represent AT&T. Arthur A. Butler, Ater Wynne LLP, Seattle, Washington, and Stephanie A. Joyce, Arent Fox LLP, Washington, D.C., represent T-Netix.

4 **PROCEDURAL HISTORY.** This matter has an extensive history, dating back to when the complaint was first filed in 2000 in the Superior Court. Complainants alleged in their complaint that they received collect calls from inmates in Washington State correctional facilities served by Respondents, that Respondents provided operator services to the correctional facilities and that Respondents were operator service providers (OSPs)[3] who violated the rate disclosure statute[4] by failing to assure

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As Ms. Wright's claim is restricted to interstate inmate telephone calls, and our jurisdiction extends only to intrastate telephone calls, we will not address Ms. Wright's claim in this order.

[2] Complainants originally named five telecommunications companies in their suit in Superior Court. In addition to Respondents, Complainants also filed suit against Verizon Northwest, Inc., f/k/a GTE Northwest, Inc. (Verizon), Qwest Corporation, f/k/a U.S. West Communications, Inc. (Qwest), and CenturyTel Telephone Utilities, Inc., f/k/a CenturyTel Telephone Utilities, Inc. and Northwest Telecommunications, Inc., d/b/a PTI Communications, Inc. (CenturyTel). Verizon, Qwest, and CenturyTel were subsequently dismissed from the action. Exhibit A-46. The Washington Court of Appeals affirmed the trial court's ruling, as did the Supreme Court of Washington. *Judd, et al., v. American Telephone and Telegraph Company, et al.*, 116 Wash.App. 761, 766, 66 P.3d 1102 (2003) and *Judd v. Am. Tel. & Tel. Co.*, 152 Wash.2d 195, 198, 95 P.3d 337 (2004).

[3] While WAC 480-120-021 (1989) and (1991) classify entities that provide connections from call aggregators to local and interexchange carriers (IXC) as alternate operator services companies, WAC 480-120-021 (1999) changed the term for these entities to OSP. As the Superior Court refers to them as OSPs, we will do likewise in this Order.

[4] RCW 80.36.520 provides that:

> [t]he utilities and transportation commission shall by rule require, at a minimum, that any telecommunications company, operating as or contracting with an alternative operator services company, assure appropriate disclosure to

rate disclosures for the collect calls Complainants received. Following the Superior Court's dismissal of three defendants from the suit and the subsequent affirmations of the Court's verdict, the Superior Court referred two questions to the Commission under the doctrine of primary jurisdiction:[5]

> 1) Whether Respondents were OSPs under the contracts at issue herein, and
> 2) If so, if the regulations have been violated.[6]

5 On November 17, 2004, Complainants filed a formal complaint with the Commission under the court's referral. In that filing, Complainants expanded their arguments further, claiming that Respondents had violated the Commission's rule requiring that OSPs provide rate quote information to consumers.[7] In violating the Commission's rule, Complainants allege that Respondents also violated the Washington Consumer Protection Act (WCPA).[8] On December 15, 2004, AT&T filed an answer to the formal complaint and a Motion for Summary Determination (AT&T's Motion), requesting that the Commission find that AT&T was not an OSP during the period in question and that AT&T had not violated the Commission's regulations applicable to OSPs. On December 16, 2004, T-Netix filed its answer to the formal complaint. Due

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consumers of the provision and the rate, charge or fee of services provided by an alternative operator services company.

[5] Primary jurisdiction is a doctrine which requires that issues within an agency's special expertise be decided by the appropriate agency. *Tenore, v. AT&T Wireless Services,* 136 Wash.2d 322, 345, 962 P.2d 104, 115 (1998).

[6] *Judd v. Am. Tel. & Tel. Co.*, 136 Wash.App. 1022, not reported in P.3d, (2006).

[7] *See,* WAC 480-120-141 (1991) and (1999).

[8] RCW 80.36.530 provides that:

> In addition to the penalties provided in this title, a violation of RCW 80.36.510, 80.36.520, or 80.36.524 constitutes an unfair or deceptive act in trade or commerce in violation of chapter 19.86 RCW, the consumer protection act. Acts in violation of RCW 80.36.510, 80.36.520, or 80.36.524 are not reasonable in relation to the development and preservation of business, and constitute matters vitally affecting the public interest for the purpose of applying the consumer protection act, chapter 19.86 RCW. It shall be presumed that damages to the consumer are equal to the cost of the service provided plus two hundred dollars. Additional damages must be proved.

to intervening motions relating to discovery and standing, AT&T's Motion was never adjudicated.

6 On July 28, 2005, T-Netix filed a Motion for Summary Determination (T-Netix's Motion.) In its Motion, much like that of AT&T, T-Netix alleges that it was not an OSP for certain inmate collect calls and that the exemptions of Verizon, Qwest, and CenturyTel should preclude liability for T-Netix.[9]

7 Concurrently, T-Netix filed a Motion for Summary Judgment (Summary Judgment Motion) with the Superior Court, alleging that the Complainants had suffered no injury and therefore lacked standing to bring the action.[10] On September 6, 2005, the Superior Court granted T-Netix's Summary Judgment Motion and revoked its referral to the Commission.[11] The Superior Court later clarified that the ruling also applied to AT&T.[12] As a result, neither AT&T's nor T-Netix's Motions before the Commission were addressed.

8 On September 7, 2005, T-Netix filed a Motion to Dismiss with the Commission based on the Court's revocation of the referral. On October 28, 2005, the Commission issued Order 07, granting T-Netix's Motion to Dismiss the complaint against both T-Netix and AT&T and found that, "a primary jurisdiction referral does not invoke an agency's independent jurisdiction, but is derivative of that of the court in which the matter is pending."[13]

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[9] Exhibit T-1HC, at 1.

[10] *Judd v. Am. Tel. & Tel. Co.*, King County Superior Court, No. 00-2-17565-5 SEA, *T-Netix's Motion for Summary Judgment*, July 26, 2005.

[11] *Judd v. Am. Tel. & Tel. Co.*, King County Superior Court, No. 00-2-17565-5 SEA, *Order Granting Defendant T-Netix' Motion for Summary Judgment*, September 6, 2006.

[12] *Judd*, 136 Wash.App. 1022, not reported in P.3d, (2006).

[13] *Judd v. Am. Tel. & Tel. Co.*, Docket UT-042022, Order 07, Order Granting T-Netix's Motion to Dismiss and Dismissing Complainants' Action, ¶ 19, quoting *International Ass'n of Heat and Frost Insulators and Asbestos Workers v. United Contractors Ass'n, Inc.*, 483 F.2d 384, 401 (3rd Cir. 1973).

9 On December 18, 2006, the Washington Court of Appeals reversed the lower court's decision on T-Netix's Summary Judgment Motion and remanded the case back to the Superior Court.[14] On December 4, 2007, the Supreme Court of Washington denied T-Netix's request for review.[15] On March 21, 2008, the Superior Court issued an order reinstating the referral to the Commission for the determination of the issues:

1) Whether AT&T or T-Netix were OSPs, and
2) Whether they violated the Commission's disclosure regulations.

10 On August 21, 2008, the Commission convened a prehearing conference before Administrative Law Judge Marguerite E. Russell (ALJ).[16] On October 2, 2008, the Commission entered Order 09 establishing a briefing schedule for AT&T's and T-Netix's motions.

11 The parties requested amendments to the discovery and briefing schedules on several occasions subsequent to the Commission's entrance of Order 09.[17]

12 AT&T filed an Amended Motion for Summary Determination (AT&T's Amended Motion) on August 24, 2009.[18] On August 27, 2009, T-Netix filed its Amended Motion for Summary Determination (T-Netix's Amended Motion).

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[14] *Judd*, 136 Wash.App. 1022, not reported in P.3d, (2006).

[15] *Judd v. Am. Tel. & Tel. Co.*, 162 Wash.2d 1002, 175 P.3d 1092 (2007).

[16] During scheduling discussions at the prehearing conference, it became clear that the parties did not agree on the status of the procedural schedule as it existed when the Superior Court rescinded its referral. Following briefing by the parties, the Commission entered Order 09 finding that both AT&T's and T-Netix's Motions were still pending before the Commission and that the procedural schedule should accommodate decision on the motions.

[17] There were no less than ten requests to modify the procedural schedule from October 2008 to August 2009.

[18] AT&T neglected to request leave to amend its original pleading. Following a telephonic conference on August 25, 2009, between the parties and the ALJ, AT&T and T-Netix both filed motions for leave to amend their original motions for summary determinations, stating that the original motions were more than 4 years. In Order 21, entered on August 28, 2009, the Commission granted AT&T's and T-Netix's request for leave to file amended motions for summary determination.

13 On September 10, 2009, Complainants filed a Memorandum in Opposition to T-Netix's and AT&T's Amended Motions (Complainants' Opposition); T-Netix filed its Opposition to AT&T's Amended Motion (T-Netix's Opposition); and AT&T filed its Response to T-Netix's Amended Motion (AT&T's Response).

14 On September 24, 2009, AT&T filed its Reply in Support of its Amended Motion (AT&T's Reply) and T-Netix filed its Reply in Support of its Amended Motion (T-Netix's Reply).

15 The Commission, on October 8, 2009, issued Bench Request No. 1 to T-Netix stating that T-Netix had provided duplicative exhibits, Exhibits 5 and 10, in its original Motion. Bench Request No. 1 requested that T-Netix file a list of its intended exhibits to clarify which exhibits should have been attached to the Motion. T-Netix filed a Response to Bench Request No. 1 on October 12, 2009, acknowledging that the wrong document had been provided to the Commission as Exhibit 5 and rectifying that error by including the appropriate document for Exhibit 5 and a list of exhibits T-Netix intended to file with its Motion.

16 On January 4, 2010, the ALJ issued Bench Request No. 2 to AT&T, noting that the company had alleged that it was certified as a local exchange carrier (LEC) by the Commission, but provided conflicting dates for the certification. Bench Request No. 2 asked that AT&T, *inter alia*, clarify the date of its certification and provide a copy of the Commission-issued certificate. On January 15, 2010, AT&T responded to Bench Request No. 2 stating that it was certificated as a LEC on January 24, 1997, in Docket UT-960248. AT&T included a copy of its LEC certification, asserting that it had not surrendered its LEC certificate, nor had the Commission revoked it.

17 The Commission issued Bench Request No. 3 to AT&T, explaining that AT&T had advanced the theory of collateral estoppel in response to Complainants arguments regarding RCW 80.36.520. Bench Request No. 3 requested that AT&T provide a copy of its Motion to Dismiss filed with the Superior Court and which was the subject of the Court's October 10, 2000, order. AT&T filed its response to Bench Request No. 3 on February 5, 2010, with a copy of its Motion to Dismiss. AT&T also included a copy of Verizon's Motion to Dismiss, arguing that Verizon had made the same argument.

18 On March 4, 2010, the Commission issued Bench Request No. 4 to T-Netix asking the company to indicate whether its P-III Premise call platform[19] had the ability, from June 1996 to December 2000, to provide consumers with instructions on how to receive rate quotes and provide consumers with rate quotes. T-Netix responded to Bench Request No. 4 and stated that the platform did have the capacity to accomplish both actions.

19 The Commission issued Bench Request Nos. 5 and 6 on March 19, 2010. Bench Request No. 5 noted that AT&T had alleged that T-Netix had contracted with the LECs for T-Netix to connect calls from the correctional facilities to local and long-distance service providers and to provide operator services at the correctional facilities. The Bench Request sought the contract(s) between T-Netix and the LECs on which AT&T based the allegation. AT&T responded by stating that T-Netix had not produced any contracts between the LECs and T-Netix for the relevant time period, but that T-Netix employees and agents had indicated during discovery that T-Netix had a business relationship with the LECs.

20 Bench Request No. 6 indicated that Amendment No. 3 to the DOC contract required T-Netix to remit a twenty-seven percent (27 percent) monthly commission to the DOC for local calls. The Bench Request asked that T-Netix explain what services or activities, if any, T-Netix was providing upon which the monthly commission was based. T-Netix filed its response explaining that it leased facilities to provide local calls on behalf of AT&T. According to T-Netix, AT&T agreed to reimburse T-Netix for the commission T-Netix paid on local calls placed after March 3, 1998, from the five DOC facilities T-Netix served.

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[19] In its Motion, T-Netix treated the name of its platform as highly confidential, yet T-Netix disclosed the name of the computer platform system in its Amended Motion. On January 19, 2010, the Commission issued a Notice of Commission Challenge to Assertion of Highly Confidential Designation and Notice of Intent to Make Information Public (Challenge Notice). The Challenge Notice indicated that, since T-Netix had already disseminated the moniker in filings that are public records, the company had waived its right to designate the information as highly confidential. The Challenge Notice also stated that the Commission would treat the name of T-Netix's computer platform as public information as of January 29, 2010.

21 On April 8, 2010, the Commission issued Notice of Final Exhibit List (Notice). The Notice stated that the attached exhibit list was complete and that each exhibit had been admitted on the date it was filed with the Commission. The Notice also requested that the parties file any objection or corrections to the exhibit list by Noon on April 12, 2010. None of the parties filed objections or corrections to the final exhibit list.

22 On April 8, 2010, AT&T filed with the Commission its Motion for Leave to File a Response Regarding Bench Request No. 6 (Motion for Leave) and its Response.[20] In its Motion for Leave, AT&T claims that T-Netix's Response to Bench Request No. 6 is "vague, ambiguous, and, particularly with respect to references it makes to AT&T, misleading."[21] On April 9, 2010, T-Netix filed its Opposition and Response to AT&T's Motion for Leave (T-Netix's Opposition and Response). T-Netix asserts that AT&T has failed to cite to any authority which would allow it to respond to a bench request directed only to T-Netix.[22] T-Netix also alleges that AT&T's Response is misleading, factually incorrect, and that it should be stricken.[23]

23 On April 12, 2010, the Commission issued Order 22 denying AT&T's Motion for Leave. The Commission found that AT&T's Motion for Leave was lacking in any real substance and fails to indicate how its supplementation of the record would assist the trier of fact.

MEMORANDUM

24 The Superior Court referred two questions to the Commission: 1) whether AT&T or T-Netix were OSPs and 2) whether each violated the Commission's rate disclosure regulations. Complainants' lawsuit, filed in Superior Court, alleges that they received operator-assisted collect calls from four Washington state correctional facilities and

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[20] AT&T's pleading was actually captioned "AT&T's Unopposed Motion for Leave to File its Amended Motion for Summary Determination." The pleading did, however, contain the appropriate title elsewhere in the text. As T-Netix has indicated, AT&T's Motion for Leave was not unopposed.

[21] AT&T's Motion for Leave, ¶ 2.

[22] T-Netix's Opposition and Response, ¶ 5.

[23] *Id.*, ¶ 6.

were not given the option of hearing rate quotes before accepting the collect calls in violation of the Commission's rate disclosure rules.[24] Complainants have alleged that the Respondents were each responsible, under the Commission's regulations,[25] for disclosing the collect calling rates, and that, by failing to comply with the Commission's regulations, the Respondents have violated the WCPA.[26] The Complainants claim that they received the calls in question from June 1996 through December 31, 2000. The Commission limited the scope of discovery in this matter accordingly.[27]

I. GOVERNING LAW

25 In ruling on the Respondents' motions, we consider our rule governing summary determination. WAC 480-07-380(2) provides:

> A party may move for summary determination of one or more issues if the pleadings filed in the proceeding, together with any properly admissible evidentiary support (e.g., affidavits, fact stipulations, matters of which official notice may be taken), show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. In considering a motion made under this subsection, the [C]ommission will consider the standards applicable to a motion made under CR 56 of the Washington [S]uperior [C]ourt's [C]ivil [R]ules.

26 As a result, our decision really is two-fold. First, we must review the pleadings and supporting evidence to ascertain whether there is a dispute as to any question of fact material to our determination of the issues that cannot be resolved without resorting to further process, i.e., an evidentiary hearing, to develop additional evidence. Second, if we can make all findings of fact necessary to a decision on the basis of the

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[24] The four correctional facilities are: the Washington State Reformatory (a/k/a Monroe Correctional Complex), Airway Heights, McNeil Island Penitentiary, and Clallum Bay.

[25] *See*, WAC 480-120-141.

[26] *See*, RCW 19.86.010, *et seq.*, and RCW 80.36.530.

[27] *See*, Order 14 (January 9, 2009).

pleadings and supporting evidence, we consider that evidence in the light most favorable to the nonmoving party[28] and determine whether the moving party is entitled to judgment as a matter of law.[29] We will grant motions for summary determination only where reasonable minds "could reach but one conclusion from all the evidence."[30]

27 The nonmoving party may not rely upon speculation or argumentative assertions in meeting their burden.[31] As the Court of Appeals has stated, "[e]xpert testimony must be based on the facts of the case and not on speculation or conjecture."[32] CR 56(e) provides that declarations containing conclusory statements that are unsupported by facts are insufficient for purposes of summary determination.[33]

28 The first issue referred to us under the doctrine of primary jurisdiction is whether AT&T or T-Netix was an OSP. From 1991 to 1999, WAC 480-120-021defined an OSP as:

> any corporation, company, partnership, or person other than a local exchange company providing a connection to intrastate or interstate long-distance or to local services from locations of call aggregators. The term 'operator services' in this rule means any intrastate telecommunications service provided to a call aggregator location that includes as a component any automatic or live assistance to a consumer to arrange for billing or completion, or both, of an intrastate telephone call through a method other than: (1) automatic completion with billing

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[28] *Activate, Inc., v. State, Dept. of Revenue*, 150 Wash.App. 807, 812, 209 P.3d 524 (2009) (citing *Vallandigham v. Clover Park Sch. Dist. No. 400*, 154 Wash.2d 16, 26, 109 P.3d 805 (2005).

[29] CR 56(c).

[30] *Activate*, 150 Wash.App. at 812, (citing *Vallandigham*, 154 Wash.2d at 26).

[31] *Marshall v. Bally's Pacwest, Inc.*, 94 Wash.App. 372, 377, 972 P.2d 475 (1999) (citing *Vacova Co. v. Farrell*, 62 Wash.App. 386, 395, 814 P.2d 255 (1991).

[32] *Davies v. Holy Family Hospital*, 144 Wash.App. 483, 493, 183 P.3d 283 (2008) (citing *Seybold v. Neu*, 105 Wash.App. 666, 677, 19 P.3d 1068 (2001).

[33] CR 56(e) and *Davies*, 144 Wash.App. at 496 (citing *Guile v. Ballard Cmty. Hosp.*, 70 Wash.App. 18, 25, 851 P.2d 689 (1993).

> 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.[34]

29 In 1999, we modified WAC 480-120-021 by, *inter alia*, removing the exemption of LECs from the definition of an OSP.

30 The second question on referral from the Superior Court is, if either T-Netix or AT&T was an OSP, whether either violated our rate disclosure regulations. This issue implicates WAC 480-120-141. In 1991, WAC 480-120-141(5)(a)(iv)(A)-(C) mandated that an OSP:

> Identify the [OSP] providing the service audibly and distinctly at the beginning of every call, and again before the call is connected, including an announcement to the called party on calls placed collect...The [OSP] shall immediately, upon request, and at no charge to the consumer, disclose to the consumer: (A) a quote of the rates or charges for the call, including any surcharge; (B) the method by which the rates or charges will be collected; and (C) the methods by which complaints about the rates, charges, or collection practices will be resolved.

31 In 1999, we revised WAC 480-120-141 so that OSPs were required to verbally advise consumers how to receive a rate quote. Specifically, the modified regulation provided that:

> Before an operator-assisted call from an aggregator location may be connected by a presubscribed OSP, the OSP must verbally advise the consumer how to receive a rate quote, such as by pressing a specific key or keys, but no more than two keys, or by staying on the line.[35]

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[34] WAC 480-120-021 (1991).

[35] WAC 480-120-141(2)(b) (1999).

II. UNDISPUTED FACTS

32 The facts material to our determination of the legal questions before us are those that tell us what whose responsibility it was to provide the operator services at the correctional facilities and how they went about providing such services. Based on the affidavits, deposition transcripts, and other documents attached as exhibits to the parties' various pleadings, we find the following facts well established in this matter. These facts are summarized below.

33 In 1992, AT&T entered into a contract (DOC contract) with the State of Washington Department of Corrections (DOC) to provide telecommunication services and equipment to various inmate correctional institutions and work release facilities.[36] The DOC contract authorized AT&T to subcontract with three LECs, Verizon, Qwest, and CenturyTel, for the provision of public telephone sets and equipment, lines, Dictaphone recording/monitoring equipment,[37] and local and intraLATA telephone service and operator service.[38] AT&T would only provide "0+" interLATA and international operator assisted long distance service on its own.[39]

34 In their subcontracts, the LECs agreed to provide public pay telephones and equipment and deliver interLATA traffic originating from the public pay telephones

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[36] While the DOC contract addresses public telephones made available to inmates for collect calls as well as other public telephones located on the facility premises for use exclusively by staff and visitors, Complainants' suit and thus the Commission's examination are limited to the former.

[37] Both AT&T and T-Netix have detailed the special challenges involved in providing inmate telecommunications services. *See*, Exhibit A-12, ¶ 6 and Exhibit A-19HC, ¶¶ 6-10. Inmate telecommunications systems generally need to be equipped with call control features such as call monitoring and recording equipment. *See*, Exhibit A-19HC, ¶ 7. They formerly employed live operators but now use automated operators, thereby avoiding the possibility of threats and manipulation by inmates to which live operators were subjected. *Id.* Furthermore, inmates are only allowed to call pre-approved telephone numbers in order to prevent harassment of witnesses and intimidation of the law enforcement community. *Id.*, ¶ 9. As such, inmate telecommunications systems need to be able to screen the telephone numbers inmates attempt to call. *Id.*

[38] *See*, Exhibit A-8.

[39] *Id.*

to AT&T's Point of Presence (POP) over switched access facilities.[40] The LECs also contracted to complete all "0+" local and intraLATA telephone calls, provide various live or mechanical operator announcements, and provide call timing and call blocking features.[41]

35 Amendment No. 2 to the DOC contract, executed in 1995, required AT&T to "arrange for the installation of certain call control features for intraLATA, interLATA, and international calls" which AT&T was to carry.[42] The Amendment mandated that AT&T would "install and operate such call control features through its subcontractor Tele-Matic Corporation.[43] Further in 1995, the Commission recognized the acquisition of Tele-Matic Corporation by T-Netix.[44] T-Netix was retained to provide a computerized platform at the correctional facilities that would feature call control provisions as well as various support functions for the platform.[45]

36 In 1997, T-Netix sold its P-III Premise platform to AT&T.[46] In Washington state, the P-III Premise platform was used for all local and intraLATA calls, which are the only

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[40] Exhibit A-9 (for Verizon), ¶ 3(a) and (b); Exhibit A-10 (for Qwest), ¶ 3(a) and (b); and Exhibit A-11 (for CenturyTel), ¶ 4(a) and (b). CenturyTel was responsible for delivering both interLATA and intraLATA traffic.

[41] Exhibit A-9, ¶ 3(c), (g), and (h); Exhibit A-10, ¶ 3(c), (g), and (h); and Exhibit A-11, ¶ 4(c), (g), and (h). CenturyTel was only responsible for completion of "0+" local calls, not "0+" intraLATA calls.

[42] Exhibit A-8, Amendment No. 2, ¶ 1.

[43] *Id.*

[44] Exhibit C-13, at 1.

[45] Exhibit T-25, ¶ 13; Exhibit A-1HC, ¶¶ 12, 13; and Exhibit C-1C, ¶¶ 18, 19.

[46] Exhibit T-1HC, ¶ 9. *See* Exhibit T-2C. The issue of who owns the platform is at the crux of any determination of which Respondent acted as the OSP. Yet, the parties have designated the June 4, 1997, contract, where T-Netix sells title of the platform to AT&T, as confidential, and they have redacted the entire document. This has served to complicate the Commission's discussion of the contract immeasurably. The few references to the content of the contract used by the Commission are taken directly from the parties' pleadings and not the contract itself. However, these references have been verified using the contract.

types of calls Complainants have documented in this case.[47] T-Netix was responsible for installing the platform, adjusting the call restriction settings, formatting the records of the inmate calls, and providing on-site administrative support.[48]

37 A typical call from the correctional facilities interacting with T-Netix's P-III platform would have progressed as follows:

1. The inmate lifts the handset and dials the desired "0+" destination number and, if required, a personal identification number.[49]
2. The platform screens the number against a list of prohibited numbers.[50]
3. For a valid call, the platform prompts the caller to record his name.[51]
4. The platform will seize a dedicated outbound trunk and, after receiving [a] dial tone, will outpulse[52] the destination number as a 1+ call.[53]
5. The LEC end office switch will then route the call to either an interexchange carrier (IXC) switch or to a LEC's switch, depending on the jurisdictional nature of the call and which carrier is the designated telecommunications provider for the type of call being made.[54]
6. If the called party answers the telephone, the platform will announce that they have a call from an inmate and then play the inmate's recording.[55]

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[47] *Id.*

[48] *Id.* Exhibit A-19HC, ¶ 12a-e.

[49] Exhibit A-19HC, ¶ 18(a) and (b) and Exhibit A-20HC, ¶ 14.

[50] Exhibit A-20HC, ¶ 14 and Exhibit A-19HC, ¶ 18(c).

[51] Exhibit A-20HC, ¶ 14 and Exhibit A-19HC, ¶ 18(d). T-Netix explains that, if the call is prohibited, the platform will play a rejection message and return simulated dial tone to allow for another attempt. *Id.*

[52] Outpulsing is the process of transmitting address information over a trunk from one switching center to another. BLACK'S LAW DICTIONARY 583, (19th ed. 2003).

[53] Exhibit A-20HC, ¶ 14 and Exhibit A-19HC, ¶18(e).

[54] Exhibit A-20HC, ¶ 14 and Exhibit A-19HC, ¶ 18(f).

[55] Exhibit A-20HC, ¶ 14 and Exhibit A-19HC, ¶ 18(g).

7. The platform then gives the recipient the option of accepting the call or rejecting the call.[56]
8. While this interaction is proceeding, the platform does not make a connection for the audio path between the inmate and the called party.[57]
9. If the recipient accepts the call, the platform will complete the audio path and the call proceeds, as would a normal call.[58]
10. The platform performs multiple fraud detection tests throughout the duration of the call.[59]
11. When the call has ended, the platform will record the call details, including the date, time, originating phone number, terminating phone number, length of call and distance of call. Call detail records for each call are periodically downloaded from the platform to a centralized T-Netix data center where it is formatted and sent to the LEC or IXC that owns the traffic.[60]

38 T-Netix provided support for the platform including: installation and removal of the call control platforms, performance of diagnostic checks and housekeeping functions of the systems; implementation of revisions to the call restrictions; formatting call records for the service providers for billing purposes; and provision of on-site personnel to administer the equipment.[61]

39 In 1997, AT&T and the DOC agreed to amend their original contract (Amendment No. 3) to delete CenturyTel as a subcontractor and include T-Netix as a station provider.[62] Amendment No. 3 also terminated CenturyTel's subcontract in its entirety.[63]

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[56] *Id.*

[57] *Id.*

[58] *Id.* and Exhibit A-19HC, ¶ 18(h).

[59] Exhibit A-19HC, ¶ 18(i).

[60] Exhibit A-20HC, ¶ 14 and Exhibit A-19HC, ¶ 18(j) and (k).

[61] Exhibit T-25, ¶ 13.

[62] Exhibit A-8, Amendment No. 3.

III. REFERRAL QUESTIONS

40 While the Superior Court referred two questions to the Commission, the Motions themselves only address the first question, *i.e.,* whether AT&T or T-Netix was the OSP. The second referral question, whether either AT&T or T-Netix violated the Commission's OSP rate disclosure regulations, is not addressed in this order. The parties did not raise this issue in their pleadings and did not present the Commission with facts upon which it could make a determination regarding this issue. Following the review period for this initial order, a prehearing conference will be scheduled to determine how best to address this next phase of the referral.

A. DID AT&T OR T-NETIX PROVIDE THE CONNECTION BETWEEN THE CALL AGGREGATOR LOCATIONS AND LOCAL OR LONG-DISTANCE SERVICE PROVIDERS AND THUS SERVE AS THE OSP?

1. AT&T's Arguments

41 AT&T asserts that it was not the OSP, as defined by the Commission's rule, for any of the calls in question since it did not provide the connection between the call aggregators, *i.e.*, the prisons, and the intrastate long distance or local service providers. As a result, AT&T contends that it should not be held liable for any failure to disclose rates.[64]

42 AT&T notes that the DOC contract did not anticipate that AT&T would provide the connection of inmate telephone calls from the call aggregator to its point of presence (POP).[65] According to AT&T, the LEC contracts required the LECs to make operator announcements " ... for all personal calls made from Inmate Public Telephones that the call is coming from a prison inmate and that it will be recorded and may be

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[63] *Id.*

[64] Exhibit A-1HC., ¶ 5.

[65] *Id.*, ¶ 10.

monitored and/or intercepted."[66] AT&T asserts that the LECs hired T-Netix to "connect calls from the prisons at issue to local or long-distance service providers and provide the operator services for such calls."[67] AT&T claims that T-Netix provided these services to the LECs through its P-III Premise platform.[68] However, AT&T admits that the assertion that the LECs hired T-Netix to provide operator services is based solely on the statement of T-Netix employees and agents who testified during discovery to a business relationship between T-Netix and the LECs.[69]

43 AT&T asserts that T-Netix was the OSP, through the software platform that provided the operator services.[70] In fact, AT&T argues that Complainants have already admitted that T-Netix was the OSP that provided operator services for the calls in question.[71] AT&T relies on the statement of T-Netix's employee, J.R. Roth, who stated that "[a]s the OSP we verbally advise the consumer how to receive a rate quote."[72] Further, T-Netix petitioned the FCC for a waiver of its obligation to announce actual rates to consumers because T-Netix alleged that it did not have the technical capabilities to do so.[73] AT&T claims that, in its petition, T-Netix admitted that it served access lines and was the "sole service provider in ... these facilities."[74]

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[66] Exhibit A-9, ¶ 3(g), Exhibit A-10, ¶ 3(g), and Exhibit A-11, ¶ 4(g).

[67] Exhibit A-1HC, ¶ 15. AT&T's Response to Bench Request No. 5.

[68] *Id.*

[69] AT&T's Response to Bench Request No. 5, ¶ 2. AT&T states that it does not possess any contracts in which T-Netix agreed to provide operator services on behalf of the LECs. *Id.* According to AT&T, the LECs acknowledged that they were required under contract to connect the calls at the facilities and provide operator services when they sought waivers of the Commission's rate disclosure regulation. *Exhibit A-1HC, ¶ 26.* By requesting waivers, AT&T argues that the LECs were recognizing that they or their agent, T-Netix, were the OSP at the prisons. *Id.*

[70] Exhibit A-1HC, ¶ 23.

[71] Exhibit A-45HC, ¶ 4. AT&T states that T-Netix's Opposition is largely duplicative of T-Netix's own Amended Motion which AT&T claims it responded to at length in AT&T's Opposition. As a result, AT&T asserts that it has incorporated by reference its Opposition and will only address any newly raised arguments found in T-Netix's Opposition. *Id.* n.1.

[72] Exhibit A-22HC, ¶ 40, citing Exhibit A-40.

[73] Exhibit A-22HC, ¶ 42, citing Exhibit A-42, ¶¶ 1, 5-8.

44 AT&T argues that T-Netix's distinction between the Commission's definition of 'operator services' and what T-Netix labels as 'operator functionality' is a *non sequitur*.[75] AT&T contends that T-Netix is attempting to divert attention from the Commission's regulatory definition of operator services and instead define operator services as the provision of switching, routing, access, and transport services.[76] AT&T argues that the Commission's definition of an OSP does not include the provision of switching, routing, access, or transport services, and T-Netix has not explained how these are related to the definition.[77]

45 AT&T asserts that it is critical to establishing the identity of the OSP to determine who provided the operator services, especially since the Commission's definition of an OSP included the term "operator services" and defined it.[78] AT&T maintains that in doing so, the Commission recognized that an OSP is a provider of operator services.[79] AT&T argues that T-Netix's witness, Alan Schott, testified that the services T-Netix provided had historically been performed by a live operator.[80] T-Netix's P-III Premise platform replaced live operators by performing the services itself.[81]

46 In addition to performing the operator services, AT&T maintains that T-Netix also provided the connections of the calls to the local or long-distance service providers. According to AT&T, the Commission's definition of an OSP does not look at every

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[74] *Id.* citing Exhibit A-42, ¶ 8.

[75] Exhibit A-22HC, n.3.

[76] *Id.* ¶ 14.

[77] *Id.*

[78] Exhibit A-22HC, ¶ 13.

[79] *Id.*

[80] Exhibit A-22HC, ¶ 12, citing to Exhibit A-19HC, ¶¶ 5 and 8.

[81] *Id.*

connection made during the path of a telephone call.[82] The only relevant connection, AT&T surmises, is the initial connection that allowed the call to move from the call aggregator to either the local or long-distance service provider.[83] AT&T cites to Complainants' witness, Kenneth Wilson, who detailed the path an inmate-initiated collect call would take.[84] Mr. Wilson specifically stated that "[f]or a valid call, the platform will seize an outbound trunk, and after receiving dial tone will outpulse the destination number as a 1+ call."[85]

47 AT&T asserts that T-Netix's witness, Robert Rae, testified that the company's platform acted as a gatekeeper which allowed calls to go through only if certain criteria were fulfilled.[86] Mr. Wilson stated that "[i]f the [called party] accepts the call, the [T-Netix] platform will complete the audio path and the call proceeds as would a normal call."[87] Defining the term "connection" as "how a call routes through the network, the various pieces of equipment and trunks or lines or links in a call,"[88] Mr. Wilson associated connection with completion of the call "... [with] the connection [being] made when the call is complete from end to end."[89]

48 T-Netix acknowledged, according to AT&T, that it connected all of the calls from the correctional facilities to the local or long-distance carriers through the P-III platform.[90] In fact, AT&T cites to the testimony of Scott Passe, T-Netix's witness, who stated that the P-III platform was "the interface between the inmate and the ...

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[82] Exhibit A-22HC, ¶ 17.

[83] *Id.*

[84] Exhibit A-1HC, ¶ 23 (citing to Exhibit A-20HC, ¶ 14.).

[85] Exhibit A-20HC, ¶ 14.

[86] Exhibit A-22HC, ¶ 8, citing to Exhibit A-24HC, 224:10-24.

[87] Exhibit A-20HC, ¶ 14.

[88] Exhibit C-9, at 42:10-12.

[89] *Id.* at 42:15-19.

[90] Exhibit A-22HC, ¶ 8.

[public telephone switched network]."[91] Further, AT&T points to T-Netix's data request response that "T-Netix equipment made a connection to the access line provider's facilities at the network interface device."[92]

49 AT&T disagrees with T-Netix's contention that the OSP must be a common carrier, stating that T-Netix's argument is based on the federal definition of an OSP, not the Commission's.[93] According to AT&T, T-Netix mistakenly assumes that, since the Commission stated in an order that it was "adopt[ing] the FCC's verbal disclosure requirement on an intra-state basis" that the Commission was also adopting the FCC's OSP definition.[94] AT&T argues that, had the Commission wanted to limit OSPs to common carriers, it would have.[95]

50 The Commission's order indicating that it adopted the federal verbal rate disclosure requirement does not have any impact upon the definition of an OSP.[96] AT&T asserts that the Commission's adoption of a verbal rate disclosure based on the FCC's requirement had no bearing on whom the Commission intended to perform that requirement.[97] AT&T cites to a Washington Supreme Court case in support of this assertion which mandated that "a provision of [a] federal statute cannot be grafted onto [a] state statute where the Legislature saw fit not to include such provision."[98]

51 AT&T vigorously disagrees with Complainants' attempts to hold AT&T responsible for T-Netix's failure to provide rate disclosures to consumers. Complainants contend

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[91] *Id.* citing to Exhibit A-23, at 97:8-24.

[92] *Id.* ¶ 10, quoting Exhibit A-26.

[93] Exhibit A-22HC, ¶ 22.

[94] *Id.* ¶ 24.

[95] *Id.* ¶ 23.

[96] *Id.* ¶ 24.

[97] *Id.*

[98] *Id.* quoting *Nucleonics Alliance v. Wash. Public Power Supply System*, 101 Wash.2d 24, 34, 677 P.2d 108, 113 (1984).

that RCW 80.36.520 imposes liability for failure to disclose rates upon any entity that merely contracts with the OSP. Complainants have cited to RCW 80.36.520 which provides:

> The [Commission] shall by rule require, at a minimum, that any telecommunications company, operating as ***or contracting with*** an [OSP] assure appropriate disclosure to consumers of the provision and the rate, charge or fee of services provided by an [OSP].[99]

Complainants also reference RCW 80.36.530 which states, *inter alia*, that any "violation of RCW 80.36.520 constitutes an unfair or deceptive act in trade or commerce in violation of … the consumer protection act."

52 AT&T contends that the statute only directs the Commission to establish regulations imposing that liability.[100] Further, as AT&T notes, Complainants have made this argument before and failed when the Superior Court held that "the [Washington] legislature intended to create a cause of action … only for violations of the regulations promulgated by the [WUTC] and did not create a cause of action for actions beyond or outside the regulations."[101] AT&T points out that, in the 1991 revision of WAC 480-120-021, the Commission explicitly removed the reference requiring the OSP to be in contractual privity with call aggregators.[102] Thus, AT&T argues that the Superior Court referred limited questions to the Commission and one of those was not whether AT&T is liable simply based on the fact that it contracted with an OSP.[103]

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[99] (Emphasis added).

[100] Exhibit A-45HC, ¶ 11.

[101] Exhibit A-45HC, ¶ 12.

[102] Exhibit A-22HC, ¶ 28.

[103] Exhibit A-45HC, ¶ 13.

53 As a result, AT&T argues that Complainants are collaterally estopped from raising the argument again.[104] The four elements of the doctrine of collateral estoppel, AT&T explains, are:

(1) Identical issues,
(2) A final judgment on the merits,
(3) The party against whom the plea is asserted must have been a party to or in privity with a party to the prior adjudication, and
(4) Application of the doctrine must not work an injustice on the party against whom the doctrine is to be applied.[105]

54 AT&T contends that Complainants argument is identical to the previously litigated issue.[106] The Superior Court's decision to reject Complainants' argument is now final.[107] AT&T argues that Complainants were the plaintiffs in the Superior Court case, and that preventing Complainants from re-litigating their argument will not work an injustice since Complainants were given a "full and fair hearing on the issues."[108]

55 In addition, AT&T contends that a T-Netix witness, Nancy Lee, stated that T-Netix's acquisition of Gateway Technologies, Inc. (Gateway) in 1999 was the acquisition of a T-Netix competitor.[109] According to AT&T, Gateway was certified as an OSP in the state of Washington, and Gateway acknowledged providing operator services in

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[104] *Id.* ¶ 15.

[105] *Id.* citing to *Malland v. State, Dept. of Retirement Systems*, 103 Wash. 2d 484, 489, 694 P.2d 16 (1985) (en banc) and *Shoemaker v. City of Bremerton*, 109 Wash. 2d 504, 507, 745 P.2d 858 (1987) (en banc).

[106] *Id.* ¶ 16.

[107] *Id.*

[108] *Id.* AT&T posits that allowing Complainants to relitigate this argument when the Superior Court has already rejected it would violate the Fourteenth Amendment of the United States Constitution. *Id*, ¶ 17. The Fourteenth Amendment, AT&T argues, prevents entities from being punished for that which they had no knowledge was prohibited. *Id.* This, according to AT&T, violates the company's due process.

[109] Exhibit A-22HC., ¶ 41 and Exhibit A-41, ¶ 3.

Washington.[110] From these statements, combined with T-Netix's receipt of Gateway's OSP certificate, AT&T argues that T-Netix acted as an OSP at the correctional facilities.[111]

56 Finally, AT&T notes that from 1998 to 2003, WAC 480-120-141(5)(a) required that the OSP provide necessary call detail information to the billing company for billing purposes.[112] AT&T suggests that this regulation would have been unnecessary if the call provider was the OSP as well.[113]

2. Netix's Arguments

57 T-Netix requests that the Commission find that it was not an OSP for any of the correctional facilities involved and was not bound by the Commission's rate disclosure regulation. In its original Motion, T-Netix claimed that the LECs acted as the OSP, and that it only acted as an equipment provider, supplying "customized computer-based telephone control cards."[114] As proof of the LECs' responsibilities, T-Netix points to the fact that all three LECs, Verizon, Qwest, and CenturyTel, obtained exemptions and waivers from the Commission's rate disclosure requirements.[115] T-Netix indicates that it has been providing "a proprietary platform that could be programmed to perform [the operator services] automatically" to inmate OSPs since the late 1980s.[116] According to T-Netix, it sold this platform to AT&T, and the company only operated the platform at the prisons on behalf of AT&T.[117]

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[110] *Id.*

[111] *Id.*

[112] Exhibit A-22HC, ¶ 46.

[113] *Id.*

[114] Exhibit T-1HC, ¶¶ 2, 4. In its Reply, T-Netix clarifies that the LECs were the OSP for local calls which they switched onto their own facilities and AT&T was the OSP for long-distance calls since it switched the calls at its POP to its own facilities. Exhibit T-29, ¶ 12.

[115] Exhibit T-1HC, ¶ 3.

[116] *Id.* ¶ 8.

[117] Exhibit T-13, ¶ 3.

58 T-Netix disagrees with Mr. Wilson's definition of an OSP as based on two criteria: 1) which entity performed the operator services functions and 2) which entity established an end-to-end connection.[118] With regard to the operator services prong, T-Netix argues that this examination is inappropriate because the regulation "applies to operator service providers, not operator functionality providers,"[119] and the determination of which entity provided operator services does not assist the Commission in establishing which entity actually provided the connection discussed in the regulation.[120]

59 T-Netix has raised the issue of the admissibility of Mr. Wilson's testimony and argues that his testimony is irrelevant and immaterial. T-Netix has not specifically formulated its request that the Commission exclude his testimony in a motion to strike.[121] T-Netix posits that, if the Commission finds that Mr. Wilson's opinions are admissible, then the Commission should refuse to grant AT&T's Amended Motion since Mr. Rae's testimony directly contradicts Mr. Wilson's and raises a genuine issue of material fact.[122]

60 With regard to the Commission's definition of an OSP, T-Netix argues that a connection to long distance services is established, as corroborated by AT&T's witness, Mark Pollman, "when the LEC delivered the call to AT&T, via intrastate switched access services ordered by AT&T from the LEC as a carrier, at AT&T's POP."[123] Therefore, T-Netix posits that the Commission's query should really be

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[118] Exhibit T-25., ¶ 18. T-Netix claims that this would mean that there is no OSP for incomplete or busy telephone calls. *Id.*

[119] *Id.* ¶ 18.

[120] *Id.*

[121] Exhibit T-25 , ¶¶ 32-38.

[122] *Id.* ¶ 38.

[123] *Id.* ¶ 19, citing to Exhibit T-16, Tr. 57:1-22, 60:11-61:7.

whether the LEC, connecting to AT&T's switched access services, or AT&T, connecting to its own long-distance network, provided the necessary connection.[124]

61 To further bolster its contention that it was never an OSP for the calls in question, T-Netix points to language in Amendment No. 3 to the original DOC contract which states that the company would act as a station provider.[125] Since a "station" has been defined by the Commission as "a telephone instrument installed for the use of a subscriber to provide toll and exchange service,"[126] T-Netix concludes that its contractual obligation was simply to provide inmate phones.[127] This argument, according to T-Netix, comports with the language of the contract the company entered into with AT&T in 1997.[128] The contract is silent on the question of which entity had the obligation to fulfill the rate disclosure requirement.[129] The 2001 amendment[130] to the 1997 AT&T/T-Netix contract specifically mentions for the first time "that T-Netix was obligated to assist AT&T with rate disclosures."[131]

62 T-Netix denies having any direct relationship to the DOC, the calling parties, or the call recipients, and states that it maintained a 1:1 ratio between station lines and trunks to the LEC such that the company was acting only as a gatekeeper for approval of the calls.[132]

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[124] *Id.*

[125] Exhibit T-1HC, ¶ 15.

[126] WAC 480-120-021.

[127] Exhibit T-1HC, ¶ 16.

[128] *Id.* ¶ 17.

[129] *Id.* ¶ 18.

[130] *Id.* Exhibit T-6C.

[131] *Id.* ¶¶ 19-20. T-Netix points out that it was only obligated to provide assistance to AT&T with the rate disclosures for interstate telephone calls. *Id.*

[132] Exhibit T-25, ¶¶ 14 and 15.

63 T-Netix concedes that the Commission's OSP regulation does not specifically define the term "connection" in the regulation.[133] Yet, T-Netix notes that AT&T provided the switching, routing, access, and transport services for intrastate interLATA inmate collect calls.[134] Robert Rae, T-Netix's witness, maintains that collect calls from the correctional facilities in question were connected to local and long-distance services by the LEC or AT&T, respectively.[135]

64 T-Netix contends that the Commission's definition of an OSP was never intended to implicate an entity that provides an end-to-end connection.[136] T-Netix admits that the platform was connected to inmate telephones over a separate plain old telephone serve (POTS) line to the central office serving the LEC.[137] However, T-Netix argues that the connection that an OSP provides has to occur prior to the call being answered since unanswered calls and "busy" phone calls have not technically been completed but they have been connected to an intrastate or interstate long-distance or local service provider.[138] The regulation, insists T-Netix, could have conditioned the OSP designation on call completion, but it did not.[139]

65 T-Netix proposes that, since the Commission's rate disclosure regulation is based on the FCC's own verbal rate disclosure requirement, the correctional facilities in question cannot be call aggregators.[140] The company argues that the FCC ruled in 1991 that its regulations did not classify correctional facilities as call aggregators, and

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[133] Exhibit T-25, ¶ 17.

[134] *Id.*

[135] *Id.* citing to Exhibit T-17, ¶ 8 in which Mr. Rae references Alan Schott's Supplement Affidavit, Exhibit A-19HC, which Mr. Rae adopted.

[136] Exhibit T-29, ¶ 6.

[137] *Id.* ¶ 12.

[138] *Id.* ¶ 7.

[139] *Id.* ¶ 9.

[140] Exhibit T-13, ¶ 27.

the agency later adopted a separate rule to correct this deficiency.[141] The Commission, T-Netix notes, did not adopt a separate regulation bringing these institutions under the Commission's definition, as the FCC had.[142] T-Netix asserts, therefore, that calls placed by inmates at correctional facilities are not covered by the Commission's OSP regulations and did not require verbal rate disclosures.[143] T-Netix argues that Complainants' assertion that the FCC did not forestall the state commissions from adopting greater regulations for OSPs is irrelevant.[144] In addition, T-Netix posits that the Commission has already stated that the definition of the OSP is intended to closely reflect the federal definition and even provided a point by point comparison of the two regulations.[145]

66 T-Netix argues that, contrary to AT&T's assertion, the Commission's regulation did not provide that the 'connection' in the OSP definition referred both to connecting long-distance service and connecting to the public switched telephone network (PSTN).[146]

67 T-Netix stresses that the objective of the Commission's OSP regulation has been to shield the consumer from excessive charges by carriers for calls from aggregator's payphones.[147] According to T-Netix, the rationale was that carriers providing long distance services from aggregator locations would institute high fees because of their preferred contractual status.[148] As a result, T-Netix posits, the Commission adopted regulations requiring that the OSP insure that the call aggregator posted a notice stating that: the public phone rates may be higher than normal, which OSP was

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[141] *Id.*

[142] *Id.*

[143] *Id.*

[144] Exhibit T-29, ¶ 44.

[145] Exhibit T-13, n.9.

[146] Exhibit T-29, ¶ 13.

[147] Exhibit T-25, ¶ 21.

[148] *Id.*

responsible for the call, and disclosing that, *inter alia*, the caller may access other carriers from the public phones.[149] The regulations also required that the OSP brand itself as such at the beginning of the telephone call and provide a rate quote for the call upon request.[150]

68 T-Netix asserts that the regulations themselves require that an OSP must be a common carrier.[151] The Commission's regulation implementing the verbal rate quote in 1999 was based on the FCC's rate disclosure requirement, and the FCC specifically defined an OSP as a common carrier.[152] T-Netix also argues that the OSP serving end user customers is the entity that the Commission required to provide verbal rate quotes.[153] T-Netix cites to the Commission's adoption order, Order R- 452, which provides that OSPs are to resolve service problems directly with the interexchange carrier or other party responsible for resolving blockage problems.[154]

69 To bolster its argument that OSPs must be common carriers, T-Netix points out that both the 1991 and 1999 versions of WAC 480-120-021 refer to "operator services" as any intrastate telecommunications service.[155] The 1991 and 1999 versions of WAC 480-120-141 mandate that "telecommunications companies" providing operator

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[149] *Id.* ¶ 22, referencing Exhibit A-5.

[150] *Id.*

[151] *Id*, ¶ 20.

[152] *Id.* ¶ 23. T-Netix quotes the federal statute as defining a "provider of operator services" to be "any common carrier that provides operator services or any other person determined by the Commission to be providing operator services." *Id.*, citing to 47 U.S.C. § 226(a)(9).

[153] Exhibit T-25, ¶ 24.

[154] *Id.* ¶ 25, citing to Exhibit A-6.

[155] Exhibit T-29, ¶ 15. WAC 480-120-021 specifically defines "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, or 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."

services must comply with this and all other Commission telecommunications regulations.[156] T-Netix maintains that the regulations purposely designated OSPs as telecommunications companies, and thus, common carriers.[157] According to T-Netix, it did not provide any transmission, switching, or access services, and therefore, did not act as a common carrier.[158] The company argues that AT&T and the LECs served as OSPs under the Commission's regulations.[159]

70 T-Netix contends that, while it did agree to be a station provider at correctional facilities that CenturyTel had contracted to serve, none of those facilities originated any of the calls at issue in this matter.[160] T-Netix asserts that the only CenturyTel facility at issue in this matter is the Clallam Bay Corrections Center, and Complainants only allege that they received intraLATA calls from this facility.[161] T-Netix points out that neither AT&T nor Complainants have asserted that T-Netix provided intraLATA calling services at the Clallam Bay facility.[162]

71 T-Netix notes that the OSP definition also contains an explanation of the term "operator services."[163] The term "operator services" was defined in WAC 480-120-021 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,

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[156] *Id.*

[157] *Id.* ¶¶ 17-19.

[158] *Id.* ¶ 28.

[159] *Id.*

[160] *Id.* ¶ 29.

[161] *Id.*

[162] *Id.*

[163] Exhibit T-1HC, ¶ 21.

> or (2) completion through an access code use by the consumer with billing to an account previously established by the consumer with the carrier.[164]

72 T-Netix maintains that it did not arrange for billing or completion of an intrastate telephone call.[165] AT&T and the other LECs each billed for calls that they individually carried.[166] T-Netix posits that its only role in the billing process was to provide call detail records to the billing entity.[167] For that matter, T-Netix claims that call completion was performed through the routing of calls.[168] According to T-Netix, all signaling functions required to complete the call were enabled by the LEC switch.[169]

73 In a letter to AT&T from T-Netix, the company explains that it would "provision the local traffic on AT&T's behalf."[170] That being said, T-Netix opines that this obligation "required **obtaining the local phone line** from the phone to the LEC switch and billing end users for local calls."[171] Since neither of the Complainants received a call from any of the correctional facilities affected by the March 1998 letter to AT&T, T-Netix argues that it could not have been acting as an OSP for the calls received by the Complainants.[172]

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[164] *Id.*

[165] *Id.* ¶ 25.

[166] *Id.*

[167] *Id.* ¶ 26.

[168] *Id.* ¶¶ 29 and 31.

[169] *Id.* ¶ 31.

[170] Exhibit T-1HC, ¶ 22 and Exhibit A-12.

[171]. *Id.* (Emphasis in original).

[172] *Id.*

74 T-Netix argues that AT&T's participation in interLATA collect calls reflects the company's understanding of itself as the OSP.[173] The interLATA collect calls in question were assessed AT&T service rates, were branded as AT&T telephone calls,[174] and were billed on behalf of AT&T by T-Netix.[175] T-Netix asserts that it would be absurd to have the telephone calls branded as AT&T's but find that T-Netix was the ultimate OSP since the Commission's regulations were designed to clarify for the consumer which party was actually providing the services and whose rates would be applied.[176] T-Netix maintains that there can only be one OSP for any given payphone call.[177]

75 According to T-Netix, the FCC rule for which it sought a waiver dealt directly with inmate calling services, not the general OSP rule.[178] T-Netix explains that the email from Mr. Roth which AT&T cites to was taken out of context.[179] T-Netix asserts that Mr. Roth was merely confirming that Verizon was the OSP for prisons located in its territory and that T-Netix, as the equipment supplier for Verizon, would enable Verizon to comply with its OSP regulatory responsibilities.[180]

76 T-Netix contends that there is no evidence that Mr. Roth qualifies as a "speaking agent" for T-Netix and thus his statements would not be admissible under Washington Rule of Evidence (WRE) 801(d)(2).[181] According to T-Netix, whether a declarant is a

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[173] Exhibit T-25, ¶ 28.

[174] T-Netix acknowledges that it performed this branding function on behalf of AT&T. *Id.* ¶ 29.

[175] *Id.* T-Netix admits that it billed the recipients on behalf of AT&T. *Id.*

[176] *Id.* ¶ 30.

[177] *Id.* ¶ 31.

[178] Exhibit T-29, ¶ 63.

[179] *Id.* ¶ 66.

[180] *Id.*

[181] *Id.* n.31.

speaking agent for purposes of WRE 801(d)(2) is a question of preliminary fact governed by WRE 104(a).[182]

77 T-Netix acknowledges that it did petition the Commission for authority to acquire Gateway's OSP certificate, but the company argues that Gateway was not a party to any of the contracts at issue in this case.[183] T-Netix originally petitioned for transfer of the certificate on January 9, 2001, and the Commission granted it on January 25, 2001.[184] Not only was this transfer subsequent to any of the telephone calls received by the Complainants, T-Netix asserts that Gateway never provided equipment to any of the four correctional facilities at issue in this case.[185]

78 T-Netix asserts that Complainants' witness, Mr. Wilson, draws conclusions that are irrelevant, since they are not based upon the "connection" standard for determining the OSP and use a theory of the term "connection" that would make the OSP regulations useless.[186] Specifically, T-Netix contends that Mr. Wilson based his testimony upon an incorrect legal standard, namely that connection occurs at the point when the call is terminated to the call recipient and an end-to-end connection is established.[187] T-Netix quotes WRE 702 as mandating that "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."[188] According to T-Netix, Mr. Wilson's testimony cannot be of assistance to the Commission.[189] In addition, T-Netix argues that the Commission cannot rely upon Mr. Wilson's testimony because he provides a legal opinion in declaring that

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[182] *Id. See Condon Bros. v. Simpson Timber Co.*, 92 Wash.App. 275, 285, 966 P.2d 355 (1998).

[183] Exhibit T-1HC, ¶¶ 32-33.

[184] *Id.* ¶ 34.

[185] *Id.* ¶ 35.

[186] Exhibit T-25, ¶ 32.

[187] *Id.* ¶ 34-35.

[188] *Id.* ¶ 33.

[189] *Id.*

T-Netix, not AT&T, was the OSP.[190] According to the company, WRE 704 prohibits reliance upon expert legal opinions or opinions that address mixed questions of facts and law.[191]

79 T-Netix quotes AT&T as counseling the Commission in a prior rulemaking to amend WAC 480-120-021 in 1988, such that, "if the Commission is concerned that a facilities-based carrier such as AT&T or [Qwest] would attempt to charge a unique rate to telephone customers of a particular aggregator – beyond the rate offered to the general pubic [sic] – AT&T suggests that the definition now in WAC 480-12-021 [sic] and WAC 480-120-141 remain."[192] T-Netix points out that the Commission did as AT&T proposed and declined to revise its regulatory definition.[193]

3. Complainants' Arguments

80 According to Complainants, T-Netix not only provisioned equipment to the correctional facilities but also engaged in the regulated activity of providing operator services.[194] T-Netix, asserts Complainants, performed the duties of an OSP and received remuneration for its performance.[195] Complainants allege that T-Netix controlled the P-III platform which provided operator services such as identifying the corrections facility and the name of the inmate, branding the call, and detecting three-way calls.[196] Though T-Netix argues that Amendment No. 3 only designated the company as a "station provider," Complainants point out that T-Netix is obligated under Amendment No. 3 to pay a commission to the DOC for local calls for which it

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[190] *Id.* ¶ 37.

[191] *Id.*

[192] Exhibit T-13, ¶ 22 and Exhibit T-21 at 4.

[193] *Id.*

[194] Exhibit C-1C, ¶ 41.

[195] *Id.*

[196] *Id.* ¶ 19, 22 and Exhibit C-6C.

would not have to if it were simply an equipment supplier.[197] The company engaged in a regulated activity and should have to abide by the rules of doing so.[198]

81 With regard to T-Netix's claim that the rate disclosure waivers the LECs received demonstrate that these companies were the OSPs, Complainants declare that there is no evidence that the LECs performed OSP duties at the facilities in question.[199] Instead, Complainants contend that it was T-Netix's platform that was present and operating at each of these locations and providing operator services.[200]

82 Complainants point out that AT&T understood that it was the OSP when it sought a waiver of its own for some of the OSP rules.[201] Additionally, they claim that AT&T attempted to comply with the Commission's rate disclosure requirements in 2000 after it was sued by the Complainants.[202] As is evidenced by a letter dated August 25, 2000, AT&T and T-Netix engaged in negotiations to implement rate disclosures for intrastate inmate telephone calls in the state of Washington.[203] This attempt at compliance with the rate disclosure regulations, argues Complainants, shows that AT&T knew it was also the OSP and that it had a responsibility to comply with the OSP regulations along with T-Netix.[204] Complainants allege that T-Netix was AT&T's subcontractor, and AT&T had ultimate control over T-Netix to ensure that the rate quotes were provided.[205]

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[197] *Id.* ¶ 53 and Exhibit A-8, Amendment No. 3.

[198] *Id.* ¶ 41.

[199] *Id.* ¶ 57.

[200] *Id.* ¶ 57.

[201] *Id.* ¶ 21. See, Exhibit C-5.

[202] *Id.* ¶ 28.

[203] Exhibit C-1C, ¶ 25.

[204] *Id.* ¶ 28.

[205] *Id.*

83 With regard to AT&T's argument that it is not liable under RCW 80.36.520 for the failures of T-Netix to provide rate disclosures, Complainants argue that AT&T has failed to demonstrate that the Commission intended to exclude companies that contract their OSP responsibilities from compliance with the OSP regulations.[206]

84 Complainants maintain that T-Netix provided the connection to intrastate telecommunications services from call aggregator locations.[207] In this instance, Complainants note that the Court of Appeals has found that "[w]ords of a statute, unless otherwise defined, must be given their usual and ordinary meaning."[208] The logical meaning of the word 'connection' is when the call is completed end-to-end.[209]

85 Complainants' witness, Mr. Wilson, asserts that, traditionally, when an operator receives a collect call request, the operator would pull another line to contact the called party for verification that this party will accept the charges for the call.[210] Once the called party has agreed to accept the charges, the operator connected the calling party and the recipient by "plugging them together, completing the call."[211] Complainants maintain that this is the "connection" referred to in the statute and the Commission's regulation.[212]

86 Complainants contend that T-Netix's interpretation of "connection" would mean that the call is connected even before the called party listens to the voice prompt asking if they will accept the call or possibly before the call transmission reaches the called party.[213] Complainants assert that "[t]he T-Netix platform is the gateway for the call

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[206] *Id.* ¶ 38.

[207] *Id.* ¶ 41.

[208] *Id.* ¶ 44, quoting *East v. King County*, 22 Wash.App. 247, 253, 589 P.2d 805 (1978).

[209] *Id.*

[210] *Id.* ¶ 46 and Exhibit C-2HC, ¶ 9.

[211] *Id.*

[212] *Id.*

[213] *Id.* ¶ 48.

going anywhere in the system" and if "the call placed by the inmate [does not pass] the initial security checks on the T-Netix platform, the call doesn't get beyond the prison walls."[214] Thus, Complainants contend that it is this platform that creates the connection.[215]

87 Complainants disagree with T-Netix's assertion that prisons cannot be considered call aggregators under the Commission's regulations. Complainants argue that "[t]here has never been any doubt that prisons are among the places covered by the rate disclosure statute and the Commission's rate disclosure rules."[216] According to Complainants, the Commission specifically included "prisons" in its 1989 regulation, WAC 480-120-141(2)(b), when defining OSPs as those carriers with which hotels, motels, hospitals, prisons, campuses, et cetera., contract to provide operator services to its customers.[217] The Commission's 1991 modification of the regulation stated in its introductory remarks that "[p]rison service waivers can be accomplished on a case-by-case basis."[218] For that matter, T-Netix was granted a waiver of some of its OSP responsibilities in 1993 including the requirement to include informational stickers on its inmate payphones stating how to contact the operator.[219]

88 In addition, Complainants argue that while the FCC opined that the term "call aggregator" did not include inmate payphones, the FCC also clarified that "states are not precluded from adopting greater safeguards or more stringent rules regarding OSP services and aggregator practices with regard to intrastate operator services than those that we have adopted herein for interstate services."[220] Contrary to T-Netix's suggestion that the Commission was required to follow the FCC's lead in adopting a separate and specific rule setting out the inclusion of correctional facilities in the rate

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[214] *Id.* ¶ 49.

[215] *Id.*

[216] *Id.* ¶ 7.

[217] *Id.* ¶ 62.

[218] *Id.* ¶ 63.

[219] *Id.* ¶¶ 64-65 and Exhibit C-12.

[220] *Id.* ¶¶ 70-71, citing to Exhibit T-20, ¶ 54.

disclosure requirements, Complainants assert that would have been unnecessary given the Commission's 1989 regulation, adopted before the FCC's determination.[221]

89 ***Decision.*** Only T-Netix has alleged that there is any genuine issue of material fact and that AT&T's Amended Motion should not be granted. Complainants and AT&T did not but instead argue that the T-Netix's Motion and Amended Motion should be denied because the company is not entitled to judgment as a matter of law. However, T-Netix has failed to demonstrate that Complainants' witness, Mr. Wilson, and its own witness, Mr. Rae, have presented a genuine issue of material fact. T-Netix does not cite to any specific examples of the two witnesses disagreeing on any material facts. The selected portions of Mr. Wilson's deposition which we received from T-Netix support the conclusion that Mr. Wilson was attempting to shed light on a question of law, namely the interpretation of one of our regulations and the term "connection" contained therein. T-Netix also points to Mr. Wilson's assertion that an OSP necessarily provides operator services. Again, it is apparent from the context of Mr. Wilson's remarks that he is endeavoring to flesh out a legal definition, not raise contentious facts. Statutory construction is a question of law, not a question of fact.[222] T-Netix's lack of proof as to any genuine issue of material facts leaves us with no choice but to decline to accept T-Netix's argument. We find that no genuine issues of material facts exist, and thus move on to the merits of each party's Motion.

90 In addressing the first part of the Superior Court's referral, namely whether either AT&T or T-Netix were the OSP, we first examine the regulations at issue. During the time frame which Complainants claim to have received operator-assisted inmate telephone calls, WAC 480-120-021, defined an OSP as:

> any corporation, company, partnership, or person other than a local exchange company providing a connection to intrastate or interstate long-distance or to local services from locations of call aggregators. The term 'operator services' in this rule means any intrastate telecommunications service provided to a call aggregator location that

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[221] *Id.* ¶ 74.

[222] *In re Detention of Strand*, 167 Wash.2d 180, 186, 217 P.3d 1159 (2009) (citing to *In re Det. Of Martin,* 163 Wash.2d 501, 506, 182 P.3d 951 (2008).

> 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.[223]

The 1999 version of the regulation eliminated the LEC exemption.[224] As a result, if we find that AT&T was the OSP, we will then ascertain whether or not the company falls within the LEC exemption as AT&T claims.

91 Critical to our analysis is what, specifically, the term "connection" means within the regulatory definition of an OSP. The parties have proposed contradictory interpretations. Therefore, it is imperative that we examine the meaning of the OSP definition and the "connection" requirement.

92 When interpreting the meaning of agency regulations, the courts look no further than the plain language of a facially unambiguous administrative regulation.[225] An agency regulation is unambiguous if it is susceptible to only one reasonable interpretation after considering the entire statutory scheme, including related regulations.[226]

93 The plain meaning of a statutory provision is discerned from the ordinary meaning of the language at issue, the context of the statute in which the provision is found, related provisions, and the statutory scheme as a whole.[227] The courts have found that

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[223] WAC 480-120-021 (1991).

[224] WAC 480-120-021 (1999).

[225] *State, Dept. of Labor & Indus. v. Tyson Foods, Inc.*, 143 Wash.App. 576, 582, 178 P.3d 1070 (2008), citing to *Cockle v. Dept. of Labor & Indus.*, 142 Wash.2d 801, 807, 16 P.3d 583 (2001).

[226] *Tyson Foods, Inc.*, 143 Wash.App. at 582, citing to *Wash. Cedar & Supply Co., Inc. v. Dept. of Labor and Indus.*, 137 Wash.App. 592, 599-600, 154 P.3d 287 (2007) and *Dept. of Labor and Indus. v. Gongyin*, 154 Wash.2d 38, 45, 109 P.3d 816 (2005).

[227] *Det. of Strand*, 167 Wash.2d at 188 (citing to *Udall v. T.D. Escrow Servs., Inc.*, 159 Wash.2d 903, 909, 154 P.3d 882 (2007) (quoting to *Tingey v. Haisch*, 159 Wash.2d 652, 657, 152 P.3d 1020 (2007).

a word should not be read in isolation when attempting to ascertain plain meaning.[228] There is no part of a statute that should be viewed as inoperative or superfluous unless that part is the result of clear error or mistake.[229] Rules of statutory construction are also applicable to the interpretation of agency regulations.[230]

94 T-Netix's interpretation of the term is flawed when the regulation is read in its entirety. First, our definition of an OSP in WAC 480-120-021 never references switching, routing, access, and transporting as services necessary to the classification of an OSP. For that matter, "connection" cannot indicate, under the regulatory definition, every time a call is switched or transported during the journey of a telephone call. A typical telephone call can go through two, three, or more carriers and if the OSP were to be the company that transported or switched the call, there would be several OSPs for one call. We would never be able to determine who the OSP was, and that result obviously cannot be what the regulation intends.

95 In addition, our inclusion of the definition of "operator services" within the definition of an OSP is quite telling. As the case law indicates, both regulatory definitions must be read together.[231] As a result, an OSP is both a "corporation, company, partnership, or person other than a local exchange company providing a connection to intrastate or interstate long-distance or to local services from locations of call aggregators" and the merchant of "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

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[228] *Id.* (citing *State v. Roggenkamp*, 153 Wash.2d 614, 623, 106 P.3d 196 (2005) (quoting *State v. Jackson*, 137 Wash.2d 712, 729, 976 P.2d 1229 (1999)).

[229] *Id.* at 189, (citing to *Klein v. Pyrodyne Corp.*, 117 Wash.2d 1, 13, 810 P.2d 917 (1991)).

[230] *Linville v. State*, 137 Wash.App. 201, 209, 151 P.3d 1073 (2007) (citing *State v. Reier*, 127 Wash.App. 753, 757-58, 112 P.3d 566 (2005).

[231] *Silverstreak, Inc., v. Dep't. of Labor and Indus.*, 159 Wash.2d 868, 884, 154 P.3d 891 (2007), where the Court found that interpretations must "give meaning to every word in a regulation."

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."[232]

96 The P-III Premise platform linked the calling party at the prison to the local or long-distance provider. If the inmate attempted to dial out using a number that was prohibited, it was the platform that prevented that connection to the local or long-distance service from being provided. It was the admitted gatekeeper for calls from the correctional facilities.

97 We find that the P-III platform performed the operator services at the correctional facilities. It validated the telephone numbers the inmates dialed, recorded the call details, and provided automated announcements to the call recipients indicating that they had received a call from a particular inmate. The call flow diagram that T-Netix provided supports our analysis as does Mr. Wilson's description of the collect call's path. An examination of the call path indicates that the P-III platform took the call and, after verifying that the call was valid and not prohibited, out pulsed it as a '1+' call. Based on this analysis, we find that the owner of the P-III platform, having connected the '0+' call to the local or long-distance service provider and outpulsing it as a '1+' call, is the OSP.

98 Even without examining the schematics of an inmate-initiated collect call, the contracts themselves point to the owner of the platform as an OSP. In construing a written contract, the basic principles require that: 1) the intent of the parties controls; 2) the court ascertains the intent from reading the contract as a whole; and 3) a court will not read an ambiguity into a contract that is otherwise clear and unambiguous.[233] Interpretation of an unambiguous contract is a question of law.[234]

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[232] *See,* WAC 480-120-021. T-Netix has drawn a confounding distinction between operator services and operator functions in contending that it did not provide operator services. However, T-Netix fails to coherently distinguish between these two terms and has cited to no precedent for the distinction in the first place. Therefore, whether T-Netix labels them operator services or operator functions, an OSP is, by logic, a provider of operator services as defined under the regulation.

[233] *Mayer v. Pierce County Med. Bureau,* 80 Wash.App. 416, 420, 909 P.2d 1323 (1995) (citing to *Felton v. Menan Starch Co.,* 66 Wash.2d 792, 797, 405 P.2d 585 (1965)).

[234] *Id.* quoting *Absher Constr. Co. v. Kent School District No. 415,* 77 Wash.App. 137, 141, 890 P.2d 1071 (1995).

99 The DOC contract provided that AT&T would provide the equipment and services as required by the DOC's request for proposal. For reasons unknown to the Commission, the DOC contract also mandates that the LECs will provide the operator services at the prisons in question. That being said, it was AT&T, not the LECs, who purchased the P-III Premise call control platform from T-Netix for use at each of the correctional facilities.

100 Amendment No. 2 to the DOC contract, executed in 1995, provided that AT&T would install and operate such call control features through its subcontractor, Tele-Matic Corporation. Tele-Matic was later acquired by T-Netix. Of particular importance, the contract between AT&T and T-Netix, which was executed on June 4, 1997, provides that AT&T bought the platform from T-Netix and took title to it. T-Netix solely provided the technical and training services. AT&T has failed to establish otherwise. In fact, the August 2000 letter from AT&T to T-Netix clearly shows that AT&T had certain responsibility for the implementation of rate quotes using the platform for the Washington State correctional facilities. Therefore, AT&T, through the P-III platform, provided the connection between the call aggregator and long-distance or local service providers.

101 In contrast to AT&T's assertion that the LECs had retained T-Netix to provide operator services at the correctional facilities in question, the company has provided us with no evidence that this is the case. In fact, the only contract we have clearly demonstrates that it was AT&T who purchased title to the P-III platform.

102 In addition, the legislature and the Commission's order adopting the OSP rules indicated that the OSP disclosure rules were created, at least in part, to protect the consumer from accepting collect calls without being properly informed as to who was providing the service and at what charge. This is the reason that the regulations required the OSP to ensure that the call aggregator with whom it has contracted posts a notice of how the consumer may obtain rate information. Specifically, the rates over which the Commission expressed concern would have been AT&T's for long-distance service and the LECs' for local service, not T-Netix's. T-Netix did not directly contract with the DOC. Additionally, the rule provided that the OSP must disclose the identity of the OSP providing the service to the consumer. It was AT&T's service that was carrying the call to the call recipient and it was AT&T's

name that was branded during the telephone call. AT&T presented no evidence that T-Netix charged the Complainants for any of the calls they received or that T-Netix provided Complainants with telecommunications services that required branding. To have required T-Netix to announce its own name as the OSP would have been nonsensical and serve only to confuse the consumer.

103 It should be emphasized that call connection is not the same as call completion. There are many connections made throughout the journey that a telephone call takes. Call completion is just one of these. According to the rules, the crucial connection in establishing the OSP is the connection from the correctional facilities to the appropriate LEC service provider or to AT&T. The definition does not require that the OSP complete the call from end-to-end or even provide the connection between the calling party and the call recipient.

104 T-Netix has incorrectly argued that, since our regulations mirror the federal statute[235] and the FCC's regulations,[236] and as the FCC did not include prisons *per se* in the definition of call aggregators until 1998, that prisons are not a part of our definition. While the FCC did find that the federal law, the Telephone Operator Consumer Service Improvement Act (TOCSIA) did not intend for the term "aggregator" to include correctional facilities, T-Netix overlooks the fact that the federal statute and RCW 80.36.520 have several fundamental differences. First, TOCSIA's language defining an aggregator does not include any examples of these entities, whereas RCW 80.36.520 provides a list of aggregators including four enumerated examples as well as the important caveat that these four are not exclusive.

105 Further, TOCSIA contains a much more specialized and limited definition of call aggregators than RCW 80.36.520 or any of our regulations. TOCSIA provides that an aggregator "in the ordinary course of its operations, makes telephones available to the public or to transient users of its premises, for interstate telephone calls using a provider of operator services."[237] When the FCC determined that TOCSIA did not

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[235] Exhibit T-13, ¶ 30. The federal statute is the Telephone Operator Consumer Services Improvement Act of 1990 (TOCSIA), 47 U.S.C. § 226.

[236] *Id.* See, 47 C.F.R. §§ 64.703-708.

[237] 47 U.S.C. § 226(a)(2).

apply to inmate-only phones at correctional facilities, it focused, in particular, on the fact that inmates are not members of "the public" and are not "transient users of [the facility's] premises."[238] RCW 80.36.520 and the associated regulations do not contain such narrowly tailored provisions.[239]

106 The cases cited by T-Netix to advance its theory that our regulation like does not apply to correctional institutions, are inapposite. The decisions in *State v. Bobic* and *State v. Williams* support the proposition that a state statute that is "substantially similar" to a federal statute carries the same construction as the federal law. However, these cases can be distinguished from the instant case. The court in *Bobic* noted that the Washington statute in contention "does not clearly indicate whether the Legislature intended to punish a defendant multiple times for a single conspiracy."[240] The Commission's intent to include prisons within the definition of a call aggregator is clear from our order adopting the OSP regulations in 1991, after the FCC's rules were adopted and its order issued. In that order, the Commission stated that "[p]rison service waivers can be accomplished on a case-by-case basis, so no express provision is required."[241] There is no question that the Commission intended to include correctional facilities in the regulatory scheme.

107 In *Williams*, the Court of Appeals found that the statutory definition of a "security" was substantially identical to the federal definition, and in fact, was "basically derived from the federal act."[242] First, the state statute at issue in *Williams* did not clearly identify whether patent and royalty interests were included within the definition of a "security," and thus the court found it necessary to interpret the statute using legislative history.[243] The Commissions' rule, on the other hand, clearly indicated

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[238] Exhibit T-24, at 2752, fn 30.

[239] T-Netix also points to a letter from the Commission Staff which compares the FCC's regulations with our own. However, as the April 30, 1991, letter clearly points out, "this *draft* is a *staff* document." *Exhibit T-23, at 1.*

[240] *State v. Bobic*, 140 Wash.2d 250, 263, 996 P.2d 610 (2000).

[241] Exhibit A-5, at 107.

[242] *State v. Williams,* 17 Wash.App. 368, 371, 563 P.2d 1270 (1977).

[243] *See, Williams*, 17 Wash.App. at n 1.

that a call aggregator means a "hotel, motel, hospital, *prison*, campus, pay telephone, etc."[244] In addition, the definition of a call aggregator is not "substantially identical" to the FCC's rule. T-Netix admits that the FCC's rules were implemented in 1991, at which time our regulations already stated that OSPs provided services to prisons.[245]

108 While the Commission did adopt the OSP definition to more closely reflect the federal definition, T-Netix has provided no indication that the Commission's call aggregator definition was intended to mirror the FCC's. In fact, the Commission's 1991 call aggregator definition proclaims that these entities "[make] telephones available for intrastate service to the public or to users of its premises, including, but not limited to, hotels, motels, hospitals, campuses, and pay phones."[246] In 1991, the FCC's rule provided that an aggregator is "any person that, in the ordinary course of its operations, makes telephones available to the public or to transient users of its premises, for interstate telephone calls using a provider of operator services."[247] Whereas the federal rule does not set out specific examples of call aggregators, the Commission's rule does.

109 Each of the parties has raised arguments with questionable relevancy to the issues that the Superior Court referred to this Commission. Complainants argue that AT&T sought and was granted a waiver of the OSP rules and therefore must have been an OSP under the Commission's rules. AT&T asserts that T-Netix received a waiver from the FCC's OSP rules and so T-Netix must have been the OSP in question. T-Netix points out that the LECs requested and were given waivers so they must be the OSPs. If the request for a waiver was enough to establish OSP liability at every facility that a company operated, there would be at least three OSPs for each of the calls at issue. Respondents and the LECs may or may not have believed that they were the OSPs responsible for telephone calls placed from correctional facilities around the state. The Commission's orders waiving the OSP regulations do not

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[244] Exhibit A-5, at 112, (Emphasis added). WAC 480-120-141(3).

[245] *See*, Exhibit A-4, at 74, WAC 480-120-141 (1989).

[246] Exhibit A-5, at 109, WAC 480-120-021 (1991) and (1999).

[247] 47 U.S.C. § 226(a)(2).

specify at which correctional facilities the companies were providing OSP services. Further, at least one company, AT&T, has stated that it filed its request in an abundance of caution, uncertain at that point whether or not it would be acting as the OSP under the DOC contract. Even viewing the waivers in a light most favorable to Complainants, they have not presented evidence to indicate that the waiver of AT&T, or for that matter, those of the LECs or T-Netix at the federal level, demonstrates the companies' OSP status. Thus, the waivers establish only that the companies involved were attempting to protect themselves in case they were the OSP. The waivers alone are not demonstrative proof that any of the parties were the OSP.

110 AT&T also raised the irrelevant issue of T-Netix's acquisition of Gateway, a certificated OSP. AT&T argued that one of T-Netix's witnesses, Nancy Lee, claimed that T-Netix was in direct competition with Gateway, an OSP, such that T-Netix must also be an OSP. This, alone, does not demonstrate that T-Netix was an OSP under the Commission's rules. While Ms. Lee may have argued that Gateway and T-Netix were competitors, Ms. Lee does not state that T-Netix provided operator services to the four institutions we are examining. For that matter, T-Netix's acquisition of Gateway's OSP certificate does not indicate, and none of the parties has alleged, that Gateway provided the operator services at the institutions in question. Likewise, AT&T's argument that Mr. Roth, a T-Netix employee, admitted that T-Netix was the OSP proves little except what one employee believes. Our OSP definition is clearly controlling law and does not rely on popular belief in classifying the OSP.

111 T-Netix's arguments against the reliance on Mr. Wilson's testimony and Mr. Roth's e-mail are procedurally inappropriate. Pursuant to WAC 480-07-375(2), these arguments should have been framed as motions to strike in a separate pleading apart from its Opposition. As T-Netix's arguments are procedurally deficient, they are rejected.

112 With regard to AT&T's contention that Complainants are collaterally estopped from asserting its theory of liability based on RCW 80.36.520, the Supreme Court of Washington has noted that there are four elements to the doctrine of collateral estoppel:

1) Identical issues;
2) A final judgment on the merits;
3) The party against whom the plea is asserted must have been a party to or in privity with a party to the prior adjudication; and
4) Application of the doctrine must not work an injustice on the party against whom the doctrine is to be applied.

113 Complainants clearly state in their Opposition that:

> The statute directing compliance with the rate disclosure rules established by the Commission requires that those disclosures be made "by any telecommunications company, operating as ***or contracting with*** an [OSP]. *RCW 80.36.520.* Here, to the extent that AT&T was not the OSP itself, it clearly contracted with T-Netix, who it states was the OSP.[248]

114 In its 2000 decision, the Superior Court determined that the rate disclosure statutes, RCW 80.36.510, .520, .524, and .530, and the Commission's rules do not create a separate cause of action under the WCPA for violations of the statutes.[249] Put another way, the claim against Respondents must stem from the Commission's rules, not from a statute, including one that directs the Commission, not the telecommunications providers, to impose disclosure regulations upon those "contracting with" an OSP.[250] We find that the issue Complainants raise in their Opposition is identical to the issue previously decided by the Superior Court.

115 As to the second prong of the collateral estoppel test, there must have been a final judgment on the merits of the issue. The Court of Appeals[251] and the Supreme

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[248] Exhibit C-1C, ¶ 32. (Emphasis in original).

[249] *Judd v. AT&T*, 116 Wash.App. at 766.

[250] *Id.* and Exhibit C-1C, ¶ 37. This is of particular importance to Complainants since our regulations do not provide for liability of those "contracting with" an OSP.

[251] *See, Judd*, 116 Wash.App. at 763.

Court[252] affirmed the trial court's decision. Thus, the courts have already resolved the Complainants' issue.

116 Complainants were the party in both actions and there is no indication that applying collateral estoppel against the Complainants will work an injustice since they have already had at least three previous opportunities to make the same argument. AT&T has met its burden of proof, and we find that the Complainants are collaterally estopped from raising their argument regarding RCW 80.36.520.

117 In summary, we find that the nonmoving parties have presented no genuine issue of material fact. Further, AT&T, having purchased the P-III Premise software platform from T-Netix on June 4, 1997, the platform which connected the long-distance and local service providers to the call aggregators and provided the operator services to the four correctional facilities, was the OSP from June 4, 1997 on. We find that T-Netix provided service and training for the platform but did not hold title to it. In addition, we find that correctional facilities are included within the regulatory definition of call aggregators, and Complainants are collaterally estopped from relitigating their argument that RCW 80.36.520 imposes liability upon an entity that contracts with an OSP.

B. Was AT&T a LEC for Purposes of the Commission's OSP Definition, and Thus Exempt From the Rate Disclosure Requirement?

118 AT&T claims that it was a LEC from 1996 to the present and was therefore exempt from the OSP disclosure regulations.[253] AT&T argues that the comments to the 1991 rule clearly state the Commission's intention to focus on non-LECs.[254] According to AT&T, it was certified a LEC by the Commission from January 1997 to the present. Thus, AT&T claims that it cannot be held liable for compliance with the OSP disclosure regulations during this time period.[255]

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[252] *See, Judd v. AT&T*, 152 Wash.2d at 204.

[253] Exhibit A-1HC, ¶ 19.

[254] *Id.*

[255] Exhibit A-1HC, ¶ 20, and Exhibit A-12, ¶ 12.

119 Complainants acknowledge that the Commission's rate disclosure rules exempted LECs from the definition of an OSP from 1991 to 1999, when the regulation was revised, and thus the rate quote requirements.[256] Yet, Complainants contend that AT&T was not acting as a LEC during the brief period of time when LECs were exempt from providing inmates with rate disclosures.[257] AT&T's own witness, Ms. Gutierrez, admitted that the company did not provide LEC services at any time under the DOC contract to any of the correctional facilities.[258] As such, Complainants argue that AT&T should not be allowed to now hide behind its LEC certificate to avoid responsibility as an OSP.[259]

120 Complainants maintain that AT&T refers to the LECs separate and apart from itself.[260] In neither its Response to T-Netix's Amended Motion nor its Reply does AT&T counter the Complainants' allegation that it was not functioning as a LEC in these circumstances and should not be permitted to claim the LEC exemption under the Commission's OSP definition.

121 ***Decision.*** We find that the LEC exemption within the OSP definition does not apply to AT&T, a carrier who holds certification as both an interexchange carrier[261] and a LEC,[262] since AT&T was not acting as a LEC in the matter before us. Furthermore, allowing the company to appropriate this exemption would produce an absurd result. When it filed its Amended Motion, AT&T included as an exhibit the Commission's order adopting revisions to WAC 480-120-021, which created the LEC exemption.[263]

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[256] Exhibit C-1C, ¶ 4.

[257] *Id.* ¶ 40.

[258] *Id.* and Exhibit A-12, ¶ 12.

[259] *Id.*

[260] *See*, Exhibit A-22HC, ¶¶ 4 and 36, and Exhibit A-45HC, ¶¶ 13, 20, and 23.

[261] *See*, AT&T's Response to Bench Request No. 2, at 1.

[262] *Id.* at 2.

[263] *See*, Exhibit A-5.

In that order, the Commission stated that the reason for the LEC exemption was that, "[c]onsumers often expect that they are using their LEC when they use a pay phone; requirements that apply to non-LEC companies to inform the consumer that [they are] not the LEC is reasonable."[264] AT&T was not acting as a LEC in the correctional facilities in question and the consumers would, therefore, have no reason to believe that they were using AT&T's services absent disclosure.

122 The Supreme Court has stated on occasion that "statutes should receive a sensible construction to effect the legislative intent and, if possible, to avoid unjust and absurd consequences."[265] If we accepted AT&T's argument, interexchange carriers would be able to escape regulation under the OSP definition simply because they possess LEC certification, not because they were providing local services. This would circumvent the disclosure requirement and produce an absurd result. For this reason, as well as the company's failure to defend its argument in either its Response or Reply, we find that AT&T does not qualify for the LEC exemption under WAC 480-120-021 (1991).

C. DID AT&T AND T-NETIX ESTABLISH A PRINCIPAL/AGENT RELATIONSHIP SUCH THAT AT&T WOULD BE LIABLE FOR ANY VIOLATION OF COMMISSION LAW THAT T-NETIX MAY HAVE COMMITTED?

123 AT&T has asserted that Complainants erroneously rely upon agency law to argue that AT&T is responsible for T-Netix's failure to comply with the disclosure regulations. According to AT&T, T-Netix was, at most, an independent contractor under the DOC contractual scheme.[266] As AT&T points out, "a principal is only liable for the acts of its agents, not its independent contractors."[267] AT&T notes that there are several

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[264] *Id.* at 107.

[265] *State v. Vela*, 100 Wash.2d 636, 641, 673 P.2d 185 (1983) (citing to *Crown Zellerbach Corp. v. Department of Labor & Indus.*, 98 Wash.2d 102, 653 P.2d 626 (1982); *Whitehead v. Department of Social & Health Servs.*, 92 Wash.2d 265, 595 P.2d 926 (1979).

[266] Exhibit A-45HC., ¶ 24.

[267] *Id.* citing to *Getzendaner v. United Pac. Ins. Co.*, 52 Wash.2d 61, 67, 322 P.2d 1089 (1958) and *Gaines v. Pierce County*, 66 Wash.App. 715, 725, 834 P.2d 631 (1992).

factors that Washington courts examine in determining whether an agency relationship exists, including:

> 1) the extent of control the employer may exert over the details of the work;
> 2) whether or not the one employed is engaged in a distinct occupation or business;
> 3) whether the work is usually done under the direction of the employer or by a specialist;
> 4) whether the employer supplies the tools and the place of work for the employee; and
> 5) whether the parties believe they are creating an agency relationship.[268]

124 AT&T notes that T-Netix exerted control over its own work product, "working autonomously by any means, mode, or manner it found most suitable."[269] AT&T contends that T-Netix's own witness, Mr. Rae, acknowledged that T-Netix decided how frequently its own site administrators visited the correctional facilities and that he saw nothing to indicate that AT&T had input into that decision.[270]

125 AT&T asserts that T-Netix operates its own business apart from AT&T, that T-Netix performs specialized functions that AT&T cannot provide, that T-Netix controlled its proprietary platform, and that both believed that their business dealings were among two, independent contractors.[271] For this last assertion, AT&T relies on the 1991 contract between the two where T-Netix admitted that it was serving as an independent contractor.[272]

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[268] *Id.* ¶ 25, quoting *Kroshus v. Koury*, 30 Wash.App. 258, 263-4, 633 P.2d 909 (1981) (citing RESTATEMENT (SECOND) OF AGENCY § 220(2) (1958)).

[269] *Id.* ¶ 27.

[270] *Id.* citing to Exhibit A-48HC, 131:4-133:18.

[271] *Id.* ¶ 29.

[272] *Id.* citing to Exhibit A-43, § 14.5.

126 AT&T also contends that consideration of Complainants' vicarious liability theory exceeds the scope of the Superior Court's referral.[273] The Commission was not directed to determine whether AT&T could be held liable for T-Netix's failure to provide rate quotes to consumers.[274] Further, AT&T notes that the Commission has already concluded that its authority in this matter is constrained and "does not invoke the independent jurisdiction of the agency."[275] According to AT&T, the principal behind the doctrine of primary jurisdiction is that the administrative agency is better able to address certain technical questions which touch upon the agency's expertise.[276] As AT&T notes, Complainants' theory of vicarious liability does not involve the Commission's technical expertise and is a legal question that the Superior Court is capable of addressing.[277]

127 Complainants assert that AT&T is still responsible for providing rate disclosures despite having contracted away the responsibility to T-Netix.[278] Pursuant to Amendment No. 2 to the DOC contract, it was AT&T's responsibility to install and operate the call control features through its subcontractor, Tele-Matic, which later became T-Netix.[279] AT&T, according to Complainants, is liable if its subcontractor fails to comply with the law.[280] Complainants argue that AT&T contractually agreed

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[273] *Id.* ¶ 31.

[274] *Id.*

[275] *Id.* ¶ 32, quoting Complainants' assertion which the Commission agreed with in *Judd v. AT&T*, et. al., Order No. 5, Order Denying T-Netix's Motion for Summary Determination and to Stay Discovery, ¶ 29 (July 18, 2005).

[276] *Id.* ¶ 33, citing to *Tenore v. AT&T Wireless Servs.*, 136 Wash.2d at 345.

[277] *Id.*

[278] Exhibit C-1C, ¶ 20.

[279] *Id.* ¶ 10, citing to Exhibit A-8, Amendment No. 2.

[280] *Id.* ¶ 28 and Exhibit C-2HC, ¶ 21(j). Specifically, the call control features verified that the inmate was not attempting to call a prohibited telephone number and would inform the call recipient that the calling party was an inmate and play the inmate's name. *Exhibit C-2HC, ¶ 13.* The platform providing the call control features would also connect the audio talk path if the call recipient accepted the collect call. *Id.*

to provide telephone services that were in compliance with the law.[281] Complainants state that "[t]raditional agency law holds that a principal is not relieved of its obligations by hiring an agent to perform in its stead."[282] Then, in a perplexing move, Complainants assert that there is no need to apply agency law in establishing AT&T's responsibility to ensure that its subcontractor performed its obligation.[283]

128 ***Decision.*** We find that AT&T is correct. The question of whether an agency relationship existed is outside the scope of the questions referred to us by the Court. There is no specialized expertise necessary for making a determination of the existence of such a relationship. As a result, we decline to make a determination on this issue.

IV. CONCLUSIONS

129 Based on the foregoing, we find that the P-III Premise platform provided the connection between long-distance and local services and the correctional facilities. As the owner of this platform, AT&T provided the connection and was, therefore, the OSP for the correctional facilities. AT&T did not act as a LEC at any of the facilities at issue in this case and does not qualify for the LEC exemption to the OSP regulatory definition. We still have yet to hear evidence on whether AT&T, as the OSP, violated our disclosure regulations. Following the review period for this initial order, we will issue a prehearing conference notice to discuss the procedural schedule for that phase of the referral.

130 T-Netix, having sold the platform to AT&T and solely providing technical services and training for the platform, is not the OSP. Thus, we will not address whether T-Netix violated any of our OSP regulations at this time

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[281] Exhibit C-1C, ¶ 33.

[282] *Id.* ¶ 32.

[283] *Id.*

FINDINGS OF FACT

131 (1) In 1992, AT&T Communications of the Pacific Northwest, Inc., entered into a contract with the State of Washington Department of Corrections to provide telecommunication services and equipment for various inmate correctional institutions and work release facilities.

132 (2) Due to the unique challenges involved in providing inmate telecommunications services, the original contract was amended in 1995 to require AT&T to arrange for the installation of call control features for intraLATA, interLATA, and international calls through its subcontractor, Tele-Matic Corporation.

133 (3) In 1995, the Commission recognized the acquisition of Tele-Matic Corporation by T-Netix, Inc.

134 (4) In 1997, T-Netix and AT&T contractually agreed that AT&T would purchase title to the P-III Premise software platform from T-Netix and that T-Netix would solely provide support and training for the platform.

135 (5) The platform provided call control services including: screening the dialed number against a list of prohibited telephone numbers; if the number is not prohibited, seizing a dedicated outbound trunk and outpulsing the destination number as a 1+ call; and if the recipient accepted the call, the platform would complete the audio path.

136 (6) AT&T was not acting as a local exchange company for any of the calls placed at the four correctional facilities.

137 (7) AT&T possessed the ability to direct T-Netix to modify the P-III platform.

138 (8) The parties have not provided sufficient evidence to support a decision as to whether AT&T violated the Commission's rules governing operator service providers.

CONCLUSIONS OF LAW

139 (1) Summary judgment is properly entered if there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *WAC 480-07-380(2). CR 56(c).*

140 (2) In resolving a motion for summary judgment, a court must consider all the facts submitted by the parties and make all reasonable inferences from the facts in the light most favorable to the nonmoving party. *Activate, Inc., v. State, Dept. of Revenue, 150 Wash.App. 807, 812, 209 P.3d 524, 527 (2009) (citing Vallandigham v. Clover Park Sch. Dist. No. 400, 154 Wash.2d 16, 26, 109 P.3d 805 (2005).*

141 (3) With regard to AT&T's and T-Netix's Motions for Summary Determination, none of the nonmoving parties raised questions of material fact as to the role of Respondents in connecting the calls in question from the correctional institutions.

142 (4) Connection, based on an examination of the call schematics and the plain meaning of the regulation, occurs after the P-III Premise platform verifies that the call is valid and not prohibited, and when the platform passes the '0+' call to the local or long-distance service provider by outpulsing it as a '1+' call.

143 (5) The P-III Premise platform provided the connection between the intrastate or interstate long-distance or local services and the correctional facilities. *WAC 480-120-021(1991) and (1999).*

144 (6) AT&T, as the owner of the platform, was the operator service provider from June 4, 1997, the date of the execution of the General Agreement for the Procurement of Equipment, Software, Services, and Supplies Between T-Netix, Inc. and AT&T Corp.

145 (7) T-Netix was not the OSP for the correctional institutions involved in this case.

146 (8) AT&T does not qualify for the LEC exemption under WAC 480-120-021.

147 (9) Call aggregators, as defined by WAC 480-120-021, include correctional facilities.

148 (10) The Commission should schedule a prehearing conference to address the procedural steps to address the second question posed by the Superior Court.

ORDER

THE COMMISSION ORDERS:

149 (1) AT&T Communications of the Pacific Northwest, Inc.'s Amended Motion for Summary Determination, which requests that the Commission find that AT&T was not an operator service provider, is denied in part.

150 (2) T-Netix, Inc.'s Motion and Amended Motion for Summary Determination are granted.

Dated at Olympia, Washington, and effective April 21, 2010.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

Marguerite Friedlander

MARGUERITE E. FRIEDLANDER
Administrative Law Judge

original +4

NOTICE TO THE PARTIES

This is an Initial Order. The action proposed in this Initial Order is not yet effective. If you disagree with this Initial Order and want the Commission to consider your comments, you must take specific action within the time limits outlined below. If you agree with this Initial Order, and you would like the Order to become final before the time limits expire, you may send a letter to the Commission, waiving your right to petition for administrative review.

WAC 480-07-825(2) provides that any party to this proceeding has twenty (20) days after the entry of this Initial Order to file a *Petition for Administrative Review*. What must be included in any Petition and other requirements for a Petition are stated in WAC 480-07-825(3). WAC 480-07-825(4) states that any party may file an *Answer* to a Petition for review within (10) days after service of the Petition.

WAC 480-07-830 provides that before entry of a Final Order any party may file a Petition to Reopen a contested proceeding to permit receipt of evidence essential to a decision, but unavailable and not reasonably discoverable at the time of hearing, or for other good and sufficient cause. No Answer to a Petition to Reopen will be accepted for filing absent express notice by the Commission calling for such answer.

RCW 80.01.060(3) provides that an initial order will become final without further Commission action if no party seeks administrative review of the initial order and if the Commission fails to exercise administrative review on its own motion.

One copy of any Petition or Answer filed must be served on each party of record with proof of service as required by WAC 480-07-150(8) and (9). An Original and nine (9) copies of any Petition or Answer must be filed by mail delivery to:

Attn: David W. Danner, Executive Director and Secretary
Washington Utilities and Transportation Commission
P.O. Box 47250
Olympia, Washington 98504-7250

STATE OF WASHINGTON
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION
1300 S. Evergreen Park Dr. S.W., P.O. Box 47250 • Olympia, Washington 98504-7250
(360) 664-1160 • TTY (360) 586-8203

October 6, 2010

NOTICE OF REOPENING THE RECORD AND BENCH REQUESTS
(Responses to Bench Requests due by Wednesday, October 20, 2010;
Responses to Bench Request Responses due by Wednesday, October 27, 2010)

RE: *Sandy Judd and Tara Herivel, Complainants, v. AT&T Communications of the Pacific Northwest, Inc., and T-Netix, Inc.*, Docket UT-042022

The Washington Utilities and Transportation Commission (Commission) on its own motion pursuant to WAC 480-07-830, reopens the record for the limited purpose of obtaining specific additional information necessary to make a determination on review of the Initial Order in this proceeding in the form of the following bench requests:

BENCH REQUEST NO. 7 (to all parties):

Please identify each type of charge for, associated with, arising from, or otherwise related to the collect calls at issue in this proceeding that AT&T, T-Netix, or any other company billed, or had billed on its behalf, to end user customers who accepted those collect calls. For each such charge, please provide the following information:

a. The company that billed or was identified as billing the charge on the customer bill;
b. The name of the charge as reflected on the customer bill;
c. A description of when and how that charge applied;
d. The sections or pages of the tariff, price list, contract, or other publicly available governing document (collectively "Tariff") in which the rates, terms, and conditions associated with the charge were set forth; and
e. A description of the costs the charge was designed to recover.

Please provide a copy of a sample bill sent to an end user customer that includes these charges and a copy of the Tariff sections or pages identified in response to subpart d above.

DOCKET UT-042022

BENCH REQUEST NO. 8 (to AT&T and T-Netix):

Did AT&T's or T-Netix's Washington price list for local exchange services that was on file with the Commission during the time period at issue in this proceeding include rates, terms, and conditions for any of the charges identified in response to Bench Request No. 7? If so, please identify the applicable price list provisions and provide a copy of the relevant pages from that price list.

BENCH REQUEST NO. 9 (to AT&T and T-Netix):

Please provide the prices, rates, charges, or other compensation that AT&T paid T-Netix for the equipment and/or services that T-Netix provided under the contract(s) between the companies that are part of the record in this docket. Please describe the nature (e.g., recurring and/or nonrecurring, flat fee, commission or percentage of sales or revenues, etc.) and form(s) that compensation took (e.g., lump sum payment, installment payments, per transaction fees, etc.).

BENCH REQUEST NO. 10 (to AT&T):

Please describe how AT&T recovered the amounts it paid to T-Netix identified in response to Bench Request No. 9 from end user customers, in particular those customers who accepted the collect calls at issue in this proceeding. If AT&T did not recover those amounts from end user customers, please explain how and from whom AT&T recovered those costs.

Please respond to these Bench Requests no later than **Wednesday, October 20, 2010,** with an original and five (5) copies. Pursuant to WAC 480-07-830, parties may respond to any other party's responses to these Bench Requests no later than **Wednesday, October 27, 2010.**

If you have any questions concerning these requests, please contact Gregory J. Kopta, Director, Administrative Law Division, at 360-664-1355, or via e-mail at gkopta@utc.wa.gov.

Sincerely,

GREGORY J. KOPTA
Director, Administrative Law Division

STATE OF WASHINGTON
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION
1300 S. Evergreen Park Dr. S.W., P.O. Box 47250 • Olympia, Washington 98504-7250
(360) 664-1160 • TTY (360) 586-8203

November 30, 2010

NOTICE OF BENCH REQUESTS
(Responses due by Wednesday, December 8, 2010;
Replies to Other Responses due by Wednesday, December 15, 2010)

RE: *Sandy Judd and Tara Herivel, Complainants v. AT&T Communications of the Pacific Northwest, Inc., and T-Netix, Inc.*, Docket UT-042022

The Washington Utilities and Transportation Commission (Commission) issues the following bench requests:

BENCH REQUEST NO. 11 (to AT&T):

Sections 1 and 24 of the Agreement between the Washington Department of Corrections (DOC) and AT&T dated March 16, 1992, and included in the record in this docket state that the Agreement incorporates by reference the DOC's Request for Proposal No. CRFP2562, dated September 4, 1991 (RFP), and the combined proposals from AT&T and other carriers submitted in response to the RFP on November 12, 1991. Please provide copies of the documents incorporated by reference into the Agreement.

BENCH REQUEST NO. 12 (to AT&T):

Section 4 in Attachment B to Amendment No. 2 to the Agreement between the Washington Department of Corrections and AT&T dated June 16, 1995, and included in the record in this docket provides, "In the event AT&T is unable to provide [Inmate Calling Service (ICS)] as of the effective date of this Agreement, as defined in Section 3 of the Agreement, then AT&T will provide its standard live operator services to connect the inmate's call to the called party until it is able to provide ICS." Did AT&T provide its standard live operator services to connect an inmate's collect call to the called party from any of the correctional institutions covered by the Agreement between June 20, 1996, and December 31, 2000? If so, please describe those services and identify the time period during which AT&T provided the services, the types of intrastate calls (local,

intraLATA, or interLATA) for which AT&T provided the services, and the location from which the calls originated.

BENCH REQUEST NO. 13 (to AT&T):

Did AT&T bill, or have a third party bill on AT&T's behalf, any consumer (as that term was defined and used in WAC 480-120-021 and WAC 480-120-141) for any intrastate operator services or operator-assisted calls placed from the four correctional institutions at issue in this proceeding between June 20, 1996 and December 31, 2000? If so, please identify the service(s) billed and provide a copy of the tariff or price list provisions in effect at that time that established the rates, terms, and conditions for the billed service(s).

BENCH REQUEST NO. 14 (to T-Netix):

Did T-Netix bill, or have a third party bill on T-Netix's behalf, any consumer (as that term was defined and used in WAC 480-120-021 and WAC 480-120-141) for any intrastate operator services or operator-assisted calls placed from the four correctional institutions at issue in this proceeding between June 20, 1996 and December 31, 2000? If so, please identify the service(s) billed and provide a copy of the tariff or price list provisions in effect at that time that established the rates, terms, and conditions for the billed service(s).

BENCH REQUEST NO. 15 (to AT&T and T-Netix):

Do AT&T or T-Netix have any record of billing Ms. Herivel, or having a third party bill Ms. Herivel on its behalf, for operator services or an operator-assisted call in connection with any collect call placed from the Airway Heights correctional institution near Spokane and received by Ms. Herivel at her home in Seattle between August 26, 1997, and January 1, 1999? If so, please provide a copy of the bill(s). If a copy of the bill is unavailable, please identify the service(s) for which Ms. Herivel was billed, the amounts billed, and the date(s) on which the billed service(s) was (or were) provided.

Please respond to these Bench Requests no later than **Wednesday, December 8, 2010**, with an original and five (5) copies. Pursuant to WAC 480-07-830, parties may respond to any other party's responses to these Bench Requests no later than **Wednesday, December 15, 2010.**

If you have any questions concerning these requests, please contact Gregory J. Kopta, Director, Administrative Law Division, at 360-664-1355, or via e-mail at gkopta@utc.wa.gov.

Sincerely,

GREGORY J. KOPTA
Director, Administrative Law Division

cc: all parties

[*Service date: December 8, 2010*]

BEFORE THE
WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION

SANDY JUDD and TARA HERIVEL, Complainants, v. AT&T COMMUNICATIONS OF THE PACIFIC NORTHWEST, INC., and T-NETIX, INC., Respondents.	Docket No. UT – 042022 **T-NETIX, INC'S RESPONSE TO BENCH REQUESTS NO. 14 AND 15**

Respondent T-Netix, Inc. ("T-Netix"), through counsel, submits this Response to Bench Requests No. 14 and 15. Nothing in these responses is confidential.

BENCH REQUEST NO. 14:

Did T-Netix bill, or have a third party bill on T-Netix's behalf, any consumer (as that term was defined and used in WAC 480-120-021 and WAC 480-120-141) for any intrastate operator services or operator-assisted calls placed from the four correctional institutions at issue in this proceeding between June 20, 1996 and December 31, 2000? If so, please identify the service(s) billed and provide a copy of the tariff or price list provisions in effect at that time that established the rates, terms, and conditions for the billed service(s).

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RESPONSE TO BENCH REQUEST NO. 14:

T-Netix did not bill, nor did T-Netix have a third party bill on its behalf, any consumer (as that term was defined and used in WAC 480-120-021 and WAC 480-120-141) for any intrastate operator services or operator-assisted calls placed from the four correctional institutions at issue in this proceeding between June 20, 1996 and December 31, 2000. As T-Netix stated on October 6, 2010, in response to Bench Request No. 7, it was not the telephone company who carried the calls at issue in this proceeding, nor did it brand, rate, or bill the calls.

BENCH REQUEST NO. 15:

Do AT&T or T-Netix have any record of billing Ms. Herivel, or having a third party bill Ms. Herivel on its behalf, for operator services or an operator-assisted call in connection with any collect call placed from the Airway Heights correctional institution near Spokane and received by Ms. Herivel at her home in Seattle between August 26, 1997, and January 1, 1999? If so, please provide a copy of the bill(s). If a copy of the bill is unavailable, please identify the service(s) for which Ms. Herivel was billed, the amounts billed, and the date(s) on which the billed service(s) was (or were) provided.

RESPONSE TO BENCH REQUEST NO. 15:

T-Netix has researched all call records in its possession and has not found any record of billing Ms. Herivel, or having a third party bill Ms. Herivel on its behalf, for operator services or an operator-assisted call in connection with any collect call placed from the Airway Heights correctional institution near Spokane and received by Ms. Herivel at her home in Seattle between August 26, 1997, and January 1, 1999. T-Netix researched all three telephone numbers that Ms.

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Herivel identified twice in response to discovery: (206) 652-9415; (360) 714-8119; and (360) 738-8903.

T-Netix is not in possession of information regarding AT&T that would enable it to answer this Bench Request on AT&T's behalf.

DATED this 8th day of December, 2010.

T-NETIX, INC.

By: _____

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CERTIFICATE OF SERVICE

I hereby certify that I have this 8th day of December, 2010, 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 (5), of the foregoing document will be delivered to the WUTC, via the method(s) noted below, properly addressed as follows:

David Danner
Washington Utilities and Transportation Commission
1300 S Evergreen Park Drive SW
Olympia, WA 98504-7250

____ Hand Delivered
____ U.S. Mail (first-class, postage prepaid)
__x__ Overnight Mail (UPS)
____ Facsimile (360) 586-1150
__x__ Email (records@wutc.wa.gov)

I hereby certify that I have this 8th day of December 2010, served a true and correct copy of the foregoing document upon parties of record, via the method(s) noted below, properly addressed as follows:

On Behalf Of AT&T Communications

Letty S.D. Friesen
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On Behalf Of Complainants :

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On Behalf Of Complainants :

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Courtesy copy to:

Marguerite Friedlander
Washington Utilities and Transportation Commission
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Olympia WA 98504-7250

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S Carpenter

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CERTIFICATE OF SERVICE

Pursuant to WAC 480-07-150, I hereby certify that I have this day, December 8, 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, December 8, 2010, filed MS Word and PDF versions of this document by e-mail, and six copies of this document by Federal Express, with the WUTC at the e-mail address and mailing address listed below:

Mr. David W. Danner
Secretary and Executive Director
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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, December 8, 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: December 8, 2010

/s/ Charles H.R. Peters
Charles H.R. Peters

BENCH REQUEST NO. 15 (to AT&T and T-Netix):

Does AT&T or T-Netix have any record of billing Ms. Herivel, or having a third party bill Ms. Herivel on its behalf, for operator services or an operator-assisted call in connection with any collect call placed from the Airway Heights correctional institution near Spokane and received by Ms. Herivel at her home in Seattle between August 26, 1997, and January 1, 1999? If so, please provide a copy of the bill(s). If a copy of the bill is unavailable, please identify the service(s) for which Ms. Herivel was billed, the amounts billed, and the date(s) on which the billed service(s) was (or were) provided.

AT&T'S RESPONSE TO BENCH REQUEST NO. 15:

AT&T has conducted a reasonable search of its records and has not located any record of billing Ms. Herivel for an operator-assisted call from Airway Heights correctional institution between August 26, 1997 and January 1, 1999.

Dated: December 8, 2010

SUBMITTED BY:

AT&T COMMUNICATIONS OF THE PACIFIC NORTHWEST, INC.

By: /s/ Charles H.R. Peters
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AT&T'S RESPONSE TO BENCH REQUEST NO. 13:

To the extent that Bench Request No. 13, by seeking information regarding billing, deviates from the Commission's own regulation at issue, WAC § 480-120-021, which expressly defines an Operator Service Provider ("OSP") as the entity "providing a connection to intrastate or interstate long-distance or to local services from locations of call aggregators," AT&T respectfully objects to this Bench Request. Consistent with the fact that billing information is not relevant to the question at issue — namely, determining which entity provided the "connection" for the prison collect calls received by the Complainants at issue in this proceeding — the information now sought in this Bench Request was not developed or argued by the parties, or considered by the ALJ, prior to the Commission's Bench Request. As a result, raising these billing issues now, on this incomplete record, and straying from the express language of the Commission's own regulation at issue, raises concerns about due process, fundamental fairness, inadequate notice, and the lack of an opportunity to be fully heard. Moreover, to the extent this Bench Request seeks information received by persons other than the Complainants, the Request raises concerns with respect to the Commission's limited jurisdiction in this proceeding.

Subject to its objections, AT&T states that, with respect to operator-assisted collect calls placed from the four correctional institutions at issue in this proceeding, for the period between June 20, 1996 and December 31, 2000, AT&T provided operator-assisted ("0+") interLATA, intrastate service. AT&T expressly denies that it provided the requisite "connection," under the Commission's regulation at issue in this proceeding, "to intrastate or interstate long-distance or to local services." AT&T is in the process of searching for and retrieving the appropriate tariff(s) to respond to this Bench Request, but requires additional time to do so. Accordingly, AT&T respectfully requests an additional seven (7) days to locate and retrieve the appropriate tariff(s) and to provide the additional information requested regarding tariffs.

"[c]onnection, based on an examination of the call schematics and the plain meaning of the regulation, occurs after the P-III Premise platform verifies that the call is valid and not prohibited, and when the platform passes the '0+' call to the local or long-distance service provider by outpulsing it as a '1+' call." *Id.* at ¶ 142, Conclusion of Law No. 4. That particular conclusion has not been challenged by any party. Moreover, the ALJ concluded that "[t]he P-III Premise platform provided the connection between the intrastate or interstate long-distance or local services and the correctional facilities," citing WAC 480-120-021 (1991 and 1999). *Id.* at ¶ 143, Conclusion of Law No. 5. That particular conclusion also has not been challenged by any party.

AT&T objects to this Bench Request to the extent that it covers correctional institutions other than the four at issue in this proceeding on all available grounds, including but not limited to overbreadth, irrelevance, lack of standing, improper jurisdiction, lack of due process, and other constitutional and legal issues. Without waiving its objections, AT&T states that, to the best of its knowledge, information and belief, it did not provide its standard live operator services to connect an inmate's collect call to the called party from any of the correctional institutions covered by the Agreement between June 20, 1996, and December 31, 2000.

BENCH REQUEST NO. 13 (to AT&T):

Did AT&T bill, or have a third party bill on AT&T's behalf, any consumer (as that term was defined and used in WAC 480-120-021 and WAC 480-120-141) for any intrastate operator services or operator-assisted calls placed from the four correctional institutions at issue in this proceeding between June 20, 1996 and December 31, 2000? If so, please identify the service(s) billed and provide a copy of the tariff or price list provisions in effect at that time that established the rates, terms, and conditions for the billed service(s).

BENCH REQUEST NO. 12 (to AT&T):

Section 4 in Attachment B to Amendment No. 2 to the Agreement between the Washington Department of Corrections and AT&T dated June 16, 1995, and included in the record in this docket provides, "In the event AT&T is unable to provide [Inmate Calling Service (ICS)] as of the effective date of this Agreement, as defined in Section 3 of the Agreement, then AT&T will provide its standard live operator services to connect the inmate's call to the called party until it is able to provide ICS." Did AT&T provide its standard live operator services to connect an inmate's collect call to the called party from any of the correctional institutions covered by the Agreement between June 20, 1996, and December 31, 2000? If so, please describe those services and identify the time period during which AT&T provided the services, the types of intrastate calls (local, intraLATA, or interLATA) for which AT&T provided the services, and the location from which the calls originated.

AT&T'S RESPONSE TO BENCH REQUEST NO. 12:

It is undisputed in this proceeding that T-Netix's P-III Premise platform was installed and utilized at the four prisons at issue prior to June 20, 1996 through later than December 31, 2000. *See* T-Netix's Response, Amended Response, and Second Supplemental Response to AT&T's Second Data Request No. 7, attached hereto as Exhibit A (T-Netix's Response and Amended Response are also attached to AT&T's Petition for Administrative Review at Tabs 16 & 17). As the Administrative Law Judge ("ALJ") found, T-Netix's P-III Premise platform "provided call control services including: screening the dialed number against a list of prohibited telephone numbers; if the number is not prohibited, seizing a dedicated outbound trunk and outpulsing the destination number as a 1+ call; and if the recipient accepted the call, the platform would complete the audio path." Order No. 23, Initial Order, at ¶ 135, Finding of Fact No. 5.[1] That particular finding has not been challenged by any party. The ALJ further concluded that

[1] Although the ALJ correctly found that the platform performed these functions, the Initial Order incorrectly stated that AT&T, not T-Netix, owned the platform, even though the factual record indisputably establishes that at all relevant times T-Netix, not AT&T, owned the platform. The ALJ concluded that the owner of the platform was the OSP. The question of who owned the platform is central to AT&T's Petition for Administrative Review, which is the matter presently pending before the Commission. AT&T has asked the Commission to review and reverse the ALJ's conclusion that AT&T owned the platform rather than T-Netix, which the factual record plainly shows was the platform's owner.

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 RESPONSES TO NOVEMBER 30, 2010 BENCH REQUESTS

AT&T Communications of the Pacific Northwest, Inc. ("AT&T"), by its attorneys, respectfully submits the following responses to the bench requests served by the Washington Utilities and Transportation Commission (the "Commission") on November 30, 2010. AT&T incorporates by reference as if fully stated herein the preliminary statement from AT&T's previously-filed Responses to October 6, 2010 Bench Requests, including but not limited to the objections asserted in that preliminary statement.

BENCH REQUEST NO. 11 (to AT&T):

Sections 1 and 24 of the Agreement between the Washington Department of Corrections (DOC) and AT&T dated March 16, 1992, and included in the record in this docket state that the Agreement incorporates by reference the DOC's Request for Proposal No. CRFP2562, dated September 4, 1991 (RFP), and the combined proposals from AT&T and other carriers submitted in response to the RFP on November 12, 1991. Please provide copies of the documents incorporated by reference into the Agreement.

AT&T'S RESPONSE TO BENCH REQUEST NO. 11:

AT&T previously searched for the documents dated from 1991 referenced in Bench Request No. 11 and, upon receiving this Bench Request, AT&T conducted another search of its records. AT&T has not located these documents in its possession, custody, or control.