

SIRIANNI YOUTZ  
SPOONEMORE

February 2, 2012

**BY HAND & EMAIL**

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David Danner  
Secretary and Executive Director  
WASHINGTON STATE UTILITIES AND TRANSPORTATION COMMISSION  
1300 S. Evergreen Park Drive S.W., P.O. Box 47250  
Olympia, WA 98504-7250

**RE: WUTC Docket No. UT-042022**  
*Judd, et al., v. AT&T, et al.*

Dear Mr. Danner:

We write to request a prehearing conference to address a remand of a portion of the Final Order in this matter to the Commission by the Thurston County Superior Court. We represent the complainants in these proceedings.

**A. OVERVIEW AND PROCEDURAL HISTORY**

In 1988, in response to the telecommunication industries' practice of failing to disclose toll rates, the legislature mandated transparency. It directed the WUTC to promulgate rules to ensure full disclosure of rates. RCW 80.36.510-.520.

The WUTC issued detailed regulations in 1991. Under those regulations, "alternate operator services" companies were required to disclose rates for a particular call "immediately, upon request, and at no charge to the consumer." WAC 480-120-141(5)(a)(iv) (1991). The operator was required to provide "(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." *Id.* In 1999, the WUTC amended the regulation to require automatic verbal rate disclosures triggered by a call recipient pressing the keys on the telephone keypad. WAC 480-120-141(2)(b) (1999).

The legislature made noncompliance with the WUTC regulations a violation of the Washington Consumer Protection Act. RCW 80.36.530.

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SIRIANNI YOUTZ  
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David Danner  
February 2, 2012  
Page 2

Plaintiffs filed this King County lawsuit in the summer of 2000 as a putative class action, asserting that five companies had violated the Washington Consumer Protection Act by failing to comply with the WUTC regulations on collect calls placed from Washington state prisons. All five companies filed motions to dismiss. Three of those companies (Qwest, Verizon, and CenturyTel) were dismissed by the trial court.

The two remaining defendants—T-Netix and AT&T—also moved to dismiss, but the trial court did not grant their motions. AT&T alternatively requested that the matter be referred to the Washington Utilities and Transportation Commission (“WUTC”) under the doctrine of primary jurisdiction.<sup>1</sup>

The court agreed and referred two questions to the WUTC: (1) whether T-Netix and AT&T were operator service providers (OSPs) and (2) whether they had violated WUTC the regulations that require OSPs to disclose rates to consumers.<sup>2</sup> The court stayed all further activity in the case, including a pending motion for class certification, until the WUTC made its ruling.

Plaintiffs appealed and eventually argued their case in the Washington Supreme Court, which affirmed the dismissals, including a holding that liability for violating the statute depended on showing a violation of WUTC regulations. *Judd v. American Tel. & Tel. Co.*, 152 Wn.2d 195, 95 P.3d 337 (2004). Thus, in November 2004, a complaint was filed with the WUTC to address the questions referred by the court.

The parties hired experts and began discovery in the WUTC proceedings. T-Netix then filed a motion for summary determination in the WUTC, arguing that plaintiffs lacked standing. The administrative law judge denied the motion and denied AT&T’s separate motion to be dismissed on standing grounds. The WUTC affirmed the administrative law judge’s decision on the ground that the WUTC lacked jurisdiction to determine whether plaintiffs had standing.

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<sup>1</sup> 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).

<sup>2</sup> See, WAC 480-120-141 (1991) and (1999).

SIRIANNI YOUTZ  
SPOONEMORE

David Danner  
February 2, 2012  
Page 3

T-Netix requested the court to lift the stay on trial court proceedings and filed a motion for summary judgment on the standing issue, repeating the same arguments it had made in the agency. On September 6, 2005, the Superior Court granted T-Netix's summary judgment motion and revoked its referral to the Commission.<sup>3</sup> The Superior Court later clarified that the ruling also applied to AT&T.<sup>4</sup>

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 to refer the matter back to the WUTC.<sup>5</sup> On December 4, 2007, the Supreme Court of Washington denied T-Netix's petition for review.<sup>6</sup> On March 21, 2008, the Superior Court issued an order reinstating the referral to the Commission.

On April 21, 2010, following extensive proceedings in the Commission, the administrative law judge issued Order 23, an initial order concluding that 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 regulations.

AT&T filed a petition for review of Order 23 by the full Commission on May 11, 2010. On May 21, 2010, T-Netix and the plaintiffs filed answers opposing AT&T's petition. The Commission reopened the record to receive additional evidence.

On March 31, 2011, the Commission issued Final Order 25, which addressed the two questions referred from the King County Superior Court. For the first question of whether AT&T and T-Netix were Operator Service Providers for collect telephone calls from Washington Department of Corrections facilities, the Commission responded that AT&T was an Operator Service Provider. For the second question of

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<sup>3</sup> *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.

<sup>4</sup> *Judd*, 136 Wash.App. 1022, not reported in P.3d, (2006).

<sup>5</sup> *Judd*, 136 Wash.App. 1022, not reported in P.3d, (2006).

<sup>6</sup> *Judd v. Am. Tel. & Tel. Co.*, 162 Wash.2d 1002, 175 P.3d 1092 (2007).

SIRIANNI YOUTZ  
SPOONEMORE

David Danner  
February 2, 2012  
Page 4

whether WAC 480-120-141 was violated in connection with those calls, the Commission responded that AT&T had violated the regulation. A copy of that order is attached as Exhibit A.

#### **B. THE APPEAL OF FINAL ORDER 25**

On April 29, 2011 respondents AT&T and T-Netix each filed a petition for review under the Washington Administrative Procedure Act of Final Order 25. AT&T filed a petition in Thurston County Superior Court (No. 11-2-00992-8) to vacate both of the conclusions reached by the Commission. T-Netix also filed a petition in Thurston County Superior Court (No. 11-2-00998-7) to vacate the Commission's findings that WAC 480-120-141 had been violated and to challenge the admission into evidence of telephone bills that were considered by the Commission. These petitions were consolidated for consideration in one proceeding.

The Thurston Superior Court affirmed the Commission's ruling that AT&T was the OSP for the calls at issue in this case. AT&T then asked Judge Paula Casey if she was also affirming the Commission's decision that AT&T could not claim an exemption as an LEC. This was an argument raised in a footnote in AT&T's brief that was not argued during the oral presentations. Judge Casey indicated that she would review the parties' briefs and provide a written letter ruling on that issue. She later affirmed the Commission's conclusion that AT&T is not entitled to invoke the LEC exemption allowed by WAC 480-120-021 (1991).

The second question regarding whether AT&T had violated WAC 480-120-141 presented two issues: (1) whether AT&T and T-Netix were denied due process because an additional hearing was not held to determine whether the regulations had been violated, and (2) whether there was sufficient evidence in the record to support a finding that the regulations had been violated. Judge Casey only considered the first issue, and ruled that AT&T and T-Netix were denied due process because they did not have an additional opportunity to submit evidence regarding the issue of whether the regulations had been violated. Judge Casey did not make a ruling on whether the evidence considered by the Commission was sufficient to support its decision. Accordingly, she ruled that "the parties were not provided the full opportunity to present evidence on that issue, and this matter is remanded to the WUTC to receive additional evidence on that issue and reconsider its response to the [question of whether the regulation had been violated]."

SIRIANNI YOUTZ  
SPOONEMORE

David Danner  
February 2, 2012  
Page 5

A copy of the Court's Order on the Petitions for Administrative Review is attached as Exhibit B.

**C. THE PROCEEDING IN THE KING COUNTY SUPERIOR COURT**

After the Commission issued Final Order 25, the King County proceedings were assigned to Judge Beth Andrus. Both Judge Andrus and Judge Casey requested defendants to allow the King County court to review the petitions for administrative review, but the defendants refused to do so. The defendants then sought to stay the proceedings in King County, which Judge Andrus denied. She has established a discovery schedule, a schedule for determining the motion for class certification (which is now under consideration by her), and a trial date of June 25, 2012.

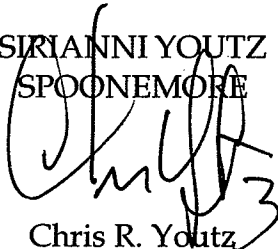
**D. REQUEST FOR PREHEARING CONFERENCE**

We request that the Commission address the issues raised by the remand from the Thurston County Superior Court as soon as possible with the parties at a prehearing conference. This matter is now in its 11<sup>th</sup> year of litigation with a trial date set in King County Court in June, 2012.

We also request that the Commissioners preside over the additional proceedings contemplated by the remand as permitted by WAC 480-07-330. The order that was remanded by the court was decided by the full commission and the Commission would be in the best position to receive additional evidence and determine how that evidence affects its original decision. Further, there is no doubt that if this remand is assigned to an administrative law judge for an initial decision that the order would be appealed to the full commission. It will unquestionably be more efficient if the full commission considers the remand.

Very truly yours,

SIRIANNI YOUTZ  
SPOONEMORE

A handwritten signature in black ink, appearing to read 'Chris R. Youtz', is written over the typed name 'SIRIANNI YOUTZ SPOONEMORE'. The signature is stylized and includes a large number '3' at the end.

Chris R. Youtz  
Richard E. Spoonemore

SIRIANNI YOUTZ  
SPOONEMORE

David Danner  
February 2, 2012  
Page 6

CRY:tr  
Enclosures

cc (w/enc.): Letty S.D. Friesen  
Charles H.R. Peters/David C. Scott/Doug Snodgrass  
Arthur A. Butler  
Stephanie A. Joyce  
Clients

# Exhibit A

**BEFORE THE WASHINGTON STATE  
UTILITIES AND TRANSPORTATION COMMISSION**

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



**TABLE OF CONTENTS**

DISCUSSION ..... 6

    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. .... 6

        1. An OSP is the Entity with the Direct Business Relationship with the  
           Consumers of Operator Services. .... 6

        2. The Undisputed Record Evidence Demonstrates that AT&T Was the OSP for  
           the Intrastate Operator-Assisted Toll Calls AT&T Carried. .... 13

        3. AT&T Was Not Exempt from the Definition of “OSP.” ..... 19

    B. AT&T Violated Commission Rules Requiring OSPs to Make Rate Quotes  
        Available to Consumers of Operator-Assisted Collect Calls. .... 22

FINDINGS OF FACT ..... 25

CONCLUSIONS OF LAW ..... 27

ORDER ..... 29

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)<sup>1</sup> 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.<sup>2</sup> 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,<sup>3</sup> and that Respondents were operator service providers (OSPs)<sup>4</sup> that violated RCW 80.36.520

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<sup>1</sup> 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.

<sup>2</sup> 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.

<sup>3</sup> 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).

<sup>4</sup> 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:<sup>5</sup>

- 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.<sup>6</sup>

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.<sup>7</sup> 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.

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

<sup>5</sup> 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).

<sup>6</sup> Ex. A-3 at 2.

<sup>7</sup> 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 480-120-021 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 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.<sup>8</sup>

- 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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<sup>8</sup> 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.”<sup>9</sup> 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.”<sup>10</sup> 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.<sup>11</sup> A “consumer” for purposes of the OSP rules is “the party initiating and/or paying for a call using operator services.”<sup>12</sup> Operator services by definition are provided to consumers, and to state the obvious, an OSP provides operator services.<sup>13</sup> 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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<sup>9</sup> RCW 80.36.510 (emphasis added).

<sup>10</sup> RCW 80.36.520 (emphasis added).

<sup>11</sup> WAC 480-120-021 (1991 & 1999) (emphasis added).

<sup>12</sup> 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).

<sup>13</sup> 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.**<sup>14</sup>

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.<sup>15</sup>

- 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.<sup>16</sup> 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.<sup>17</sup> The customer does

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<sup>14</sup> 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.

<sup>15</sup> 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.

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

<sup>17</sup> 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.<sup>18</sup> 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."<sup>19</sup> 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.

<sup>18</sup> 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.

<sup>19</sup> *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.”<sup>20</sup> 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.”<sup>21</sup> The Commission rules thus expressly contemplate that the OSP and the local or toll service provider may be one and the same.<sup>22</sup> 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.”<sup>23</sup> 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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<sup>20</sup> *Id.* ¶ 26 (emphasis in original).

<sup>21</sup> WAC 480-120-021 (1991) (emphasis added).

<sup>22</sup> 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.

<sup>23</sup> 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].”<sup>24</sup>

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.”<sup>25</sup> AT&T “suggests that deviating from the express OSP

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<sup>24</sup> Ex. A-24HC at 173, lines 5-8.

<sup>25</sup> 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.”<sup>26</sup>

- 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.<sup>27</sup>
- 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.”<sup>28</sup> 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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<sup>26</sup> *Id.*

<sup>27</sup> 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.

<sup>28</sup> WAC 480-120-021 (1991 & 1999) (emphasis added).

any collect call.<sup>29</sup> 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.”<sup>30</sup>

- 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.<sup>31</sup> 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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<sup>29</sup> Exs. A-13 through A-15.

<sup>30</sup> Ex. A-8 § 4.A & C.

<sup>31</sup> 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.<sup>32</sup>

- 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.<sup>33</sup> 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.<sup>34</sup> 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.<sup>35</sup> 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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<sup>32</sup> Ex. T-25 ¶ 29.

<sup>33</sup> 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.

<sup>34</sup> 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.

<sup>35</sup> 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."<sup>36</sup> 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.<sup>37</sup> 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,<sup>38</sup> but AT&T failed to provide those documents.<sup>39</sup> 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.<sup>40</sup>

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<sup>36</sup> AT&T's Response to Bench Request No. 13.

<sup>37</sup> Ex. A-22HC ¶¶ 16-17, 26-27 & 44-46.

<sup>38</sup> Ex. A-8 §§ 1 & 24.

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

<sup>40</sup> 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.<sup>41</sup> 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.

<sup>41</sup> 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,<sup>42</sup> 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.<sup>43</sup>

### 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.<sup>44</sup> 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<sup>45</sup> and a LEC beginning in 1997,<sup>46</sup> 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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<sup>42</sup> T-Netix Responses to Bench Request Nos. 7 & 14.

<sup>43</sup> 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.

<sup>44</sup> 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.

<sup>45</sup> See AT&T’s Response to Bench Request No. 2 at 1.

<sup>46</sup> *Id.* at 2.

consumer that it is not the LEC are reasonable.”<sup>47</sup> 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.”<sup>48</sup>

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.<sup>49</sup>

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.”<sup>50</sup>

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.<sup>51</sup> The intent of the rule, therefore, was to exclude LECs only to the extent

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<sup>47</sup> *Id.* at 107.

<sup>48</sup> Order 23 ¶ 121.

<sup>49</sup> AT&T Petition for Administrative Review ¶¶ 39-42.

<sup>50</sup> *Id.* ¶ 43.

<sup>51</sup> 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.<sup>52</sup> 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.

<sup>52</sup> 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.<sup>53</sup> 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."<sup>54</sup> 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.<sup>55</sup>

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

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<sup>53</sup> 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.

<sup>54</sup> Order 23 ¶ 129.

<sup>55</sup> 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.<sup>56</sup>

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.<sup>57</sup> Indeed, the DOC-AT&T contract required the use of such an automated operator services platform,<sup>58</sup> 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.<sup>59</sup> 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.<sup>60</sup> Correspondence between AT&T and T-Netix confirms that as of

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<sup>56</sup> WAC 480-120-141(2)(b) (1999).

<sup>57</sup> *E.g.*, AT&T Response to Bench Request No. 12 and record citations therein.

<sup>58</sup> Ex. A-8, Amendment No. 2, Attachment B.

<sup>59</sup> AT&T Response to Bench Request No. 12.

<sup>60</sup> 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.<sup>61</sup> 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."<sup>62</sup>

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.<sup>63</sup> 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.<sup>64</sup>

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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<sup>61</sup> Ex. C-4C.

<sup>62</sup> *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).

<sup>63</sup> Exs. A-13 through A-15.

<sup>64</sup> *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**

# **Exhibit B**

1  EXPEDITE  
2 (if filing within 5 court days of hearing)  
3  Hearing is set:  
4 Date: February 2, 2012  
5 Time: 1:30 pm.  
6 Judge/Calendar: Hon. Paula Casey

7 IN THE SUPERIOR COURT OF WASHINGTON  
8 FOR THURSTON COUNTY

9 AT&T COMMUNICATIONS OF THE  
10 PACIFIC NORTHWEST, INC.,

11 Petitioner,

12 v.

13 WASHINGTON STATE UTILITIES AND  
14 TRANSPORTATION COMMISSION,

15 Respondent,

16 and

17 SANDY JUDD and TARA HERIVEL

18 Intervenors,

19 and

20 T-NETIX, INC.,

21 Interested Party.

22 T-NETIX, INC., a Delaware corporation,

23 Petitioner,

24 v.

25 WASHINGTON STATE UTILITIES AND  
26 TRANSPORTATION COMMISSION,

Respondent.

NO. 11-2-00992-8

and

NO. 11-2-00998-7

~~PROPOSED~~

ORDER ON PETITIONS FOR REVIEW



## I. BACKGROUND

1 The King County Superior Court in *Judd, et al., v. AT&T, et al.*, Case No. 00-2-17565-5  
2 (SEA) referred two questions to the Washington Utilities and Transportation Commission  
3 (“WUTC”) under the doctrine of primary jurisdiction. The court requested the WUTC to  
4 determine: (1) whether AT&T and T-Netix were Operator Service Providers for inmate-initiated  
5 collect telephone calls from Washington Department of Corrections facilities (“the First  
6 Question”); and (2) If so, whether WAC 480-120-141 was violated in connection with those calls  
7 (“the Second Question”).

8 The Commission answered those questions in Final Order Number 25. The Commission  
9 responded that AT&T was the Operator Service Provider and that it had violated WAC 480-120-  
10 141.

11 AT&T filed a petition in this court (No. 11-2-00992-8) to vacate both of those  
12 conclusions. T-Netix filed a petition in this court (No. 11-2-00998-7) to vacate the  
13 Commission’s findings that WAC 480-120-141 had been violated, that the T-Netix equipment  
14 was not capable of providing rate quotes, and to challenge the admission into evidence of  
15 telephone bills that were considered by the Commission. Sandra Judd and Tara Herivel were  
16 permitted to intervene to oppose both petitions. T-Netix was permitted to intervene to oppose  
17 AT&T’s petition on the issue of whether AT&T was an Operator Service Provider.

18 The petitions were later consolidated for consideration in one proceeding.

## 19 II. PROCEEDINGS BEFORE THIS COURT

20 This court considered the petitions filed by AT&T and T-Netix on December 9, 2011.  
21 The court received the full record of proceedings from the WUTC and considered the following  
22 submissions from the parties:

- 23 1. AT&T Petition for Judicial Review of Administrative Agency Decision and for  
24 Declaratory Relief;
- 25 2. T-Netix Petition for Judicial Review and Declaratory Judgment;
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3. AT&T's Opening Brief in Support of Its Petition for Judicial Review, including Appendix and Exhibits A-I;
  4. Petitioner's Brief of T-Netix, Inc.;
  5. Intervenors' Response to AT&T's Petition for APA Review;
  6. Intervenors' Response to T-Netix's Petition for APA Review;
  7. Declaration of Chris R. Youtz In Opposition to Petitions for Judicial Review;
  8. Washington Utilities and Transportation Commission's Combined Response Brief to Opening Briefs of AT&T and T-Netix;
  9. Intervenor's Brief of T-Netix;
  10. AT&T's Reply in Support of Its Petition for Judicial Review;
  11. Petitioner's Reply Brief of T-Netix, Inc.; and
  12. Declaration of Arthur A. Butler In Support of Petitioner's Reply Brief of T-Netix,

Inc. *13. AT&T's demonstrative exhibits presented at oral argument.*

The court also considered the oral arguments of the parties.

### III. RULING

~~The Court rules that~~ <sup>T</sup>the WUTC's response to the First Question, that AT&T was the Operator Service Provider, ~~and all related findings,~~ is affirmed.

The WUTC's conclusion that AT&T is not entitled to invoke the exemption of LECs from the definition of an Alternate Operator Services Company (the predecessor term for an Operator Service Provider) in WAC 480-120-021 (1991) for collect calls from inmates at the DOC Facilities between June 20, 1996, and December 31, 2000 is affirmed.

~~The~~ <sup>T</sup>With respect to the Second Question regarding whether WAC 480-120-141 was violated, ~~the Court~~ finds that the parties were not provided the full opportunity to present evidence on that issue and this matter is set aside and remanded to the WUTC to receive additional evidence, ~~on that issue and reconsider its response to the Second Question.~~


1 The Commission's statement in Paragraph 58 of the Final Order No. 25 that the T-Netix  
2 P-III equipment "was not able to receive a consumer request and provide a rate quote" is set  
3 aside and remanded to the WUTC.

4 The Commission's decision to admit into evidence telephone bills from Columbia Legal  
5 Services is affirmed.

6 Unless otherwise provided in this order, all findings of fact, conclusions of law, and  
7 rulings made by the Commission are affirmed.

8 No evidence outside of the record was considered in reaching this decision.

9 DATED: February 2, 2012.

10   
11 Paula Casey  
12 Superior Court Judge

13 *Presented by:*

14 ATER WYNNE LLP

15 /s/ Arthur A. Butler

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\* Admitted pro hac vice by order dated June 3, 2011