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September 11, 2008

David S. Danner
Secretary and Executive Director
Washington Utilities and Transportation Commission
1300 S. Evergreen Park Drive S.W.
Olympia, WA 98504-7250

VIA UPS NEXT DAY AIR AND E-FILE

Re: *Judd and Herivel v. AT&T Communications of the Pacific Northwest, Inc. and T-Netix, Inc.*
WUTC Docket No. UT-042022

Dear Mr. Danner:

Enclosed for filing in the above-referenced docket are the original and four (4) copies of the *Reply Brief of T-Netix, Inc. on Discovery.* Electronic copies were filed with the WUTC Records Department as of this date. All Parties of Record were served as outlined in the attached Certificate of Service.

If you have any questions, please feel free to contact me.

Sincerely,

ATER WYNNE LLP

S. Arellano

Susan Arellano
Assistant to Arthur A. Butler

Enclosures
cc: Parties of Record

384713_1/AAB/102728-0001

[Service date: **September 11, 2008**]

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 **REPLY BRIEF OF T-NETIX, INC. ON DISCOVERY**

1. Respondent T-Netix, Inc. ("T-Netix"), by its attorneys and pursuant to Order No. 08, respectfully submits its reply brief regarding the legal and procedural status of discovery in this proceeding.

2. Both Complainants and Respondent AT&T Communications of the Pacific Northwest, Inc. ("AT&T") propose that discovery in this primary jurisdiction referral should "proceed where it left off." AT&T Br. ¶¶ 2, 5; Compl. Br. ¶ 18 ("pick up where we left off"). Both offer as rationales that (a) AT&T's 2005 motion for summary judgment on the issue of whether it or T-Netix is an OSP is still pending, and (b) no one has objected to discovery (at least

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prior to dismissal of this matter in 2005) or offered a reason why the original discovery schedule[1] is now inapplicable. AT&T Br. at ¶¶ 2, 5-6; Compl. Br. ¶¶ 2, 18.

3. Neither of these justifications has any basis in the record or reality. ***First,*** whether or not a party objected to or agreed with former ALJ Rendahl's revised discovery schedule (Notice of Revised Procedural Schedule, July 29, 2005) has no bearing on whether that same schedule now remains appropriate, and certainly does not bind the parties or the Commission. ***Second,*** T-Netix has offered a legitimate and, we believe, dispositive rationale as to why discovery is no longer applicable in this proceeding.

4. As counsel indicated during the conference and explained in full on brief, the reason discovery was even permitted in the first instance — in order to allow factual exploration of AT&T's 2005 motion for summary determination — is no longer apposite since **AT&T's motion is no longer pending** and, indeed, is **barred as a matter of law** by the Court of Appeals' decision. *See* T-Netix Br. at ¶ 29.

> Because the Court of Appeals found a disputed issue, based on conflicting expert declarations, about whether either Respondent was an OSP for the calls allegedly received by Complainants, *AT&T would no longer have any valid basis to request summary disposition of this referral proceeding even if it submitted additional testimony or documents.* The ground for AT&T's motion (like a similar motion filed by AT&T with, but withdrawn from, the Superior Court a few months ago) was that there was no question for adjudication by the Commission as to which party was an OSP because the underlying facts were clear. That position is obviously incorrect as a consequence of the Court of Appeals' reversal. *As a result, the limited discovery authorized by the Commission in the July 29, 2005 procedural schedule, restricted to the issues raised in AT&T's motion, is no longer justified or appropriate.*

Id. (emphasis supplied).

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[1] AT&T argues for adoption of what it terms "the previously agreed-upon schedule entered in Order No. 1." AT&T Br. at ¶ 6. But even there AT&T errs, because App. B to Order No. 1, issued Feb. 22, 2005, was superseded by the revised July 29, 2005 procedural schedule. *See* T-Netix Br. at ¶¶ 16, 19, 23; Compl. Br. at ¶ 13. As discussed in the following text, moreover, whether or not the schedule was agreed to in 2005 is immaterial today.

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5. AT&T seeks, in effect, to have its summary determination motion reinstated. Yet the Commission's proceeding here was not merely "interrupted," AT&T Br. at ¶ 4, it was dismissed. Order No. 07. And in the intervening time period, the Court of Appeals held that the question of OSP status "could not be decided as a matter of law" and thus that summary adjudication was inappropriate. *Judd v. American Tel. & Tel Co.,* No. 57015-3-1, slip op. at 9-10 (Dec. 18, 2006). Indeed, the Court emphasized that "[t]he summary determination motion before the WUTC and the later summary judgment motion before the superior court" were "both" invalid in light of "appellant's expert's [affidavit] testimony that AT&T and T-Netix could have been OSPs for the calls in question." *Id.*

6. In the wake of the Court of Appeal's decision, there is no basis for any Commission consideration or reinstatement of AT&T's 2005 motion for summary determination. In this state, like all other jurisdictions, an appellate ruling is the law of the case, binding all parties and lower tribunals on remand. *See, e.g., Roberson v. Perez*, 156 Wn. 2d 33, 41, 123 P.3d 844, 849 (2005) ("[t]he law of the case doctrine stands for the proposition that once there is an appellate holding enunciating a principle of law, that holding will be followed in subsequent stages of the same litigation."); *Folsom v. County of Spokane*, 111 Wn.2d 256, 264, 759 P.2d 1196, 1200-01 (1988) ("Under the doctrine of 'law of the case,' as applied in this jurisdiction, the parties, the trial court, and this court are bound by the holdings of the court on a prior appeal until such time as they are 'authoritatively overruled.'"). Consequently, because the only reason for discovery prior to the filing of testimony by Complainants was to allow briefing on a motion that is now moot and barred by the law of the case, the Commission has no basis to depart from its ordinary complaint procedures.

7. Complainants want to have their cake and eat it too. They insist that discovery is required in order to "test the issues that were addressed in this [expert] affidavit," Compl. Br. at ¶ 8, but neglect to add they have already raised a disputed question, as the Court of Appeals

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found, by the affidavit of their own expert. Hence Complaints do not need any additional discovery in order to avoid summary adjudication. And before the King County trial court just months ago, they opposed AT&T's (later withdrawn) motion for summary determination, arguing that the motion was foreclosed because "[t]he Court of Appeals clearly stated that summary judgment was not appropriate to determine whether T-Netix and AT&T were OSPs." Plaintiffs' Reply to Defendant AT&T's Response to Motion to Vacate Orders and Reinstate Referral, No. 00-2-17565-5 SEA, at 2 (March 20, 2008) (attached as Exh. A).

8. Complainants were right then. What Complainants really seek, now, is not at all the narrow discovery allowed by the Commission in 2005 related to the then-pending motions, but rather unlimited discovery in order to find evidence supporting their claims, to locate additional plaintiffs, and to substantiate their judicial request for class certification by "discovering" inmate calls placed from prisons other than the facilities from which Sandy Judd and Tara Herivel received calls. T-Netix Br. at ¶ 31. That sort of open-ended fishing expedition is precisely what T-Netix warned against in the August 21 prehearing conference. Complainants' current request for a schedule commanding response to their second set of data requests amply illustrates their *sub silentio* intent to use this regulatory proceeding as a substitute for civil litigation discovery.

9. The Commission never permitted such broad discovery in the first place and, in any event, lacks the jurisdiction to do so because it exceeds the scope of the primary jurisdiction referral. T-Netix Br. at ¶ 31. If Judd or Herivel do not have *prima facie* evidence that T-Netix or AT&T were OSPs within the meaning of the Commission's regulations, judgment on their complaint should be entered in favor of Respondents. If Judd and Herivel have such evidence, which their expert affidavit demonstrates they do, they should put that evidence to the test by prefiling proposed written testimony. And even whether or not Judd or Herivel are to be allowed discovery in this regulatory complaint proceeding, discovery should not and cannot extend to

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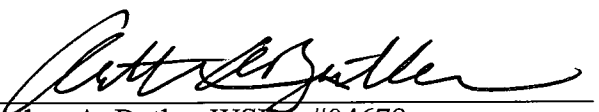
other (non-Complainant) recipients of inmate calls, calls placed from other prisons, or calls processed by other inmate phone "platform" equipment.

10. In sum, because the basis on which the Commission in 2005 allowed discovery regarding AT&T's now moot motion for summary determination is no longer applicable as a matter of law, the Commission should fashion a new schedule, *see* T-Netix Br. ¶ 45, beginning with the typical prefiling of proposed direct testimony by Complainants under WAC 480-07-460.

RESPECTFULLY SUBMITTED this 11th day of September, 2008.

ATER WYNNE LLP

By: 

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CERTIFICATE OF SERVICE

I hereby certify that I have this 11th day of September, 2008, served via e-filing a true and correct copy of the foregoing, with the WUTC Records Center. The original, along with the correct number of copies (4), of the foregoing document will be delivered to the WUTC, via the method(s) noted below, properly addressed as follows:

David S. Danner Secretary and Executive Director 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 11th day of September, 2008, served a true and correct copy of the foregoing document upon parties of record, via the method(s) noted below, properly addressed as follows:

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HON. JEFFREY RAMSDELL
Noted for Consideration: March 21, 2008
Without Oral Argument

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.; 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

PLAINTIFFS' REPLY TO DEFENDANT AT&T'S RESPONSE TO MOTION TO VACATE ORDERS AND REINSTATE REFERRAL

Defendant AT&T objects to plaintiffs' request for an order reinstating the primary jurisdiction referral to the WUTC mandated by the Court of Appeals and vacating three orders issued in September and October, 2005, on the grounds that it wants this Court to first consider an additional motion for summary judgment on whether it is an OSP. AT&T is simply trying to revive a battle that it has already lost in the WUTC and the Court of Appeals and its objections should be rejected.

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Despite the mandate from the Court of Appeals, AT&T argues that this Court should exercise its "discretion" and not reinstate the primary jurisdiction referral.[1] AT&T now seeks summary judgment by claiming plaintiffs and their expert "admitted" in the initial proceedings before the WUTC that AT&T is not an OSP. AT&T made this same argument before the administrative law judge in a motion for summary determination, which it lost. It was also unsuccessful with this argument in the Court of Appeals. *See* AT&T Brief, pp. 23-29 attached as Exhibit A to this reply.

The Court of Appeals clearly stated that summary judgment was not appropriate to determine whether T-Netix and AT&T were OSPs:

> The summary determination motion before the WUTC and the later summary judgment motion before the superior court both suffer from the same circular reasoning. Each appears to have been brought essentially to avoid discovery on the issue of whether T-Netix and AT&T are OSPs. But for summary judgment to be appropriate, a court must decided, without the benefit of that discovery, that AT&T and T-Netix were not OSPs as a matter of law.
>
> * * *
>
> The trial court erred in granting summary judgment because to do so it had to ignore both appellant's expert's testimony that AT&T and T-Netix could have been the OSPs for the calls in question and the ALJ's determination that this issue could not be decided as a matter of law.

Judd v. American Telephone and Telegraph Co., No. 57015-3-1 (Dec. 18, 2006) at 9-10 (attached as Ex. A to plaintiffs' motion).

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[1] AT&T states that this Court "reconsidered and revoked its initial referral" in connection with T-Netix' motion for summary judgment. AT&T response at 2. That statement is misleading. This Court did not decide to revoke the referral on the grounds that it did not need input from the WUTC; it revoked its referral *after* it granted the motions for summary judgment because the case was terminated and there was nothing left for the WUTC to consider.

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Thus, AT&T continues to try to avoid discovery by again making an argument that was rejected by the Court of Appeals. This Court should follow the mandate from the Court of Appeals and refer the case back to the WUTC so that the agency can apply its expertise to determine whether AT&T is an OSP.

AT&T also argues that it has an indemnification claim against T-Netix that must be determined by this Court and not the WUTC. First, we have not seen any pleading filed by AT&T that raises a cross-claim against T-Netix. Second, it is more appropriate to have the WUTC first determine the status of both defendants before determining whether T-Netix should indemnify AT&T for damages that may be assessed against it. There is no reason to delay referring this matter to the WUTC simply because AT&T believes that it is entitled to indemnification from T-Netix.

For these reasons, this Court should enter the order proposed by the plaintiffs.

DATED: March 20, 2008.

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CERTIFICATE OF SERVICE

I certify, under penalty of perjury and in accordance with the laws of the State of Washington, that on March 20, 2008, I served a copy of the foregoing document on all counsel of record as indicated below:

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DATED: March 20, 2008, at Seattle, Washington.

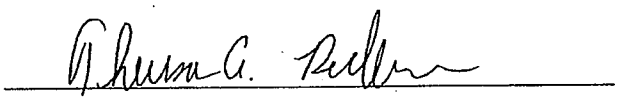

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Exhibit A

Appeal No. 57015-3-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

SANDY JUDD and TARA HERIVEL,

Appellants,

v.

AMERICAN TELEPHONE AND
TELEGRAPH COMPANY and T-NETIX, INC.,

Respondents.

BRIEF OF RESPONDENT AT&T
(Filed Under Seal)

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Dated: April 19, 2006

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prisons. Accordingly, there is no genuine dispute between Plaintiffs and AT&T that AT&T was not the OSP and, therefore, Plaintiffs do not have standing to assert claims against AT&T as a matter of law.

1. The OSP Was The Party That Provided The "Connection."

The WUTC regulations on which Plaintiffs base their claim define the OSP as "any corporation, company, partnership, or person providing a connection to intrastate or interstate long-distance or to local services from locations of call aggregators." WAC 480-120-021 (1999) (Pls.' Appendix, D-4).[8] Accordingly, the OSP is the party that provided the "connection" for the inmate-initiated calls of which Plaintiffs complain — the party that connected the calls from the prison phones to the intrastate or interstate long-distance or the local service provider.

2. Plaintiffs Admit That AT&T Was Not The OSP.

Plaintiffs and their expert repeatedly admit that T-Netix, not AT&T, provided the "connection" for the inmate-initiated calls of which Plaintiffs complain and, therefore, was the OSP. For example, Plaintiffs state in their opening brief:

[8] Plaintiffs incorrectly state that "[n]either T-Netix nor AT&T is a local exchange company, so the regulation [WAC 480-120-021 (1991) (Pls.' Appendix, D-4)] applies to them if they provided the requisite 'connection' described in the regulation." Pls.' Opening Br. at 20-21. On the contrary, from 1996 to the present, AT&T has been a certified local exchange company and cannot, therefore, be found to be an AOS company for this time period or to be liable for failing to make disclosures that only AOS companies were required to make pursuant to WAC 480-120-021 (1991). CP 47, ¶ 12.

- "T-Netix owned and operated a call control platform at each of [the four] facilities [at issue] that provided operator services." Pls.' Opening Br. at 4.

- "[P]laintiffs' expert has concluded that T-Netix was the Operator Services Provider for these institutions and should have provided automated rate disclosure to consumers." *Id.*

- "Accordingly, plaintiffs have been injured by T-Netix's failure to disclose rates in its capacity as the Operator Services Provider on these calls." *Id.* at 3-4.

- "Plaintiffs received inmate-initated calls from four different Washington prisons for which no rate disclosure was provided, and on which T-Netix served as the OSP." *Id.* at 7.

- "Plaintiffs' expert provided sworn testimony that the T-Netix platform provides a 'connection' as that term is used in WAC 480-120-021 (1999):" *Id.* at 13.

- "The T-Netix platform provides a connection to intrastate and interstate long-distance providers and to local service providers from all correctional facilities where the T-Netix platforms are located. Calls from inmates in correctional institutions cannot be made without going through the T-Netix platform. Calls are not connected, except by, and through the platform." *Id.* at 14.

- "T-Netix is an OSP at every location where its platform is operational." *Id.*

- "T-Netix was the Operator Services Provider at each of the prisons from which plaintiffs received calls." *Id.* at 17.

- "Among [Plaintiffs' expert's] many conclusions regarding T-Netix's role in the Washington state prison telecommunications system are the following: . . . The T-Netix platform provides automated operator services functions that are consistent with the WUTC's definition of an OSP and its definition of 'operator services.'" *Id.* at 24.

- "[B]oth plaintiffs received calls from institutions where T-Netix was acting as an OSP." *Id.* at 26.

Having repeatedly conceded in their opening brief that T-Netix was the operator services provider at each of the facilities at issue in this case, Plaintiffs cannot now attempt to keep AT&T in the case by simply asserting that a factual issue might exist on this point. Plaintiffs are bound by their concessions and this Court may consider Plaintiffs' concessions in reviewing the trial court's grant of summary judgment for AT&T. *See, e.g., Hofsvang v. Estate of Brooke*, 78 Wash. App. 315, 321 n.4, 897 P.2d 370, 373 n.4 (Div. I 1995) (although plaintiff argued that certain documents raised an issue of material fact, "[a]t oral argument, counsel conceded that the documents alone were not sufficient to raise an issue of fact and thus [the court did] not address them"). There is no dispute between Plaintiffs and AT&T, therefore, that T-Netix, not AT&T, was the OSP for the inmate-initiated calls and prisons at issue and summary judgment for AT&T is appropriate.

3. AT&T Was Not The OSP Under The Relevant Contracts.

The contracts governing the provision of telephone services to the Washington prisons at issue further demonstrate that AT&T was not the OSP for those prisons or inmate-initiated calls originating from those prisons. Plaintiffs received calls from four prisons: Washington State

Reformatory, McNeil Island, Airway Heights, and Clallam Bay. Pls.' Opening Br. at 15. Under the relevant contracts, Qwest was responsible for providing service at McNeil Island and Airway Heights, Verizon was responsible for providing service at Washington State Reformatory, and CenturyTel was responsible for providing service at Clallam Bay. CP 51; CP 63; CP 76. Qwest's and Verizon's contracts provide that Qwest and Verizon shall provide the following services: "Delivery of interLATA traffic . . . to AT&T's Point of Presence" and "[c]ompletion of all '0+' local and intraLATA calls . . . and all '1+' local and intraLATA calls." CP 51; CP 63. Similarly, CenturyTel's contract provides that CenturyTel shall provide the following services: "Delivery of intraLATA and interLATA traffic . . . to AT&T's Point of Presence" and "[c]ompletion of all '0+' local calls and all sent-paid local calls." CP 76. Because other companies were responsible for delivering telephone traffic to AT&T's "point of presence," AT&T could not, as a matter of law, have been the OSP. Other companies provided the "connection" to AT&T. *See* WAC 480-120-021 (1999) (Pls.' Appendix, D-4); WAC 480-120-021 (1991) (Pls.' Appendix, C-3).[9]

[9] Qwest, Verizon, and CenturyTel fulfilled their contractual obligations, at least in part, by retaining T-Netix to provide services at the prisons for which the LECs were responsible. *See* footnote 6, *supra*. Pursuant to contracts it entered into with Qwest, Verizon, and CenturyTel, T-Netix provided its P-III platform (also known as the (Continued . . .)

In addition to the Qwest, Verizon, and CenturyTel contracts, AT&T's contract with the DOC demonstrates that AT&T was not the OSP. AT&T's contract with the DOC provides that Qwest, Verizon, and CenturyTel "shall . . . provide local and intraLATA telephone service and operator service" at the specified prisons. Supp. CP ___. It also provides that Qwest, Verizon, and CenturyTel "shall install and maintain public telephone sets, all associated equipment, lines, Dictaphone recording/monitoring equipment and call timing and call blocking software" at the prisons assigned to them. Supp. CP ___. Consistent with AT&T's contract with the DOC, its contracts with Qwest, Verizon, and CenturyTel provide that the LECs would provide public pay telephones, cabling and associated equipment, and live or mechanical operator announcements. CP 51-52; CP 62-63; CP 76-77. Because companies other than AT&T had their equipment and lines at the prisons at issue, AT&T could not, and did not, connect the calls from these prisons to local or long-distance service providers. Indeed, T-Netix's expert stated that "[i]nmate telephone station sets are typically provided, installed, and maintained by the contracted operator services provider or their

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PREMISE platform) at all of the prisons at issue. *Id.*; CP 414. Among other services, the P-III platform and its attendant software "perform[ed] operator services functionality" and "ma[de] the connection to intrastate and interstate long-distance services from correctional institutions." CP 465-68, ¶¶ 13-14, 16-17; *see also* Section III.B.3, *supra*.

subcontractor." CP 419, ¶ 13. AT&T's role under the contractual scheme was to *receive* the "connection" — not to *make* the "connection" — for long-distance calls from the OSP or the LEC.[10]

The Supreme Court of Washington has already held in this case that it is appropriate to review these contracts in order to determine the relationships among the parties. *See Judd*, 152 Wash. 2d at 206, 95 P.2d at 343. On Plaintiffs' earlier interlocutory appeal, the Supreme Court affirmed the dismissal of CenturyTel based on the Court's review of the undisputed terms of the contract between CenturyTel and the Washington DOC. *Id.* That very contract is one of the contracts at issue in this appeal. CP 75-83. Because Plaintiffs have not disputed the authenticity of any of these contracts, this Court can, and should, review the contracts to determine the nature of the parties' responsibilities.

[10] Plaintiffs misleadingly suggest that "[o]ther fact questions exist with regard to AT&T's role as an OSP" because "one of the T-Netix operator services platforms is tightly integrated with an AT&T switch" and "discovery is not complete on this issue in the WUTC." Pls.' Opening Br. at 33. Plaintiffs' statement is flatly contradicted by the sworn affidavits of both Plaintiffs' and T-Netix's experts, both of whom stated that for each of the prisons at issue, the T-Netix platform was on site, not integrated with an AT&T switch. CP 419-20, ¶¶ 13-15 (T-Netix's expert stating that the prisons at issue used the P-III platform, which "is an on-premise platform typically installed on-site at the correctional facility in a location that provides access to the facility's inmate station wiring and the outbound network trunks"); CP 463-67, ¶¶ 10-16 (Plaintiffs' expert stating that T-Netix's "PREMISE or P-III" platform "is located on-site at the correctional institution premise" and "seems to be the most common configuration in Washington"); CP 414 (T-Netix's discovery response stating that its P-III platform was in place "at all institutions from which [Plaintiffs] received calls"). Accordingly, contrary to Plaintiffs' suggestion, no such fact question exists.

According to the allocation of responsibility established by the relevant contracts, the inmate-initiated calls of which Plaintiffs complain never even touched AT&T's network.

> AT&T did not and does not own the LEC facilities that connect and transport inmate traffic to AT&T's network. Rather, the LECs carry the traffic, on their own facilities, from the various DOC premises. So, for example, where Ms. Judd . . . received calls at her home in Snohomish from her husband incarcerated at the Washington State Reformatory at Monroe, the calls would only have traversed GTE's network to travel between the Monroe to Snohomish exchanges. Because her calls are intraLATA calls, they were all completed entirely on the LEC network and never touched AT&T's own network.

CP 46-47, ¶ 8. As a result, AT&T was not, and could not have been, the OSP for *any* of the inmate-initiated calls of which Plaintiffs complain, including the interLATA call that Ms. Herivel alleges she received from Mr. Miniken at Airway Heights.[11]

C. AT&T Cannot Be Liable For "Contracting With" The OSP.

Plaintiffs suggest that in addition to the OSP being liable for failing to make rate disclosures for inmate-initiated calls, a party that "contracted with" the OSP also can be liable. Pls.' Opening Br. at 22, 33-

[11] Plaintiffs incorrectly claim that AT&T "acknowledge[s] that if the [interLATA call allegedly received by Ms. Herivel] *was* made, then a factual dispute exists concerning which defendant — T-Netix or AT&T — was the Operator Services Provider for the call." Pls.' Opening Br. at 5 (emphasis in original). AT&T has made no such acknowledgment. In fact, as Plaintiffs recognize, Pls.' Opening Br. at 31-32, AT&T moved for a summary determination from the WUTC that AT&T *was not* the OSP under any circumstances. That motion remained pending at the time the matter was referred back to the trial court.