Confidential Per Protective Order in WUTC Docket No. UT-042022

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

SANDRA JUDD, et al., Complainants, v. AT&T COMMUNICATIONS OF THE PACIFIC NORTHWEST, INC.; and T-NETIX, INC., Respondents.	DOCKET NO. UT-042022 **REDACTED FOR PUBLIC FILING** COMPLAINANTS' MEMORANDUM IN OPPOSITION TO T-NETIX' MOTION FOR SUMMARY DETERMINATION AND AT&T'S MOTION FOR SUMMARY DETERMINATION

I. INTRODUCTION

1. T-Netix and AT&T have each filed a motion for summary determination claiming that they were not responsible for providing operator services to the institutions at issue in this matter and, thus, cannot be liable for failing to comply with the rate disclosure regulations issued by the Commission. AT&T filed an amended motion as a substitute for its original motion. We will refer to that motion as "AT&T Amended Motion." T-Netix also filed an amended motion, which we refer to as "T-Netix Amended Motion," but has incorporated all of the arguments made in its original motion as well, which we refer to as the "T-Netix Original Motion." As explained below, all of these motions should be denied.

II. FACTUAL BACKGROUND

A. The requirement for rate disclosure

2. In 1988, the Washington Legislature acted to require companies providing long-distance operator services at public telephones to disclose rates. *See* RCW 80.36.510, .520, and .530.

> The legislature finds 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.

RCW 80.36.510.

3. These disclosure requirements were specifically imposed on "alternate operator service companies":

> The utilities and transportation commission shall by rule require, at a minimum, 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.

RCW 80.36.520. The phrase "alternate operator services company" was defined by the legislature as follows:

> For the purposes of this chapter, "alternate operator services company" means 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.

RCW 80.36.520.

4. The Commission issued rate disclosure regulations in accordance with these statutes in 1991—the year before AT&T would enter into a contract with the Washington Department of Corrections to provide telephone services to the prisons.

Under the 1991 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 quote of the rates or charges for the call, including any surcharge." *Id.* An alternate operator services company, or AOSC, was defined to include any company, other than a local exchange company, providing a connection to intrastate or interstate long-distance or to local services from locations of call aggregators. WAC 480-120-021 (1991).

5. In 1999, the WUTC amended the regulation, substituting the term "operator services provider" (OSP) for "alternate operator services company" (AOSC). *See* WAC 480-120-021 (1999). Although the regulation now applied to local exchange companies, the definition of an OSP was identical in all other respects to the older definition of "alternate operator services company." Thus, the terms AOSC and OSP are synonymous and interchangeable for purposes of these motions. We shall refer to both as OSP.

6. The 1999 regulation imposed stronger disclosure requirements. The rules required automatic rate disclosure that is activated by pressing keys on the telephone keypad:

> 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 rule applies to all calls from pay phones or other aggregator locations, including prison phones....

WAC 480-120-141(2)(b) (1999).

7. There has never been any doubt that prisons are among the places covered by the rate disclosure statute and the Commission's rate disclosure rules. In 1989, when the Commission adopted regulations regarding alternate operator services, it stated that "Alternative operator services companies (AOS) are those with which a hotel, motel, hospital, ***prison***, campus, customer-owned payphone, etc. contracts to provide operator services to its clientele. *See* WAC 480-120-141(2)(b) (1989) (emphasis added), AT&T Ex. 3 at p. 74. *See also*, WAC 480-120-141(3)(1991) (call aggregator includes prisons).

8. Under both the 1991 and 1999 regulations, the company providing operator services must disclose rates as part of the services it provides. *See* WAC 480-120-141(2)(b) (1999) ("***the OSP*** must verbally advise the consumer how to receive a rate quote ...") (emphasis added); WAC 480-120-141(5)(a)(iv) (1991) ("***The alternate operator services company shall:*** ... immediately, upon request, and at no charge to the consumer, disclose to the consumer: a quote of the rate or charges for the call, including any surcharge") (emphasis added).

B. The AT&T/DOC contract

9. In 1991, when the rate quote requirements were being introduced into the regulations, AT&T was preparing its proposal to provide telephone services to the correction facilities managed by the Washington Department of Corrections ("DOC"). AT&T was awarded the contract, and in a contract dated March 16, 1992, agreed to be responsible for the entire project and to enter into subcontracts with PTI, GTE, and

U.S. West who would serve as LECs for the prisons in their service areas. AT&T Ex. 7 at p. 1.

10. In 1995, AT&T and the DOC made a second amendment to their agreement to change the way in which calls from the DOC facilities were handled. The amendment provided, in part:

> 1. Department and Contractor [AT&T] agree that Contractor shall arrange for the installation of certain call control features for intraLATA, interLATA and international calls carried by AT&T. The State Correctional Institutions and Work Facilities to receive such call control features and the installation schedule shall be determined by agreement between Department and Contractor. Contractor shall install and operate such call control features through its subcontractor Tele-Matic Corporation in accordance with the terms and conditions set forth in Attachment B and Exhibit 1 hereto, which are incorporated by reference.

AT&T Ex. 7, Youtz Ex. A. Tele-Matic later changed its name to T-Netix. Youtz Ex. K. T-Netix installed platforms at AT&T's direction that handled the call control features at the prisons involved in this case.

11. The DOC contract was again amended in February, 1997, to substitute T-Netix as the LEC for the DOC facilities served by PTI.

C. Rate Quoting in Washington

12. We have seen no evidence of rate quotes being provided prior to 1999, when AT&T became concerned about meeting the rate quote requirements for interstate calls that were imposed by the FCC in 1998.

13. This lawsuit was filed in June, 2000, because recipients of collect phone calls from inmates were not being provided with rate information as required by the

regulations. After that date, AT&T contacted T-Netix to initiate rate quotes for intrastate calls at the Washington prisons. As of August, 2000, T-Netix was refusing to do so unless AT&T paid it additional money. Youtz Ex. B.

14. Rate disclosures for intrastate calls for the Washington prisons were not made until early 2001 at the earliest, in violation of both the 1991 and 1999 regulations. Not surprisingly, AT&T and T-Netix each disclaim any responsibility for providing operator services for inmate calls, which included the responsibility to make verbal rate disclosures.

III. ISSUES

15. Even if AT&T hired T-Netix to provide operator services, is AT&T still responsible for ensuring that required rate disclosure is provided under its agreement to provide phone services to the DOC institutions?

16. Even though T-Netix did not directly enter into a contract with the DOC, is it liable as the actual provider of the operator services for the DOC institutions for failing to comply with the regulations governing OSPs, including requirements for rate disclosure?

IV. ARGUMENT

A. Introduction

17. The ultimate question to be answered in this case is whether rate disclosures for collect calls from inmates incarcerated in Washington prisons were provided as required by regulations issued by the Commission. The statute authorizing these regulations provides that an operator service provider ("OSP"), or a

person contracting with an OSP, may be liable under the Washington Consumer Protection Act for failing to provide those disclosures. RCW 80.36.520. AT&T and T-Netix each claim that the other is the OSP for calls at issue in this case and each has brought a motion for summary determination that it cannot be liable for the duties imposed on OSPs by the regulations.

18. AT&T entered into an agreement with the Washington Department of Corrections in 1992 that, among other things, gave it the right—and the obligation--to provide all of the telephone services for inmate use. Had AT&T purchased, installed, operated, maintained, and controlled the automated equipment used to provide the services needed to handle collect calls from inmates, this case would be simple: AT&T would be the OSP. AT&T, however, entered into agreements with other companies, including T-Netix, to provide services that AT&T was required to provide under the DOC contract.

19. The services contracted out by AT&T included operator services provided by T-Netix. Discovery confirmed that T-Netix controlled the equipment and software that provided operator services for the DOC facilities at issue in this case. T-Netix made the "connection" contemplated by the statute and the regulations to make it liable as an OSP. Further, T-Netix provided numerous "operator services" to the prisons, confirming its role as an operator services provider.

20. T-Netix argues that AT&T cannot contract away its original responsibilities for providing operator services under the DOC contract. We agree that AT&T cannot escape liability by contracting away its operator service

responsibilities, but that does not relieve T-Netix from its liability as the entity that actually provided the operator services. AT&T and T-Netix are jointly liable for the calls in issue in this case.

B. AT&T is liable as an OSP

21. In 1991 as AT&T was submitting its proposal to provide telephone services to Washington DOC facilities, it filed a petition with the Commission seeking a waiver of certain rules applicable to OSPs. The request from AT&T was in anticipation that it would provide "telecommunications services to inmates of correctional institutions." Youtz Ex. C. The particular rules that AT&T obtained a waiver for included (1) the requirement under WAC 480-120-141(4)(a) to place stickers on the inmate phones describing how to contact an operator (which is not possible from inmate phones), (2) the requirement under WAC 480-120-141(4)(b) that the user be told how to use another provider (an option not available on prison phones), and (3) the requirements under WAC 480-120-141(7) for handling emergency calls (which are not needed from inmate phones). *Id.* The significance of this petition is that it shows that AT&T understood that it was intending to be an OSP under its expected contract with the Washington DOC.

22. Also in 1991, T-Netix (then known as Tele-Matic) entered into an agreement with AT&T to provide equipment and services, apparently on a national basis, for contracts that AT&T planned to obtain for providing telephone services to correctional facilities. Youtz Ex. D. That agreement specified the automated operator services to be provided by T-Netix, including identifying the corrections facility and

the name of the inmate, branding the calls, detecting three-way calls, etc., similar to the operator services that would be required of an OSP under the Washington DOC contract. Youtz Ex. D at 2-3.

23. The list of responsibilities for T-Netix in this agreement, and in a later agreement between T-Netix and AT&T signed in 1997 (T-Netix Original Motion, Ex. 2), did not specifically include providing rate quoting. This has now caused T-Netix to take the position that it was not required to provide rate quoting under its agreements with AT&T.

24. This lawsuit was filed in June, 2000. Sometime after that, AT&T says that it became aware that rate quoting was not provided as required:

Deposition of Karen Vitale at 51, Youtz Ex. E.

25. It is not known how soon after this suit was filed that AT&T contacted T-Netix about the need to provide rate quotes for intrastate calls from inmate phones. By August, 2000, however, it was clear that T-Netix was unwilling to do the work needed to add intrastate rate quoting unless it was paid additional money:

Letter from Karen Casciotta (AT&T) to Ken Stibler (T-Netix), Aug. 25, 2000, Dep. Ex. 22, Youtz Ex. B.

26. An implementation schedule was never provided (Deposition of Karen Vitale at 51, Youtz Ex. E.), and it does not appear that further action was taken until 2001.

27. An agreement between T-Netix and AT&T dated January 1, 2001, specifically charged T-Netix with making equipment and software changes to meet rate quoting requirements for interstate calls. In that agreement, AT&T details the verbiage that should be used in the announcements. Thus, T-Netix claims that "January 1, 2001, was the earliest time that T-NETIX was obligated to assist AT&T with rate disclosures (and only for interstate calls)." T-Netix Original Motion at 6.

28. AT&T had the ultimate control over its subcontractor, T-Netix, to ensure that rate quotes were provided. In earlier efforts to comply with the federal rate quote requirements, AT&T provided direction to T-Netix and had a rate quote committee to ensure that federal requirements were met. When it came to meeting the requirements

established by the WUTC, however, AT&T took no action until after it was sued in June, 2000. Even then, T-Netix balked at providing the quotes until it was paid additional money to do so by AT&T. While T-Netix is required to comply with the Commission's rules, as discussed below, AT&T is still responsible for ensuring that its subcontractors comply with the law.

29. AT&T argues that the contract it signed with the Washington DOC relieves it of any responsibility for operator services and places that duty, at least initially, on PTI, U. S. West, and GTE. These LECs did not sign the agreement with the DOC; they signed agreements with AT&T and they were expressly identified as subcontractors to AT&T. AT&T argues that because the contract states in a paragraph that "Contractor" "shall include" AT&T, its employees, agents, suppliers, and subcontractors, and the employees of each of those entities, that the subcontractors became directly responsible to the DOC, relieving AT&T of any responsibility for operator services. This leap of logic does not jibe with the original agreement, which in its first line identifies AT&T as the "Contractor," and each of the amendments, which also identify AT&T the "Contractor." If AT&T was correct, then each of its individual employees would also be directly and solely answerable to the DOC rather than to AT&T for the performance of their work. This makes no sense.

30. Of more significance is the second amendment to the DOC Contract where AT&T agrees to install call control features for intraLATA, interLATA, and international calls, to be handled by the T-Netix platform. The amendment states:

> Contractor [AT&T] shall install and operate such call control features through its subcontractor Tele-Matic Corporation [T-Netix]....

Amendment No. 2 to DOC Contract, June 16, 1995, Youtz Ex. A.

31. AT&T acknowledges that the T-Netix platform "provided all operator services for calls from the Washington prisons at issue...." Opinions of Mark Pollman (AT&T expert), Youtz Ex. F. This amendment shows that AT&T was the party responsible for the installation and operation of that platform, which would include the associated obligations to provide rate quotes, even though it was performing this work "through its subcontractor [T-Netix]."

32. AT&T cannot contract away this duty. Traditional agency law holds that a principal is not relieved of its obligations by hiring an agent to perform in its stead. It is not necessary to resort to agency law to confirm AT&T's responsibility here, however. The statute directing compliance with the rate disclosure rules established by the Commission requires that those disclosures be made "by any telecommunications company, operating as ***or contracting with*** an [OSP]." RCW 80.36.520. Here, to the extent that AT&T was not an OSP itself, it clearly contracted with T-Netix, who it states was the OSP. Opinions of Mark Pollman (AT&T expert), Youtz Ex. F.

33. Whether AT&T is considered to be an OSP because it has the ultimate responsibility under the DOC contract to provide telephone services to the Washington DOC that are in compliance with the law or whether it remains responsible because it contracted with T-Netix who actually provided the operator

services to the inmate phones does not matter. It remains responsible for compliance with the rate quote obligations.

34. AT&T argues that it cannot be liable under the "contracting with" portion of the statute because the regulations issued by the Commission under that statute do not include that phrase. This argument arises from the holding in *Judd v. AT&T,* 152 Wash.2d 195 (2004), which held that for there to be a failure to disclose rates that is actionable under the CPA, the failure must violate the rules adopted by the WUTC for "appropriate disclosure" of rates.

35. There were two statutes at issue in *Judd.* The first, RCW 80.36.510, states:

> The legislature finds 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.

36. The second statue, RCW 80.36.520, provides:

> The utilities and transportation commission shall by rule require, at a minimum, 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.

37. The issue on appeal was whether the first statute by itself provided a cause of action for violation of the Consumer Protection Act, or whether it was necessary to show a violation of the specific disclosure rules issued by the Commission pursuant to the second statute. The court held that the first statute "does

not establish a cause of action independent from claims based on violations of the disclosure regulations adopted by the WUTC." *Id.* at 199.

38. The court of appeals opinion concluded that the Commission was in the best position to understand what constituted "appropriate disclosure." "A plain reading of the statute indicates that the legislative requirement directed the WUTC to assure "appropriate disclosure" to consumers through promulgation of rules. It is within the purview of the WUTC to direct how, when, or to whom the disclosure is made." *Judd v. AT&T*, 116 Wn. App. 761, 770 (2003). The legislature had already determined that alternative operator services companies and those who contracted with them would be bound by the rules issued by the Commission; the expertise needed from the Commission involved the appropriate levels and means of disclosing rates. AT&T has presented no evidence that the Commission intended to exclude companies who contract out their OSP responsibilities to companies like T-Netix from complying with the OSP rules.

39. AT&T's motion also asks for a declaration that it did not violate the regulations. As shown above, AT&T is liable for the failure to ensure that rate quotes were given as required by the regulations. As shown by Youtz Ex. B, also discussed above, AT&T was aware that rate quotes were not being provided on intrastate calls from DOC facilities in Washington as required by the Commission's regulations. Thus, AT&T's motion must be denied.

40. AT&T also contends that it is exempt from providing rate disclosure because it was a LEC during the time that LEC's were exempt from OSP requirements.

According to AT&T's own witness, however, AT&T did not become a CLEC until January, 1997. Declaration of Fran Gutierrez, ¶12, AT&T Amended Motion, Ex. 13. As Ms. Gutierrez then states, however, "at no time did AT&T take over the provision of local exchange services under the DOC contract at any DOC location." *Id.* In other words, AT&T was not acting as a LEC in connection with this case. If AT&T is not actually acting as a LEC it cannot take advantage of the short exemption between 1997-98 to avoid its responsibilities for rate disclosure.

C. T-Netix was an OSP

1. T-Netix was an OSP because it connected the call from the inmate to the recipient

41. Although AT&T retains responsibility for ensuring that the operator services it was obligated to provide under the DOC contract complied with the Commission's regulations, T-Netix is also liable because it acted as the OSP. While T-Netix notes that AT&T is ultimately responsible for ensuring that the OSP rules are followed, T-Netix is jointly responsible. T-Netix engaged in a regulated activity—providing operator services—for which it was paid. Since it chose to participate in regulated activity, it was obligated to play by the rules.

42. T-Netix was subject to the rate disclosure rules because it clearly met the definition of an OSP. The Commission defines an OSP as follows:

> Operator Service Provider (OSP)—any corporation, company, partnership, or person ***providing a connection*** to intrastate or interstate long-distance or to local services from locations of call aggregators. The term "operator services" in this rule means ***any intrastate telecommunications service provided to a call aggregator location that includes as a component any automatic*** or live ***assistance to a consumer to arrange for billing or completion, or both, of an intrastate telephone***

call through a method other than (1) automatic completion with billing to the telephone from which the call originated, or (2) completion through an access code used by the consumer with billing to an account previously established by the consumer with the carrier.

WAC 480-120-021 (1999) (emphasis added).

43. Ken Wilson, a telecommunications expert, testified that the "connection" contemplated by the regulation referred to the end-to-end completion of the call:

> Q What do you understand the term "connection" to mean?
> A As an engineer, I typically like to think about the connectivity of a call, how a call routes through the network, the various pieces of equipment and trunks or lines or links in a call.
> When I think about the word "connection," I generally associate it with those links. I also associate it with completing a connection, meaning as a call is being set up, it goes through various pieces of equipment, various trunks. The connection is finally made when the call is complete from end to end.

Wilson Dep. at 42, Youtz Ex. G.

44. T-Netix argues that the term "connection" is an undefined term having no meaning in the telecommunications industry and that it should be disregarded in determining whether someone is an OSP. Statutes and regulations, however, do not always contain terms defined by other statutes or regulations. Words that are not defined within the applicable statutes are given their normal, commonly understood meaning. "Words of a statute, unless otherwise defined, must be given their usual and ordinary meaning." *East v. King County*, 22 Wn. App. 247, 253 (1978). To most any person reading the statute, expert or layperson, the logical meaning of the word

"connection" is when the call is completed and the parties to the call are able to communicate with each other.

45. The use of the term "connection" to mean the completed connection of the call from the inmate to the recipient is consistent with the use of the word "connect" in other sections of the rules pertaining to OSPs. For example, the regulation requiring rate disclosure states:

> 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....

WAC 480-120-141(2)(b) (1999) (emphasis added). This rule clearly uses the word "connected" to mean when the caller and the recipient are able to talk to each other, which would not occur until after the recipient received a verbal announcement on how to receive a rate quote. "Whenever a legislature had used a word in a statute in one sense and with one meaning, and subsequently uses the same word in legislating on the same subject matter, it will be understood as using it in the same sense, unless there be something in the context or the nature of things to indicate that it intended a different meaning thereby." *East,* 22 Wn. App. at 254.

46. All three experts agree that traditionally an OSP provided operator services with live operators who assisted callers with requests, including requests to make collect telephone calls. As Mr. Wilson notes, an operator receiving a request to complete a collect phone call would use another line to contact the recipient of the call to ask if the called party would pay for the call. After it was established that the call

would be paid for, the operator connected the two parties by plugging them together, completing the call. This constituted the "connection" referenced by the statute and the regulation. See also, Schott Dec. ¶¶ 4-5, T-Netix Original Motion, Ex. 1.

47. All three experts also agree that the T-Netix platform replaces a live operator with an automated platform that handles the functions previously performed by the live operator. Thus, the T-Netix platform completes the "connection" after assuring that the call should be passed through, just like its live counterpart did years earlier. *Id.*

48. T-Netix claims that the "connection" occurs when the signal from the telephone hits the LEC switch or AT&T's POP and the transmission is forwarded onward by the LEC or AT&T, making them the OSPs. Thus, under T-Netix' definition, the "connection" is already made before the recipient could listen to the voice prompt or even before the transmission reaches the telephone of the called party.

49. T-Netix also suggests it is necessary to participate in switching, transporting, or routing a call in order to be an OSP. It cites no authority for this proposition. The T-Netix platform is the gateway for the call going anywhere in the system. Unless the call placed by the inmate passes the initial security checks on the T-Netix platform, the call doesn't get beyond the prison walls. And, after the call is placed, it doesn't go forward unless the recipient notifies the platform by pressing a button that the call will be accepted. The T-Netix platform makes the requisite connection.

2. T-Netix is an OSP because it provided operator services

50. The rule defining "operator service provider" provides additional clarification by including a description of "operator services." It is only logical that an entity that provides operator services is an operator services provider.[1] In this case, T-Netix provided several necessary operator services. *See, e.g.,* WAC 480-120-021 (1999).

As described above, operator services means services "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...." *Id.* In fact, the call cannot be completed unless it passes all the checks made by the T-Netix platform.

52. The T-Netix platform provides automated services that are necessary to complete a call from an inmate.

See Wilson Dec., ¶13. Mr. Wilson provides

[1] In the FCC regulations, which T-Netix relies on in its other arguments, the required rate quotes are given by a "provider of operator services," which is defined as "any common carrier that provides operator services or any other person determined by the Commission to be providing operator services." 47 U.S.C.A. § 226(a)(9).

substantial detail in his declaration describing the operator services provided by T-Netix.

3. T-Netix is not simply an equipment supplier

53. T-Netix replaced PTI as the LEC for some DOC facilities, including Clallam Bay. T-Netix claims that the amendment to the DOC contract making that change proves that it was only an equipment supplier for all the DOC sites where its platform was used. This is based on a statement in the recitals to the agreement stating that T-Netix would become the "station provider." T-Netix, original motion Ex. 6. T-Netix then argues that "station" is defined by the WUTC to mean "telephone instrument" and, thus, that T-Netix "was simply the provider of inmate phones." T-Netix original motion at 6. This argument does not square with the operative terms of the agreement that require T-Netix to pay the DOC a commission of 27% on revenue received for local calls—revenue that T-Netix would not be entitled to if it simply sold the phones to the DOC. T-Netix, original motion Ex. 6 ¶5. Further, this argument completely ignores the platforms managed by T-Netix to provide operator services, as described by Mr. Wilson in paragraphs 13-18 of his declaration..

D. T-Netix was not relieved of its obligations as OSP when two LECs received waivers

54. T-Netix claims that because Qwest and Verizon obtained temporary waivers from the disclosure rule, they, and not T-Netix, were the real OSPs.

55. There is a straightforward reason why a company like Qwest, that carries part of a call, and ultimately sends the bill to the consumer, is not an OSP at the

four prisons at issue here. T-Netix's operator services platforms perform different functions than those performed by LECs. As explained by Ken Wilson, the LEC may

> provide transport and switching of the calls that are sent to it from the T-Netix platform. The LEC does ***not*** provide operator services functionality in locations served by T-Netix platforms. ***Critically, transport of a call is not associated with operator services functions.***

Wilson Dec. ¶ 18 (emphasis added).

56. Mr. Wilson provides a "blow-by-blow" description of the operator services functions provided by the various T-Netix platforms in paragraphs 13-18 of his declaration. These functions are distinct from the functions performed by LECs; they are performed exclusively by the T-Netix software and hardware associated with its platform.

57. T-Netix asks: Why did Qwest and Verizon seek and obtain waivers from the disclosure regulations if they were not, in fact, operating as OSPs? The answer is straightforward. Qwest and Verizon ***were*** acting as OSPs at various payphone facilities across the state. But that does not mean that they were acting as OSPs at ***every*** such facility where they had a presence. There is no evidence, as T-Netix asserts, that the LECs were OSPs at the "correctional facilities in question." T-Netix admits that its platform was operational at each of the four prisons at issue.

58. The waiver orders themselves say nothing about the particular locations served by Qwest and Verizon; they operate as blanket waivers for those facilities where the LECs were in fact serving as the OSP. As a result, the waivers do not address, much less serve as conclusive evidence for, the question of whether Qwest or

Verizon functioned as OSPs at these four prisons. Verizon, for example, was later fined for failing to make rate disclosures after its waiver had expired at pay phone locations that were apparently not at prison locations. Youtz Ex. H.

59. Also, T-Netix controlled critical operator services, such as rate disclosure. There is no evidence that any of the LEC's (other than T-Netix itself [2]) controlled the rate disclosure operations on T-Netix' platform. An example of the control held by T-Netix is shown by its treatment of a request to change the branding of certain calls from U. S. West to Qwest. T-Netix refused to make the change unless it was paid to do so. This apparently did not happen, and all of the announcements from correctional facilities for Qwest calls continued to be misbranded until the equipment was ultimately removed. Dan Gross Dep. at 104-06, Youtz Dec. Ex I.

E. The Rate Disclosure Regulations Apply to Inmate-Initiated Calls

60. T-Netix' final argument is that the state legislature and the Commission intended to exclude family members and other recipients of collect calls from inmates from the protections of the rate disclosure statute and associated regulations. T-Netix makes this argument by claiming that a Washington prison cannot be a "call aggregator." Thus, T-Netix argues, there is no OSP for inmate calls and no obligation

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[2] PTI was the original LEC for the Clallam Bay facility when AT&T entered into the DOC contract. In 1996, T-Netix replaced PTI as the LEC for that facility and continued to provide operator services just has it had before it became the LEC. If T-Netix is correct that the OSPs for the facilities involved in this case are AT&T and the LECs, then T-Netix by its own admission was an OSP for Clallam Bay. Further, unlike Qwest or Verizon, T-Netix did not seek a temporary waiver of the rate disclosure requirements.

to provide oral rate quotes. In making this argument, T-Netix ignores its prior analysis in its original motion.

61. T-Netix' original motion for summary determination, which it adopted in its entirety in its amended motion, states:

> A "call aggregator" is any corporation...or person who, in the ordinary course of its operations makes telephones available to the public or to users of its premises for telephone calls using a provider of operator services[.]" *Id.* ***In this instance, Washington correctional facilities are the call aggregators.***

T-Netix Original Motion at 8, n. 7 (emphasis added). T-Netix was correct the first time. Its about-face in its amended motion ignores portions of the Commission's regulations that prove its new contention is wrong.

62. For example, the 1989 revised regulations state that "Alternative operator services companies (AOS) are those with which a hotel, motel, hospital, ***prison***, campus, customer-owned payphone, etc. contracts to provide operator services to its clientele." *See* WAC 480-120-141(2)(b) (1989) (emphasis added), AT&T Ex. 3 at p. 74. *See also*, The 1999 regulations WAC 480-120-141(3)(1991)

63. In WAC 480-120-141, which addressed alternate operator services, the regulation defined "customer" to be the "call aggregator, i.e., the hotel, motel, hospital, ***prison***, campus, pay telephone, etc. contracting with an AOS for service." The introductory comments to the 1991 amendments "to the AOS rule" state that "Prison service waivers can be accomplished on a case-by-case basis," recognizing that the

AOS requirements applied to inmate phones but that there were certain requirements that could be waived if necessary.

64. In 1993 T-Netix sought a waiver of some of its obligations as an AOS provider for prisons. The order granting the waiver noted that "This waiver request concerns the provision of telecommunications services to inmates of correctional institutions and mental facilities. Tele-Matic proposes to provide automated collect-only telecommunications services to inmates at confinement facilities." Youtz Ex. J.

65. The rules that T-Netix successfully obtained a waiver for included (1) the requirement under WAC 480-120-141(4)(a) to place stickers on the inmate phones describing how to contact an operator (which is not possible from inmate phones), (2) the requirement under WAC 480-120-141(4)(b) that the user be told how to use another provider (an option not available on prison phones), and (3) the requirements under WAC 480-120-141(7) for handling emergency calls (which are not needed from inmate phones). Youtz Ex. J. T-Netix, however, did not obtain or even seek a waiver of WAC 480-120-141(5), which required rate disclosure to recipients of the collect calls.

66. This waiver request shows that in 1993 T-Netix clearly understood: 1) it was an OSP subject to the rules contained in WAC 480-120-141, and 2) those rules applied to inmate phone systems. And, assuming T-Netix read the section in its entirety, it knew that it had obligations to verbally provide rate information to the recipients of the calls.

67. In 1990 FCC defined a call aggregator, as "any person that, in the ordinary course of its operations, makes telephones available to the public or to

transient users of its premises, for ***interstate telephone calls*** using a provider of operator services." The FCC concluded in a discussion adopting the definition that an aggregator did not encompass dedicated inmate phones. The FCC's definition expressly applies only to interstate calls.

68. In 1991, the WUTC adopted a definition of aggregator as someone who "makes telephones available to the public or to users of its premises." Notably, the Commission did not include the term "transient" in its definition and the definition applies only to intrastate calls. Also, as described above, the Commission included the word "prisons" in describing the additional facilities that were considered to be call aggregators.

69. The statute says: For the purposes of this chapter, "alternate operator services company" means 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.

70. T-Netix argues that if the FCC opines that the definition of "aggregator" should not include dedicated inmate phones, that the WUTC rules must be changed to exclude prisons as well. Both the FCC and the WUTC disagree with T-Netix. First, the FCC was asked whether state were precluded from adding broader safeguards regarding OSP and aggregator practices:

> Although we did not invite comment on this issue, NARUC and the NYCPB request that we make clear that states are not precluded from adopting greater safeguards or more stringent rules regarding OSP services and aggregator practices with regard to intrastate operator services than

> those that we have adopted herein for interstate services.[FN160] The Ohio Commission, which supports adoption of oral disclosure rules as suggested by the Colorado Commission staff, urges that, regardless of our decision regarding additional oral branding requirements, "any posting requirements, either mandated by the FCC or by the individual states, be maintained."[FN161] Other state regulatory agencies similarly oppose adoption of any rules that would preclude states from adopting more safeguards or more stringent rules regarding OSPs and providers of operator services to correctional institutions.

In re Billed Party Preference for interLATA 0+ Calls, Second Report and Order on Reconsideration, Jan. 29, 1998, ¶53, T-Netix Amended Motion, Ex. 7.

71. The FCC responded:

> While we continue to receive many complaints about high rates for 0+ calls involving both interstate and intrastate services from payphones, the policies and rules adopted herein are applicable only to interstate services.[FN167] As requested by NARUC and the NYCPB, we clarify that the states are not precluded from adopting greater safeguards or more stringent rules regarding OSP services and aggregator practices with regard to intrastate operator services than those that we have adopted herein for interstate services.

In re Billed Party Preference for interLATA 0+ Calls, Second Report and Order on Reconsideration, Jan. 29, 1998, ¶54, T-Netix Amended Motion, Ex. 7.

72. Similarly, the WUTC noted "While FCC rules ended state regulation of the local coin rate, it left to the states the authority to regulate other aspects of the pay phone industry, especially in the area of consumer protection." Gen Order R-252, Dec. 28, 1998, (adopting the new verbal disclosure rule), AT&T Amended Motion, Ex. 5 at p. 6.

73. During 1998, the FCC adopted rules that required OSPs to provide rate disclosure by pressing no more than two keys or staying on the line. The FCC also adopted a rule providing similar disclosure requirements for interstate calls from inmates. In its order of December 28, 1998, the WUTC adopted a similar rule, requiring no more than two keystrokes to obtain rate information for intrastate calls. *Id.*

74. T-Netix claims that because the WUTC did not adopt a specific rule requiring that these disclosures be made for collect calls from inmates that calls from inmates are excluded from rate disclosure. An additional rule was not needed, however. As noted above, from at least 1989, the Commission's regulations regarding the obligations of OSPs covered calls from inmates, which is why OSPs, such as T-Netix, obtained waivers for certain OSP requirements, such as providing access to an operator, for calls originating from inmates. The Commission's rules have consistently included prisons when describing call aggregators who receive operator services from OSPs. The current statement of the oral disclosure rule could not make it clearer that prisons are call aggregators falling within the scope of the disclosure rule:

> (3) *Oral disclosure of rates.* This subsection applies to all calls from pay phones ***or other call aggregator locations, including, but not limited to, prison phones*** and store-and-forward pay phones or 'smart' phones. When a collect call is placed, both the consumer placing the call and the consumer receiving the call must be given the rate quote options required by this section.

WAC 480-120-262(3) (emphasis added).

75. Because the 1999 rules required that both the person initiating a collect call and the person receiving the collect call had the right to initiate a rate quote

request, the commission allowed a waiver for inmate calls to allow only the recipient to initiate the request, although both the recipient and the inmate would hear the quote and either could terminate the call. This again shows that the Commission and providers recognized that the rate disclosure requirements applied to collect calls from inmates.

V. CONCLUSION

76. Complainants respectfully request that the Commission (1) deny AT&T's Amended Motion for Summary Determination and (2) deny T-Netix' Original Motion for Summary Determination and its Amended Motion for Summary Determination.

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