[Service date: *September 10, 2009*]

BEFORE THE
WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION

SANDY JUDD and TARA HERIVEL, Complainants, v. AT&T COMMUNICATIONS OF THE PACIFIC NORTHWEST, INC., and T-NETIX, INC., Respondents.	Docket No. UT-042022 **T-NETIX, INC.'S OPPOSITION TO AT&T'S AMENDED MOTION FOR SUMMARY DETERMINATION**

INTRODUCTION

1. Respondent T-Netix, Inc. ("T-Netix"), through counsel, hereby opposes Respondent AT&T's Amended Motion for Summary Determination, filed August 24, 2009.

2. The Washington Utilities and Transportation Commission (the "Commission" or "WUTC") has before it a crucial predicate issue, namely whether Respondent AT&T Communications of the Pacific Northwest, Inc. ("AT&T") or T-Netix — or neither — was an Operator Services Provider ("OSP") under the applicable regulations for inmate calls from certain correctional facilities in Washington in 1996-2000. Reversing positions from its initial 2005 motion, AT&T now asserts, based principally on an unexplained, unsubstantiated opinion from an expert witness designated by Complainants (Kenneth Wilson), that T-Netix alone was

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601 Union Street, Suite 1501
Seattle, Washington 98101
(206) 623-4711

the OSP.[1] But that purported "evidence," even if admissible and relevant, is hardly dispositive. AT&T's current strategy of avoiding regulatory responsibility for disclosing its own intrastate interLATA rates for inmate calls is no more compelling than its earlier, now-abandoned position that the local exchange carriers ("LECs") were the OSPs for collect calls originating at these correctional institutions. In either event, because AT&T has not established and cannot show that under any set of undisputed facts, it is entitled to a decision in its favor as a matter of law, its Amended Motion can and must be denied by the Commission.

SUMMARY

3. Under the language of the definition of OSP in WAC 480-120-021, the entity "providing a connection" to local or long-distance services from payphones is considered an operator service provider. At all of the Washington Department of Corrections ("DOC") facilities in question, the facts make clear that the applicable T-Netix "platform" — a combination of hardware and software provided to AT&T pursuant to contract and operated by T-Netix on behalf of AT&T at the prisons — did not provide a "connection" for any calls. All inmate calls from these correctional institutions were transported to the central office of the serving LEC over plain old telephone service ("POTS") lines provided by the LEC; no transport, switching or routing of inmate calls over the public switched telephone network ("PSTN") was performed by T-Netix. Thus, the LECs made the "connection" to local exchange services by switching local calls onto their own local exchange facilities/services and AT&T made the

[1] In its initial motion, AT&T contended that the LECs (including T-Netix at "certain" unspecified facilities) were the OSPs. AT&T Mot. Sum. Determination ¶¶ 19-22. Specifically, AT&T argued that the LECs were OSPs because they "directed calls from the prison telephones to the appropriate carrier and provided automated operator announcements." *Id.* ¶ 22. AT&T based this argument on an affidavit from its former employee, Francis Gutierrez, but it never designated Ms. Gutierrez as an expert witness and AT&T's expert, Mark Pollman, declined to adopt that affidavit. Pollman Depo. Tr. 33:6-34:8. Accordingly, AT&T has no evidence of its own supporting its present Amended Motion.

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Seattle, Washington 98101
(206) 623-4711

"connection" to long-distance services by switching interLATA calls, at its point of presence (POP), onto AT&T long-distance facilities/services. Because AT&T provided the "connection" for the intrastate interLATA calls at issue in this matter, AT&T was the OSP for those calls. *See* Section I below.

4. T-Netix cannot be the OSP for any local, intraLATA or interLATA calls from the DOC facilities because the collect calling services (and rates) offered to the inmates at the prisons were not T-Netix services or T-Netix rates. The OSP rules, themselves derived from earlier 1991 regulations governing so-called Alternative Operator Services ("AOS") providers, are premised expressly on the precondition that an OSP is a provider of "telecommunications services," in other words a common carrier. *See* WAC 480-120-021 (1991), attached as Exhibit 4 to AT&T's Amended Motion for Summary Determination (hereafter cited at "AT&T Exh. ___"). Because it is undisputed that AT&T, contractually and as a matter of telecommunications law, was the common carrier serving inmates for interLATA collect calling from these institutions, only AT&T can be the OSP for those calls.[2] Whatever functions T-Netix and its "platform" performed are irrelevant to whether AT&T, as the entity holding itself out to the public as the carrier and the entity providing transmission of 0+ calls from the institutions, can escape its OSP responsibilities by virtue of a subcontract. Indeed, the WUTC's OSP rules plainly envision that the serving OSP, not an underlying facilities, equipment or functionality provider, has the regulatory obligation to disclose rates WAC 480-120-141(5)(a)(4) (1991) and WAC 480-120-141(2)(b) (1999) (AT&T Exh. 4 and 5). *See* Section II below.

5. A determination that T-Netix was the OSP for purposes of the verbal rate quote requirement cannot be squared with AT&T's compliance with the other OSP mandates —

[2] Similarly, the LECs serving those institutions were the common carriers serving inmates for intraLATA collect calling.

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branding, customer service, etc. — or with the purpose of the Commission's regulations. For interLATA collect calls, branded (by T-Netix on behalf of AT&T) as AT&T calls, charged at rates set by AT&T, and billed through arrangements made contractually by AT&T with T-Netix, the rates Complainants argue were not disclosed are indisputably AT&T's collect calling rates. It makes no sense for AT&T to assume responsibility for branding calls, something that only the OSP is required to do, if it were in fact not acting as an OSP. Nor does it make any sense as a matter of regulatory policy to require T-Netix to disclose rates set by another carrier over which it has no control for payphone-originated calls. *See* Section III below.

6. The T-Netix equipment installed at the Washington correctional facilities during the 1996 to 2000 period functioned much like a Private Branch Exchange ("PBX") or other electronic premises system. This equipment includes the hardware and software capable of screening inmate calls, logging calls, producing records of calls and performing other functions required by the Washington DOC and other correctional officials. However, no one would claim that any provider of CPE or network equipment, including its associated software services, was a carrier or an OSP. Even vendors of central office switching equipment, such as Siemens, Lucent or Nortel, are not considered "OSPs" even though their equipment and software is used to provide, to and on behalf of the carrier, the capability of connecting calls to a LEC trunk or directly to the PSTN. Rather, it is the carrier that brands the calls and whose rates are charged for the call which "connects" calls from the point of origination to the PSTN (or if long-distance service is involved, to the terminating LEC).

7. Lastly, the testimony and purported expert opinions relied upon by AT&T in support of its motion is not relevant or admissible in this matter. Complainants' expert, like AT&T's expert, based his conclusion on a legal standard — which entity "performed operator

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601 Union Street, Suite 1501
Seattle, Washington 98101
(206) 623-4711

services functions" — that is not germane to the Commission's inquiry. Whatever "functions" T-Netix and its platform performed are irrelevant to whether AT&T provided a "connection" to long distance services. The expert conclusions are therefore not relevant to the issue referred to this Commission, and the experts' testimony is inadmissible because it could not possibly assist the trier of fact. Accordingly, this Commission should disregard the testimony in resolving AT&T's motion. *See* Section IV below.

8. In any event, AT&T's motion is based on the fundamentally wrong assumption that the Commission's OSP rules apply to the inmate-initiated calls at issue in this case. They do not. As discussed in T-Netix's Amended Motion for Summary Determination (filed Aug. 27, 2009), as a matter of law a prison is not an "aggregator" for inmate phones; therefore, T-Netix could not be an OSP for the calls relevant to this primary jurisdiction referral, because the OSP verbal rate disclosure requirement, effective as of 1999, applies like all other operator services regulations in Washington only to telecommunications services provided to aggregator locations. Quite apart from AT&T's initial or new positions, the Commission should grant summary determination to T-Netix on that basis.

PROCEDURAL BACKGROUND[3]

9. The Complainants filed a civil damages suit, arising under the Washington Consumer Protection Act, in the Superior Court on June 20, 2000. The complaint was styled as a putative class action against five telephone companies. Complainants alleged they were recipients of inmate-initiated calls and that the telephone company defendants failed to provide oral disclosure of the applicable rates for those calls, as required by Commission rules. Three of

[3] This case has undergone a circuitous procedural history over the past eight years, summarized at length in this Commission's Order 09. T-Netix will provide only a brief summary, as it relates to AT&T's motion.

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the five defendants were dismissed from the lawsuit due to waivers or exemptions earlier granted by the Commission from the rate-disclosure regulations.

10. The trial court referred certain issues for the remaining defendants (AT&T and T-Netix) to the Commission under the doctrine of primary jurisdiction, but later entered summary judgment and vacated its referral. The Court of Appeals, in an unpublished opinion, reversed and remanded the case to the trial court with directions to reinstate the primary jurisdiction referral for the issues originally before the WUTC, namely (1) whether AT&T or T-Netix were OSPs, and (2) if so, whether they violated the WUTC rate disclosure regulations. *Judd v. Am. Tel. & Tel. Co.*, 2006 WL 3720425 (Wash. App. Div. 1, December 18, 2006). This proceeding was initiated as a result of reinstatement of the referral.

FACTUAL BACKGROUND

11. Between June 20, 1996 and December 31, 2000, complainants Sandy Judd and Tara Herivel both claimed to have received telephone calls, placed on inmate-only phones, from inmates at four Washington State prisons. Judd and Herivel both claim that they did not hear rate information before choosing to accept these inmate-initiated collect calls.

12. During the timeframe when the Complainants allegedly received these calls, respondent AT&T had a contract with the Washington Department of Corrections to provide telephone service to Washington State prisons. Under its contract with the DOC, AT&T agreed to provide interstate interLATA long distance service and to subcontract with three LECs, US WEST Communications, Inc., GTE Northwest Inc., and Telephone Utilities of Washington, Inc. ("PTI" or "CenturyTel") to provide local exchange service and intraLATA long-distance service. The LECs also agreed to provide the telephones and the local service connections or "lines" necessary to transport the calls to their local or intraLATA destinations or to pass them to AT&T

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to transport them to their ultimate interLATA long distance destinations. Over time each of the original LEC subcontractors were changed. US WEST became Qwest Communications, Inc. ("Qwest"). GTE became Verizon Northwest, Inc. ("Verizon"). PTI terminated its contract with AT&T, and T-Netix agreed to be the station-provider and to provision local traffic on AT&T's behalf at the PTI facilities.[4] Teleport Communications Group ("TCG") became the provider of intraLATA long-distance calling at those facilities.[5]

13. AT&T also subcontracted with respondent T-Netix to provide a customized call control platform and associated support functions in connection with the inmate calling services provided at the prisons. The call control platforms consisted of customized computer-based equipment, including telephony control cards that were controlled by proprietary software modules. The major support functions provided by T-Netix to maintain the call control platforms included: (a) installation and de-installation of the call control platforms; (b) performing periodic diagnostic checks and housekeeping functions; (c) implementing changes in call restrictions dictated by the services providers (AT&T and the LECs) and their customer (DOC); (d) formatting call records for the services providers so those providers could bill for the calls; and (e) providing on-site personnel at larger sites to administer the equipment.

14. There is no dispute regarding the configuration and functionality of the P-III platform, the equipment provided by T-Netix to AT&T at the four correctional institutions in

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[4] *See* Amendment No. 3 to Agreement Between DOC and AT&T (AT&T Exh. 11); Letter from Giannaula to Hornung, dated March 10, 1998 (AT&T Exh. 12).

[5] According to Ken Rose, a T-Netix employee and former AT&T employee, TCG was bought by AT&T and later branded AT&T Local Service ("ALS"). Rose Depo. Tr. at 138:8-139:24 (Exh. A.). This is likely the reason AT&T amended its motion for summary determination and abandoned its theory that T-Netix was an OSP because it replaced PTI as a LEC. The documents and testimony now show that it was actually AT&T's own ALS that took over the intraLATA calling for the PTI facilities. Therefore, under its previous theory, AT&T was essentially pointing the finger at itself with respect the PTI facilities.

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question, or the relationship of AT&T to T-Netix. T-Netix provided software, equipment and maintenance services "to" AT&T pursuant to a 1997 contract. Initial T-Netix Mot. ¶¶ 17-20; Depo. Exh. 77 [Wilson opinion #5], attached as Exhibit 1 to T-Netix, Inc.'s Am. Mot. Sum. Determination[6]. T-Netix was solely a subcontractor to AT&T, having no direct or independent relationship to the Washington DOC or to either the calling parties (inmates) or called parties for collect calls placed from these institutions.

15. The P-III platform was installed on-site at the correctional facility, typically in a location that provides access to the facility's inmate station wiring and the outbound network trunks. The P-III platform was interconnected with the PSTN by a series of LEC-provided POTS lines, ordered by T-Netix on behalf of AT&T, and performed no transport, routing, or switching functions whatever. Initial T-Netix Mot. ¶¶ 22-24; Rae Depo. Tr. at 289:4-291:8 (Exh. 2); Pollman Depo. Tr. at 89:22-90:4, 91:3-9 (Exh. 3 and Exh. B). The P-III's function was simply to apply the calling restrictions to each call as specified by AT&T and DOC. At all times, T-Netix maintained a 1:1 ratio between station lines (to inmate phones) and trunks to the LEC, acting merely as a gate for approval of the calls. Rae Depo. Tr. at 219:22-220:14, 235:11-22, 289:4-290:10 (Exh. 2).

[6] References herein to exhibit numbers (*e.g.*, Exh. 1) are to exhibits attached to T-Netix, Inc.'s Amended Motion for Summary Determination, and references to Exhibit letters (*e.g.*, Exh. A) are to exhibits attached to this opposition.

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601 Union Street, Suite 1501
Seattle, Washington 98101
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ARGUMENT

I. AT&T WAS THE OSP FOR INTERLATA CALLS FROM WASHINGTON DOC INMATES BECAUSE IT PROVIDED A "CONNECTION" FOR THOSE CALLS RECEIVED BY COMPLAINANTS

16. The Commission's definition of OSP in WAC 480-120-021 (1999) (identical in substance to the earlier definition of AOS provider in WAC 480-120-021 (1991)) provides in full:

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

(Emphasis added) (AT&T Exh. 4 and 5).

17. Under the operative language of the first sentence of this definition, AT&T was the OSP for certain inmate collect calls from the four Washington DOC institutions because AT&T "provide[d] a connection" to long distance services. The rule does not define "connection," which is not a recognized term in the telecommunications industry. Rae Decl., Dec. 12, 2008 ¶ 9 (Exh. 4). However, AT&T provided switching, routing, access, and transport for the intrastate interLATA calls originating from these institutions. Moreover, as T-Netix expert Robert Rae explained:

> As corroborated by the Schott Supplemental Affidavit, a call was placed by an inmate, processed by the T-Netix platform (essentially holding the voice path while the call was verified and the called party queried for collect call acceptance), outpulsed to a LEC trunk and thereafter switched at the LEC central office to connect either to (a) a local or intraLATA called party, via the

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> LEC's local or intrastate toll networks, respectively, or (b) LEC intrastate switched access services purchased by AT&T and thereafter to AT&T's point-of-presence (POP). *Id.* For interLATA calls, the call was then switched at the AT&T POP to connect to AT&T's long-distance network and then to a terminating LEC via the LEC's intrastate switched access service (typically at the tandem in the serving wire center) and finally switched by that terminating LEC to the called party's line. In this call flow, the entity that "connects" a collect call to local and long-distance services (WAC 99-02-020) is in every case the LEC or AT&T, so reviewing the engineering details underlying any of the T-Netix platforms, or their quantity and provider of trunks, facilitating this call flow will tell the Complainants and this Commission nothing of relevance.

Id. ¶ 8 (Exh. 4).

18. The opinions offered by the purported experts testifying on behalf of Complainants (Kenneth Wilson) and AT&T (Mark Pollman), in contrast, are based on a test — specifically, which party performed "operator services functions" — that is neither drawn from nor consistent with the Commission's OSP definition. Wilson Depo. Tr. 64:3-19, 158:5-159:16, 245:18-246:18 (Exh. 5); Pollman Depo. Tr. 61:23-62:25 (Exh. 3). Further, Mr. Wilson testified that a call is "connected" within the meaning of WAC 480-120-021 only when it is terminated to the called party and an "end-to-end connection" established. Wilson Depo. Tr. 227:22-228:14, 236:16-237:7, 245:2-7 (Exh. 5). Neither of these positions can possibly be correct. The former is wrong because (a) the rule in question applies to operator service providers, not operator functionality providers, and (b) it bears no textual or logical relationship to the definition's "providing a connection" criterion. The latter is wrong because OSPs remain OSPs even for incomplete, busy, and other call attempts, whether or not an end-to-end connection is established to the called party. Indeed, under Mr. Wilson's approach, there could be no OSP for incomplete 0+ call attempts from payphones, because no end-to-end connection is ever established by any

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entity, even though the Commission's substantive rules expressly prohibit OSPs from billing for uncompleted calls. *See* WAC 480-120-141(5)(b) (1999).

19. Moreover, there is no dispute as to when an intrastate interLATA call was "connected to . . . long-distance services" in this case. As AT&T expert Pollman conceded, the first possible point at which an interLATA call from the prisons was "connected" to long-distance services was when the LEC delivered the call to AT&T, via intrastate switched access services ordered by AT&T from the LEC as a carrier, at AT&T's POP. Pollman Depo. Tr. 57:1-22, 60:11-61:7 (Exh. 3). Therefore, as Mr. Rae explained: "[f]or interLATA traffic, the question for the Commission to resolve is whether the LEC (by 'connecting' to AT&T's switched access services) or AT&T (by 'connecting' to its long-distance network) connected such calls to 'long-distance services.'" Rae Decl., Dec. 12, 2008 ¶ 9 (Exh. 4).[7]

II. AT&T WAS THE OSP FOR WASHINGTON DOC INMATE CALLS BECAUSE IT SERVED AS THE COMMON CARRIER PROVIDER OF "TELECOMMUNICATIONS SERVICES"

20. The central purpose of the WUTC's OSP rules, the history of OSP regulation and the language of the regulations themselves all lead to the conclusion that to be an OSP an entity must be a common carrier, in other words a "telecommunications company" that provides "telecommunications service," as those terms are defined under state law. An OSP must also be the entity that contracts with the call aggregator. AT&T was the common carrier for all interLATA calls from the Washington DOC institutions, both as a matter of contract and telecommunications law, and it contracted with the DOC, which Complainants will argue is the aggregator in this case.

[7] "T-Netix, in contrast, did not provide access, switching or transport for any interLATA calls, and therefore did not make a 'connection' as I interpret that phrase." Rae Decl., Dec. 12, 2008 ¶ 9 (Exh. 4).

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21. The objective of OSP regulation has always been to protect consumers from the high charges formerly assessed by some carriers for calls from public phones at aggregator locations. The concern is with carriers contracting with aggregators to be designated as the presubscribed IXC for long distance calls from the payphones and charging excessive fees due to their preferred status. The policy problem was described by the FCC in its *Billed Party Preference for InterLATA 0+ Calls,* Second Report and Order on Reconsideration, 13 FCC Rcd. 6122 (1998), as follows:

> OSPs generally compete with each other to receive 0+ traffic by offering commissions to payphone or premises owners on all 0+ calls from a public phone. In exchange for this consideration, the premises owners agree to designate the OSP as the "presubscribed" IXC or PIC serving their payphones. Many OSPs using this strategy agree to pay very high commissions to both premises owners and sales agents who sign up those premises owners and claim, as a consequence, they must assess very high usage charges to consumers placing calls from payphones. While this process has generated added revenues for the premises owners and sales agents, it forces callers to pay exceptionally high rates.

(Exh. 7).

22. The FCC and the WUTC both adopted a number of protections for consumers that were designed to address this concern. In its 1991 rules, which mirrored earlier FCC regulations, the WUTC required AOS providers (as a part of any contract with an aggregator) to require aggregators to post a notice advising that services provided on the phone may be provided at rates that are higher than normal, identifying the AOS provider and its telephone number, and disclosing that, among other things, the caller has the right to access other carriers from payphones. WAC 480-120-141(4) (1991) (AT&T Exh. 4). The AOS provider was required to withhold payment of commissions to any aggregator that blocked access to other IXCs. WAC 480-120-141(2)(a) (1991) (AT&T Exh. 4). The AOS was also required to have the aggregator

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post a notice stating whether a location surcharge was imposed for calls from the phone, the amount of the surcharge and the circumstances when it would apply, to identify or "brand" itself at the beginning of a call and to disclose the charges for the call upon request.[8] WAC 480-120-141(4)(d) (1991) (AT&T Exh. 4).

23. In its 1998 Order implementing the verbal rate quote requirement (effective in 1999), Order No. 452, Docket No. UT-970301, at 8 (Dec. 29, 1998), the Commission "adopt[ed] the FCC's verbal disclosure requirement on an intra-state basis." (AT&T Exh. 5) The federal scheme specifically defines a "provider of operator services" 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. § 226(a)(9) (emphasis added). Likewise, the 1998 FCC rule imposing a rate disclosure requirement on providers of inmate operator services states that a "[p]rovider of inmate operator services means any **common carrier** that provides outbound interstate, domestic, interexchange operator services from inmate telephones." 47 C.F.R. 64.710(b)(4) (emphasis added). As a matter of law, the FCC provision that OSPs are common carriers must be deemed incorporated into the WUTC's definitions due to its "adoption" of the FCC rule.[9]

24. This conclusion is equally supported, without regard to the FCC's approach, by the language of the second sentence of WAC 480-120-021. There, the WUTC makes clear that

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[8] In later rules adopted by FCC and mirrored by the WUTC, at issue here, additional protections were added including a requirement that OSPs disclose orally to payphone callers how to obtain the rates for a operator-assisted call before the call is connected. It is the latter 1999 mandate that Complainants allege was violated in this proceeding.

[9] *State v. Bobic*, 140 Wash. 2d 250, 264 (2000); *Everett Concrete Products, Inc. v. Department of Labor & Industries*, 109 Wash. 2d 819, 823-24 (1988); *State v. Carroll*, 81 Wash. 2d. 95, 109 (1972); *State v. Tranchell*, 164 Wash. 71, 75 (1932); *Peoples State Bank v. Hickey*, 55 Wash. App. 367, 371 (1989); *McClellan v. Sundholm*, 89 Wash. 2d 527, 531 (1978); *State v. Williams*, 17 Wash. App. 368, 371 (1977).

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the term "operator service provider" applies to a common carrier that provides calling service to end users at aggregator locations. WAC 480-120-021, both the 1991 and 1999 versions, defines "operator services" as "any intrastate **telecommunications service** provided to a call aggregator location that **includes as a component** any automatic or live assistance to a consumer to arrange for billing or completion, or both, of an intrastate telephone call." (Emphasis added) (AT&T Exh. 4 and 5). Accordingly, to be a provider of operator services subject to the WUTC's rules, an entity must provide an intrastate "telecommunications service" that includes the assistance of an operator to arrange for billing or completion of an intrastate call. "Telecommunications" is defined in RCW 80.04.010 as "the transmission of information" and "telecommunications company" is defined as "every corporation, company, . . . operating or managing any facilities used to provide telecommunications for hire, sale, or resale to the general public within this state." Thus, an OSP — which of course provides "operator services" — in Washington is an entity providing an intrastate transmission service to the general public that includes operator assistance as a component.

25. AT&T is the OSP with respect to interLATA traffic from the correctional facilities at issue in this case for three basic reasons. First, AT&T operated as a common carrier or telecommunications company at each of those facilities, because it offered "telecommunications" services (*i.e.,* transmission) to the public. The incumbent LECs and AT&T both offered transmission services, *i.e.,* local and intraLATA long-distance calling in the case of the LECs and interLATA long-distance calling in AT&T's case. Second, AT&T contracted with the aggregator, the DOC.[10] That contract expressly obligated AT&T "to provide '0+' interLATA

[10] The WUTC's 1989 rules defined AOSCs as those companies "with which a hotel, motel, hospital, campus, or customer-owned pay telephone, etc., contracts to provide operator services to its clientele." The reference to "contracts" was dropped from the definition in later

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and international service" to inmate phones at the prisons. AT&T/DOC Contract, March 16, 1992, at 2 (AT&T Exh. 7). Third, 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. Depo. Exh. 77 [Wilson opinion #5] (Exh. 1). 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.[11]

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versions of the rule, but other provisions of those later rules make it clear that the Commission considered AOSCs/AOS providers as the entities that contracted with the call aggregator. For example, an AOS's "customer" was defined as "the call aggregator, i.e., the hotel, motel, hospital, prison, campus, pay telephone, etc., **contracting with an AOS for service**." WAC 480-120-141 (1991) (emphasis added). The rules also required AOS providers to assure its customers (aggregators) complied fully with contract provisions specified in the rules and withhold payment to aggregators if they did violate them. WAC 480-120-141(1), (1)(a) (1991). An AOS could not do that if it was not the entity contracting with the aggregator.

[11] 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 service the OSP is reselling, that is responsible for regulatory compliant. With respect to WAC 480-120-141(6)(b), for instance, the Commission explained that "[t]his rule requires the OSP to determine cause of excessive blockage and take steps to correct the problem. US WEST argues this is not enforceable, stating that the responsible party is the [underlying interexchange carrier], since the IXC is provisioning trunking. The commission believes that the OSP needs to pursue any service problem directly with the IXC or other responsible party to resolve a blocking problem." Order No. 452, Docket No. UT-970301, at 9 (Dec. 29, 1998) (AT&T Exh. 5). Similarly, in adopting rules relating to protection of customer prepayments and prepaid calling services, the Commission rejected a proposal from the Telecommunications Resellers Association that non-facilities based resellers be exempted from a rule requiring certain technical network performance standards, saying:

> The Commission shares Commission Staff's concern that any company holding itself out to provide service to the public should be ultimately responsible to that consumer for the service. To do otherwise would reduce the carrier's incentives to secure adequate service from existing or other possible suppliers. The underlying carrier's failures may also be the subject of private or Commission enforcement action, as well.

Order No. R-462, Docket No. UT-971469, at 6-7 (April 30, 1999) (Exh. C).

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601 Union Street, Suite 1501
Seattle, Washington 98101
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26. AT&T has admitted as much in the past. For instance, in December 21, 1988 comments in Docket No. U-88-1882-R (Exh. 8), AT&T acknowledged that the WUTC's AOS rules applied to carriers. Addressing "the fundamental question of how to define an Alternative Operator Service (AOS) provider and, hence, to whom the proposed rules should apply" (AT&T Comments, at 1), AT&T stated that the incentive for the Washington Legislature to pass what is now RCW 80.36.520 was

> the ongoing concern that the public, without adequate notice, is often being charged higher rates for operator assisted and card interexchange calls than they have come to expect from their local exchange company and presubscribed interexchange carrier when calls are made from an institution (or aggregator) such as a hotel, hospital or university. This would occur when the aggregator enters into an agreement with an AOS provider, whose rates may be different than those which end-user customers are usually charged by their presubscribed carriers, to provide interexchange service to that aggregator and its patrons.

AT&T Comments at 2. AT&T went on to explain that:

> AOS providers are resellers who specialize in operator handled long distance calls. AOS providers enter into contracts with the aggregator industry, *i.e.* hotels, hospitals, privately owned pay telephone owners, for the purpose of providing operator assisted calls to the telephone customers of the aggregator.

Id. at 2-3. These companies have an incentive to maximize revenue for the aggregator and themselves. *Id.* at 2-3. On the merits, AT&T argued that "if the Commission is concerned that a facilities-based carrier such as AT&T or US West Communications would attempt to charge a unique rate to telephone customers of a particular aggregator — beyond the rate offered to the general public — AT&T suggests that the definition now in WAC 480-12-021 and WAC 480-120-141 remain." *Id.* at 4. That is just what the WUTC did, left the definition alone.

27. Significantly, in a clarification notice to all parties in Docket No. UT-900726, dated October 1, 1991, the WUTC Secretary advised it was a Staff consensus that, among other

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things, "[a]n AOS company is any which offers service through aggregators — service as defined in the rule. In a non-equal access setting, AT&T is an AOS company although the person who controls the instrument has no other option for presubscribed AOS service." (Exh. 9) In other words, to be an AOS provider one must be an entity that offers a telecommunications service and the entity that contracts with an aggregator. Also, since a state correctional facility is essentially the equivalent of a non-equal access setting because only a single interLATA provider, AT&T, can be accessed, AT&T is by Staff consensus an AOS provider.

III. AT&T CANNOT AVOID ITS OSP STATUS IN LIGHT OF ITS COMPLIANCE, IN AT&T'S OWN NAME, WITH THE OTHER SUBSTANTIVE OSP OBLIGATIONS IMPOSED UNDER THIS COMMISSION'S RULES

28. The Commission should disregard AT&T's attempt to disclaim its regulatory duties by pointing the finger at its subcontractor because there is no dispute that AT&T retained sole responsibility for compliance with the vast majority of the OSP obligations imposed by the Commission's regulations. A determination that AT&T was not the OSP for purposes of the verbal rate quote requirement cannot be squared with AT&T's adherence to the other OSP mandates — branding, customer service, *etc.* — or with the purpose of the Commission's regulations. AT&T simply cannot have it both ways. Allowing AT&T to somehow retrospectively jettison its OSP status by means of a subcontract, even where AT&T retained several OSP responsibilities, would render numerous provisions within the applicable regulations meaningless or absurd.

29. For interLATA collect calls, branded (by T-Netix on behalf of AT&T) as AT&T calls, charged at rates set by AT&T and billed through arrangements made contractually by AT&T with T-Netix, the rates Complainants argue were not disclosed are indisputably AT&T's collect calling rates. Wilson Depo. Tr. at 151:7-14 (Exh. 5). It makes no sense for AT&T to

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assume responsibility for branding calls, something that only the OSP is required to do,[12] if it were in fact not acting as an OSP. Nor does it make any sense as a matter of regulatory policy to require T-Netix to disclose rates set by another carrier for payphone-originated calls when it is neither responsible for establishing nor has any control over those rates.

30. The approach advocated by Complainants and AT&T would make large portions of the Commission's OSP regulations a nullity. For instance, under these parties' theory, an OSP can brand traffic from payphones with the name of whatever carrier it desires as a business matter. Wilson Depo. Tr. at 134:18-136:22; 168:6-17 (Exh. 5). Since the purposes of the rules are to assure the identification and accountability of parties offering operator services to the public, segregating the branding requirement from the serving OSP is irrational, as end users would have no way to discern which carrier is responsible for service to payphones. Furthermore, since the objective of the rate quote disclosure requirement is obviously to guaranty that **the OSP's rates** can easily be known to consumers before payphone-originated calls are accepted, divorcing OSP status from the entity whose rates are applied (and thus disclosed) is equally absurd.

31. Not unsurprisingly, therefore, neither AT&T nor Complainants can explain how T-Netix could as a matter of law be the OSP for purposes of the rate quote mandate yet AT&T be named the OSP for calls "branded" from the same phones. As even Mr. Wilson concedes, there can only be one OSP for any call from a payphone. Wilson Depo. Tr. at 56:22-57:16 (Exh. 5). Consequently, AT&T's assumption of responsibility for compliance with the branding requirement (directing T-Netix to brand the calls in AT&T's name) and for pricing of the calls, among other things, means that AT&T was the OSP. The result of any other conclusion would

[12] *See* WAC 480-120-141(5) (1991) and WAC 480-120-141(4) (1999) (AT&T Exh. 4 and 5).

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Seattle, Washington 98101
(206) 623-4711

be chaos, in that some of the OSP regulations would apply to one party for some calls while other portions of those same regulations would apply to a different entity for the very same calls. There is nothing in the Commission's rules, orders, or jurisprudence to sanction such a result.

IV. THE PURPORTED EXPERT WITNESS TESTIMONY RELIED UPON BY AT&T IS IRRELEVANT AND INADMISSIBLE BECAUSE IT IS NOT BASED UPON THE CRITERIA OF THE COMMISSION'S OSP REGULATIONS

32. AT&T's Amended Motion relies principally upon the expert testimony of Complainants' designated expert witness, Kenneth Wilson. AT&T Motion ¶¶ 16, 22, 23. Yet that testimony relied upon is inadmissible on the key question of the Commission's OSP definition because it is irrelevant, as it is not based upon and is immaterial to the "connection" standard under the Commission's OSP definition, and adopts a view of "connection" that would render much of the OSP regulatory scheme a nullity. Accordingly, the Commission may not rely upon Mr. Wilson's inadmissible testimony in ruling on AT&T's motion for summary determination.[13]

33. The trier of fact has a recognized gatekeeping function under the Washington rules of evidence, such that"[t]he question of admissibility of the testimony of . . . experts is better determined under ER 702, 401 and 402." *State v. Ellis*, 136 Wn. 2d 498, 523, 963 P.2d 843 (1998). The admissibility of expert testimony is addressed specifically in Rule 702 of the Washington Rules of Evidence, which provides that "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a

[13] The opinion of AT&T's designated expert, Mark Pollman, is inadmissible for much of the same reasons discussed in this section. *See* T-Netix's Am. Mot. for Sum. Determination ¶¶ 14-15 (filed Aug. 27, 2009). Inexplicably, however, AT&T does not reply on any portion of Mr. Pollman's testimony in support of its amended motion, nor does Pollman adopt the affidavit AT&T proffered in support of its initial motion. *See* note 1 above. Since it has no bearing on AT&T's amended motion, therefore, the Commission need not decide the relevance or admissibility of Pollman's opinions in order to deny AT&T's amended motion.

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fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." The testimony relied upon by AT&T must be excluded because it cannot possibly assist the Commission, as the trier of fact, in making the determinations referred to it here. *See, e.g., State v. Ciskie*, 110 Wn. 2d 263, 270-71, 751 P.2d 1165 (1988) (describing threshold considerations governing admissibility of expert testimony under ER 702, including whether "the expert testimony would be helpful to the trier of fact."); *State v. Allerey*, 101 Wn. 2d 591, 596, 682 P.2d 312 (1984).

34. Mr. Wilson's so-called expert testimony is irrelevant because, based on the wrong legal standard, it by definition cannot be "helpful to the trier of fact" in determining whether AT&T (or T-Netix for that matter) was the OSP with respect to the DOC contracts and services. The question whether expert testimony will be "helpful" to the trier of fact is often closely related to questions of reliability, relevance and prejudice. *See, e.g., State v. Flett*, 40 Wash. App. 277, 284, 699 P.2d 774 (1985). Rule 401 of the Washington Rules of Evidence defines "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Irrelevant evidence is of course not admissible under Rule 402 of the Washington Rules of Evidence.

35. AT&T relies upon a written declaration of Complainants' expert to support two of its primary arguments. AT&T Motion ¶¶ 22, 23; AT&T Exh. 22. The first argument is that AT&T was not an OSP because "AT&T did not connect calls from the prisons at issue to local or long-distance service providers." AT&T Motion ¶ 22. At his deposition, Mr. Wilson opined, repeatedly, that a call is "connected" within the meaning of WAC 480-120-021 only when it is terminated to the called party and an "end-to-end connection" is established. Wilson Depo. Tr.

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Lawyers
601 Union Street, Suite 1501
Seattle, Washington 98101
(206) 623-4711

213:9-12, 227:22-228:14, 236:16-237:7, 245:2-7 (Exh. 5). This proposed definition of "connection" could not possibly be what the Commission intended. OSPs must remain OSPs even for incomplete, busy, and other call attempts, whether or not an end-to-end connection is established to the called party. Indeed, under Mr. Wilson's approach, there could be no OSP for incomplete 0+ call attempts from payphones, because no end-to-end connection is ever established by any entity, even though the Commission's substantive rules expressly prohibit OSPs from billing for uncompleted calls. *See* WAC 480-120-141(5)(b) (1999). Such an absurd proposition is irrelevant, and thus inadmissible, since it is premised on a flatly incorrect legal standard that has absolutely no bearing on the Commission's decision and which would contradict the essential structure of its OSP regulations.

36. AT&T more generally contends that it was not the OSP because "AT&T did not provide the operator services for calls from the prisons at issue." AT&T Motion ¶ 23. This is based on Mr. Wilson's "expert opinion" that it was T-Netix which served as the OSP because the T-Netix P-III platform "performed the . . . operator services functions." Wilson Depo. Tr. 64:3-19, 158:5-159:16, 245:18-246:18 (Exh. 5). That assumption is neither drawn from nor consistent with the Commission's OSP definition. First, the rule in question applies to operator service providers, not operator functionality providers, and second, it bears no textual or logical relationship to the definition's "providing a connection" criterion. This expert testimony is therefore not relevant to the Commission's determination of who was the OSP and is inadmissible (whether or not Wilson in fact has the requisite qualifications to offer opinion testimony as an expert witness).

37. Mr. Wilson's testimony is also not helpful to the fact finder because it constitutes a legal opinion. Although expert witnesses may express opinions on ultimate issues of fact,

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Lawyers
601 Union Street, Suite 1501
Seattle, Washington 98101
(206) 623-4711

Evidence Rule 704 does not permit AT&T to rely upon expert opinions on issues of law and/or questions of mixed fact and law. *See Everett B. v. Diamond*, 30 Wn. App. 787, 791, 638 P.2d 605 (1981) (Department of Labor and Industries safety inspector could not testify that the defendants' corporation had violated certain state laws or standards since such a determination constituted an impermissible conclusion of law). Mr. Wilson's conclusion that, under the Commission's rules, T-Netix was an OSP and AT&T was not an OSP must therefore be stricken and disregarded by this Commission.

38. Finally, but by no means insignificantly, summary determination requires that the Commission have before it undisputed factual issues as to which it can issue a ruling as a matter of law. *See* WAC 480-07-380 (2)(a), which provides in pertinent part that "[a] party may move for summary determination of one or more issues if the pleadings filed in the proceeding, together with any properly admissible evidentiary support (*e.g.*, affidavits, fact stipulations, matters of which official notice may be taken), show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." If there are factually contested matters, the Commission is not entitled, at this stage of the proceeding, to make decisions as to weight and credibility. Hence, if Mr. Wilson's opinions are deemed admissible, the record is plain that the expert opinions offered by Robert Rae on behalf of T-Netix (including his adoption of former T-Netix employee Alan Schott's declarations) are more than sufficient to establish a disputed issue of material fact. In sum, the WUTC can either enter summary determination in favor of T-Netix or set this matter for an evidentiary hearing, but may not permissibly grant summary determination to AT&T.

CONCLUSION

39. For all the reasons stated above, AT&T's Amended Motion for Summary Determination should be DENIED.

ATER WYNNE LLP
Lawyers
601 Union Street, Suite 1501
Seattle, Washington 98101
(206) 623-4711

DATED this 10th day of September, 2009.

T-NETIX, INC.

By: _____

Arthur A. Butler, WSBA # 04678
ATER WYNNE LLP
601 Union Street, Suite 1501
Seattle, WA 98101-3981
(206) 623-4711
(206) 467-8406 (fax)

Glenn B. Manishin
Joseph S. Ferretti
DUANE MORRIS LLP
505 9th Street, N.W., Suite 1000
Washington, DC 20004-2166
(202) 776.7800
(202) 478.2811 (fax)

CERTIFICATE OF SERVICE

I hereby certify that I have this 10th day of September, 2009, served via e-filing a true and correct copy of the foregoing, with the WUTC Records Center. The original, along with the correct number of copies (4), of the foregoing document will be delivered to the WUTC, via the method(s) noted below, properly addressed as follows:

David Danner
Washington Utilities and Transportation Commission
1300 S Evergreen Park Drive SW
Olympia, WA 98504-7250

____ Hand Delivered
____ U.S. Mail (first-class, postage prepaid)
x Overnight Mail (UPS)
____ Facsimile (360) 586-1150
x Email (records@wutc.wa.gov)

I hereby certify that I have this 10th day of September, 2009, served a true and correct copy of the foregoing document upon parties of record, via the method(s) noted below, properly addressed as follows:

On Behalf Of AT&T Communications

Letty S.D. Friesen
AT&T Communications
Law Department
Suite B 1201
2535 East 40th Avenue
Denver CO 80205

____ Hand Delivered
____ U.S. Mail (first-class, postage prepaid)
x Overnight Mail (UPS)
____ Facsimile
x Email (lsfriesen@att.com)

Confidentiality Status: Highly Confidential

On Behalf Of AT&T Communications:

Charles H.R. Peters
Schiff Hardin LLP
233 South Wacker Drive
6600 Sears Tower
Chicago IL 60606

____ Hand Delivered
____ U.S. Mail (first-class, postage prepaid)
x Overnight Mail (UPS)
____ Facsimile (312) 258-5600
x Email (cpeters@schiffhardin.com)

Confidentiality Status: Highly Confidential

On Behalf Of AT&T Communications:

David C. Scott
Schiff Hardin LLP
233 South Wacker Drive
6600 Sears Tower
Chicago IL 60606

____ Hand Delivered
____ U.S. Mail (first-class, postage prepaid)
____ Overnight Mail (UPS)
____ Facsimile (312) 258-5600
x Email (dscott@schiffhardin.com)

Confidentiality Status: Highly Confidential

ATER WYNNE LLP
Lawyers
601 Union Street, Suite 1501
Seattle, Washington 98101
(206) 623-4711

On Behalf Of AT&T Communications:

Tiffany Redding Schiff Hardin LLP 233 South Wacker Drive 6600 Sears Tower Chicago IL 60606	____ Hand Delivered ____ U.S. Mail (first-class, postage prepaid) ____ Overnight Mail (UPS) ____ Facsimile (312) 258-5600 _x_ Email (dscott@schiffhardin.com)

Confidentiality Status: Highly Confidential

On Behalf Of Complainants :

Chris R. Youtz Sirianni Youtz Meier & Spoonemore Suite 1100 719 Second Avenue Seattle WA 98104	____ Hand Delivered ____ U.S. Mail (first-class, postage prepaid) _x_ Overnight Mail (UPS) ____ Facsimile (206) 223-0246 _x_ Email (cyoutz@sylaw.com)

Confidentiality Status: Highly Confidential

On Behalf Of Complainants :

Richard E. Spoonemore Sirianni Youtz Meier & Spoonemore Suite 1100 719 Second Avenue Seattle WA 98104	____ Hand Delivered ____ U.S. Mail (first-class, postage prepaid) _x_ Overnight Mail (UPS) ____ Facsimile (206) 223-0246 _x_ Email (rspoonemore@sylaw.com)

Confidentiality Status: Highly Confidential

Courtesy copy to:

Marguerite Friedlander Washington Utilities and Transportation Commission 1300 S Evergreen Park Drive SW PO Box 47250 Olympia WA 98504-7250	____ Hand Delivered ____ U.S. Mail (first-class, postage prepaid) ____ Overnight Mail (UPS) ____ Facsimile (360) 586-8203 Email (Word version) _x_ (mrussell@utc.wa.gov, mfriedla@utc.wa.gov

Susan Mellan

ATER WYNNE LLP
Lawyers
601 Union Street, Suite 1501
Seattle, Washington 98101
(206) 623-4711

Exhibit A

BEFORE THE

WASHINGTON UTILITIES AND

TRANSPORTATION COMMISSION

SANDY JUDD and TARA HERIVEL, Plaintiffs,	*	
VS.	*	DOCKET NO. UT-042022
AT&T COMMUNICATIONS OF THE PACIFIC NORTHWEST, INC., and T-NETIX, INC., Defendants.	*	

****

ORAL DEPOSITION OF

KENNETH ROSE

APRIL 24, 2009

****

ANSWERS AND DEPOSITION of KENNETH ROSE, a witness produced on behalf of the Defendant AT&T Communications, taken in the above styled and numbered cause on the 24th day of April, 2009, from 9:07 a.m. to 1:58 p.m., before Rachel D. Chavez, a Certified Shorthand Reporter in and for the State of Texas, taken in the offices of Bennett Weston & Lajone, P.C., 1750 Valley View Lane, Suite 120, in the City of Dallas, County of Dallas, State of Texas, in accordance with the Washington Utilities and Transportation Commission.

EXHIBIT

A

all about keeping the chips in the cards intact because of pending litigation?

A. No.

Q. Okay. Were you advised by anybody to maintain the equipment without any changes after it was removed because of pending litigation?

A. No.

Q. If you'll look at Exhibit 10, that's the -- a couple of quick questions on that. If you look on page -- I guess this is not numbered, but it's the fourth page in. It's the one on the left that begins "Intra Carrier Name."

A. Okay.

Q. Do you have that?

A. Yes.

Q. You see "Qwest, Qwest," and then there's something called "TCG"?

A. Uh-huh.

Q. Do you know who TCG is?

A. Uh-huh.

Q. Who is that?

A. AT&T.

Q. TCG and AT&T are the same?

A. Yes. Teleport Communications Group.

Q. Okay.

A. The company that was bought by AT&T and rebranded as ALS, AT&T Local Service.

Q. Oh, okay. And let's see. Do you have any understanding of why under "intradialing" for the two facilities above, it's required to do 1 +, but for the third site you have to dial 10102881? Do you know why that is?

A. Yes.

Q. Why is that?

A. The -- because Qwest is the local provider of the dial tone service, and as such the default to them for intraLATA is 1 +. The one there for TCG, because the local telephone company in that area was Century Telephone, they were not the intraLATA provider. TCG was. So in order to access that, they had to do what was called 1010 dial around to access that network.

Q. Okay. On the next page it says -- do you see where it says "BIOS Version"?

A. Yes.

Q. Okay. Then if you skip over to where it says, "Bill to Local," then it says -- the first grouping, Qwest," then "Qwest," and then there's something called "ALS." Do you know who ALS is?

A. AT&T Local Service.

Q. Okay. AT&T. Okay. Great. I apologize if we

Exhibit B

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

SANDRA JUDD, et al.,	)	
	)	
Complainants,	)	
	)	DOCKET NO.
vs.	)	
	)	UT-042022
AT&T COMMUNICATIONS OF THE PACIFIC NORTHWEST, INC., and T-NETIX, INC.,	)	
	)	
Respondents.	)	

Atlanta, Georgia

August 10, 2009

DEPOSITION OF MARK POLLMAN

called for oral examination by Counsel for Respondents, pursuant to notice, at Duane Morris, 1180 West Peachtree Street, Suite 700, Atlanta, Georgia, commencing at 10:45 a.m., before Donna Fishman for Capital Reporting, a Notary Public and Certified Court Reporter in and for the State of Georgia.

EXHIBIT
B

Q What do you mean by "type one," sir?
A From what I have been led to believe, that those were lines and they utilized lines-based signaling, which is essentially the originating number was assigned at the LEC end, a piece of copper wire came in, it must be associated with this telephone number. The only thing that was conveyed across that telephone line was, bear with me, the prefix code, which in this case was a one, and the ten-digit designation number. The CIC was not signaled.
Q And all of this was using in-band signaling as opposed to out-of-band SS7 signaling?
A Yes, it was.
Q Is the reason that you clarified my use of CIC code that T-Netix, the P-3 platform, and the LEC were not connected on a carrier-to-carrier basis?
MR. PETERS: Objection to form. And foundation.
A I don't understand the use of the term "carrier-to-carrier."
Q Okay. Well, let me see if I can ferret that out because I believe you told me that the type of facility connecting the P-3 platform to the LEC central office was a regular line, a type one line?

A That is my understanding, yes.
Q Is that also the same thing as what's commonly referred to as a DS-0 or a POTS line?
A Yes, it would be.
Q Okay. And if an originating carrier, say, an originating CLEC sends traffic for routing to a local exchange carrier, does it ordinarily do that over regular POTS lines or some other sort of access, service or facility?
MR. PETERS: Objection. Form. It's vague and ambiguous.
A That's not --
Q Is that beyond the scope of your expertise?
A Not only is it beyond the scope of my expertise, it would have to depend upon the circumstances of the connection.
Q It could because -- well, if it's beyond the scope of your expertise, I won't ask you about it. You're not familiar with the different ways in which carriers connect for purposes of long distance access?
MR. PETERS: I'm going to object to the form of that, but you can answer subject to that objection.

A That is indeed outside my realm, yes, indeed.

Q Is it relevant to your opinions in any way that the P-3 platform had no switching or routing capabilities?

MR. PETERS: Objection. Form. That assumes facts not in evidence.

A It is my understanding that it could not do selective routing and switching.

Q And was that relevant in any way to the opinions that you've expressed in this case on Exhibit 82?

A None whatsoever.

Q Do you recall Mr. Rae testifying that there was a one-to-one relationship between trunks and the lines to the LEC as used in the P-3 platform?

A Yes, he mentioned that.

Q Is that relevant at all one way or another to you in reaching the opinions listed on Exhibit 82?

A None whatsoever.

Q Just to make sure we do all of this, at the very beginning you classified operator services calls as encompassing 00 minus, 0 plus, and 01 plus. First I just want to make sure that there aren't

Exhibit C

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of Adopting	)	DOCKET NO. UT-971469
	)	
WAC 480-120-052 and WAC 480-120-058	)	GENERAL ORDER NO. R-462
	)	
Relating to Protection of Customer	)	
Prepayments and Prepaid Calling Services.	)	ORDER ADOPTING RULES
	)	PERMANENTLY
. . . . .	)	

STATUTORY OR OTHER AUTHORITY: The Washington Utilities and Transportation Commission takes this action under Notice WSR # 98-24-124, filed with the Code Reviser on December 2, 1998. The Commission brings this proceeding pursuant to RCW 80.36.140.

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

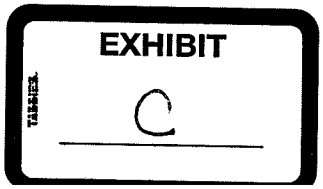
DATE OF ADOPTION: The Commission adopted this rule on January 27, 1999.

CONCISE STATEMENT OF PURPOSE AND EFFECT OF THE RULE: The rules define prepaid calling services, establish disclosure requirements for relevant terms, and establish technical and customer service standards. The rules also require that any company collecting customer prepayments must post a bond, establish an escrow account, or provide other satisfactory evidence of financial ability to provide customer refunds if necessary.

REFERENCE TO AFFECTED RULES: This rule changes the following sections of the Washington Administrative Code (WAC): None.

PREPROPOSAL STATEMENT OF INQUIRY AND ACTIONS THEREUNDER: The Commission filed a Preproposal Statement of Inquiry (CR-101) on February 13, 1998, at WSR # 98-05-055.

ADDITIONAL NOTICE AND ACTIVITY PURSUANT TO PREPROPOSAL STATEMENT: The CR-101 statement advised interested persons that the Commission was considering entering a rulemaking relating to Prepaid Calling Services and Protection of Consumer Prepayments. The Commission also informed persons of the



inquiry into this matter by providing notice of the subject and the CR-101 to all persons on the Commission's list of persons requesting such information pursuant to RCW 34.05.320(3), providing notice to all registered telecommunications companies, and by providing notice to the Commission's list of telecommunications attorneys.

NOTICE OF PROPOSED RULEMAKING: The Commission filed a Notice of Proposed Rulemaking (CR-102) on December 4, 1998, at WSR #98-98-24-124. The Commission scheduled this matter for oral comment and adoption under Notice WSR #98-98-24-124 on Wednesday, January 27, 1999 in the Commission's Hearing Room, Second Floor, Chandler Plaza Building, 1300 S. Evergreen Park Drive S.W., Olympia, Washington. The Notice also provided interested persons the opportunity to submit written comments to the Commission.

MEETINGS OR WORKSHOPS; ORAL COMMENTS: The Commission convened a workshop on May 28, 1998, prior to filing the notice of proposed rulemaking (CR-102). Many interests participated in the CR-101 phase discussions, and a number of issues were resolved during that phase. The Commission commends the parties for the spirit of cooperation and the efforts that produced a high degree of consensus about most aspects of the rulemaking.

Several persons presented oral comments at the Commission's January 27, 1999 rulemaking hearing. Theresa Jensen, representing US WEST Communications, Inc., asked whether the proposed rule would apply to the company's prepaid T-1 services. The rule will not apply to T-1 services as currently marketed. By definition it would only apply to prepaid services that are depleted as the customer uses the service, and when the prepaid time is exhausted the customer's access is terminated. This satisfied U S WEST's concerns.

Manuel Chavallo and Tim Hegert of MUNDO Telecommunications asked whether the bonding requirement in the rule applied to all telecommunications companies, even those who resell wholesale service to the public. The rule will apply to such companies and to any telecommunications company that is collecting customer prepayments.

Howard Segermark, International Telecard Association (ITA) stated that the reporting requirements in the rule require prepaid calling card companies to estimate their Washington figures since they distribute cards through wholesale distributors and cannot identify where the cards are actually sold. He suggested that the language be amended to read "The report must contain the following estimated information" and opposed the rule with its proposed language, "the report must contain the following information". The suggestion is rejected because the rule applies to all telecommunications companies that collect advanced payments, not only prepaid calling card providers. Most other services are marketed in ways that easily identify the value of service sold in Washington. This reporting requirement now applies to most prepaid calling card providers currently operating in the state, pursuant to a condition in

the companies' registrations, and they appear to be providing adequate information based on Staff experience where it was necessary to collect on the bond.

COMMENTERS (written and oral comments): The Commission received written and oral comments from many interested persons prior to the adoption hearing. These included the following:

Ron Gayman and Janet Browne, AT&T
Howard Segermark and Steve Trotman, International Telecard Association
Michael Welch, Global Communications Network
Manuel Chavallo and Tim Hegert of MUNDO Telecommunications
Rogelio Pena, MCI Worldcom
Andrew Isar, Telecommunications Resellers Association
Elizabeth Holowinski, Law Offices of Thomas K. Crowe
Dan Agar, Paracom
Andrew Jones, Sprint
Richard L. Goldberg, Sprint
Nancy Judy, Sprint
Theresa Jensen, Joyce Morris and Bob Couture, US WEST
Tim Peters, Electric Lightwave
Glenn Harris, Sprint
Karen Markle, BLT Technologies/Worldcom prepaid
Sjelby Gilje, Seattle Times
Sunny Kim and Cliff Chow, TTI Telecommunications
Marcy Greene, PT-1 Communications, Inc.
Robert Munoz, WORLDCOM
James L. Forney, Fone America, Inc.
Linda Tong and Joan Gage, GTE
Heidi Kristen Yore, MCI

Comments suggesting changes that the Commission accepted (and adopted changes from the language noticed) or rejected (to adopt the noticed language) are set out below under the relevant headings. Here the Commission identifies written and oral comments of a general nature.

Mundo Telecommunications (Manuel Chavallo) submitted general comments on the rules asking that enforcement mechanisms be implemented to deal with companies not providing proper disclosure; failing to comply with technical standards or providing service within the state without proper registration. No changes to the rule were necessary. Staff indicated that the Commission would enforce compliance with the new rules provisions in the same manner as it enforces existing rules. This satisfied the company's concerns.

Sprint (Andrew Jones) supports both the requirement that technical assistance be available to customers 24-hours a day, 7 days a week and the

requirement that a company must make an announcement when the prepaid account or prepaid calling card balance is about to be depleted. It stated that these requirements should not be lessened under the guise of fostering competition.

The Telephone Resellers Association ("TRA", by Andrew Isar) urged the Commission to authorize out of state providers to deposit prepayments in out of state banks having Washington-state branches. This rule will allow companies to use out of state banks that have a branch in Washington when customer prepayments are maintained in an in-state branch.

RULEMAKING HEARING: The rule proposal was considered for adoption, pursuant to the notice, on Wednesday, January 27, 1999, before Chairwoman Anne Levinson via teleconference and Commissioner Richard Hemstad. The Commission heard oral comments from Mary Taylor, representing Commission Staff; Theresa Jensen, U S WEST Communications; Howard Segermark, International Telecard Association; Manueal Chavello and Tim Hegert of MUNDO Telecommunications. Comments of a general nature are set out above.

SUGGESTIONS FOR CHANGE THAT ARE REJECTED:[1]

In response to industry comments, Commission Staff withdrew a proposal that companies publish the availability of the Commission to resolve problems and a telephone number to reach the Commission. It proposed and the Commission adopted a new subsection 052(7) merely restating companies' existing obligation to provide information about the Commission in certain settings. AT&T, ITA and MCIW commented on the new subsection (7). AT&T and ITA believe it is an improvement over the prior proposal. MCIW argued the sufficiency of its current approach -- merely referring consumers to the blue pages of their telephone directory. MCIW contends that the requirement of referral to many different jurisdictions is unnecessarily expensive. The Commission rejects MCIW's suggestion. Simply referring customers to the directory does not meet the Commission's present requirement under WAC 480-120-101. The additional requirement will have minimal expense. The Commission accepts the new subsection (7) but rejects MCIW's suggested changes.

ITA also stated that new phone cards may become available that offer unlimited service for a number of days. The company proposed language to state that cards offering unlimited domestic and international service within a given period need not post their per-minute rates or their decrementing policies, which would be irrelevant. The Commission defers the subject to another time in the absence of information that such cards actually are on the market and require a change in the rule proposal. The

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[1]In this discussion, the adopted rules will be referred to as sections 052 and 058. Both are within chapter 480-120 WAC; the chapter designation is deleted for convenience and ease in reference.

rule's requirement that all rates, surcharges, fees or taxes be outlined in the presale documentation should cover this situation. If it does not, companies may request an exemption from the rule or petition for its amendment.

ITA addressed subsection 052(5)(b)(iii), requiring the disclosure of expiration policies in presale documents. ITA stated that some firms have issued cards with no expiration, but impose a monthly "line-maintenance" charge if the card is not used in six months. ITA urged the Commission to adopt Florida language that "Cards without a specific expiration period printed on the card, and with a balance of service remaining, shall be considered active for a minimum of one year from the date of first use, or if recharged, from the date of the last recharge." The Commission rejects the proposal. Any "line-maintenance" fee must be disclosed under subsection 052(5)(b)(ii), and the Commission believes that the expiration policy stated in subsection 052(5)(b)(iii) is reasonable, appropriate, and should be adopted.

ITA suggested deleting subsection 052(10)(b), requiring customer notice of a company's termination of business in the State, contending that no phonecard issuer knows the identity of its customers. The Commission rejects the suggestion because the rule language is clear that a company is only required to comply with this provision if it knows the relevant information.

Thomas K. Crowe (by Elizabeth Holowinski) proposed that the Commission require companies to report the number of prepaid calling card intrastate minutes used by consumers in the State of Washington within a reporting period. The Commission received similar suggestions on this issue from MCIW and ITA. We reject the proposal because under it the Commission would only be able to identify services used within Washington. The bond is designed to protect the unused portion of prepaid service purchased in the state, because the consumer may elect to use it all within the state. The Commission accepts the Commission Staff observation that while some debit card companies may be structured so that they cannot identify the actual cards sold in Washington, they certainly can make reasonably accurate estimates based on the information they retain about their businesses. The rule will not only apply to companies providing prepaid calling services, it will apply to any company that is collecting customer prepayments within the State. Many such companies do track the information on a Washington-specific basis.

MCI commented on the requirement in subsection 052(4)(d) that companies provide call detail report free of charge to customers upon request. The company contended that, while it can provide call detail reports for a given day, providing Accumulative Call Detail Reports for individual prepaid personal identification numbers is particularly onerous and will require costly systems modifications to implement. ITA comments that companies should be able to provide the information orally to a customer and charge the customer if a written report is requested. Sprint stated that other sections of the rule adequately disclose this information to the customer, and therefore the call detail requirement is unnecessary. Sprint also stated

concerns about a company's possible liability if it released information to someone other than the actual user of the service. The Commission believes that a consumer with a dispute will reasonably expect -- and a company should be required to provide -- sufficient information to resolve a billing inquiry. When a dispute is related to prepaid services the company must be capable of explaining how, when and where prepaid service was depleted. Under modified language, it is clear that companies may take steps to confirm that the person making the request was the actual user of the service.

Sprint, AT&T, ITA, and MCIW commented on subsection 052(8), relating to refunds for unused balances. All four stated that refunds should only be required when a company has failed to provide service as promised. Additionally AT&T indicated that companies should only be required to refund unused balances after Commission review. ITA urged that the refunds should be made in-kind and at the discretion of the service provider. MCI stated that because it does not collect full retail price for prepaid calling cards it should not be required to refund based on the retail value remaining on the card. Prior language, focusing on contentions of failure to provide service as opposed to actual failure, has been changed so it is clear that refunds are required in instances of service failure. The Commission rejects MCIW's contention that it need not refund the full cost of service because it does not receive full payment. A consumer who is experiencing service problems should not be penalized because a company chooses to provide service through retail sellers who purchase the cards at a wholesale rate. The customer has paid a specific dollar amount for a prepaid calling card, and must receive a refund of the unused amount if the company fails to provide service.

TRA argues that 24 hour staffing is unreasonable and burdensome to small companies, asserting that perpetual staffing is unnecessary for discretionary services, such as prepaid calling cards. The Commission believes that 24-hour coverage for technical assistance is a reasonable requirement for all providers of telecommunications services because the need for such services continues around the clock. Prepaid service may well be the only service available to a customer. It is entirely reasonable to require that any company electing to provide the service will support it at any time it may be needed. We decline to modify the proposed language.

TRA asked that subsection 052(9), Performance Standards for Prepaid Calling Services, be modified to recognize that resellers who rely exclusively on the technical network services provided by underlying carriers are incapable of meeting the Commission's proposed standard. TRA agrees with Commission Staff that the reseller should work with its underlying carrier to resolve network problems, but argues that to hold a reseller unilaterally responsible for substandard performance when it has made a good faith effort to resolve service affecting problems with its underlying carrier would serve to punish the reseller and allow the underlying carrier to operate with seeming impunity. This would be particularly harmful if the underlying carrier is also competing against the reseller. TRA also raised this argument during both the CR-101 and CR-102 comment periods, and Commission Staff did not support the suggestions. The

Commission shares Commission Staff's concern that any company holding itself out to provide service to the public should be ultimately responsible to that consumer for the service. To do otherwise would reduce the carrier's incentives to secure adequate service from existing or other possible suppliers. The underlying carrier's failures may also be the subject of private or Commission enforcement action, as well.

COMMISSION ACTION: After considering all of the information regarding the proposal, the Commission adopted the proposed rules with the changes recommended by Commission Staff.

CHANGES FROM PROPOSAL: The Commission adopted the proposal with several changes from the text noticed at WSR # 98-24-124. We describe here the changes that the Commission adopted, other than grammatical, organizational, or clearly non-substantive changes.

480-120-052

1. Subsection (1). Exclude credit and debit cards from "prepaid services" in the rule, and explain how such cards are treated. U S WEST Communications, Inc. (Joyce Morris) asked that the definitions section be amended to make it clear the Prepaid Calling Services rule did not apply to credit cards (*e.g.,* Visa, Mastercard) or cash equivalent ("debit") cards. The Commission modifies this section to make clear the distinctions among the various cards commonly used to secure service, and how each is considered for regulatory purposes.

2. Subsections (2) and (3). Clarification that the without-charge number for technical assistance may be the same as the business office number. International Telecard Association (ITA) (Howard Segermark) suggested a clarification stating that a company may use the same toll-free number for both its business office function and its technical assistance function. The proposal is accepted. This change makes it clear that companies are not required to have different toll-free numbers for technical and business purposes, as long as the 24-hour technical service support requirement is met. This change clarifies that companies are not required to bear the cost of two toll-free lines.

3. Subsection (4). Require that billing increments be defined in the company staff's price list, tariff, or presale documentation. This change on the Commission's initiative requires a definition of billing increment, so the company's compliance with the definition and the terms of its prepaid service may be verified.

4. Subsection (4). Reduce from 36 to 30 months the time for retention of call records. This change reduces the cost to companies of retaining records, to better balance consumer and regulatory needs with the costs of compliance. Commission Staff recommends the change after consultation with affected companies to reduce the costs of compliance.

5. Subsection (4). Require production of only information that the company possesses. MCIW states that it does not always acquire originating number information and it is thus not always able to retain the information to comply with subsection (4)(e)(ii) of the rule as proposed. The Commission modifies the rule to specify that the information only must be maintained when it is actually passed to the company.

6. Subsection (4). Call detail reports. In response to a concern voiced by ITA, the modified rule allows companies to first provide an oral call detail report and to take measures to confirm that the person requesting call detail is the actual account holder. The change reduces costs to companies while preserving consumer protections.

7. Subsection (5). Require that, if a consumer is required to call a company to obtain an access number for use with the service, the company must publish a toll-free telephone number for that purpose on the prepaid calling card. The change responds to comments by MCI and provides marketing flexibility without hampering consumer interests.

8. Subsection (5). Allow expiration to be defined by a period of availability (e.g., 90 days) as well as by a date certain. This change recognizes the business problems of providers who market through retail outlets and may have little control over how long a card may stay in inventory before it is sold. The provision gives providers the flexibility to standardize the period of service availability to assure equal value for customers and to provide accurate information for consumer information and comparison. Paracom also addressed subsection (5)(a)(vi) which required that an expiration date, if applicable, be printed on prepaid calling cards. The company stated that it prints a large number of cards at a time in order to achieve necessary economies of scale and keep prices low. The actual expiration date of these cards will vary depending on their distribution date. The company suggested an amendment providing an option in the dialing menu to provide the expiration date by pressing key on telephone. MCI addressed similar concerns and advocated printing a specific expiration date or policy statement to inform customers how the expiration date is determined, and making the actual expiration date available to consumers by calling customer service. The Commission adopts amended language that allows a company whose expiration dates are established based on initial use to print a statement on the card that indicates the length of time the card will be active after the initial activation.

9. Section 5. Remove a requirement to warn consumers that lost cards may be irreplacable. Both MCI and ITA objected to the proposed language in subsection (5)(a)(viii) which required that a statement be placed on a prepaid calling card warning customers to safeguard their cards because they would assume full

liability for lost or stolen cards. Commission Staff supported removing this subsection entirely; the Commission accepts the Staff recommendation on the basis that the consequences of loss are within the public's general understanding and that the limited space available for notices should be devoted to matters of higher priority.

10. Subsection (6). Remove requirement for advance disclosure of international rates in presale documentation. AT&T (Ron Gayman), Paracom, and Thomas Crowe argue for deletion of a requirement to disclose international rates in the presale documentation, on the basis that it is impossible to include because the charges vary from country to country and fluctuate much more often than rates for domestic calls. There is wide disparity and great volatility as to international rates. Quoted rates may be outdated before use and the space required to state all rates could be out of proportion with the consumer benefit.

As a result the Commission removed proposed disclosure requirements relating to international rates and removed references to international rates from subsections 052(5)(b)(i) and (6)(a)(vi). The change reduces the burdens of compliance. MCI questioned the Commission's jurisdiction over the requirements in subsections (5)(b)(i) and (6)(a)(vi) that rates for interstate as well as international calls be disclosed in presale documents. Interstate rates are discussed above. The Commission is not asserting jurisdiction over interstate rates. The Commission is asserting jurisdiction over disclosure of rates to Washington state consumers.

11. Subsection (7). Remove the draft requirement of presale disclosure of consumers' right to Commission assistance with complaints; remove requirement of referral to Commission at time of unresolved complaint and substitute the requirement to provide the Commission's complaint number to a consumer upon request or in compliance with other rule. AT&T, ITA, TRA, Sprint, and Thomas K. Crowe commented on subsections 052(5)(b)(v) and (6)(a)(x) of the proposal, requiring sellers of prepaid services to disclose in presale documents consumers' right to assistance from the state regulatory agency in the state where the prepaid service was purchased. AT&T argued that this section is unnecessary because existing WAC 480-120-101 already requires supervisors to make unhappy customers aware of the Commission. Mr. Crowe argued that this requirement would be discriminatory since no other segment of the telecommunications industry is required to provide this information in its bills or point of sale materials. ITA argued that the statement would require too much room on a prepaid calling card. TRA argued that the Commission cannot lawfully require prepaid telecommunications service providers to include a general statement about consumer rights to contact regulatory agencies in other states, no matter how technically correct such a statement may be. Sprint suggested that the information be provided via the company's customer service number, not written material. The commenters raise valid points. In response to

the comments the Commission accepts the Commission Staff recommendation to eliminate the two subsections in question and substitute new subsection (7), which restates companies' responsibility under WAC 480-120-101.

12. Clarify that information must be placed either on the card or card packaging, or at the point of sale, but not both. MCI commented that the proposed rules relating to packaging and point of sale documents will be difficult and costly to implement, and that it has only limited control over retail cooperation in displaying the information. The proposal's intent was that the information be in either form, at the company's option. The Commission modifies the rule language to clarify the intent.

13. Subsection (7). Clarify that refunds other than for failure to charge proper rates or failure to meet technical standards are within a company's discretion and may be undertaken pursuant to the company's own form. The rule requires companies to refund prepaid service when the company fails to meet technical standards and when it fails to charge the proper rates. This change, in response to ITA and AT&T comments, clarifies that refunds for other reasons are within the company's business discretion, and authorizes companies to develop forms to assist them in gathering accurate and sufficient information.

14. Subsection (9). Reduce from 99 to 98 per cent the standards for call completion. This change brings the standard for prepaid service into consistency with the standard for other types of telecommunications service, and reduces the burden of compliance on companies subject to the rule.

15. Subsection (11). Extend the phase-in of disclosure compliance by extending compliance in printing for 90 days and display for 9 months (up from 90 days) after the rule's effective date. Both ITA and MCIW objected to the 90-day time frame for compliance with WAC 480-120-052 (10). They argued that requiring compliance with the rule on that schedule would cause extraordinary costs to prepaid calling card companies, citing costs including destruction of existing inventory, reprinting cards, and producing entirely new and unforeseen packaging and point of sale materials. Both argued that the Commission should consider allowing 9 months for compliance to permit depletion of existing inventory. The adopted rule is amended to require that any material printed more than 90 days after the effective date of the rule must conform with the new requirements. All printed materials on display or distributed more than nine months after the effective date of the rule must comply with the rule provisions. The remaining provisions will be effective 90 days from the effective date of the rule. This change reduces burdens on companies by allowing them to continue to print existing materials while designing replacements, and by allowing them to exhaust much or all of their stock of such materials before using new materials. It reflects a balancing of consumer and commercial interests.

16. Subsection 480-120-052(7) (vi) is added, requiring supervisory personnel when dealing with dissatisfied consumers to provide the consumer with the Commission's toll-free number and address, clarifying that the requirement applicable to all telecommunications companies does apply to prepaid service providers.

17. Subsection 480-120-052(8)(a) is modified slightly to clarify that companies must only provide refunds when they fail to provide service as promised, not simply when a customer "contends" that the company has failed to provide service as promised.

18. Subsection 480-120-052(11) proposed language would have allowed 90 days from the effective date of this rule for compliance. The language is modified so that companies have nine months to have all written materials in circulation (e.g. prepaid calling cards and presale documents) in compliance with the rule provisions. The remaining rule requirements retain the 90-day implementation deadline. This change is to mitigate costs of compliance and to better balance consumer and provider interests.

WAC 480-120-058

19. Allow companies that seek exemption from bonding or guarantee provisions to present any evidence they believe will demonstrate the adequate protection of consumer interests. Paracom requested that language that would excuse a company from posting a bond if the company has transferred funds sufficient to cover all outstanding customer prepayments to its underlying carrier if the carrier meets the requirements of section (a) or (b). It also advocated a new section (4)(e) which would allow a company to petition the Commission on an exception basis and state reasons for requesting exemption from bonding requirements. Paracom's resale agreement is unique and it is not appropriate to address each unique situation in the rule. The Commission does add subsection (e) to the rule, which allows a company to petition for a waiver of the rule and to present any additional information it believes supports a contention that consumers will be adequately protected if the financial security requirement is reduced or waived. Doing so allows the Commission to minimize financial burdens on companies to the greatest extent consistent with protection of consumer interests.

20. In WAC 480-120-058, Protection of Customer Prepayments, subsection (4), the Commission added language to clarify that a company may petition for waiver of the bonding requirement to offer evidence that consumer interests will be adequately protected without the requirement. This charge reduces regulatory burdens on business while retaining consumer protections.

ORDER

THE COMMISSION ORDERS That:

1. WAC 480-120-052 and WAC 480-120-058, as set forth in Appendix A, is adopted as a rule of the Washington Utilities and Transportation Commission, to take effect on the ninety-first day after the distribution date of the issue of the Washington State Register in which it appears.

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

3. The Commission sets out in this order its reasons for adoption of the proposed rule, for adopting changes from the language originally noticed, and for declining to adopt suggested changes. This discussion supplements and may modify information and reasoning set out in Commission Staff memoranda, presented when the Commission considered filing a preproposal statement of inquiry, when it considered filing the formal notice of proposed rulemaking, and when it considered adoption of this proposal. To provide a complete picture, the Commission adopts the Commission Staff memoranda, in conjunction with the text of this order, as its Concise Explanatory Statement as required by RCW 34.05.025.

DATED at Olympia, Washington, this day of April 1999.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

WILLIAM R. GILLIS, Commissioner

RICHARD HEMSTAD, Commissioner