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BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

SANDY JUDD, and TARA HERIVEL,

Complainants,

v.

**AT&T COMMUNICATION OF THE PACIFIC
NORTHWEST, INC., and T-NETIX, INC.,**

Respondents.

Docket No. UT-042022

**AT&T'S RESPONSE TO T-NETIX'S
AMENDED MOTION FOR SUMMARY DETERMINATION**

SUMBITTED BY:

**AT&T COMMUNICATIONS OF
THE PACIFIC NORTHWEST, INC.**

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1. Throughout the relevant period, June 20, 1996 to December 31, 2000,¹ the WUTC's regulations have always defined an Operator Service Provider ("OSP") as "any corporation, company, partnership, or person providing a connection to intrastate or interstate long-distance or to local services from locations of call aggregators." WAC 480-120-021. T-Netix has admitted that, throughout this same period, it served as the interface between the inmate placing a call from the relevant Washington prisons and the public switched telephone network ("PSTN"). This is just one of many fundamental undisputed facts. Others include the following:

- the agreed-upon structure for providing telephone service to inmates at Washington Department of Corrections ("DOC") prison facilities allocated operator service responsibility to the local exchange company ("LEC") serving each prison;
- the LECs providing local service to the prisons entered into contractual and strategic relationships with T-Netix;
- T-Netix installed, operated, and maintained its P-III Premise platform at each of the prisons at issue during the entire relevant time period; and
- T-Netix's P-III Premise platform provided the following services:
 - verbally advised the calling party (*i.e.*, the inmate) what steps he or she would need to take, such as entering a personal identification number, in order to place the call;
 - screened the call to determine whether it could be placed;
 - served as the "gatekeeper" or "focal point" between the inmate placing the call and the Public Switch Telephone Network ("PSTN");
 - verbally advised the called party (*e.g.*, the inmate's friend or family member) that he or she had received a collect call from the inmate and of the steps that the called party had to take to accept or reject the call;

¹ This was established as the relevant time period by Order No. 14 entered on January 9, 2009. (Order 14, Docket UT-042022 at p. 10 n. 44 and p. 12, ¶ 38 (Wash. Util. & Trade Comm'n January 9, 2009).)

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- processed the called party's decision to accept or reject the call;
- if the called party accepted the call, joined the calling party and called party together, allowing them to talk; and
- maintained the call detail records so that the call could be properly billed.

2. Faced with these undisputed facts, T-Netix resorts to a variety of misplaced arguments, hoping that one of them might just allow it to avoid being classified as the OSP. Initially, T-Netix pays lip service to the WUTC's "connection to" test, but ultimately ignores the fact that its own expert — consistent with the other parties' experts — has acknowledged that T-Netix served as the focal point between the calling party and the PSTN, determining which calls went through and which did not. Before any call made it to the LEC central office, or even the LEC line transporting calls from T-Netix's platform to the central office, T-Netix had to authorize the call and allow it to be transmitted.

3. T-Netix then urges the WUTC to disregard the actual definition of an OSP contained within its regulations and to adopt instead a new and different test conceived by T-Netix. Rather than genuinely identify which entity connected calls from the aggregator location to local or long-distance services, T-Netix's proposed test would identify the OSP as the common carrier that provided the local or long-distance services. Of course, that is not how the WUTC defined an OSP. The WUTC's definition states that an OSP is "*any corporation, company, partnership, or person providing a connection*" to local or long-distance services.. If the WUTC wanted to limit OSPs to common carriers, it could have, and presumably would have, said so. Moreover, if the WUTC intended the local or long-distance provider to be the OSP, it would have been unnecessary to define the OSP as the entity that provided "*a connection to . . . long distance or local services.*" It would have just defined the OSP as the entity that provided

the long-distance or local services. T-Netix's proposal does violence to the plain language of the WUTC's chosen definition.

4. T-Netix also claims that it was simply an equipment and software supplier to AT&T. But that is not true. Again, T-Netix had a direct contractual relationship with the LECs. It also regularly dealt directly with the DOC and prison officials. Representatives of T-Netix were regularly on site at the DOC facilities to provide all of the required support for its services. T-Netix has repeatedly recognized and acknowledged that it was an OSP precisely because of this broad range of support and services that it provided.

5. Under the WUTC's definition, T-Netix was the OSP because it provided the requisite "connection." This makes sense not only as a matter of construing the plain language of the definition, but also in terms of practical reality given the services that T-Netix actually provided. T-Netix was the only entity that communicated directly with either the calling party or the called party during the call flow process. As such, it was in the best position to perform the OSP function of notifying those parties how they could receive rate disclosures. Yet, even though the WUTC defined "operator services" within its definition of an OSP, T-Netix now attempts to persuade the WUTC that it should ignore the "operator services" based on T-Netix's counterintuitive position that an Operator Service *Provider* is not necessarily the entity that *provides* the operator services. Again, this position disregards the WUTC's plain language.

6. In the Amended Motion for Summary Determination, T-Netix claims that in its original July 28, 2005 Motion for Summary Determination, it argued that AT&T was the OSP. (See T-Netix Amended Motion for Summary Determination ("T-Netix Amended Mot.") at 1.) That is not true. In its original motion it argued that "the LEC is the primary party responsible 'for arranging for . . . completion . . . of an interstate call under WAC 480-120-021, rendering it

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the OSP as well as the call's carrier." (T-Netix Initial Motion for Summary Determination ("T-Netix Initial Mot.") at 10.) Nowhere in that motion did it claim AT&T was the OSP. Discovery has now demonstrated, however, that T-Netix actually connected all of the inmate calls to the PTSN and provided all of the operator services.

7. As discussed below and in AT&T's Amended Motion for Summary Determination, T-Netix was the OSP. A finding to that effect comports with the plain language of the WUTC's definition of an OSP, is fully consistent with the WUTC's regulatory scheme, and fits with the undisputed facts developed in this proceeding.

I. T-Netix Was the OSP Because It Connected all of the Calls from the Prisons at Issue to a Local or Long Distance Service Provider.

A. T-Netix Connected all Calls from the Prisons to the PSTN.

8. As T-Netix has repeatedly admitted, through its P-III Premise platform, it connected all of the calls from the prisons at issue to local or long-distance service. Accordingly, it was the OSP. Scott Passe, one of the developers of the P-III platform and the T-Netix employee probably most knowledgeable about the hardware, testified that "[t]he [P-III] telephony module is the device that *connects* the inmate to the PSTN period." (Ex. 1 hereto, Excerpts of April 5, 2009 Deposition of Scott Passe ("Passe Dep."), at 38:23-39:25, 49:1-7, 97:8-24) (emphasis added).) He explained that it is "the interface between the inmate and the . . . PTSN." (*Id.* at 98:1-2.) T-Netix's expert testified that the platform was the "focal point" between the payphones in the prison and the Public Switch Telephone Network:

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

(Ex. 2 hereto, Excerpts of August 6, 2009 Deposition of Robert Rae (“Rae Dep.”), at 224:10-24 (underlined language has been designated highly confidential and has been redacted from the public version of this motion).) T-Netix’s expert further testified that the platform performed a “gating” function: [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (*Id.* at 235:15-22 (underlined language has been designated highly confidential and has been redacted from the public version of this motion).) He explained:

[REDACTED]

[REDACTED]

[REDACTED]

(*Id.* at 219:24-220:14 (underlined language has been designated highly confidential and has been redacted from the public version of this motion).)

9. [REDACTED]

[REDACTED]

[REDACTED]

(*Id.* at 220:18-25 (underlined language has been designated highly confidential and has been redacted from the public version of this motion).) [REDACTED]

[REDACTED]

[REDACTED] (*Id.* at 210:15-18 (underlined language has been designated highly confidential and has been redacted from the public version of this motion).) Accordingly, the P-III Premise platform acted as the gatekeeper for all calls: “The Premise platform intercepts all calls dialed by the inmates and performs multiple security screening functions prior to outpulsing the call to the LEC switch. If the call does not pass the appropriate security tests, the call will be ‘denied’ and the call will not be outpulsed to the LEC switch.” (Ex. 19 to AT&T Amended Motion for Summary Determination (“AT&T Am. Mot.”), June 10, 2005 Aff. of Alan Schott (“6/10/05 Schott Aff.”), at ¶ 9.)

10. T-Netix has elsewhere admitted that, for a prison collect call, “[i]f the number passes the screening, the premise equipment then processes the call by routing it to local exchange lines through the LEC’s Network Interface (NI) or Network Interface Device (NID) for connection to the dialed number.” (Ex. 3 hereto, T-Netix Resp. to AT&T Second Data Req. No. 16.) In addition, “[w]hen T-Netix equipment made a connection to the access line provider’s facilities at the network interface device, the call was then processed through the public switched network.” (Ex. 4 hereto, T-Netix Second Supp. Resp. to AT&T Second Data Req. No. 18.) In short, T-Netix connected all calls from the prisons to the PSTN and local and long-distance service. (*See also* AT&T Am. Motion at ¶¶ 15, 16, 22, 23.)

B. T-Netix also Provided Operator Services for all Calls from the Prisons.

11. T-Netix also indisputably provided operator services for all calls from the prisons at issue. The WUTC's definition of an OSP incorporates a definition of "operator services," which 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" WAC 480-120-021 (1999).² T-Netix clearly provided services for prison collect calls involving automated assistance to consumers to arrange for billing and completion of the calls. "A typical call flow for a T-Netix P-III premise-based call control platform" included the following services performed by the platform:

- "Inmate . . . hears a simulated dialtone form the platform"
- "Platform validates the destination number and PIN, if required, using several database tables."
- "If the platform allows the call, the automated voice prompts the inmate to record his name. If the platform denies the call, the automated voice will play a rejection message to the inmate and return simulated dial tone to allow another attempt."
- "A valid call will cause the platform to seize the dedicated outbound trunk and listen for true dialtone from the serving end office (LEC). When the platform validates the presence of battery and dialtone from the serving end office, it will then outpulse the destination number. . . ."
- ". . . The platform's automated voice will announce that they have received a call from an inmate (platform plays the inmate's actual pre-recorded name) and then prompts the called party on the procedure to accept the call. . . ."
- "If the called party accepts the call, which involves pressing a specific keypad digit, the platform will configure the audio paths to allow two-way conversation between the inmate and called party."

² This was the language of the 1991 and 1999 versions of the regulation. The language changed slightly in 2003. (See Exs. 4-6 to AT&T Am. Mot. (1991, 1999, and 2003 versions of regulations).)

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- “The platform will provide call timing and perform multiple fraud detection tests throughout the duration of the call.”
- “When the call has ended, the platform will record the call detail that includes start time, stop time, date, origination number, terminating (destination) number, call acceptance flags, and other validation information.”
- “Call detail data is downloaded periodically from the platform to a centralized data center where it is formatted and sent to the LEC or IXC that owns that traffic.”

(Ex. 1 to T-Netix Initial Mot., July 27, 2005 Supp. Aff. of Alan Schott (“7/27/05 Schott Supp. Aff.”), at ¶ 18. *See also* Ex. 3 hereto, T-Netix Resp. to AT&T Second Data Req. No. 16; Ex. 4 hereto, T-Netix Second Supp. Resp. to AT&T Second Data Req. No. 18.)

12. T-Netix’s expert agrees that these services constitute operator services.

Historically, these services were provided by a live operator:

Upon receiving the called party’s number, the operator would then place the inmate on hold and originate a new call to the called party. The operator would then ask the called party if they wished to accept the charges for the call from the inmate. If the called party agreed to accept the charges, the operator would bridge the inmate call to the called party and the operator would be disconnected from the audio path. Call timing and call detail for billing would be performed through the carrier’s operator services switch.

(Ex. 1 to T-Netix Initial Mot., 7/27/05 Schott Supp. Aff., at ¶ 5.) But platforms such as T-Netix’s P-III Premise platform obviated the need for live operators and replaced them in providing operator services.

These platforms could effectively replace the call control functionality of the live operators and the operator services switch with automated inmate-specific applications. . . .

Call control platforms replaced the live operator system with automated, computerized systems that utilized synthesized or prerecorded voice prompts to instruct the inmates and called parties on how to use the service.

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(*Id.* at ¶¶ 8, 9.) Complainants’ expert agrees that these services provided by the P-III Premise platform constitute operator services, both historically and under the WUTC definition. (See Ex. 22 to AT&T Am. Mot., August 15, 2005 Decl. of Kenneth Wilson, at ¶¶ 13-21 (e.g., “In the Premise or P-III configuration, the T-Netix platform performs operator services functions on each call dialed by an inmate”).

13. The WUTC’s inclusion of the defined term “operator services” in the definition of an OSP must be given meaning. (See *City of Spokane v. Rothwell*, --P.3d--, 2009 WL 2783436 at *2 (Wash. 2009) (“statutes must be construed so that all language is given effect and no portion is rendered meaningless or superfluous”); *State v. J.P.*, 149 Wash.2d 444, 450, 69 P.3d 318 (2008) (quoting *Davis v. Dep’t of Licensing*, 137 Wash.2d 957, 963, 977 P.2d 554 (1999)) (“[w]e interpret statutes to give effect to all language in the statute and to render no portion meaningless or superfluous.”)) By defining “operator services” within the definition of an OSP, the WUTC recognized that, under pure common sense, an Operator Service *Provider* is a *provider* of operator services. There is no dispute here that T-Netix *provided* operator services for all calls from the prisons at issue. T-Netix’s attempt to convince the WUTC to disregard who actually provided those services is simply an attempt to avoid the ramifications of that undisputed reality.³

³ T-Netix asserts that “the rule in question applies to operator **service** providers, not operator **functionality** providers.” (T-Netix Am. Mot. at ¶ 14 (emphasis in original).) This is a non sequitur. The WUTC’s defined term is “operator services,” not “operator functions” or “operator functionality.” Moreover, the WUTC made it a point to couple that defined term with the definition of an OSP. It is unreasonable to ignore it — much less to pretend that the term is actually “operator functions” or “operator functionality” instead of “operator services.”

C. T-Netix Attempts to Avoid the OSP Definition's Plain Language at all Costs.

14. Rather than confronting the actual language selected by the WUTC, T-Netix seeks to add unwritten elements into the WUTC definition of an OSP that are not contained anywhere in the regulation. The question under the plain language of the OSP definition is “did T-Netix’s P-III Premise platform provide a connection to intrastate or interstate long-distance or to local services from locations of call aggregators?” T-Netix answers that question with a non-answer: “T-Netix did not provide switching, routing, access or transport for any of the local exchange or intrastate interLATA calls originating from these institutions.” (T-Netix’ Am. Mot. at ¶ 13.) None of these elements — switching, routing, access, or transport — can be found in the OSP definition. Moreover, T-Netix makes no attempt to explain whether and how these elements bear on the language that is in the definition. T-Netix simply complains that “[t]he rule does not define ‘connection,’ which is not a recognized term in the telecommunications industry.” (*Id.*) In other words, rather than address the OSP definition’s language, T-Netix asserts a red herring argument by importing unwritten elements into the definition and then claiming that T-Netix does not do these things.

15. Moreover, even if switching, routing, access, or transport were elements in the OSP definition, T-Netix is disingenuous when it claims that it did not do any of these things. T-Netix has admitted that, for a prison collect call, “[i]f the number passes the screening, the [T-Netix] premise equipment then processes the call *by routing it to local exchange lines* through the LEC’s Network Interface (NI) or Network Interface Device (NID) for connection to the dialed number.” (Ex. 3 hereto, T-Netix Resp. to AT&T Second Data Req. No. 16 (emphasis added).) One of the developers of the P-III described its “automated operator” functionality as “voice prompting . . . and *routing* under microprocessor control, according to its programming.”

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(Ex. 1 hereto, Passe Dep., at 132:9-22.) Similarly, T-Netix itself has described its P-III Premise platform as a switch: “This functionality is similar to the function of a premise-based PBX when connecting to a local exchange access line at the LEC’s NID.” (*Id.*) A PBX, or private branch exchange, does, of course, function as a switch. 480-120-021. T-Netix’s own technical documentation describes “switching” as the “process of connecting appropriate lines and trunks to form a desired communications path between two points in a telecommunications network.” (Ex. 5 hereto, Excerpts of Deposition Exhibit 4, T-Netix Products Due Diligence, at TNXWA 00330.) That is exactly what T-Netix’s PIII platform does. If a call is authorized, it connects the lines running from the inmate handsets to the LEC facilities in order to form a path that allows the inmate to talk to his friend or family member. (*See also* Ex. 6 hereto, Excerpts of August 7, 2009 Deposition of Kenneth Wilson (“Wilson Dep.”), at 251:3-5 (P-III Premise platform performs a switching function).) Accordingly, T-Netix’s Senior Architect described the P-III as “provid[ing] the *control switching* and bridging” between the inmate and the PSTN. (Ex. 1 hereto, Passe Dep., at 30:18, 126:5-10 (emphasis added).)⁴

16. When T-Netix does pay lip service to the “connection” language of the OSP definition, its interpretation of that language is difficult to discern. Indeed, T-Netix’s expert

[REDACTED]

[REDACTED] and [REDACTED] (Ex. 2 hereto,

⁴ AT&T’s Expert, Mark Pollman, explained that the P-III does not provide “*selective routing and switching*.” (Ex. 7 hereto, Excerpts of August 10, 2009 Deposition of Mark Pollman (“Pollman Dep.”), at 91:1-12 (emphasis added).) That is correct. It was not a “selective” switch, but it was a switch. The P-III did not select between multiple routing options. It was a fairly simple binary switch. If it determined the call was authorized, it would switch the call to the PSTN. That “go/no go” decision to connect or not connect is a switching function because it connects multiple lines to complete a path.

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Rae Dep. at 170:25-171:12 (underlined language has been designated highly confidential and has been redacted from the public version of this motion).) He expressed frustration and confusion in attempting to interpret “connection” (*Id.* at 88:1-7, 110:21-111:3, 171:7– 172:5), but he arrived at the following tortured definition:

[REDACTED]

(*Id.* at 172:23-173:10 (underlined language has been designated highly confidential and has been redacted from the public version of this motion).) This interpretation of “connection” is not based on [REDACTED] — *i.e.*, the language — but instead on [REDACTED] at least as T-Netix’s expert understands it. (*Id.* at 173:13-14 (underlined language has been designated highly confidential and has been redacted from the public version of this motion).) Such an approach, however, results in complete ambiguity as to who actually is the OSP. He admits: [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (*Id.* at 177:4-9 (underlined language has been designated highly confidential and has been redacted from the public version of this motion).)

17. Contrary to the approach suggested by T-Netix’s expert, the definition of an OSP does not look at every connection involved in a call. It has a defined starting and ending point.

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The connection that is relevant for determining who is an OSP is solely the initial connection that allows a call to move from the aggregator to either local or long distance services. There is no genuine dispute that T-Netix provided that connection because it served as the gatekeeper, determining which calls were allowed to be transmitted to the PSTN, and provided all of the verbal instruction and services needed to facilitate those transmissions.

D. AT&T Did Not Provision the Lines Between the Prisons and the LECs.

18. T-Netix claims that its P-III Premise platform connected to the PSTN through “a series of POTS lines, provisioned by T-Netix on behalf of AT&T.” (T-Netix Am. Mot. at ¶ 11.) But T-Netix would only connect a call to those lines after it had instructed the inmate how to place the call, performed all of its screening functions and determined that the call should, in fact, be transferred to the PSTN.

19. Contrary to T-Netix’s claim, AT&T did not provision those lines, nor did anyone provision them on AT&T’s behalf. The DOC contractual scheme explicitly made the LECs responsible for “install[ing] and maintain[ing] . . . lines” at the prisons at issue. (*See* Exs. 7-10 to AT&T Am. Mot. — Ex. 7 at 2-3 (DOC contract), Ex. 8 at 1-3 (GTE contract); Ex. 9 at 1-3 (US West contract) & Ex. 10 at 1-3 (PTI contract); *see also* Ex. 2 hereto, Rae Dep., at 224:20-24

[REDACTED]

[REDACTED]

[REDACTED] (underlined language has been designated highly confidential and has been redacted from the public version of this motion).)

20. The fact is that the majority of calls from the Washington prisons at issue never even touched AT&T’s network because only interLATA long-distance calls were delivered to AT&T’s Point of Presence (“POP”). (*See* Ex. 13 to AT&T Am. Mot., December 14, 2004 Aff.

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of Frances Gutierrez, at ¶¶ 7-8.) Indeed, under the DOC contractual scheme, AT&T was responsible only for carrying interLATA traffic and the LECs were responsible for carrying local and intraLATA traffic and for delivering interLATA traffic to AT&T's POP. (Exs. 7-10 to AT&T Am. Mot. — Ex. 7 at 2-3 (DOC contract), Ex. 8 at 1-3 (GTE contract), Ex. 9 at 1-3 (US West contract) & Ex. 10 at 1-3 (PTI contract).) T-Netix admits this: "It is T-Netix's belief that, in each instance, calls were transported to AT&T over the LEC's intrastate switched access service and connected thereby to AT&T's POP and long-distance network." (Ex. 8 hereto, T-Netix Am. Resp. to AT&T Second Data Req. No. 18.) It defies all logic to even suggest that AT&T could somehow be deemed the OSP for calls that it never handled in any way.

II. The WUTC Did Not Define OSPs as, or Limit Them to, Common Carriers.

21. As discussed above, T-Netix cannot square its position with the plain language of the WUTC's definition of an OSP. Accordingly, T-Netix attempts to circumvent that language in any way it can. One of its primary arguments is that the OSP must be a common carrier. (T-Netix Am. Mot. at ¶¶ 16-23.) That argument does not withstand scrutiny.

A. The WUTC's OSP Definition Explicitly Extends Beyond Common Carriers.

22. Of course, the proposition that an OSP must be a common carrier appears nowhere in, and is not supported by, the WUTC's definition of an OSP. Instead, T-Netix's argument is based on *the FCC's* definition, *not* the WUTC's definition. This argument is flawed for several reasons.

23. First, if the WUTC wanted to limit OSPs to common carriers, it could have, and presumably would have, said so. It did not. Rather, the WUTC's definition extends to "*any corporation, company, partnership, or person providing a connection*" to local or long-distance

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services. WAC 480-120-021 (1999) (emphasis added).⁵ T-Netix points to the federal scheme, which defines a “provider of operator services” as “any common carrier that provides operator services or any other person determined by the [FCC] to be providing operator services.” (T-Netix Am. Mot. at ¶ 19 (citing 47 U.S.C. § 226(a)(9)).) Then T-Netix conjures a round-about argument for superimposing the FCC’s definition of a “provider of operator services” on the WUTC’s definition of an OSP. (*Id.*) The WUTC amended its regulations in 1999, after the FCC’s definition was in place, yet the WUTC chose *not* to use the FCC’s definition. The WUTC easily could have replaced the language of its OSP definition with the language of the FCC’s definition. It did not. Accordingly, that decision, and the language actually contained in the WUTC definition, must be given effect.

24. T-Netix places great weight on a phrase from the WUTC Order implementing its verbal rate quote requirement — the WUTC “adopts the FCC’s verbal disclosure requirement on an intra-state basis.” (T-Netix Am. Mot. at ¶ 19.) That says nothing about, and has no effect on, the definition of an OSP. That comment indicates that the Commission intended to impose a verbal disclosure requirement, not that it intended to adopt the federal definition of an OSP or federal determination of who would be responsible for providing that verbal disclosure. Nevertheless, T-Netix attempts to argue that that phrase transforms the WUTC OSP definition “as a matter of law” so that it mirrors the FCC definition. That argument is flawed on its face and finds no support in the law. The Washington Supreme Court has held that when interpreting Washington statutes, “a provision of [a] federal statute cannot be engrafted onto [a] state statute where the Legislature saw fit not to include such provision.” *Nucleonics Alliance v. Wash.*

⁵ The 1991 regulation’s definition of AOS Company used the same language, but excluded local exchange companies.

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Public Power Supply System, 101 Wash. 2d 24, 34, 677 P.2d 108, 113 (Wash. 1984) (holding that a National Labor Relations Act provision that was conspicuously absent from the Washington labor statute may not be incorporated into the Washington statute where the legislature failed to include the federal provision). The WUTC's decision to use a different definition than the FCC must be respected and cannot be usurped through T-Netix's round-about argument.

25. Moreover, the cases cited by T-Netix do not support the proposition that Washington statutes or regulations must adopt and incorporate similar provisions contained in federal statutes or regulations. (T-Netix Am. Mot. at 12-13 n.5 (citing cases).) On the contrary, T-Netix's cited cases stand for the proposition that where a Washington statute is *substantially similar* to a federal statute, Washington courts *may* look to federal case law for *guidance* regarding the construction and interpretation of the Washington statute. (*Id.* (emphasis added).) However, since the WUTC's definition is unambiguous, there is no construction or interpretation to be done. *See State v. Delgado*, 148 Wash. 2d 723, 727, 63 P.2d 792, 794-95 (Wash. 2003) (“[w]hen statutory language is unambiguous, we look only to that language to determine the legislative intent without considering outside sources”); *State v. Wilson*, 125 Wash. 2d 212, 217, 883 P.2d 320, 323 (Wash. 1994) (“[p]lain language does not require construction”); *Adams v. Dep't of Soc. & Health Services*, 683 P.2d 1133, 1135 (Wash. Ct. App. 1984) (“[a]n unambiguous statute is not subject to construction”).

B. The WUTC's OSP Definition Recognizes that an OSP May Be a Different Entity from the Local or Long Distance Service Provider.

26. T-Netix's “common carrier” argument essentially equates the OSP with the local or long-distance service provider, which would be the common carrier for the call. Once again, that argument ignores the plain language of the WUTC's definition. Had the WUTC wanted that

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outcome, it would *not* have defined an OSP as the entity providing the connection *to* local or long-distance services. T-Netix’s proposed interpretation reads the “connection to” language completely out of the WUTC’s definition.

27. Similarly, the term “telecommunication service” in the WUTC’s definition of “operator services” does not limit an OSP to a common carrier. A “telecommunication service” is defined as “the offering of telecommunications for a fee directly to the public, or to such classes of users to be effectively available directly to the public, regardless of the facilities used.” WAC 480-120-021. Under that definition, T-Netix offered telecommunications services — it transmitted information for a fee directly to the public. At a minimum, T-Netix’s services were “effectively available directly to the public.” Indeed it was the entity that most directly dealt with the public since its automated operator contacted and provided the announcements and voice prompts to the calling party and the called party.

C. The WUTC Explicitly Eliminated the Need for an OSP to Contract Directly with a Call Aggregator.

28. T-Netix also argues that only an entity that contracts directly with a call aggregator can be classified as an OSP. (T-Netix Am. Mot. at ¶ 21.) But the WUTC rejected this proposition in 1991 when it amended the definition of Alternate Operator Services Company (“AOS Company”) and specifically struck language requiring contractual privity between the AOS Company (the predecessor term for an OSP) and the call aggregator. (*See* Ex. 4 to AT&T Am. Mot. at 108.) The WUTC amended the definition as follows:

Alternate operator services company – any corporation, company, partnership, or person other than a local exchange company providing a connection to intrastate or interstate long-distance or to local services from (~~places including but not limited to, hotels, motels, hospitals, campuses, and customer owned pay telephones.~~ **Alternate operator services companies are those with which a hotel, motel, hospital, campus, or customer owned pay**

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~~telephone, etc., contracts to provide operator services to its clientele~~) locations of call aggregators.

(*Id.* (underlined language added, stricken language deleted) (emphasis added)). Nothing in the regulations in effect during the relevant time period limited OSPs to entities in direct privity with call aggregators.

D. Neither AT&T Nor the WUTC Has Previously Indicated that AT&T Was an OSP for Calls from the Prisons at Issue.

29. T-Netix also suggests that AT&T made certain admissions related to OSPs or AOS Companies in a 1988 filing with WUTC. (T-Netix Am. Mot. at ¶ 22.) T-Netix misconstrues that filing. It addressed regulations that are no longer in effect and were not in effect during the relevant time period for this case. In that filing, AT&T merely emphasized that AOS Companies typically were non-facilities-based providers who charged higher prices for calls from aggregator locations than the prices charged by Qwest and AT&T, which did not discriminate between calls from aggregator locations and other comparable calls. The WUTC recognized the same point when it later adopted an exemption for LECs from the OSP definition.

30. T-Netix similarly misconstrues a 1991 clarification notice from the WUTC. (*Id.* at ¶ 23.) That notice dealt with an old rule in the non-inmate context where AT&T could provide the connection to its long-distance service and the specified operator services. That suggestion has absolutely no relevance to calls made from the prisons at issue here, for which T-Netix provided both the connection to local and long-distance service, and the operator services.

III. T-Netix Was Not Simply an Equipment Provider to AT&T.

31. In its initial motion, T-Netix first argued that it was not the OSP because it was merely “an equipment provider in this case.” (T-Netix Initial Mot. at ¶¶ 13-20.) Discovery has proven that argument to be false. But while T-Netix has deemphasized the argument, it

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nonetheless states in its amended motion that it simply “sold software, equipment and maintenance services ‘to’ AT&T pursuant to a 1997 contract.” (T-Netix Am. Mot. at ¶ 11; *see also id.* at ¶ 3.)⁶ In fact, the evidence, including T-Netix’s own admissions, has shown that T-Netix was not simply an equipment provider, was not merely AT&T’s subcontractor, and was providing operator services and acting as the OSP.

A. T-Netix Owned and Installed Its P-III Premise Platform at each Prison and Independently Provided Various On-Site Functions and Services.

32. As T-Netix recognizes, “[t]here is no dispute regarding the configuration and functionality of the T-Netix ‘P-III’ platform.” (T-Netix Am. Mot. at ¶ 11.) T-Netix installed its P-III Premise platform at each of the four prisons at issue prior to June 1996. (*See* Ex. 9 hereto, T-Netix Second Supp. Resp. to AT&T Second Data Req. No. 7.) T-Netix maintained and operated its P-III Premise platform at those prisons until after December 31, 2000. (*See* Ex. 10 hereto, T-Netix Am. Resp. to AT&T Second Data Req. No. 7; *see also* Ex. 19 to AT&T Am. Mot., 6/10/05 Schott Aff., at ¶ 6 (only P-III Premise platform used in Washington prisons); Ex. 1 to T-Netix Initial Mot., 7/27/05 Schott Supp. Aff., at ¶¶ 13, 15 (same).) Accordingly, T-Netix’s P-III Premise platform operated on site at each of the four prisons at issue for the entire relevant time period. Moreover, T-Netix always owned and held legal title to its P-III Premise platform at each prison. (Ex. 11 hereto, T-Netix Resp. to AT&T Second Data Req. No. 7; Ex. 10 hereto, T-Netix Am. Resp. to AT&T Second Data Req. No. 7.)

⁶ In addition, T-Netix claims that it “adopts and incorporates the Initial T-Netix Motion, in its entirety, by reference” into its amended motion. (T-Netix Am. Mot. at ¶ 1.) In other words, despite purporting to have “amended” the initial motion, T-Netix would have the WUTC consider, and have AT&T and Complainants respond to, both the initial motion and the “amended” motions. This is contrary to the idea, and defeats the purpose, of amending the motion in the first place. Regardless, AT&T will attempt to respond to all of T-Netix’s contentions and arguments.

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33. T-Netix did far more than simply provide equipment. At each prison, T-Netix installed the platform, performed periodic diagnostic checks, implemented changes in call restrictions, formatted call records, and provided on-site personnel to administer the platform. (*Id.*) In addition, T-Netix created and maintained call block lists, recorded inmate calls, archived recorded calls, prevented recording of attorney-client privileged calls, managed facility-specific rules for call time and call number limits, captured and retrieved call detail records, performed system upgrades, maintenance, and improvements, and monitored and provided trouble-shooting for network operations, including for local access lines. (Ex. 12 hereto, T-Netix Second Supp. Resp. to AT&T Second Data Req. No. 9.) With respect to rate disclosures, T-Netix installed into its P-III Premise platform computer cards that facilitated rate disclosures “by voice prompt or voice response message.” (Ex. 13 hereto, T-Netix Resp. to AT&T Second Data Req. No. 11.) T-Netix also configured the P-III Premise platform “to provide the rate quote via voice recording,” either by way of an “automatic rate quote” or a “customer-requested quote.” (*Id.*; Ex. 14 hereto, T-Netix Second Supp. Resp. to AT&T Second Data Req. No. 11.) T-Netix made the recordings for the oral rate quotes and created Voice Prompt Logs and Master Text Files documenting its work on oral rate quotes. (*Id.*)

34. T-Netix performed day-to-day maintenance of its P-III Premise platform on site at the prisons, such as making test calls, testing the platform computer cards, cleaning the systems, translating data so that prison officials could run reports, and generally going through a checklist of maintenance items. (Ex. 15 hereto, Excerpts of April 24, 2009 Deposition of Ken Rose (“Rose Dep.”) at 36:14-37:7, 40:20-25.) Part of T-Netix’s maintenance involved changing the program chips and voice chips on the P-III Premise platform’s computer cards. (Ex. 16 hereto,

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Excerpts of June 4, 2009 Deposition of Daniel Gross (“Gross Dep.”), at 24:25-25:14; Ex. 2 hereto, Rae Dep., at 94:6-95:3; Ex. 1 hereto, Passe Dep., at 174:6-175:4).

B. T-Netix Operated Autonomously, Not Merely as AT&T’s “Subcontractor.”

35. T-Netix similarly distorts its role by claiming that it acted merely as a “subcontractor” of AT&T. (*See, e.g.*, T-Netix Am. Mot., at ¶¶ 3, 11.) First, as a threshold matter, whether T-Netix provided its services pursuant to a contract with AT&T or anyone else is legally insignificant because the WUTC’s regulations impose OSP obligations on the party that serves as the OSP, regardless of who might contract with the OSP to provide those services. Second, and perhaps more important, T-Netix’s claim is actually contradicted by the evidence. It is undisputed that the contractual scheme established by the Washington DOC made the LECs, or someone retained by them, responsible for providing operator services. (AT&T Am. Mot. at ¶¶ 10, 11 & Exs. 7-10 thereto (DOC contracts).) That scheme did *not* make AT&T responsible for providing operator services; it limited AT&T’s role to providing long-distance service. (*Id.*) T-Netix acknowledges that it “provided its [P-III Premise] platform to US West, GTE, and PTI” — the three LECs who were allocated operator services responsibility under the DOC contractual scheme. (T-Netix Initial Mot. at ¶ 9.) T-Netix also admits that its independent contractual and strategic relationships with LECs such as US West and GTE existed throughout the relevant period between 1996 and 2000, and “allow[ed] the . . . LECs to provide [T-Netix’s] sophisticated control services to prison facilities while leaving [the LECs’] existing telephones in place.” . (Ex. 5 hereto, Excerpts of Deposition Exhibit 4, T-Netix Products Due Diligence, at TNXWA 00369-70; *see also* Ex. 2 hereto, Rae Dep., at 228:13-233:3; Ex. 17 hereto, Excerpts of April 23, 2009 Deposition of Alice J. Clements (“Clements Dep.”), at 141:9-142:3, 233:22-234:2.)

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36. T-Netix dealt directly with the LECs, not through AT&T, to provide them with operator services. For example, when US West changed its name to Qwest, it asked T-Netix to change announcements made by the T-Netix platform to reflect the name change. (Ex. 16 hereto, Gross Dep., at 71:14-19, 104:13-105:5.) In response, T-Netix demanded that Qwest, not AT&T, pay for the work required to make the change, and when Qwest declined, T-Netix refused to change the announcements. (*Id.* at 104:18-105:13.) T-Netix never involved AT&T in this dispute.

37. In claiming that it was merely acting as AT&T's "subcontractor," T-Netix references "a 1997 contract" between T-Netix and AT&T. (*See, e.g.*, T-Netix Am. Mot. at ¶ 11.) But there is no evidence even indicating, let alone demonstrating unequivocally as required on a motion for summary determination, that T-Netix agreed to provide services in Washington pursuant to that contract, as opposed to an agreement with the LECs. The 1997 contract is a blanket, national contract; not a Washington-specific contract. (*See* Ex. 2 to T-Netix Initial Mot.) And by the time T-Netix and AT&T entered into that agreement, T-Netix had already been providing services to the Washington prisons at issue for at least two years, if not longer. T-Netix's own records show that it had installed its P-III Premise platform at each of the prisons at issue by at least November 8, 1994. (*See* Ex. 9 hereto, T-Netix Second Supp. Resp. to AT&T Second Data Req. No. 7.) AT&T and T-Netix did not enter into the referenced agreement until June 1997.⁷ As discussed above, T-Netix admits that it provided its P-III Premise platform to the

⁷ If T-Netix did provide operator services pursuant to the 1997 contract, it committed to do so in full compliance with all applicable laws. (Ex. 2 to T-Netix Initial Motion, 1997 Contract, at 23.) As such, AT&T has filed a cross-claim against T-Netix in the Superior Court of King County, seeking indemnification in the event that AT&T incurs any liability. That indemnification claim, however, is inherently contingent upon the court first making the mistaken finding that AT&T was the OSP and violated a WUTC regulation. Because the cross-
(Continued . . .)

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LECs and that it had strategic and contractual relationships with them. Those admissions, coupled with the undisputed fact that the LECs had operator service responsibility under the DOC contractual scheme, make it far more apparent that T-Netix installed and operated its P-III Premise platform at the prisons at issue pursuant to its contracts with the LECs, not AT&T.

38. In addition to having relationships with the LECs — who were responsible for providing, or retaining someone to provide, operator services at the prisons at issue — T-Netix also interacted directly with the Washington DOC and prison officials. Its technicians performed day-to-day maintenance on T-Netix’s P-III Premise platform located on-site at the prisons, requiring regular visits to the prisons and direct interactions with prison officials. (*See* Ex. 15 hereto, Rose Dep., at 36:14-37:10, 40:17-24; Ex. 17 hereto, Clements Dep., at 168:14-169:5 (describing duties of a site administrator).) For example, “[i]f [a prison] request[ed] a change [from] what is the normal, then one of the technicians would have to dial into the system and manually make those changes in the system for that site specific.” (Ex. 15 hereto, Rose Dep., at 87:3-6.)

39. In sum, T-Netix acted independently and autonomously in terms of business (strategic relationships with the LECs), law (separate contracts with the LECs), and practical everyday affairs (activities on-site directly interacting with prison officials).

C. T-Netix Has Repeatedly Recognized that It Provided Operator Services and Acted as the Operator Service Provider.

40. In sharp contrast with the position that T-Netix is taking now, claiming it was simply an equipment supplier and a subcontractor, in the past T-Netix has repeatedly and

claim is inherently contingent, it should not be construed to suggest that T-Netix actually provided services at the prisons at issue pursuant to the 1997 contract. In reality, T-Netix provided operator services pursuant to its arrangements with the LECs.

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consistently recognized that it provided operator services and acted as the OSP. First, T-Netix specifically discussed the OSP and rate quote issues in an August 2000 e-mail exchange with GTE (*i.e.*, Verizon). (Ex. 18 hereto, August 2000 E-mail String, at TNXWA 34248-50.) In that exchange, representatives of GTE questioned whether the announcements provided by T-Netix's P-III Premise platform complied with the WUTC rate quote regulation at issue here, WAC 480-120-141(2)(b). (*Id.*) Naturally, GTE, the LEC responsible for providing operator services under the DOC contractual scheme, asked T-Netix, the entity that it had retained to act as the OSP and provide operator services, how T-Netix's P-III Premise platform could be adjusted to provide rate quotes in a manner compliant with the WUTC regulation. (*Id.*) A T-Netix employee, J.R. Roth, e-mailed his T-Netix colleagues and GTE's representative, first citing the WUTC regulation, and then writing: "*As the OSP we verbally advise the consumer how to receive a rate quote.*" (*Id.* (emphasis added).) No one disagreed, or took issue, with Mr. Roth's statement; rather, one of his T-Netix colleagues proposed a possible adjustment for bringing the P-III Premise platform into compliance. (*Id.*)

41. Second, in June 1999, T-Netix merged with Gateway Technologies, Inc. ("Gateway"), another provider of automated call control platforms to prisons. (Ex. 14 to T-Netix Initial Mot., July 28, 2005 Aff. of Nancy Lee ("Lee Aff."), at ¶¶ 2-5.) Gateway conducted business in Washington, "provided operator services to several correctional facilities in Washington," and, in fact, "was certified as an operator service provider ('OSP') in Washington." (*Id.* at ¶ 3; *see also* Ex. 13 to T-Netix Initial Mot. (various documents admitting Gateway provided operator services for calls from Washington prisons).) T-Netix asked the WUTC to transfer Gateway's OSP certification to T-Netix. (T-Netix Initial Mot. at ¶¶ 32-35; Ex. 19 hereto, Lee Aff., at ¶¶ 5-6.) In its Initial Motion, T-Netix argues that its request to

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transfer Gateway's OSP certification to it does not necessarily mean that T-Netix was the OSP for calls from the four prisons at issue. (T-Netix Initial Mot. at ¶¶ 32-35.) It is true that Gateway did not service the four prisons at issue (T-Netix did), and, as a matter of form, Gateway's OSP certification did not apply to these four prisons before T-Netix received the transfer. As a matter of substance, however, "Gateway was a leading competitor of T-Netix" (Ex. 19 hereto, Lee Aff. at ¶ 3) — in other words, they provided the same or very similar services through automated call control platforms. (See Ex. 1 to T-Netix Initial Mot., 7/27/05 Schott Supp. Aff., at ¶ 8 (equating T-Netix and Gateway).) While T-Netix attempts to elevate form over substance, considering (a) Gateway's OSP certification and repeated admissions that it provided operator services in Washington, coupled with (b) the facts that T-Netix was Gateway's leading competitor, provided the same or very similar services, and asked the WUTC to transfer Gateway's OSP certification to T-Netix, it is difficult to avoid the conclusion that T-Netix acted as an OSP for calls from Washington prisons, including the four prisons at issue.

42. Third, when the FCC instituted a rule requiring providers of inmate operator services to announce actual rates on prison collect calls instead of maximum rates, T-Netix petitioned the FCC for a waiver because T-Netix's platforms at approximately one-third of the prisons it serviced nationally did not have the technical capabilities to comply with the new rule. (See Ex. 20 hereto, June 17, 2002 FCC Order, at ¶¶ 1, 5-8.) T-Netix would have needed to petition the FCC for a waiver if it did not consider itself to be an OSP. T-Netix acknowledged in the petition that even though it was serving "access lines," "it [was] the sole service provider in each of these facilities" providing the required rate quotes. (*Id.* at ¶ 8.) T-Netix's FCC petition represents another instance of T-Netix admitting, contrary the position it now takes, that it served as an OSP for prison collect calls.

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43. Finally, in a 1995 national contract between AT&T and T-Netix (then called Tele-Matic Corporation), T-Netix also acknowledged that it acted as an operator services provider. (Ex. 21 hereto, Deposition Exhibit 25, November 1, 1991 Contract, at A000063-74.) In that contract, T-Netix recognized that among its responsibilities, it would:

provide complete automated operator services for Inmate Calling . . . includ[ing] the provision of all functions by which the [T-Netix] System interfaces with the inmate during the call set-up processes, establishes the call through AT&T's network, detects an answer of the call by the called party, announces that the call is originating from the specific Client correctional facility and is being provided by AT&T to the called party, identifies the inmate placing the call through a pre-recorded message . . . , detects the positive acceptance of the call by the called party, and terminates the call following detection of the "hang-up" condition by the called or calling party.

(*Id.* at A000065 (emphasis added).) Outside the context of this litigation, when T-Netix could be far more candid, it repeatedly acknowledged that it served as an OSP for inmate calls. Only now, as it seeks to avoid its OSP obligations, has T-Netix falsely oversimplified its role and responsibilities.

IV. A Determination that T-Netix Was the OSP Is Not Inconsistent with AT&T's Prior Conduct or the WUTC's Other Rules.

44. T-Netix attempts one last indirect argument, again circumventing the on-point regulations, definitions, and language, in favor of round-about reasoning. T-Netix asserts that AT&T must be the OSP because it asked T-Netix to notify recipients of long-distance calls that a charge at a specified rate would appear on their AT&T bill. (T-Netix Am. Mot. at ¶¶ 24-26.) T-Netix engages in the following circular logic:

- The OSP was required by regulation to identify itself at the beginning of each call it serviced.

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- AT&T separately and independently asked T-Netix to include an announcement on calls to AT&T long-distance customers informing them that a charge at a specified rate would appear on their AT&T long-distance bill.
- T-Netix included this announcement for AT&T.
- T-Netix did not include an announcement identifying itself as the OSP for the call.
- Therefore, T-Netix could not have been the OSP and, instead, AT&T must have been the OSP.

In other words, T-Netix reasons that *because it failed to comply* with the regulation requiring it to identify itself as the OSP for each call it serviced, *it was not obligated to comply* with that regulation. Of course, law and logic could never support this type of flawed argument. One's disregard for the law is not evidence that one is not bound by the law.

45. T-Netix's logic is also flawed because AT&T's request that its long-distance customers be informed about AT&T's rates and the charges that would appear on their bills had nothing to do with AT&T acting as the OSP and is not evidence that AT&T acted as the OSP. In anticipation of proposed FCC rule changes, AT&T began as early as 1998 to propose that T-Netix inform long-distance customers how they could obtain a rate quote and, if they sought such a quote, to inform the customers of the rates that would appear on their AT&T long-distance bills. (*See, e.g.*, Ex 22, 12/22/98 e-mail from A. Gregory Shuler of AT&T transmitting quote request to A. Schopp and K. Christensen of T-Netix.) This request does not indicate in any way that AT&T was acting as the OSP, nor is it inconsistent with T-Netix acting as the OSP.

46. Recognizing T-Netix as the OSP is fully consistent with the WUTC's entire regulatory scheme. Under the WUTC's regulations, T-Netix was obligated to identify itself as the OSP at the very outset of the call, without regard to which entity billed the call. The WUTC regulations did not require the OSP to quote its own rates because the WUTC recognized that the

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OSP may not actually provide the local or long-distance service. Instead, the WUTC required the OSP to instruct the consumer how he or she could obtain rate information. The WUTC repeatedly recognized that the OSP may very well be separate from the entity that billed the call. WAC 480-120-141(5)(c), in effect from 1991 to 1998, required the Alternative Operator Service Provider, subsequently renamed as an OSP, to “[p]rovide to the local exchange company such information as may be necessary for billing purposes” Similarly, WAC 480-120-141(5)(a), in effect from 1998 to 2003, required the OSP to “[p]rovide the billing company applicable call detail necessary for billing purposes.” If, as T-Netix claims, the carrier providing the call was the OSP, then neither of these provisions would be necessary or make any sense. As the OSP, T-Netix maintained the call detail records and transferred them to other parties to facilitate billing. (Ex. 1 hereto, Passe Dep. at 62:13-63:22.) This is just one of many services that it provided, as the OSP.

Conclusion

For the reasons stated above, and in AT&T’s Amended Motion for Summary Determination, the WUTC should grant AT&T’s motion, deny T-Netix’s Amended Motion for Summary Determination, and make a finding that T-Netix, not AT&T, was the OSP for the prisons at issue during the relevant time period.

Dated: September 10, 2009

Respectfully submitted,

**AT&T COMMUNICATIONS OF
THE PACIFIC NORTHWEST, INC.**

By: /s/ Charles H.R. Peters

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CERTIFICATE OF SERVICE

Pursuant to WAC 480-07-150, I hereby certify that I have this day, September 10, 2009, served this document upon all parties of record by e-mail and Federal Express overnight delivery at the e-mail addresses and mailing addresses listed below:

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Pursuant to WAC 480-07-145, I further certify that I have this day, September 10, 2009, filed MS Word and PDF versions of this document by e-mail, and the original and four copies of this document by Federal Express, with the WUTC at the e-mail address and mailing address listed below:

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Pursuant to the Prehearing Conference Order 08, I further certify that I have this day, September 10, 2009, provided a courtesy copy of this document, in MS Word, to ALJ Friedlander by e-mail at the following e-mail address: mfriedla@utc.wa.gov.

Dated: September 10, 2009

/s/ Tiffany R. Redding
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