

TAB 39

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

**SERVICE DATE
JAN - 9 2009**

SANDY JUDD AND TARA	)	DOCKET UT-042022
HERIVEL,)	
	)	ORDER 14
Complainant,)	
	)	ORDER GRANTING IN PART AND
v.	)	DENYING IN PART
	)	COMPLAINANTS' MOTION TO
AT&T COMMUNICATIONS OF	)	COMPEL; ORDER GRANTING IN
THE PACIFIC NORTHWEST, INC.,	)	PART AND DENYING IN PART
AND T-NETIX, INC.,	)	AT&T'S MOTION TO COMPEL;
	)	AND DENYING T-NETIX'S
Respondents.	)	MOTION FOR A PROTECTIVE
.....	)	ORDER

1 ***Synopsis.** This order resolves a discovery dispute between Complainants, AT&T, and T-Netix. The order grants in part Complainants' and AT&T's motions to compel responses from T-Netix to data requests involving the four institutions from which Complainants received calls from 1996 to 2000, and denies Complainants' and AT&T's motions to compel responses from T-Netix to data requests concerning all other Washington institutions T-Netix served from 1996 to the present. This order specifically denies Complainants' motion to compel Complainants' Second Data Request No. 5 as over broad. This order also denies T-Netix's motion for a protective order regarding the expanded discovery sought by Complainants as the issue is not yet ripe.*

SUMMARY

2 **NATURE OF PROCEEDING.** Docket UT-042022 involves a formal complaint filed with the Washington Utilities and Transportation Commission (Commission) by Sandy Judd and Tara Herivel (Complainants) against AT&T Communications of the Pacific Northwest, Inc. (AT&T), and T-Netix, Inc. (T-Netix or the Company, collectively with AT&T, "Respondents"), requesting that the Commission resolve

certain issues of fact and law under the doctrine of primary jurisdiction and referred by the Superior Court of Washington for King County (Superior Court).

3 **APPEARANCES.** Chris R. Youtz, Sirianni Youtz Meier & Spoonemore, Seattle, Washington, represents Complainants (collectively with Respondents, "Parties"). Letty Friesen, AT&T Law Department, Austin, Texas, and Charles H. R. Peters, Schiff Hardin, LLP, Chicago, Illinois, represent AT&T. Arthur A. Butler, Ater Wynne LLP, Seattle, Washington, Joseph S. Ferretti, Duane Morris, LLP, Washington, D.C., and Glenn B. Manishin, Kelley Drye & Warren LLP, Washington, D.C., represent T-Netix.

MEMORANDUM

A. Procedural History

4 On November 17, 2004, Complainants filed a formal complaint with the Commission against Respondents under the court's referral.¹ The Superior Court had referred two questions to the Commission: 1) whether AT&T or T-Netix were Operator Service Providers (OSPs) and 2) whether they violated the Commission's disclosure regulations.²

5 On October 23, 2008, the Commission entered Order 10 granting T-Netix's Motion to Amend the Scheduling Order and extending the procedural schedule deadlines by approximately two weeks. The procedural schedule was again modified when, on November 12, 2008, the Commission entered Order 11 granting Complainants' Motion to Amend the Scheduling Order and extending the deadline for filing motions to compel by one week. Therefore, the motions to compel were due by November 26, 2008.

¹ The procedural history in this matter is described more fully in Order 09 in this docket and is not repeated here.

² *Judd et. al., v. AT&T et. al.*, King County Superior Court, No. 00-2-17565-5 SEA, *Order Denying Plaintiffs' Motion to Vacate Orders Granting Defendants' Motions for Summary Judgment and Granting Motion to Reinstate Referral to WUTC* (March 21, 2008).

- 6 On November 26, 2008, Complainants filed a motion to compel discovery responses from T-Netix (Complainants' Motion) along with the Declarations of Chris Youtz and Kenneth Wilson; AT&T filed a motion to compel T-Netix to respond fully to AT&T's Second Set of Data Requests (AT&T's Motion); and T-Netix filed a motion for a protective order along with the Declaration of Arthur A. Butler (T-Netix's Motion, collectively with Complainants' Motion and AT&T's Motion, "Discovery Motions").
- 7 On December 5, 2008, the Commission entered Order 12 granting the Parties' motion to extend time to file oppositions to the Discovery Motions. Oppositions to the Discovery Motions were due by December 12, 2008.
- 8 On December 12, 2008, Complainants filed an opposition to T-Netix's Motion (Complainants' Opposition) and the Declaration of Chris Youtz, and T-Netix filed an opposition to Complainants' Motion (T-Netix's Opposition) and an opposition to AT&T's Motion (T-Netix's Opposition 2).
- 9 On December 16, 2008, the Parties filed a joint motion for permission to file replies (Joint Motion) in support of the various Discovery Motions. The Commission issued Order 13 on December 19, 2008, granting the Joint Motion and giving the Parties until December 24, 2008, to file any replies.
- 10 On December 24, 2008, AT&T filed a reply in support of its Motion (AT&T's Reply), Complainants filed a reply memorandum in support of Complainants' Motion (Complainants' Reply), and T-Netix filed a reply brief in support of its Motion (T-Netix's Reply).

B. Discovery Motions

- 11 First, the Commission addresses Complainants' and AT&T's request to expand the scope of discovery to include all Washington Department of Corrections (DOC) facilities for the time period from 1996 to the present, as well as T-Netix's Motion to protect against the discovery of such information. The Commission then turns to the specific information sought in Complainants' and T-Netix's Motions: (1) the services and products T-Netix provided to the DOC facilities and (2) rate disclosure

procedures including details surrounding a project that involved the replacement of chips in a telecommunications system in order to comply with the FCC rate disclosure regulations.

1. Expansion of Discovery

12 Complainants' argue that the Superior Court referral did not limit the scope of the Commission's review to the four institutions³ from which Complainants received the calls in question.⁴ According to Complainants, their suit in Superior Court is a class action, and potential class members exist in all persons who were incarcerated or were called by an incarcerated person in Washington.⁵ Further, Complainants maintain that T-Netix has not followed its own discovery limitations with regard to AT&T, noting that T-Netix propounded data requests to AT&T seeking information regarding all Washington DOC facilities, not just the four institutions at issue in the Complaint.⁶

13 T-Netix, on the other hand, suggests that a protective order is necessary to prevent Complainants from "seek[ing] discovery well beyond [the four institutions from which and during the time period Complainants received their telephone calls]."⁷ T-Netix alleges that Complainants' expansive discovery tactics "will continue to plague the discovery process without an appropriate order from the Commission."⁸

14 According to T-Netix, the Commission's jurisdiction over this matter is limited to the primary jurisdiction referral from the Superior Court and does not invoke the Commission's independent jurisdiction.⁹ T-Netix also insists that the Superior Court never certified a class in this matter and has stayed all class issues.¹⁰ Thus, T-Netix

³The four facilities are listed as: Washington State Reformatory (a.k.a. Monroe Correctional Complex), Airway Heights, McNeil Island, and Clallum Bay. *Complainants' Motion*, at 1, ¶ 2, and at 2, fn 1.

⁴*Id.*, at 2, ¶ 3. If Complainants' Motion is granted, then AT&T requests that T-Netix supplement its responses to AT&T's data requests as well. T-Netix has agreed. *AT&T's Motion*, at 2, ¶ 5. *T-Netix's Opposition* 2, at 1, ¶ 2.

⁵*Complainants' Motion*, at 2, ¶ 4.

⁶*Complainants' Motion*, at 3, ¶ 6.

⁷*T-Netix's Motion*, at 8, ¶ 20.

⁸*Id.*

⁹See, *T-Netix's Opposition*, at 4, ¶ 8 and *T-Netix's Motion*, at 3, ¶ 4.

¹⁰*T-Netix's Opposition*, at 3, ¶ 7.

recommends that the Commission limit discovery to the two Complainants and the events surrounding their complaint.¹¹

15 Complainants argue that T-Netix has not proffered the necessary factual showing of a particular need for a protective order.¹² T-Netix, according to Complainants, only posits that Complainants' data requests are burdensome but does not actually show how the requests are burdensome.¹³

16 ***Discussion and decision.*** The Commission specifically determined in this proceeding that, "[t]he Commission's jurisdiction in this proceeding is limited to the issues referred by the Superior Court."¹⁴ In its prior referral order, the Superior Court stayed the issue of class status pending Commission action on the referral questions.¹⁵ The Commission's sole responsibility under the doctrine of primary jurisdiction is to answer the referral questions as they were posited by the Superior Court. Had class certification proceeded the referral to the Commission, Complainants' claim that discovery should include all of the Washington DOC facilities from 1996 to the present would have been more persuasive.

17 Complainants have not advanced a compelling legal argument that would support the Commission's ruling on the issue of class certification, effectively removing class certification from the jurisdiction of the Superior Court. The Commission, therefore, denies the Complainants' motion to compel discovery from T-Netix which goes beyond the scope of the two Complainants' claims. This determination, however, does not prevent the Superior Court from referring broader questions to the Commission should such a referral prove necessary.

¹¹*Id.*, at 2, ¶ 2. See also, *T-Netix's Motion*, at 12, ¶ 33.

¹²*Complainants' Opposition*, at 3, ¶ 7.

¹³*Id.*

¹⁴*Judd et. al., v. AT&T et. al.*, UTC Docket UT-042022, Order 05, at 12, ¶ 38. See, *Id.*, Order 07, at 5, ¶ 19 and *Id.*, Order 09, at 12-3, ¶ 50.

¹⁵*Judd et. al., v. AT&T et. al.*, King County Superior Court, No. 00-2-17565-5 SEA, *Order Denying in Part Defendant T-Netix, Inc.'s Motion to Dismiss First Amended Complaint – Class Action and Granting in Part and Referring to WUTC*, November 8, 2000.

- 18 Further, we deny T-Netix's Motion. The Company has not stated how Complainants' discovery requests or conduct warrant the Commission's protection of T-Netix from "annoyance, embarrassment, oppression, or undue burden or expense," as asserted in WAC 480-07-420. T-Netix has not demonstrated that Complainants' requests for information have created any of these difficulties. Additionally, it is hard to understand how the request for state-wide information would cause any of these problems for the Company when T-Netix has acknowledged that information sought by Complainants with regard to the additional institutions would be identical to the information sought for the uncontested institutions.
- 19 In addition, T-Netix's Motion is moot. This order denies Complainants' Motion to expand discovery. Moreover, T-Netix should give Complainants an opportunity to comply with this Order before seeking a protective order.

2. Services and products T-Netix provided to DOC facilities

Complainants' Data Request Nos. 2 and 3 and AT&T's Data Request Nos. 7, 8, 9, 10, 18, 19, and 21

- 20 In their Second Data Request Nos. 2¹⁶ and 3¹⁷, Complainants seek information pertaining to the platforms, equipment, and services that T-Netix provided to each Washington DOC facility. Complainants argue that T-Netix's response to Data

¹⁶Complainants' Data Request No. 2 requests that, "[t]o the extent you have not already produced such documents, please produce all documents that describe or relate to platforms or other equipment or services that T-Netix provided with regard to each T-Netix Institution, including without limitation system drawings, trunking diagrams, trunking lists, configuration diagrams, systems engineering documents, systems specification documents, white papers, performance specification documents, performance analysis documents, systems architecture documents, marketing documents, and any other documents that describe or relate to the equipment or services that T-Netix provided with regard to each T-Netix Institution." (Emphasis deleted).

¹⁷Complainants' Data Request No. 3 asks that, "[f]or each T-Netix Institution, please produce all documents that describe or relate to the platform (including, but not limited to, Adjunct (TNXWA 00224), POP (TNXWA 00225) and Premise (TNXWA 00226)) used in that T-Netix Institution, including all documents that show where the main components of the platform were located, how trunking was configured from the T-Netix Institution to the platform location, how trunking was configured from the platform to the LEC or IXC switch, and, if the Adjunct configuration was used, which AT&T 5ESS was used, where it was located, and how trunking involving that switch was configured." (Emphasis deleted).

Request Nos. 2 and 3 does not provide any specific details regarding the platforms in use at each institution.¹⁸

21 Complainants claim that the specific details of T-Netix's platform and how it handled each collect call from the institutions at issue is relevant to show whether rate disclosures occurred.¹⁹ Additionally, Complainants' witness, Kenneth L. Wilson, opines that diagrams of T-Netix's platform schematics would provide certainty as to how the platform is connected to the public switched telecommunications network.²⁰ Information regarding the platform connection, according to Mr. Wilson, would:

answer such questions as who the lines and/or trunks were purchased or leased from, how they were connected to the P-III Platform, how many lines and/or trunks were in use, and other information that is highly relevant in determining who actually provided the operator services for an institution.²¹

22 Similarly, AT&T contends that T-Netix has failed to respond fully to its Data Request Nos. 7²², 8²³, 9²⁴, 10²⁵, 18²⁶, 19²⁷ and 21²⁸. AT&T seeks information relating to the

¹⁸ *Complainants' Motion*, at 5, ¶ 13.

¹⁹ *Id.*, at 5-6, ¶¶ 13 and 14.

²⁰ *Declaration of Kenneth L. Wilson*, at 3, ¶ 8.

²¹ *Id.*

²² AT&T's Data Request No. 7 asks that T-Netix "[i]dentify as specifically as possible all equipment (including hardware and software) provided by T-Netix relating to telephone service at Washington state prisons during the relevant period, including for each particular piece of equipment the dates during which T-Netix provided the equipment, the Washington state prison at which the equipment was provided or for which it facilitated telephone service, the person or entity that owned the equipment at the time, and the person most knowledgeable about such equipment."

²³ AT&T's Data Request No. 8 seeks a description "in as much detail as possible the nature of and functions performed by each particular piece of equipment (including hardware and software) identified in your response to Data Request No. 7" from T-Netix.

²⁴ AT&T's Data Request No. 9 requests that T-Netix "[i]dentify as specifically as possible all services provided by T-Netix relating to telephone service at Washington state prisons during the relevant period, including for each particular service the dates during which T-Netix provided the service, the Washington state prison at which or for which it was provided, and the person most knowledgeable about such service."

²⁵ AT&T's Data Request No. 10 requires T-Netix to "[d]escribe in as much detail as possible the nature and purpose of each particular service identified in your response to Data Request No. 9."

²⁶ AT&T's Data Request No. 18 requests T-Netix "[d]escribe in as much detail as possible the process by which an intrastate, interLATA call from a payphone at a Washington state prison was

equipment, the function of that equipment, the services, and the nature of those services employed by T-Netix at the various Washington state prisons. AT&T asserts that the information sought is intended to “explain T-Netix’s role with regard to inmate-initiated calls at issue, and in particular T-Netix’s role in connecting and providing operator services and rate disclosures for such calls.”²⁹ T-Netix’s responses refer AT&T to documents that lack details regarding the specific equipment and services that T-Netix provided at the facilities at issue during the relevant time period.³⁰

23 T-Netix disagrees, arguing that the information both AT&T and Complainants seek regarding T-Netix’s platforms and network configuration are entirely irrelevant to the question of whether it was operating as an OSP for the calls in question.³¹ It is the function of the carriers themselves, not the design of the networks, which determine the carriers’ regulatory status.³²

24 T-Netix argues that its role during the call process was “essentially holding the voice path while the call was verified and the called party queried for collect call acceptance.”³³ T-Netix witness, Robert L. Rae, posits that the Company did not provide a “connection” as he defines the term from the Commission’s regulation defining an OSP.³⁴ Mr. Rae argues that the question for the Commission to decide is whether the Local Exchange Carrier (LEC), by connecting to AT&T’s switched access services, or AT&T, by connecting to its long distance network, provided the connection that would identify either as an OSP.³⁵ Mr. Rae contends that a literal interpretation of “connection” to identify an OSP would produce absurd results

processed from caller to call-recipient, specifying in particular who connected the call from point of origin to the service provider and what hardware or software was used to process the call.”

²⁷AT&T’s Data Request No. 19 asks T-Netix to “[d]escribe in as much detail as possible each and every change or revision to the process described in your response to Data Request No. 18.”

²⁸AT&T’s Data Request No. 21 asks T-Netix to “[p]roduce all documents relating to or identifying the call control platform and architectural variant used at each Washington state prison during the relevant period.”

²⁹*AT&T’s Motion*, at 4, ¶ 9.

³⁰*Id.*, at ¶ 10.

³¹*T-Netix’s Opposition*, at 9, ¶ 21.

³²*Id.*, at 10, ¶ 22.

³³*Declaration of Robert L. Rae*, at 3, ¶ 8.

³⁴*Id.*, at 4, ¶¶ 8 and 9.

³⁵*Id.*, at 4, ¶ 8.

including designation of a wholesale carrier as the OSP instead of the actual service provider.³⁶

25 AT&T replies that the Commission's regulations define an 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."³⁷ AT&T charges that this definition means that an entity which facilitates a call transfer from a call aggregator to a long distance service provider is an OSP.³⁸ Yet, T-Netix refuses to provide any details on the role it played in the connection process.³⁹

26 Complainants state that the fact that T-Netix's witness, who is also a T-Netix employee, disagrees with Complainants' witness regarding the usefulness of the documents does not automatically render the information useless.⁴⁰ Further, Complainants indicate that the Commission's regulation defining an OSP "do[es] not limit liability to those who were required to provide operator services by contract; those regulations speak in terms of operator services provided by a party."⁴¹

27 **Discussion and decision.** The Commission's rules require that data requests must "seek only information that is relevant to the issues in the adjudicative proceeding or may lead to the production of information that is relevant."⁴² Parties may not object to a data request on the grounds that information may be inadmissible, as the Commission will allow discovery if the information "appears reasonably calculated to lead to discovery of admissible evidence."⁴³

³⁶*Id.*, at 5, ¶ 10.

³⁷*AT&T's Reply*, at 2, citing WAC 480-120-021 (1999) and WAC 480-120-262(1) (current).

³⁸*AT&T's Reply*, at 2.

³⁹*Id.*, at 2.

⁴⁰*Complainants' Reply*, at 8, ¶ 21.

⁴¹*Id.*, at 9, ¶ 22.

⁴²WAC 480-07-400(4).

⁴³*Id.*

28 Having considered the contested data requests, the parties' pleadings and arguments in light of the standards for resolving discovery disputes, Complainants' motion to compel responses to Data Request Nos. 2 and 3 and AT&T's motion to compel responses to Data Request Nos. 7, 8, 9, 10, 18, 19 and 21 are granted.⁴⁴

29 The Commission has been given the task of resolving the two referral questions from the Superior Court: 1) whether AT&T or T-Netix were OSPs and 2) whether they violated the Commission's disclosure regulations. An OSP has been defined by the Commission 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.

30 Each Party has their own idea of how the term "connection" should be interpreted by the Commission. Complainants and AT&T interpret the term "connection" literally. Even though he disagrees with this interpretation, T-Netix's own witness acknowledges that there is more than one way to interpret the Commission's definition. Whether T-Netix provided a connection under the Commission's rule is the ultimate question in this proceeding, which will be decided following hearing. The issue before the Commission here is whether the information is relevant and should be provided through discovery. T-Netix's platform and network configuration may provide useful information about the Company's ability to provide a connection. These data requests are relevant to the issues in this proceeding and may lead to admissible evidence. Thus, T-Netix must respond completely to the data requests at issue.

Complainants' Data Request Nos. 5, 16, and 23 and AT&T's Data Request No. 15

31 **Data Request No. 5.** With regard to Data Request No. 5⁴⁵ of Complainants' Second Data Requests, Complainants ask for any documents containing the phrases

⁴⁴As discussed above, these data requests are limited to the four institutions that Complainants received calls from and to the time period at issue in this case, namely 1996 to 2000.

⁴⁵Complainants' Data Request No. 5 seeks, "... all documents in which T-Netix uses the phrase 'operator service' or 'operator services' or 'alternative operator services' or 'automated operator' to describe any part of the services that it has provided, is providing, or will provide. This request for documents is not limited to T-Netix Institutions." (Emphasis deleted).

“operator service”, “operator services”, “alternate operator services”, or “automated operator”. Complainants did not limit this data request to documents pertaining to the DOC facilities. Complainants explain that, in consultation with T-Netix, they agreed to limit the scope of Data Request No. 5 to documents which contain “a substantive discussion” relating to operator services.⁴⁶ Complainants assert that they have narrowed their original request and that the Commission should direct T-Netix to produce the documents.⁴⁷

32 T-Netix argues that the request is too broad.⁴⁸ The Company asserts that Complainants’ data request would have T-Netix examine millions of pages of documents which had been created over the last twenty years in order to possibly locate documents containing the phrases, “operator service,” “operator services,” “alternative operator services,” or “automated operator.” T-Netix further disagrees with Complainants’ as to the “agreement” the two parties reached narrowing the focus of this data request.⁴⁹ T-Netix states that discussions of compliance with the data request broke off before any agreement was reached.⁵⁰

33 Complainants reiterate that they have already agreed to modify the data request so as to limit it to documents containing a substantive discussion regarding operator services.⁵¹ Now, Complainants argue, the Commission should require T-Netix to respond to this narrowed request.

34 ***Discussion and Decision.*** T-Netix is correct that Complainants’ Data Request No. 5 is overly broad. Even limiting the request to only those documents containing a substantive discussion of ‘operator services’ and which pertain to the four institutions during the relevant period still would have the Company searching a broad spectrum of documents that, while the documents may contain the phrase “operator services,” have little to no relevance to the Complainants’ circumstances. This request is too broad and is denied.

⁴⁶*Complainants’ Motion*, at 6, ¶ 15.

⁴⁷*Id.*

⁴⁸*T-Netix’s Opposition*, at 11, ¶ 24.

⁴⁹*Id.*, at 11, ¶ 26.

⁵⁰*Id.*, at 12, ¶ 26.

⁵¹*Complainants’ Reply*, at 10, ¶ 26.

35 **Data Request No. 16.** In Data Request No. 16⁵² of Complainants' Second Data Requests, Complainants seek documents relating to contracts and subcontracts in which T-Netix is a party and which involve inmate-initiated telephone calls. Complainants state that they have knowledge of a dispute between contracting parties AT&T and T-Netix over performance obligations.⁵³ The information Complainants' are requesting should determine who the OSP was for the calls handled under the contract and whether T-Netix agreed to be the OSP.⁵⁴

36 T-Netix asserts that this data request is likewise overly broad as it seeks documents addressing the "negotiation, interpretation, implementation, or performance" of all T-Netix contracts relating to inmate-initiated phone calls.⁵⁵

37 Complainants disagree, arguing that this request is very similar to Complainants' First Data Request No. 2, which T-Netix responded to without complaint.⁵⁶ Complainants assert that T-Netix agreed to supplement its response to Data Request No. 16 but only to a narrower data request.⁵⁷ Complainants posit that T-Netix clearly "recognizes that there is a subgroup of documents falling within this request that should be produced, but it refuses to produce those documents or describe what it determines to be the appropriate boundaries of production."⁵⁸

38 **Discussion and decision.** In contrast to Complainants' Data Request No. 5, Data Request No. 16 is narrowly tailored to documents relating to T-Netix's contractual obligations with regard to inmate-initiated phone calls from the four institutions in question during the time period from 1996 to 2000. T-Netix's opposition to Data Request No. 16 asserts that the request "broadly refers to all aspects of the performance of a contract performed over the course of more than a decade."⁵⁹ The Commission has already limited the scope of discovery to a four and a half year

⁵²Complainants' Data Request No. 16 asks T-Netix to, "[p]lease produce all documents that relate to the negotiation, interpretation, implementation, or performance of any contracts or subcontracts in which T-Netix is a party and which relate to inmate-initiated calls." (Emphasis deleted).

⁵³*Complainants' Motion*, at 6, ¶ 16.

⁵⁴*Id.*, at 7, ¶ 16.

⁵⁵*T-Netix's Opposition*, at 12, ¶ 27.

⁵⁶*Complainants' Reply*, at 10, ¶ 27.

⁵⁷*Id.*, at 10, ¶ 27.

⁵⁸*Id.*, at 10-11, ¶ 27.

⁵⁹*T-Netix's Opposition*, at 12-13, ¶ 28.

period (June 1996 through December 31, 2000) and only the four institutions at issue. T-Netix has not raised a significant argument as to why this narrowly-tailored data request is over broad. Thus, the Commission grants Complainants' motion to compel responses to Data Request No. 16.

39 **Data Request No. 23.** In Data Request No. 23⁶⁰ of Complainants' Second Data Requests, Complainants ask which T-Netix employee or agent has the best knowledge of T-Netix rate disclosure announcements. Complainants indicate that T-Netix has not answered this data request and has simply referred them back to previous data request responses.⁶¹ Complainants entreat the Commission to order T-Netix to respond directly to this data request.⁶²

40 T-Netix asserts that the passage of time and the multitude of corporate reorganizations that have taken place make this request impossible to fulfill.⁶³ There is no one currently employed by T-Netix, according to the Company, that has first-hand knowledge of T-Netix's operations for the time period in question.⁶⁴

41 **Discussion and decision.** It is understandable that employees sometimes leave their employers in search of other work, and it is possible, as T-Netix claims, that no one currently on its payroll has any knowledge of the Company's rate disclosure announcements for the period 1996 to 2000. However, as the Commission reads Complainants' data request, it simply seeks the identity of the employee, who possesses the most knowledge relative to the Company's rate disclosure announcements for inmate-initiated calls. Although it would be best for the proponent of the data request to modify the request to seek the name of the "current or former" employee, rather than the "employee," with the most knowledge, we interpret the data request to also seek information about prior employees. It is the Company who is in the best position to know this. Given this information, Complainants and AT&T then have the option of whether they will seek to depose that individual. The

⁶⁰Complainants' Data Request No. 23 directs T-Netix to, "[p]lease identify your employee or agent with the most knowledge relating to rate disclosure announcements made by T-Netix for inmate-initiated calls." (Emphasis deleted).

⁶¹*Complainants' Motion*, at 7, ¶ 19.

⁶²*Id.*

⁶³*T-Netix's Opposition*, at 14, ¶ 32.

⁶⁴*Id.*

Commission grants Complainants' motion to compel responses to Data Request No. 23.

42 To the extent T-Netix has not already provided the identity of the current or former T-Netix employee who possesses the most knowledge of the Company's rate disclosure policies, T-Netix is directed to do so.

43 **Data Request No. 15.** AT&T's Data Request No. 15⁶⁵ sought documents pertaining to T-Netix's transfer of ownership to AT&T of telephone service equipment at the four facilities during the specific time periods at issue.⁶⁶ T-Netix has failed to produce any bills of sale, title transfers, or receipts that would prove that the Company's involvement with inmate-initiated calls was limited to supplying the equipment.⁶⁷

44 T-Netix asserts that AT&T has failed to show why these documents would be relevant.⁶⁸ T-Netix maintains that its platform functions the same regardless of ownership or trunking configurations, and the relationships between the parties and the DOC were all governed by the contract not ownership of the equipment.⁶⁹ T-Netix indicates that it provided the equipment to AT&T, and T-Netix never provided services or equipment to any DOC facilities or to any end users in Washington.⁷⁰ According to T-Netix, the Company does not know whether it held legal title to the equipment in question, so the Commission should deny AT&T's Motion as moot.⁷¹

45 AT&T counters that this information is relevant because T-Netix has argued in the past that the Company did not operate as an OSP, and that it only sold AT&T equipment.⁷² AT&T asserts that it needs to be able to respond to that argument.⁷³

⁶⁵AT&T's Data Request No. 15 seeks "all documents relating to the transfer from T-Netix to AT&T of ownership of any equipment relating to telephone service at Washington state prisons during the relevant period, including any bills of sale, transfers of title, or sales receipts."

⁶⁶*AT&T's Motion*, at 5, ¶ 13.

⁶⁷*Id.*

⁶⁸*T-Netix's Opposition 2*, at 4, ¶ 8.

⁶⁹*Id.*, at 4, ¶ 9.

⁷⁰*Id.*

⁷¹*Id.*, at 5, ¶ 10.

⁷²*AT&T's Reply*, at 4.

AT&T contends that, if T-Netix has no sale documents, then it should say so for the record.⁷⁴

46 ***Discussion and decision.*** T-Netix does not refute and indeed reiterates its claim that the Company never provided services or equipment to any institution or end user, but only provided equipment to AT&T pursuant to T-Netix's contract with AT&T. If this is correct, then evidence of such an arrangement would go far in proving that the Company's involvement was limited to non-OSP functions. The relevance of this data appears quite evident. The Commission grants AT&T's motion to compel responses to Data Request No. 15. To the extent that, as T-Netix argues, it does not have such data, the Company should state that in its response.

3. The "Project" to comply with the FCC's Rate Disclosure Regulations

47 In Data Request Nos. 21⁷⁵ and 22⁷⁶ of Complainants' Second Data Requests, Complainants allude to a "project" that they claim was brought to their attention by T-Netix.⁷⁷ T-Netix, according to Complainants, has admitted that the "project" involved the replacement of chips to comply with the FCC's rate disclosure requirements.⁷⁸ Complainants insist that, "[d]ocuments associated with this change may well provide information regarding whether this chip change could be used to satisfy both state and federal requirements."⁷⁹ Complainants contend that T-Netix has not provided Complainants with e-mails and correspondence from former T-Netix employees relative to the Company's disclosure of rates.⁸⁰ However, AT&T has produced

⁷³*Id.*

⁷⁴*Id.*

⁷⁵Complainants' Data Request No. 21 asks for, "all documents relating to the "Project" referred to in A000108-09, paragraph (b), and the subject matter of TNXWA 00785-87." (Emphasis deleted).

⁷⁶Complainants' Data Request No. 22 posits that, "[i]f the "Project" referred to in A000108-09, paragraph (b), resulted in changes to the T-Netix platform at any T-Netix Institutions, please identify those T-Netix Institutions and state when the "Project" was completed with respect to each T-Netix Institution." (Emphasis deleted).

⁷⁷*Complainants' Motion*, at 7, ¶ 17.

⁷⁸*Id.*

⁷⁹*Id.*, at 7, ¶ 18.

⁸⁰*Id.*, at 4, ¶ 10.

emails from AT&T to T-Netix detailing the Company's obligations to provide rate disclosures.⁸¹

48 T-Netix maintains that documents already produced by AT&T demonstrate that the rate disclosures were provided for intrastate calls since 1998 and that the project was necessary to comply with federal requirements for interstate calls which are not at issue here.⁸² Further, T-Netix concludes that information regarding the chip replacement has no probative value.⁸³

49 T-Netix asserts that it was never asked to produce e-mails or correspondence by Complainants in their data requests.⁸⁴ In addition, T-Netix's witness Arlin Goldberg avers that e-mails and correspondence of former T-Netix employees were never archived after T-Netix merged with Evercom Systems, Inc., under the parent company, Securus Technologies, Inc., in 2004.⁸⁵ As such, T-Netix states that "emails sent or received by the T-Netix employees involved at the time are no longer within the possession or control of T-Netix."⁸⁶

50 According to T-Netix, it has already provided supplemental responses to Complainants and so some of the requests made in Complainants' Motion are moot.⁸⁷

51 Complainants dispute T-Netix's claim that Complainants never requested e-mails in their data requests.⁸⁸ Complainants argue that both their first and second set of data requests contained a request for documents defined to include e-mail and other correspondence.⁸⁹ Additionally, Complainants cite to the Federal Rules of Civil Procedure which specifically calls for the production of e-mails in the normal course of discovery.⁹⁰

⁸¹ *Id.*

⁸² *T-Netix's Opposition*, at 13, ¶ 30.

⁸³ *Id.*

⁸⁴ *Id.*, at 7-8, ¶ 17.

⁸⁵ *Declaration of Arlin Goldberg*, at 1-2, ¶¶ 3 and 4.

⁸⁶ *T-Netix's Opposition*, at 9, ¶ 20.

⁸⁷ *Id.*, at 2, ¶ 4.

⁸⁸ *Complainants' Reply*, at 2, ¶ 2.

⁸⁹ *Id.*

⁹⁰ *Id.*, at 2, ¶ 3.

52 Complainants counter that T-Netix “has engaged in discovery gamesmanship.”⁹¹
Complainants point out that T-Netix has already admitted that it did not conduct a
search for e-mails and other responsive documents in answer to Complainants’ data
requests and that T-Netix destroyed e-mails that could have contained relevant
information.⁹²

53 Complainants contend that the declaration of Mr. Goldberg filed in support of
T-Netix’s Opposition acknowledges that T-Netix failed to preserve evidence while
this case was pending in court.⁹³ Mr. Goldberg states that T-Netix failed to archive
e-mails from its former employees when T-Netix merged with Securus in 2004, four
years after this action was filed in Superior Court.⁹⁴ Complainants assert that Mr.
Goldberg’s efforts to locate the e-mails of the former T-Netix employees were
insufficient.⁹⁵ Further, Complainants argue that T-Netix does not provide support for
its claim that a search for the emails is too burdensome.⁹⁶

54 ***Discussion and decision.*** Information regarding whether the Company implemented
a chip replacement which would allow for rate disclosure appears relevant to the
referral question of whether T-Netix violated the Commission’s regulation requiring
rate disclosure. Complainants’ motion to compel responses to their Second Data
Request Nos. 21 and 22 is granted.

55 The Commission is troubled by T-Netix’s admission that it did not preserve potential
evidence for litigation due to a merger four years after this action had been filed. A
party may be responsible for spoliation of evidence without a finding of bad faith.⁹⁷
As T-Netix has admitted that the Company has failed to exhaust possible avenues in
locating the missing e-mails and correspondence, T-Netix is instructed to continue to
diligently and promptly pursue locating and providing copies of these documents
relative to the chip replacement “project” referenced in T-Netix e-mails, as well as e-
mail correspondence.

⁹¹*Id.*, at 1, ¶ 1.

⁹²*Id.*, at 1, ¶ 1.

⁹³*Id.*, at 5, ¶ 10.

⁹⁴*Id.*, at 4, ¶ 7.

⁹⁵*Id.*, at 5, ¶ 8.

⁹⁶*Id.*, at 5, ¶ 9.

⁹⁷*Homeworks Const., Inc., v. Wells*, 133 Wash.App. 892, 138 P.3d 654 (2006).

- 56 With regard to AT&T's Data Request Nos. 11 and 12, AT&T argues that T-Netix fails to describe the actual process the Company employed to disclose rates pursuant to regulation.⁹⁸ Instead AT&T points out that T-Netix cryptically responds to its data requests with "T-Netix would have been able to configure the system to provide the rate quote via a voice recording."⁹⁹ This response, AT&T contends, does not provide information regarding how the system actually was configured or whether T-Netix's system did in fact provide the requisite rate disclosures.¹⁰⁰
- 57 T-Netix claims that it responded as fully as is possible given the eight years that have passed since this action was initiated and the corporate mergers and reorganizations which T-Netix has experienced.¹⁰¹ T-Netix no longer has employees with first-hand knowledge of these matters.¹⁰²
- 58 AT&T explains that T-Netix has only partially described the process by which rate disclosures were made to end users of inmate-initiated calls.¹⁰³ Additionally, despite the changes to regulatory requirements over time, T-Netix has told AT&T that the Company is unaware of any revisions made to the rate disclosure process.¹⁰⁴ In answer to T-Netix's claim that it does not have any additional documents, AT&T argues that, if this is truly the case, T-Netix should be required to submit amended responses for the record.¹⁰⁵
- 59 ***Discussion and decision.*** AT&T's Data Request Nos. 11 and 12 appear relevant and may lead to admissible evidence. T-Netix does not reply that these data requests are irrelevant to the instant proceeding, only that it no longer possesses any other documents which would fulfill these requests.

⁹⁸ *AT&T's Motion*, at 4, ¶ 11.

⁹⁹ *Id.*, at 5, ¶ 12.

¹⁰⁰ *Id.*, at 5, ¶ 12.

¹⁰¹ *T-Netix's Opposition 2*, at 3, ¶ 7.

¹⁰² *Id.*, at 4, ¶ 7.

¹⁰³ *AT&T's Reply*, at 3-4.

¹⁰⁴ *Id.*, at 4.

¹⁰⁵ *Id.*, at 4.

60 That said, it is one thing for T-Netix to argue that a Company cannot be expected to retain its employees for the duration of a litigated case; it is quite another to maintain that the same company cannot be expected to retain documents relating to ongoing litigation.

61 T-Netix earlier stated, in Mr. Hopfinger's declaration, that the Company has not exhausted all sources from which documents it possesses may be located. As such, the Commission finds T-Netix's argument dubious. Therefore, not only is AT&T's motion to compel Data Request Nos. 11 and 12 granted, T-Netix is strongly encouraged to search all available sources of data, whether in its possession or in the possession of its parent company, before it responds to these data requests again.

ORDER


THE COMMISSION ORDERS:

- 62 (1) Sandy Judd and Tara Herivel's motion to compel responses by T-Netix, Inc., to Data Request Nos. 2, 3, 16, 21, 22, and 23 is granted to the extent these data requests seek information regarding the four institutions at issue from June 1996 to December 31, 2000.
- 63 (2) Sandy Judd and Tara Herivel's motion to compel responses by T-Netix, Inc., to Data Request No. 5 is denied.
- 64 (3) AT&T Communications of the Pacific Northwest, Inc.'s motion to compel responses by T-Netix, Inc, to Data Request Nos. 7, 8, 9, 10, 11, 12, 15, 18, 19, and 21 is granted to the extent these data requests seek information regarding the four institutions at issue from June 1996 to December 31, 2000.

65 (4) T-Netix, Inc.'s motion for a protective order is denied.

Dated at Olympia, Washington, and effective January 9, 2009.

WASHINGTON STATE UTILITIES AND TRANSPORTATION COMMISSION



MARGUERITE E. FRIEDLANDER
Administrative Law Judge