

SERVICE DATE
JUL 18 2005

RECEIVED

JUL 19 2005

BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION

ATER WYNNE LLP

SANDRA JUDD AND TARA)	
HERIVEL,	)	DOCKET NO. UT-042022
)	
Complainants,	)	ORDER NO. 05
)	
v.	)	ORDER DENYING T-NETIX'S
	)	MOTIONS FOR SUMMARY
AT&T COMMUNICATIONS OF	)	DETERMINATION AND TO
THE PACIFIC NORTHWEST, INC.,	)	STAY DISCOVERY; DENYING
AND T-NETIX, INC.,	)	COMPLAINANTS'
	)	CONDITIONAL MOTION;
Respondents.	)	DENYING, IN PART, T-NETIX'S
	)	MOTION TO STRIKE;
	)	GRANTING AT&T'S MOTION
	)	FOR LEAVE TO FILE RESPONSE
.....)	

1 **SYNOPSIS.** *Consistent with the oral decision issued following oral argument, this Order denies T-Netix's motion for summary determination. The Commission may not dismiss the proceeding for lack of standing. The Superior Court has primary jurisdiction over this proceeding. The Order also denies T-Netix's Motion to Stay Discovery, denies Complainants' Conditional Motion, grants in part T-Netix's Motion to Strike, and grants AT&T's Motion for Leave to File a Response to the Supplemental Declaration of Kenneth L. Wilson.*

2 **NATURE OF PROCEEDING.** Docket No. UT-042022 is a complaint filed by recipients of inmate-initiated calls against AT&T Communications of the Pacific Northwest, Inc. (AT&T), and T-Netix, Inc. (T-Netix), alleging that AT&T and T-Netix failed to disclose rates for the calls, violating the Commission's rules governing disclosure. The complaint was filed with the Commission after the King County Superior Court referred the matter to the Commission under the

doctrine of primary jurisdiction to allow the Commission to complete an adjudication into certain issues of fact and law.

3 **PROCEDURAL HISTORY.** The complaint initiating this proceeding was filed with the Commission on November 17, 2004. On December 15, 2005, AT&T filed a Motion for Summary Determination, and on December 16, 2004, AT&T filed a response to the formal complaint.

4 During a prehearing conference held on February 16, 2005, before Administrative Law Judge Ann E. Rendahl, the parties agreed to a procedural schedule in the proceeding, including a schedule for discovery. The Commission adopted the schedule in Order No. 01 in this proceeding, a prehearing conference order.

5 On March 18, 2005, the Commission entered Order No. 02 in this proceeding, a protective order.

6 On April 21, 2005, T-Netix filed with the Commission a Motion for Summary Determination and a Motion to Stay Discovery.

7 Pursuant to the Commission's April 25, 2005, notice, AT&T and Complainants on May 6, 2005, filed responses to T-Netix's motions. AT&T joined in T-Netix's motions, and Complainants filed a number of declarations supporting their response, as well as a Conditional Motion to Postpone Consideration of T-Netix's Motion for Summary Determination Until Complainants Have Been Permitted Additional Discovery.

8 On May 10, 2005, T-Netix filed its Reply in Support of its Motions for Summary Determination and to Stay Discovery, a response to the Complainant's conditional motion, an affidavit in support of the Motion for Stay of Discovery, a Motion to Strike, and a declaration in support of the Motion to Strike.

- 9 Following a teleconference call held on May 10, 2005, the Administrative Law Judge learned of T-Netix's filing with the Commission and requested T-Netix's counsel to coordinate responsive pleading deadlines with counsel for Complainants.
- 10 The Administrative Law Judge issued a notice on May 11, 2005, establishing a schedule allowing parties to file additional responsive pleadings to address T-Netix' motion to strike, and scheduling oral argument on T-Netix's motions for June 7, 2005.
- 11 Pursuant to the May 11, 2005, notice, Complainants filed with the Commission on May 16, 2005, a response to T-Netix's Motion to Strike, with a supporting declaration, and a Reply to AT&T's response joining in T-Netix's motions, with supporting declarations.¹ On May 20, 2005, T-Netix filed a reply in support of its Motion to Strike, and AT&T filed a surreply in support of its response joining in T-Netix's motions.
- 12 On May 31, 2005, Complainants filed a Highly Confidential Motion for Leave to File Supplemental Declaration of Kenneth L. Wilson Dated May 27, 2005, and the Highly Confidential Supplemental Declaration of Kenneth L. Wilson in support of Complainants' response to T-Netix's motion for summary determination and Complainant's reply to AT&T's Response.
- 13 Also on May 31, 2005, T-Netix submitted by electronic mail an Emergency (1) Opposition to Complainants' Motion to File Supplemental Wilson Declaration and (2) Motion to Strike or, in the Alternative, for Right of Reply and Continuance of June 7 hearing.

¹ The May 11, 2005, notice provided for parties to submit electronic copies of the pleadings with the Commission by 5:00 pm on May 13, 2005, with paper copies to be filed on May 16. Complainants submitted electronic copies to all parties and the Commission at 7:51 and 7:54 p.m. on May 13.

- 14 On June 1, 2005, Complainants filed a Response to T-Netix's Emergency Motion and Motion to Strike.
- 15 In Order No. 04, entered on June 2, 2005, the Administrative Law Judge granted the Complainants' Motion for Leave to File a Supplemental Declaration, and denied T-Netix's Motion to Strike, allowing T-Netix and AT&T to file responses to the supplemental declaration. The Order also granted the Complainant's Motion to Continue the June 7, 2005, oral argument.
- 16 On June 6, 2005, the Commission issued a Notice rescheduling the oral argument until June 28, 2005.
- 17 On June 13, 2005, T-Netix filed with the Commission a Highly Confidential Affidavit of Alan Schott in Support of T-Netix, Inc.'s Motion for Summary Determination. On June 15, 2005, AT&T filed a Highly Confidential Motion for Leave to File Its Response to the Supplemental Declaration of Kenneth L. Wilson, as well as a Declaration of John D. Schell, Jr.
- 18 On June 20, 2005, Complainants filed a Highly Confidential Response to AT&T's Motion.
- 19 On June 24, 2005, T-Netix filed with the Commission a Highly Confidential Supplemental Affidavit of Alan Schott in Support of T-Netix, Inc.'s Motion for Summary Determination. On June 27, 2005, T-Netix filed a Supplemental Affidavit of Nancy Lee in Support of T-Netix, Inc.'s Motion for Summary Determination.
- 20 On June 28, 2005, the parties presented oral argument on the pending motions before Administrative Law Judge Rendahl. Following oral argument, the Administrative Law Judge issued an oral ruling denying T-Netix's Motions for

Summary Determination and to Stay Discovery, denying Complainant's conditional motion, granting, in part, T-Netix's Motion to Strike, and granting AT&T's Motion for Leave to File a Response to the Supplemental Declaration of Kenneth L. Wilson.

- 21 **APPEARANCES.** Jonathan P. Meier, Sirianni Youtz Meier & Spoonemore, Seattle, Washington, represents Sandra Judd and Tara Herivel, Complainants. Letty Friesen, AT&T Law Department, Austin, Texas, and Charles H.R. Peters and David C. Scott, Schiff Hardin, LLP, Chicago, Illinois, represent AT&T. Arthur A. Butler, Ater Wynne LLP, Seattle, Washington, and Glenn B. Manishin and Stephanie Joyce, Kelley Drye & Warren LLP, Washington, D.C., represent T-Netix.

MEMORANDUM

- 22 **A. T-Netix's Motion for Summary Determination.** T-Netix moves to dismiss the proceeding asserting that Complainants lack standing to pursue their claims before this Commission.² T-Netix asserts that documents recently produced in discovery show that Complainants suffered no "cognizable harm."³ T-Netix asserts that all of the calls for which Complainants seek relief were carried by two local exchange carriers, US West, and GTE, and that both carriers were granted waivers from the Commission's rule.⁴ T-Netix asserts that T-Netix did not carry any of the calls and that Complainants suffered no harm.⁵

- 23 T-Netix asserts that persons bringing a complaint before the Commission must demonstrate standing by showing injury in fact, *i.e.*, financial or other injury, and must have an interest within the "zone of interest" that the Commission's

² T-Netix's Motion for Summary Determination, ¶ 2.

³ *Id.*; see also Exhibits 9-11 to T-Netix's Motion for Summary Determination.

⁴ *Id.*, ¶¶ 9-12.

⁵ *Id.*, ¶¶ 2, 14, 16-21.

statutes or rules are designed to protect.⁶ Relying on the exhibits to its motion and several affidavits, T-Netix asserts that Complainants have suffered no injury in fact as none of the calls involved T-Netix and that none of the calls identified on Complainants' phone bills were subject to rate disclosure.⁷ T-Netix asserts that Complainants are not within the "zone of interest," as the local exchange companies, US West and GTE, did not owe Complainants a duty to disclose the rates for inmate-initiated local and intraLATA calls due to exemptions from the rule.⁸ T-Netix asserts that it has met the standards for granting a motion for summary determination: The material facts are not in dispute and the Complainants have not demonstrated standing to pursue a claim before the Commission.⁹

24 T-Netix acknowledges that this matter has been referred to the Commission by the King County Superior Court under the doctrine of primary jurisdiction to determine whether T-Netix has violated the Commission's regulations.¹⁰ T-Netix asserts, however, that the Commission need not reach that question if the Complainants lack standing.¹¹ T-Netix agrees with Complainants that the Commission has only "derivative" jurisdiction under the Superior Court's primary jurisdiction referral.¹² T-Netix asserts, however, that if the Superior Court would not have jurisdiction due to lack of standing, the Commission does not have jurisdiction to resolve the questions referred, and must dismiss the proceeding.¹³ T-Netix asserts that the Commission has no further duty to assist

⁶ *Id.*, ¶ 13, citing *Stevens v. Rosario Utils.*, WUTC Docket No. UW-011320, Third Supplemental Order at 19 (July 12, 2002); *Save a Valuable Environment (SAVE) v. City of Bothell*, 89 Wn.2d 862, 576 P.2d 401, 403-404 (1978).

⁷ *Id.*, ¶¶ 14-21; see also Exhibits 4 and 11 to T-Netix's Motion; June 13, 2005, Affidavit of Alan Schott; June 24, 2005, Supplemental Affidavit of Alan Schott; June 27, 2005, Supplemental Affidavit of Nancy Lee.

⁸ T-Netix's Summary Determination Motion, ¶¶ 22-23.

⁹ *Id.*, ¶¶ 3, 14-23.

¹⁰ *Id.*, ¶ 24.

¹¹ *Id.*, ¶ 28.

¹² T-Netix's May 11, 2005, Reply, ¶ 11.

¹³ T-Netix's Summary Determination Motion, ¶¶ 29-30; T-Netix's May 11, 2005, Reply, ¶ 11.

the Superior Court and must dismiss the proceeding.¹⁴ T-Netix further asserts that continuing with the referral would be a waste of resources, and that disposing of the issue of standing would resolve the entire controversy.¹⁵

25 AT&T joins in T-Netix's Motion for Summary Determination, asserting that the information T-Netix presents also demonstrates that Complainants have no standing to pursue a claim against AT&T.¹⁶

26 Complainants dispute T-Netix's arguments that (1) T-Netix was not involved in any of the calls, and (2) the Commission may dismiss for lack of standing a matter referred under the doctrine of primary jurisdiction.¹⁷ Complainants object to AT&T's "joinder," asserting that the pleading goes beyond the issues raised and seeks affirmative ruling for AT&T.¹⁸ Complainants object that AT&T's joinder attempts to accelerate its own motion for summary determination and limit discovery the Commission ordered on AT&T's motion.¹⁹

27 Addressing the factual issues raised by T-Netix and AT&T, Complainants assert that the issue of whether a telephone call is subject to the rate disclosure requirements in WAC 480-120-141 does not depend on the carrier that "carried" the call, but upon who provided a "connection," *i.e.*, operator services.²⁰ Complainants assert that T-Netix is an operator service provider (OSP) and that the key question is whether T-Netix provided operator services on the phone calls in question, not whether an exempt carrier was involved with the phone

¹⁴ T-Netix's Summary Determination Motion, ¶ 30.

¹⁵ T-Netix's May 11, 2005, Reply, ¶¶ 5, 13.

¹⁶ AT&T Response Joining in T-Netix's Motions for Summary Determination and to Stay Discovery, ¶¶ 2, 6, 8, 12.

¹⁷ Complainants' Response to T-Netix Motion for Summary Determination, ¶¶ 1-4.

¹⁸ Complainants' Reply to AT&T's Response, ¶ 1.

¹⁹ *Id.*

²⁰ Complainants' Response, ¶¶ 1, 20-21, 23-26; *see also* Complainants' Reply to AT&T's Response, ¶¶ 12, 19-21.

calls in question.²¹ Complainants submit two declarations of Kenneth L. Wilson in support of its Response to T-Netix's motion.²² Complainants assert that material facts remain in dispute, additional discovery is warranted, and the Commission should not dismiss the proceeding.²³ Complainants further assert that AT&T and T-Netix are liable under the statute governing operator services providers asserting that the statute focuses on companies operating as or contracting with an alternate operator services company.²⁴

28 Complainants assert that the Commission may not dismiss the case for lack of standing. Complainants assert that the King County Superior Court did not relinquish jurisdiction over the proceeding when it referred to the Commission the question of whether T-Netix violated the Commission's rules.²⁵

Complainants assert that the Court referred only specific issues to the Commission due to the Commission's expertise concerning operator services companies, but retained jurisdiction to make the final decision in the proceeding.²⁶

29 Complainants assert that an agency's role in a primary jurisdiction referral is strictly limited to the questions referred to the agency, and that primary jurisdiction does not invoke the independent jurisdiction of the agency.²⁷ Complainants assert that the Commission has statutory authority to resolve the issue of whether T-Netix violated the Commission's rules.²⁸ Complainants assert

²¹ Complainants' Response, ¶¶ 1-2, 6-7, 17-20.

²² May 2, 2005, Declaration of Kenneth L. Wilson in Support of Complainants' Response; May 27, 2004, Supplemental Declaration of Kenneth L. Wilson.

²³ Complainants' Response, ¶¶ 21-26; *see also* Complainants' Reply to AT&T's Response, ¶¶ 4, 7-11.

²⁴ Complainants' Reply to AT&T's Response, ¶ 17.

²⁵ Complainants' Response, ¶ 27.

²⁶ *Id.*, ¶ 28, quoting *Jaramillo v. Morris*, 50 Wn. App. 822, 828, 750 P.2d 1301 (1988).

²⁷ *Id.*, citing *Dioxin/Organochlorine Center v. Department of Ecology*, 119 Wn.2d 761, 837 P.2d.1007 (1992); *International Ass'n of Heat & Frost Insulators and Asbestos Workers v. United Contractors Ass'n, Inc.*, 483 F.2d 384, 401 (3d Cir. 1973).

²⁸ *Id.*, ¶ 33.

that the issue of standing is within the Superior Court's primary jurisdiction over the proceeding, an issue the court reserved for itself.²⁹ The Complainants assert that the Superior Court can address the issue of standing after the Commission resolves the questions in the referral.³⁰

30 Finally, Complainants assert that if there is a problem with standing, the Commission should allow them to amend their complaint to include additional class representatives.³¹ Complainants offer the declarations of Suzanne Elliott and Maureen Janega in support of this request.³²

31 In reply, T-Netix moves to strike the declarations of Ms. Elliott and Ms. Janega as outside of the scope of the proceeding and as prejudicial to T-Netix.³³ The motion is discussed further below in Section II. C. T-Netix asserts that the Commission does not have jurisdiction to permit joinder in a primary jurisdiction referral.³⁴ T-Netix asserts the Commission cannot decide issues outside of the scope of the referral and requests the Commission deny Complainants' request for leave to amend to include new complainants.³⁵

32 *Discussion and Decision.* Under WAC 480-07-380(2), the Commission's rules governing motions for summary determination, the Commission will consider the standards applicable to motions for summary judgment made under the civil rules. Under CR 56, a party may move for summary determination if the pleadings, together with any properly admissible evidentiary support, show that there is no genuine issue as to any material fact and the party is entitled to judgment as a matter of law. Summary judgment is properly entered if there is

²⁹ *Id.*, ¶ 29.

³⁰ *Id.*, ¶ 35.

³¹ Complainants' Reply to AT&T's Response, ¶¶ 36, 39.

³² *Id.*, ¶¶ 38-39.

³³ T-Netix's Reply, ¶ 8.

³⁴ *Id.*, ¶ 15.

³⁵ *Id.*, ¶¶ 16-19.

no genuine issue as to any material fact, that reasonable persons could reach only one conclusion, and that the moving party is entitled to judgment as a matter of law.³⁶ In resolving a motion for summary judgment, a court must consider all the facts submitted by the parties and make all reasonable inferences from the facts in the light most favorable to the nonmoving party.³⁷

33 After considering the numerous pleadings and affidavits presented by the parties and making all reasonable inferences from the facts in the light most favorable to the nonmoving party, T-Netix' motion for summary determination is denied. There is a genuine issue of material fact in dispute and T-Netix is not entitled to judgment as a matter of law.

34 The issue in this proceeding is whether T-Netix and AT&T provided service as operator service companies on the calls at issue in this proceeding. While T-Netix asserts that only US West and GTE carried the calls in question, Complainant's affidavits and pleadings raise questions as to the role of T-Netix and AT&T in connecting the calls between the correctional institutions and the Complainants. The parties' dueling and numerous affidavits identify several issues of fact concerning AT&T and T-Netix's network and their involvement in the calls in question.

35 Even if there were no genuine issue of material fact in dispute, as T-Netix asserts, T-Netix is not entitled to judgment as a matter of law. The law at issue here is not the law governing standing, but the doctrine of primary jurisdiction. Under the doctrine of primary jurisdiction, if a court finds that an issue raised in a dispute before the court is within the primary jurisdiction of an agency, the court will defer a decision in the action until the agency has addressed the particular issue within its primary jurisdiction, but retains jurisdiction over the dispute

³⁶ *Tanner Electric Coop. v. Puget Sound Power & Light Co.*, 128 Wn.2d 656, 668 (1996).

³⁷ *Id.*

itself and all other issues in dispute.³⁸ The doctrine of primary jurisdiction “does not necessarily allocate power between courts and agencies, for it governs only the question whether court or agency will initially decide a particular issue, not the question whether court or agency will finally decide the issue’.”³⁹ Thus, where a court refers issues to an agency under the doctrine of primary jurisdiction, the referral does not invoke the agency’s jurisdiction over all issues in dispute, only those issues referred to the agency.

36 In this proceeding, King County Superior Court Judge Learned referred to the Commission under the primary jurisdiction doctrine the issues of (1) “whether or not [AT&T is] considered by the agency to be an OSP under the contracts at issue herein and if so if the regulations have been violated,” and (2) “to determine if T-Netix has violated WUTC regulations.”⁴⁰ Judge Learned stayed resolution of Complainants’ Consumer Protection Act claims and any award of monetary damages pending the Commission’s action on the issues.⁴¹

37 The issue of Complainants’ standing to bring a complaint before the Commission is not within the issues referred to the Commission for consideration: Judge Learned reserved jurisdiction to resolve all other issues in the dispute. As this matter is on referral from the Superior Court and not a complaint filed initially with the Commission, the Commission does not have jurisdiction to decide the issue of standing. While resolving the issue of standing may avoid a waste of resources, as T-Netix asserts, it would be inappropriate for the Commission not to address the questions referred by the Superior Court.

³⁸ 2 R. Pierce, *Administrative Law Treatise*, § 14.1.

³⁹ *In re Real Estate Brokerage Antitrust Litigation*, 95 Wn.2d 297, 301-302, 622 P.2d 1185 (1980), quoting 3 K. Davis, *Administrative Law*, § 19.01 (1958).

⁴⁰ *Judd, et al. v. AT&T, et al.*, King County Superior Court Case No. 00-2-17565-5 SEA, Order Granting AT&T Corp.’s Motion to Dismiss, 2 (Aug. 28, 2000); *Judd, et al. v. AT&T, et al.*, King County Superior Court Case 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, 2 (Nov. 9, 2000).

⁴¹ *Id.*

38 For the same reasons this Order denies T-Netix's Motion for Summary Determination, the Order rejects Complainant's request to amend its complaint to include Ms. Elliott and Ms. Janega as complainants. The Commission's jurisdiction in this proceeding is limited to the issues referred by the Superior Court. The Superior Court retained jurisdiction over all other issues, including amending the complaint.

39 **B. T-Netix's Motion to Stay Discovery, and Complainants' Conditional Motion.** T-Netix filed a motion to stay discovery in the proceeding pending the resolution of its motion for summary determination. Because a motion for summary determination does not automatically stay the procedural schedule of a case, T-Netix requests the Commission enter an order staying discovery.⁴² T-Netix asserts that an order staying discovery is warranted as discovery is burdensome and may lead to disclosure of "highly-sensitive commercial and security information" where there is the possibility the case may be dismissed.⁴³ T-Netix also asserts that there is no deadline for resolving the proceeding.⁴⁴

40 AT&T asserts that it should not be required to disclose confidential information in discovery where there may be no basis for Complainants' claims.⁴⁵

41 Complainants oppose T-Netix's motion to stay discovery asserting that AT&T and T-Netix have already refused to continue discovery until T-Netix's motion is resolved.⁴⁶ Complainant's object to T-Netix and AT&T's refusal to participate in further discovery and asserts that T-Netix has obstructed Complainants' efforts to obtain information.⁴⁷ Complainants identify specific responses by T-Netix and

⁴² T-Netix's Motion to Stay Discovery, ¶ 3.

⁴³ *Id.*, ¶ 4.

⁴⁴ *Id.*

⁴⁵ AT&T's Response, ¶ 14; AT&T's Surreply, ¶ 15.

⁴⁶ Complainants' Response, ¶ 1; Complainants' Reply to AT&T's Response, ¶ 28.

⁴⁷ Complainants' Response, ¶¶ 3, 5-9.

AT&T as examples of the parties' refusal to respond to discovery.⁴⁸ Complainants request that the Commission not condone T-Netix and AT&T's conduct in staying discovery contrary to WAC 480-07-380(d).⁴⁹

42 Complainants further requests through a Conditional Motion that the Commission postpone consideration of T-Netix's motion for summary determination until T-Netix responds to discovery requests.⁵⁰ Complainants also request the right to discovery on issues raised in T-Netix's motion for summary determination.⁵¹

43 In reply, T-Netix denies that it has failed to cooperate in discovery.⁵² T-Netix asserts that any objections to T-Netix's responses to data requests and conduct in discovery should be raised in a motion to compel rather than in a response to its motion to stay discovery.⁵³ T-Netix will treat the portion of Complainant's Response as an invitation to meet and confer and will address Complainants' counsel's concerns.⁵⁴

44 T-Netix opposes Complainants' request for additional discovery to respond to the motion for summary determination.⁵⁵ T-Netix asserts that the facts supporting the motion are indisputable and that the Commission does not need additional information to decide the issue.⁵⁶ T-Netix objects to allowing new discovery to substantiate the claims in Ms. Elliott and Ms. Janega's declarations.⁵⁷

⁴⁸ *Id.*, ¶¶ 5-11.

⁴⁹ *Id.*, ¶ 14.

⁵⁰ *Id.*, ¶ 17.

⁵¹ *Id.*, ¶ 18.

⁵² T-Netix's Reply, ¶ 2.

⁵³ *Id.*, ¶ 7.

⁵⁴ *Id.*

⁵⁵ *Id.*, ¶¶ 8-13.

⁵⁶ *Id.*, ¶¶ 8, 11.

⁵⁷ *Id.*, ¶ 13.

45 *Discussion and Decision.* The Commission's procedural rules, specifically WAC 480-07-380(2)(d), provide that filing a motion for summary determination does not stay the procedural schedule in a case. T-Netix filed a motion to stay discovery, seeking to stay discovery until the Commission resolved the pending motion for summary determination. T-Netix's motion is denied. The numerous pleadings and affidavits in this matter indicate that there is a continuing need for discovery to resolve issues of material fact in the proceeding. Complainants' conditional motion is likewise denied. The parties must continue discovery to allow the Commission to address the issues referred by the King County Superior Court.

46 A matter of concern, however, is T-Netix and AT&T's actions in ceasing discussions with Complainants over outstanding data requests and refusing to provide answers to pending data requests until the Commission resolved the pending motions. Filing a motion to stay discovery does not allow the parties to stay discovery. T-Netix and AT&T did not wait for the Commission to resolve either motion before staying discovery on their own. Such conduct is not acceptable. The Commission expects the parties to follow the procedural rules in Chapter 480-07 WAC and will not tolerate such flagrant violations. The parties must meaningfully respond to Complainants' discovery requests. If T-Netix and AT&T are correct that they are not OSPs and had no role in the inmate-initiated calls in question, then they should be willing to disclose in discovery all relevant information in the proceeding.

47 **C. T-Netix's Motion to Strike.** T-Netix filed a motion to strike Complainants' responsive pleadings in their entirety, or in the alternative, paragraphs 1 through 9 of the response and the declarations of Ms. Elliott and Ms. Janega.⁵⁸ T-Netix asserts that Complainants did not timely file their response, serving the pleading on all parties and submitting it to the Commission at 7:51 p.m. on May 6, 2005,

⁵⁸ T-Netix's Motion to Strike, ¶¶ 1-15.

instead of the 5:00 p.m. filing deadline.⁵⁹ T-Netix asserts that Complainants did not seek an extension of time and that the Commission should not condone this disregard of Commission procedures.⁶⁰

48 Should the Commission not strike the Complainants' responsive pleadings in their entirety, T-Netix requests the Commission strike a part of the Complainant's response as "irrelevant and prejudicial."⁶¹ T-Netix objects to paragraphs 1 through 9 of Complainants' response concerning T-Netix's conduct in discovery.⁶² T-Netix asserts that Complainants' response does not address whether discovery should be stayed, but seeks merely to impugn T-Netix's counsel and raises issues that should be addressed in a motion to compel.

49 T-Netix also requests that the Commission strike the declarations of Ms. Elliott and Ms. Janega.⁶³ T-Netix asserts that the declarations raise new allegations and new complainants, matters that are outside of the scope of the Superior Court's primary jurisdiction referral.⁶⁴ T-Netix further asserts that the new declarations are prejudicial as irrelevant to T-Netix' motion and because the time to propound discovery has ended.⁶⁵

50 Complainants concede that they electronically submitted their responsive filing late on May 6, 2005, but assert that they timely filed their paper copy on Monday, May 9, 2005.⁶⁶ Complainants assert that counsel underestimated the time to comply with the confidentiality provisions of the protective order, and asserts that it will not happen again.⁶⁷ Complainants assert that the sanction T-Netix

⁵⁹ *Id.*, ¶ 2.

⁶⁰ *Id.*, ¶ 3.

⁶¹ *Id.*, ¶ 4.

⁶² *Id.*, ¶¶ 5-7.

⁶³ *Id.*, ¶ 8.

⁶⁴ *Id.*, ¶¶ 9-11.

⁶⁵ *Id.*, ¶¶ 12-14.

⁶⁶ Complainants' Response to T-Netix's Motion to Strike, ¶¶ 1-2.

⁶⁷ *Id.*, ¶ 1.

requests is too harsh, as the parties received both electronic and paper copies and had the opportunity to reply.⁶⁸

51 Complainants assert that issues raised in paragraphs 1 through 9 of their response, *i.e.*, whether T-Netix has engaged in a good-faith effort to resolve discovery disputes and respond to discovery and whether a party may halt discovery upon filing a motion for summary determination, are not irrelevant or prejudicial.⁶⁹ Complainants also assert that the two declarations should not be stricken, asserting that T-Netix will not be prejudiced if a new schedule in the proceeding allows additional discovery.⁷⁰ Complainants assert that T-Netix's objections address the Commission's authority to amend the complaint in this proceeding.⁷¹

52 **Discussion and Decision.** T-Netix's motion to strike Complainants' responsive pleading in its entirety is denied. T-Netix's requested sanction for late filing is too harsh, as T-Netix had ample opportunity to reply to the pleading. The Commission does not condone late filing of materials. Where the opposing party has not been prejudiced by the late filing, it is not appropriate to reject the pleading. Complainants' are on notice, however, that parties must submit all electronic submissions to the Commission by 5:00 p.m. of the date set for electronic submission, and send an electronic copy to the Administrative Law Judge. Any other late submissions will be dealt with appropriately.

53 T-Netix's alternative request to strike paragraphs 1 through 9 of the pleading is also denied. While some of the issues Complainants raise are appropriate for a motion to compel, Complainants are justified in complaining about discovery efforts in the proceeding in the context of responding to motions for summary

⁶⁸ *Id.*, ¶ 3.

⁶⁹ *Id.*, ¶¶ 4-6.

⁷⁰ *Id.*, ¶¶ 9-10.

⁷¹ *Id.*, ¶¶ 8-12.

determination and to stay discovery. Parties may not unilaterally halt discovery while motions for summary determination are pending, even if a motion to stay discovery is also pending.

54 The Commission expects parties to meaningfully respond to discovery requests. Should discovery disputes arise in this proceeding, the party seeking information should work directly with the responding party to address the dispute first, but should bring disputes to the Commission's attention promptly if the dispute is not resolved.

55 Finally, T-Netix's request to strike the declarations of Ms. Elliott and Ms. Janega is granted. Complainants included these declarations to support their request to amend the pleadings before the Commission. This Order rejects Complainants' request as outside of the scope of the Superior Court's primary jurisdiction referral to the Commission. The declarations are unnecessary to this proceeding and are stricken.

56 **D. AT&T's Motion for Leave to File Response.** In Order No. 04, the Administrative Law Judge allowed T-Netix to file a response to Complainants' Highly Confidential Supplemental Declaration of Kenneth L. Wilson. On June 16, 2005, AT&T requested leave to file a response to Mr. Wilson's supplemental declaration, attaching the Declaration of John D. Schell, Jr.

57 Complainants do not object to AT&T's motion, asserting that the statements in Mr. Schell's declaration support the need for additional discovery in the proceeding.⁷²

58 **Discussion and Decision.** Consistent with the decision during oral argument, AT&T's motion is granted. Complainants do not object to the motion. Order No. 04 allowed T-Netix, AT&T's co-defendant, the opportunity to file a response to

Mr. Wilson's supplemental declaration. AT&T should be given the same opportunity.

FINDINGS OF FACT

- 59 (1) Complainants Sandra Judd and Tara Herivel received inmate-initiated calls and allege in a compliant filed in King County Superior Court that they did not receive the rate disclosures for those calls required by the Commission's rules.
- 60 (2) T-Netix, Inc., and AT&T of the Pacific Northwest, Inc., are classified as competitive telecommunications companies under RCW 80.36.310-330.
- 61 (3) King County Superior Court Judge Learned ordered several issues to be considered by the Washington Utilities and Transportation Commission through a primary jurisdiction referral.
- 62 (4) T-Netix filed a motion for summary determination and motion to stay discovery asserting that the Complainants lack standing to bring their complaint before the Commission.
- 63 (5) The parties filed numerous pleadings, attaching exhibits, affidavits, and declarations, to address the matters raised in T-Netix's motions.
- 64 (6) The Commission held oral argument on T-Netix's motions, as well as Complainants' conditional motion and AT&T's motion for leave to file a response to a supplemental declaration of Mr. Wilson.

⁷² Complainants' Response to AT&T's Motion, ¶¶ 1-9.

- 65 (7) The declarations of Ms. Elliott and Ms. Janega, attached to Complainants' Response, include new allegations to support a request to amend the pleadings.
- 66 (8) Complainants electronically submitted their responsive pleading to the Commission nearly three hours after the 5:00 p.m. deadline for electronic submission, but filed paper copies with the Commission in a timely manner.

CONCLUSIONS OF LAW

- 67 (1) Summary judgment is properly entered if there is no genuine issue as to any material fact, that reasonable persons could reach only one conclusion, and that the moving party is entitled to judgment as a matter of law. *Tanner Electric Coop. v. Puget Sound Power & Light Co.*, 128 Wn.2d 656, 668 (1996). In resolving a motion for summary judgment, a court must consider all the facts submitted by the parties and make all reasonable inferences from the facts in the light most favorable to the nonmoving party. *Id.*
- 68 (2) Complainant's affidavits and pleadings raise questions of material fact as to the role of T-Netix and AT&T in connecting the calls in question between correctional institutions and the Complainants and identify several issues of material fact concerning AT&T's and T-Netix's networks and the carriers' involvement in the calls in question.
- 69 (3) The law at issue in T-Netix's motion for summary determination is the law governing the doctrine of primary jurisdiction, not the law governing standing.

- 70 (4) Where a court refers specific issues to an agency under the doctrine of primary jurisdiction, the court retains jurisdiction over all other issues in the proceeding and will defer a decision until the agency addresses the particular issues within its jurisdiction. *See 2 R. Pierce, Administrative Law Treatise, § 14.1.*
- 71 (5) T-Netix is not entitled to judgment as a matter of law, as the Commission does not have primary jurisdiction in this matter to address issues of standing, but is limited to applying its statutory authority to determine whether AT&T is an operator services provider under the Commission's rules and whether AT&T and T-Netix violated the Commission's rules governing operator services companies.
- 72 (6) The Commission does not have jurisdiction in this primary jurisdiction referral to determine whether the Complainants may amend their pleadings.
- 73 (7) Filing a motion for summary determination does not stay the procedural schedule in a proceeding, nor may a party unilaterally stay discovery after filing a motion for summary determination, even after filing a motion to stay discovery. *See WAC 480-07-380(2).*
- 74 (8) It is not appropriate to reject or strike a pleading for late filing if the opposing party has not been prejudiced by the late filing.
- 75 (9) The declarations of Ms. Elliott and Ms. Janega address matters outside of the scope of the Superior Court's primary jurisdiction referral.
- 76 (10) AT&T, as a co-defendant of T-Netix, should have the opportunity to file a response to the supplemental declaration of Mr. Wilson.

ORDER

THE COMMISSION ORDERS:

- 77 (1) T-Netix, Inc.'s, Motion for Summary Determination is denied.
- 78 (2) T-Netix, Inc.'s, Motion to Stay Discovery is denied.
- 79 (3) Complainants' Conditional Motion to Postpone Consideration of T-Netix, Inc.'s Motion for Summary Determination is denied.
- 80 (4) T-Netix, Inc.'s Motion to Strike the Declarations of Ms. Elliott and Ms. Janega is granted, while T-Netix's Motion to Strike the Complainants' Responsive Pleading in its entirety, or in the alternative paragraphs 1 through 9, is denied.
- 81 (5) The Motion of AT&T Communications of the Pacific Northwest, Inc., for Leave to Filed its Response to the Supplemental Declaration of Kenneth L. Wilson is granted.

82 **NOTICE TO PARTIES: This is an Interlocutory Order of the Commission. Administrative review may be available through a petition for review, filed within 10 days of the service of this Order pursuant to WAC 480-07-810.**

Dated at Olympia, Washington, and effective this 18th day of July, 2005.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION



ANN E. RENDAHL

Administrative Law Judge