[Service Date: June 1, 2010]

BEFORE THE
WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION

SANDY JUDD and TARA HERIVEL, Complainants, v. AT&T COMMUNICATIONS OF THE PACIFIC NORTHWEST, INC., and T-NETIX, INC., Respondents.	Docket No. UT-042022 **T-NETIX, INC. MOTION TO STRIKE PORTION OF AT&T REPLY OR, IN THE ALTERNATIVE, MOTION FOR LEAVE TO RESPOND**

Respondent T-Netix, Inc. ("T-Netix"), pursuant to WAC 480-07-375(1)(d) and through counsel, hereby moves to strike the portion of the AT&T Reply in Support of Petition for Administrative Review filed May 26, 2010 ("AT&T Reply") that relies on new exhibits that could have been supplied in its Petition for Administrative Review filed May 11, 2010 ("AT&T Petition") but was not. In the alternative, T-Netix respectfully requests leave to respond to that portion of the AT&T Reply. AT&T can have no credible excuse for improperly submitting new exhibits with its Reply other than to prevent T-Netix from responding and, as it had done in its Response to AT&T Petition for Administrative Review filed May 21, 2010 ("T-Netix Response"), demonstrating that ALJ Friedlander reached a sound decision, based in the record, that AT&T owns the P-III Platform and was the Operator Services Provider ("OSP") for the calls that Complainants allegedly received.

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STANDARD OF REVIEW

1. The Commission does not permit parties to submit new evidence in reply papers absent "some compelling reason." *Puget Holdings LLC*, Docket U-072375, Order No. 8 n.18, 2008 WL 5432243 at *96 (Dec. 30, 2008) (granting motion to strike) (quoting *Puget Holdings LLC*, Docket U-072375, Order No. 6 ¶ 10 (WUTC Nov. 5, 2008)). As the Commission has explained, "[t]here is a point at which due process requires that the record be closed so that the parties are not having to respond repeatedly to 'new' evidence and so that the Commission can do its job." Order No. 6 ¶ 8. The Commission will strike portions of a reply pleading that contain new arguments or evidence that could have been submitted with the party's initial papers. *Puget Holdings*, 2208 WL 5432243 at *96; Order No. 6 ¶ 10.

2. In addition, it is well settled in Washington courts that "issues raised for the first time in a reply brief" will not be considered. *White v. Kent Medical Center, Inc.*, 61 Wash. App. 163, 168, 810 P.2d 4, 8 (Wash. Ct. App. 1991) (citing, *inter alia*, *In re Marriage of Sacco*, 114 Wash. 2d 1, 5, 784 P.2d 1266 (1990)). The Commission can consider the guidance of Washington courts on evidentiary matters and motions practice. WAC 480-07-495(1) ("The presiding officer will consider, but is not required to follow, the rules of evidence governing general civil proceedings in nonjury trials before Washington superior courts when ruling on the admissibility of evidence."); WAC 480-07-375(2) ("The commission may refer to the Washington superior court rules for civil proceedings as guidelines for handling motions.").

ARGUMENT

I. THE COMMISSION SHOULD STRIKE PARAGRAPHS 38, 40, 44 AND EXHIBITS 39 TO 41 OF THE AT&T REPLY FOR IMPROPERLY RELYING ON EVIDENCE THAT COULD HAVE BEEN SUBMITTED WITH THE AT&T PETITION

3. AT&T submitted three documents with its Reply that have been in its possession for months and regard the lead argument in the AT&T Petition: that ALJ Friedlander should not

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have read the contract between AT&T and T-Netix[1] which states that AT&T took title to the P-III Platform. AT&T Reply ¶¶ 38, 40, 44 & Exs. 39 to 41.[2] Because the Contract so plainly states that, as ALJ Friedlander found, AT&T took title to the P-III (Initial Order ¶ 134), AT&T has resorted to the argument that she committed reversible error by even reading it, and rather should have held that T-Netix "admitted" that it owned the P-III. And because T-Netix amply disproved that it made any such "admission," and demonstrated that ALJ Friedlander was perfectly within her authority to read the Contract (T-Netix Response ¶¶ 9-21, 43-44), AT&T has submitted new Exhibits 39 to 41, which have been in AT&T's possession for a year or more, to attempt the unfounded argument again. This conduct is improper and warrants that the offending documents and the paragraphs of the AT&T Reply discussing them be stricken from the record.

4. AT&T can have no justification for submitting these documents on reply. These documents were provided to AT&T long ago.[3] These documents do not evidence some recent occurrence or event that has occurred since the AT&T Petition was filed. And they do not refute a point that T-Netix made in its Response, but rather attempt to buttress AT&T's previous argument that it does not own the P-III Platform. AT&T Petition ¶¶ 14-25.

5. The only reason AT&T could have for submitting these documents now is gamesmanship. T-Netix soundly refuted the AT&T Petition on the issues of its purported "admission" and of the Commission's lack of authority to consider the Contract in this proceeding, and thus AT&T was forced to try something new. As a direct result, AT&T has attempted to deprive T-Netix of its right to respond to AT&T's petition to reverse the Initial Order. The Commission does not and should not permit such conduct. *Puget Holdings*, 2008 WL 5432243, at *96; Order No. 6 ¶¶ 8-10.

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1 General Services Agreement Between AT&T Corp. and T-Netix, Inc. dated June 7, 1997 [HIGHLY CONFIDENTIAL] (AT&T Petition Tab 19; T-Netix Response Ex. C) (the "Contract").

2 New AT&T exhibits 34 to 38 respond to Complainants and not T-Netix, and thus T-Netix may not have cause to request that they be stricken. These exhibits are nonetheless improperly submitted and should not be accepted, nor should Paragraphs 24 to 27 of the AT&T Reply which discuss these documents.

3 Exhibit 39 is an order released January 9, 2009; Exhibit 40 is a data response provided February 13, 2009; Exhibit 41 is a motion filed August 27, 2009.

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6. In addition, the Commission should ensure that its forthcoming decision is not vulnerable to appellate scrutiny. Accepting AT&T's improperly filed Exhibits 39 to 41, and the arguments on which those documents rely, into the record could be viewed as procedural error or as an arbitrary and capricious action.

7. For all these reasons, the Commission should strike Paragraphs 38, 40, and 44 of the AT&T Reply as well as Exhibits 39 to 41.

II. THE COMMISSION SHOULD PERMIT T-NETIX TO RESPOND TO THE AT&T REPLY IN ORDER TO REFUTE EXHIBITS 39 TO 41 AND AT&T's NEW ASSERTIONS

8. AT&T has submitted additional exhibits to its Reply and re-cast its argument as to T-Netix's purported "admission" about the P-III Platform. Should the Commission deny T-Netix's request to strike these improper materials, T-Netix respectfully requests leave to respond to them. Its proposed Response is appended as Attachment A hereto.

9. In its Response to the AT&T Petition, T-Netix showed that ALJ Friedlander did not err in reading and relying upon the Contract between AT&T and T-Netix by which AT&T obtained the P-III Platform. T-Netix Response ¶¶ 7-21. The Superior Court order from which this proceeding arose expressly instructed the Commission to consider the relevant "contracts" in order to determine who acted as an OSP for purposes of Complainants' alleged calls. *Id.* ¶¶ 7, 15 & Ex. J.

10. Moreover, the Commission regularly reviews contracts involving telecommunications carriers that define their rights and duties. *Id.* ¶ 16 (citing *Qwest Corp. v. Level 3 Communs., LLC*, Docket UT-063038, Order No. 10, Final Order Upholding Initial Order, 2008 WL 2810028 (WUTC July 16, 2008); *McLeodUSA Communs. Svcs., Inc. v. Qwest Corp.*, Docket UT-063013, Order, 2007 WL 678433 (WUTC Feb. 16, 2007)).

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11. Finally, T-Netix refuted AT&T's lead argument on this point: that T-Netix already "admitted" that it owns the P-III Platform thus precluding ALJ Friedlander from even reading the Contract. *Id.* ¶¶ 43-46.[4]

12. T-Netix showed that the data responses on which the AT&T Petition relies could not be construed as an "admission." Those data responses expressly rely on and refer to four documents, and the Contract is not one of those documents. T-Netix Response ¶ 44. In addition, the data responses state that T-Netix "provided" the P-III Platform to AT&T; under any reasonable definition of "provide," T-Netix gave, or handed over, the P-III to AT&T. *Id.* ¶ 43. As such, the data responses do not "admit" that T-Netix took title to the P-III, and thus AT&T has provided the Commission no basis on which to reverse Finding of Fact 4 which states that, according to the Contract, AT&T took title to the P-III Platform. Initial Order ¶ 134.

13. Because T-Netix so soundly refuted AT&T argument as to P-III ownership, AT&T has filed three additional documents on this point that it could have appended to the AT&T Petition. AT&T has had these documents since 2009 and they regard exactly the same argument that AT&T made in its Petition. As such, its attempting to insert these documents into the record was improper.

14. In order to redress this improper act, the Commission should at a minimum permit T-Netix to file a brief response to the offending portion of the AT&T Reply. Specifically, T-Netix should be permitted to respond to the AT&T Reply and to explain why the new exhibits must not be construed as a T-Netix "admission." T-Netix respectfully submits that being permitted to reply to AT&T is the minimum that that Commission can do in order to prevent the record from being tainted and prevent prejudice to other parties.

15. For all these reasons, the Commission should grant T-Netix leave to respond to Paragraphs 38, 40, and 44, and Exhibits 39 to 41 of the AT&T Petition.

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[4] AT&T also raises new arguments based on documents it had appended but barely discussed in the AT&T Petition. For example, AT&T discusses a portion of the T-Netix Amended Motion for Summary Determination that it did not mention in the Petition. AT&T Reply ¶ 40. T-Netix would like the opportunity to respond to this new argument as well.

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CONCLUSION

16. For all these reasons, the Commission should strike Paragraphs 38, 40, and 44 of the AT&T Reply and Exhibits 39 to 41 thereto. In the alternative, at a minimum, the Commission should permit T-Netix to respond to that portion of the AT&T Reply. The proposed Response is appended hereto as Attachment A.

DATED this 1st day of June, 2010.

T-NETIX, INC.

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CERTIFICATE OF SERVICE

I hereby certify that I have this 1st day of June, 2010, served via e-filing a true and correct copy of the foregoing, with the WUTC Records Center. The original, along with the correct number of copies (9), of the foregoing document will be delivered to the WUTC, via the method(s) noted below, properly addressed as follows:

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I hereby certify that I have this 1st day of June 2010, served a true and correct copy of the foregoing document upon parties of record, via the method(s) noted below, properly addressed as follows:

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ATTACHMENT A

[Service Date: June 1, 2010]

BEFORE THE
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TRANSPORTATION COMMISSION

SANDY JUDD and TARA HERIVEL, Complainants, v. AT&T COMMUNICATIONS OF THE PACIFIC NORTHWEST, INC., and T-NETIX, INC., Respondents.	Docket No. UT-042022 **T-NETIX, INC. RESPONSE TO AT&T REPLY**

Respondent T-Netix, Inc. ("T-Netix"), pursuant to WAC 480-07-825 and through counsel, responds to that portion of the AT&T Reply in Support of Petition for Administrative Review filed May 26, 2010 ("AT&T Reply") that improperly relies upon and appends evidence that could have been submitted with the AT&T Petition for Administrative Review filed May 11, 2010 ("AT&T Petition"). AT&T plainly is attempting to insert new items into the Commission's review, having been soundly refuted by the T-Netix Response to AT&T Petition for Administrative Review filed May 21, 2010 ("T-Netix Response"). As T-Netix has explained in its Motion to Strike Portion of AT&T Reply or, in the Alternative, Motion for Leave to Respond filed contemporaneously herewith, the new items in the AT&T Reply, however improperly presented, cannot provide a basis for the Commission to reverse any finding made by ALJ Marguerite Friedlander in the Initial Order.

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SUMMARY

1. AT&T has inserted new exhibits and argument into its Reply that in no way bolster its attempt to obtain reversal of the Initial Order. The exhibits and related argument do not establish any "admission" that T-Netix owns the P-III Platform, and in fact they stand for exactly the opposite conclusion. AT&T simply has resorted to manufacturing a dispute of fact as a last-ditch effort to discredit ALJ Friedlander's decision. Review of the late-filed exhibits, and the T-Netix statements to which AT&T alludes in its Reply, very clearly and consistently state that AT&T owns the P-III Platform just as ALJ Friedlander concluded in Finding of Fact 4. The Initial Order thus should be affirmed.

ARGUMENT

I. NEW AT&T EXHIBITS 39 TO 41 DO NOT ESTABLISH ANY "ADMISSION" BY T-NETIX

2. ALJ Friedlander held in the Initial Order that AT&T owns the P-III Platform based on the plain language of the 1997 Contract between AT&T and T-Netix.[1] Initial Order ¶¶ 99-101, 134 (Finding of Fact 4). In its Petition, and because the Contract so clearly states that AT&T owns and took title to the P-III, AT&T attempts to divert the Commission's focus from the Contract to inconclusive data responses that provide no support for AT&T's appeal. New Exhibits 39 to 41 are just another salvo in that effort.

3. As an initial matter, the Commission should note that AT&T does not raise any theory of estoppel that binds either T-Netix or the Commission. T-Netix Response ¶ 45. Judicial and equitable estoppel require that some third party, or the tribunal, had actually relied on the averring litigant's statement, or estoppels will not attach. *Id.* (citing *Robinson v. City of Seattle*, 119 Wash. 2d 34, 82, 830 P. 2d 318, 345 (Wash. 1992) (*en banc*)). AT&T was correct

[1] General Agreement for the Procurement of Equipment, Software, Services, and Supplies Between T-Netix, Inc. and AT&T Corp. (Ex. T2C) [HIGHLY CONFIDENTIAL] (AT&T Tab 19) (T-Netix Response Ex. C).

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not to assert any form of estoppel here, because it cannot assert that it or the ALJ relied on anything T-Netix said.

4. T-Netix already has shown that the two data responses on which the AT&T Petition relies cannot be deemed "admissions." Both of those responses regard four documents, none of which are the Contract. T-Netix Response ¶ 44. Moreover, the data responses expressly state that T-Netix "provided" the P-III Platform to AT&T. As T-Netix showed, the word "provide" means to "furnish" — stated more simply, to hand over. *Id.* ¶ 43 (quoting Webster's II New College Dictionary at 890 (1986)). Thus, T-Netix did not "admit" that it owned or took title to the P-III Contract ***after*** T-Netix sold it. Rather, once T-Netix sold the P-III Platform to AT&T, and as the Contract states, AT&T owned it. Finding of Fact 4 thus should not be disturbed, and AT&T's Petition should be denied.

II. NEW AT&T EXHIBITS 39 TO 41 PROVIDE NO BASIS TO REVERSE THE INITIAL ORDER

5. Not only has AT&T failed to establish new Exhibits 39 to 41 as an "admission" by T-Netix, it has failed to explain how any of these documents could warrant reversal of any part of the Initial Order. For the Commission's ease of review, T-Netix will simply address each exhibit in turn:

6. **Exhibit 39** — Docket UT-042022 Order No. 14 (Jan. 9, 2009) — This document actually buttresses ALJ Friedlander's analysis in the Initial Order. She noted that the question whether T-Netix handed over title to the P-III Platform "would go far in proving that the Company's [T-Netix's] involvement was limited to non-OSP functions." Order ¶ 46. Indeed, T-Netix consistently has argued in this case that it acted as an equipment provider and not any type of telecommunications carrier or, more specifically, an OSP. ALJ Friedlander applied this same reasoning — ownership of the P-III — in the Initial Order at paragraphs 99 to 101. This exhibit thus further demonstrates the soundness of ALJ Friedlander's decision.

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7. **Exhibit 40** — T-Netix Second Suppl. Response to Data Request 15 (Feb. 13, 2009) — This document simply shows that T-Netix has no documents other than the Contract in its possession, custody, or control that shows the transfer of title in the P-III Platform from T-Netix to AT&T. The Contract being so clear on this point, one hardly needs additional documents to find that this transfer in fact took place. AT&T's outlandish statement that "[i]f the 1997 Agreement actually transferred ownership, as the ALJ mistakenly concluded and T-Netix now tries to claim, this response would have been false," AT&T Reply ¶ 38, is nonsensical. T-Netix already had produced the Contract as TNXWA 00741-00771 in 2005, and the Contract is crystal clear in its statement that AT&T would take title to the P-III Platform. T-Netix Response ¶ 41. That T-Netix could produce no additional documents in no way changes what the Contract states.

8. **Exhibit 41** — T-Netix Amended Motion for Summary Determination (Aug. 27, 2009) — AT&T relies on this document for the proposition that "T-Netix admitted that it owned the P-III equipment at all relevant times and operated it to transfer calls to the LECs." AT&T Reply ¶ 40 (citing T-Netix Amended Motion for Summary Determination ¶ 3 (Tab 41). That statement is false. T-Netix did not admit any such thing. Rather, Paragraph 3 of the T-Netix Amended Motion for Summary Determination states, in full:

> First, under the definition of OSP in WAC 480-120-021, the entity "providing a connection" to local or long-distance services from payphones is considered the operator service provider. At all of the correctional facilities in question, the facts make clear that the applicable T-Netix "platform" — a combination of hardware and software ***sold to AT&T*** pursuant to contract and operated by T-Netix ***on behalf of AT&T*** at the prisons — did not provide a "connection" for any calls. All inmate calls from these correctional institutions were sent directly by T-Netix to the central office of serving local exchange carrier (LEC) over plain old telephone service (POTS) lines ordered by T-Netix on behalf of AT&T; no switching or routing of inmate calls was performed by T-Netix. Thus, the LECs made the "connection" to local exchange services by switching local calls onto their own local exchange facilities/services and AT&T made the "connection" to long-distance services by switching interLATA calls, at its point of presence (POP), onto AT&T long-distance facilities/services.

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(emphasis in original). This paragraph states that the P-III was "sold to AT&T" and operated "on behalf of AT&T." *Id.* Thus, not only has AT&T improperly submitted this new exhibit, but AT&T has misrepresented it as well. *See also id.* ¶ 11 (P-III is "the equipment provided by T-Netix to AT&T ... T-Netix sold software, equipment and maintenance services 'to' AT&T pursuant to a 1997 contract").

9. In addition, AT&T in its Reply attempts to support its assertion that T-Netix "admitted that it owned the P-III equipment" by citing to a portion of the first T-Netix Motion for Summary Determination, filed July 28, 2005 (AT&T Tab 25), that AT&T never discussed in the Petition. AT&T Reply ¶ 40. It is another new argument, and again misrepresents T-Netix's statement. AT&T relies on the following two paragraphs to show what T-Netix "admitted," but they say nothing of the sort:

> The Schott Affidavit explains the limited role that T-Netix's platform plays in inmate calls. It takes the calling inmate's name, outpulses the call to the LEC trunk which then reaches and is routed by the LEC switch, and essentially places the inmate on hold pending authorization. Schott Aff. ¶ 12g. When the called party picks up, the T-Netix platform re-plays the inmate's name as the calling party and requests authorization. If he called party authorizes the call [by taking a particular action — REDACTED FOR CONFIDENTIALITY], the T-Netix platform releases the hold and allows the audio path to go through. *Id.* ¶ 12g-h.
>
> Completion of the call is performed by the LEC switch, which routes the call, and any other switch in the call path that ensures that the call reaches the called party. All signaling functions required to complete this process are enabled by the LEC switch, and not by T-Netix. Thus, the LEC is the primary party responsible for "arranging for ... completion ... of an intrastate call" under WAC 480-120-021, rendering it the OSP as well as the call's carrier.

10. Nothing in these paragraphs even addresses the ownership issue, let alone could be construed as an "admission" by T-Netix that it owns the P-III Platform. Moreover, this same T-Netix pleading elsewhere states **"T-Netix sold its platform to AT&T"** and was one of a few vendors that would **"provide inmate OSPs with a proprietary platform that could be programmed"** to provide automated operator

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services. T-Netix Motion for Summary Determination ¶¶ 8-9 (AT&T Tab 25) (emphasis added). Contrary to AT&T's persistent assertions, T-Netix did not "admit" ownership.

11. There is no material issue of disputed fact here as AT&T, for its last effort, claims is present. AT&T Reply ¶ 45. The Contract establishes that AT&T took title to the P-III, and T-Netix has stated consistently that it "provided" and "sold" the P-III to AT&T. As ALJ Friedlander correctly observed, "the only contract we have clearly demonstrates that it was AT&T who purchased title to the P-III platform." Initial Order ¶ 101. AT&T's self-serving denials, regardless of how often repeated, cannot in the face of clear evidence manufacture a dispute that would require reversal of ALJ Friedlander.

CONCLUSION

12. For all these reasons, as well as those expressed in the T-Netix Response to AT&T Petition for Administrative Review, the Commission should deny the AT&T Petition.

DATED this 1st day of June, 2010.

T-NETIX, INC.

By: _____

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____ Overnight Mail (UPS)
____ Facsimile (312) 258-5600
__x__ Email (DSnodgrass@schiffhardin.com)

On Behalf Of AT&T Communications:

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Confidentiality Status: Highly Confidential

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On Behalf Of Complainants :

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__x__ Email (rspoonemore@sylaw.com)

Courtesy copy to:

Marguerite Friedlander
Washington Utilities and Transportation Commission
1300 S Evergreen Park Drive SW
PO Box 47250
Olympia WA 98504-7250

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____ U.S. Mail (first-class, postage prepaid)
____ Overnight Mail (UPS)
____ Facsimile (360) 586-8203
Email (Word version)
__x__ (mfriedla@utc.wa.gov)

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