

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

SANDY JUDD, and TARA HERIVEL,

Complainants,

v.

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

Respondents.

Docket No. UT-042022

**AT&T'S RESPONSE TO COMPLAINANTS' MOTION TO FILE A REPLY IN
SUPPORT OF THEIR PETITION FOR ADMINISTRATIVE REVIEW**

SUMBITTED BY:

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

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1. AT&T, by its attorneys, respectfully submits this Response to Complainants' Motion to File a Reply in Further Support of their Petition for Administrative Review. AT&T does not object to Complainants' attempt to reply to T-Netix's argument that Complainants only made intra-LATA calls and those calls were exempt from any rate disclosure obligations (paragraphs 2-12 of the proposed reply). In the second half of Complainants' proposed reply (paragraphs 13-24), however, Complainants attempt, yet again, to argue that they should not be collaterally estopped from claiming that a party can be found liable for "contracting with" an OSP. That portion of the reply is not appropriate because it does not address new matters raised in any answer that could not have been reasonably anticipated.

I. COMPLAINANTS' PROPOSED REPLY REGARDING INTRA-LATA CALLS ONLY CONFIRMS THAT AT&T SHOULD NOT BE DEEMED THE OSP.

2. In the first portion of their proposed reply, Complainants respond to T-Netix's argument that it does not matter who owned the P-III Premise platform between 1996 and 1997 because during that time period Complainants only made intra-LATA calls that were excused from rate disclosures under the LEC regulatory exemption. Not surprisingly, Complainants argue that the intra-LATA calls remain at issue because the LEC exemption does not apply if the OSP is not a LEC. *See* Complainants' Proposed Reply at ¶¶4-11.

3. Complainants' argument that intra-LATA calls remain at issue in this litigation only reinforces why AT&T should not be deemed the OSP here. As Complainants point out, from a "functional point of view," the OSP should be the person or entity that "controls the consumer interface," and "is capable of providing rate information to the end user." *Id.* at ¶7. AT&T never touched any of those local or intra-LATA calls and had no contact whatsoever with the called or calling parties for those calls. T-Netix, in contrast, owned and operated the consumer interface, the P-III Premise platform, and dealt directly with each and every end user –

for local, intra-LATA and inter-LATA calls – through the verbal prompts that it provided. Each time an inmate picked up the phone to place a call, regardless of call type, that inmate dealt directly with T-Netix. Because T-Netix owned the P-III Premise platform, it was able to provide the operator services for each call and is properly identified as the OSP.

II. THE DECISION IN *STATE V. DORSEY* DOES NOT RAISE ANY NEW MATTER OR JUSTIFY A REPLY.

4. In the second half of their proposed reply, Complainants attempt to further address their argument that a party can be held liable for “contracting with” an OSP, a theory which the ALJ correctly recognized Complainants were collaterally estopped from pursuing because they had already litigated that issue all the way up to the Washington Supreme Court and lost. Initial Order at ¶¶112-16. In raising that issue again in the proposed reply, Complainants are solely attempting to reargue that the collateral estoppel doctrine does not apply. Complainants’ Proposed Reply at ¶¶20-24. They are not responding to anything new. The Commission’s rules preclude the use of a reply for that purpose.

5. WAC 480-07-825(5)(b) states that a party “may petition for leave to reply, citing new matters raised in the answer and stating why those matters were not reasonably anticipated and why a reply is necessary.” Thus, Complainants must prove three elements for their reply brief to be accepted: (1) that new matters were raised in the answer; (2) that those matters were not reasonably anticipated, and (3) that a reply is necessary.

6. Here, Complainants attempt to justify this portion of their reply by claiming that AT&T cited one new case in support of its argument for collateral estoppel. Complainants’ Motion to File a Reply at ¶3. That case – *State v. Dorsey*, 40 Wash. App. 459, 464 n.2, 698 P.2d 1109 (1985) – however, raised nothing new. AT&T cited *Dorsey* solely as authority for the uncontroversial point that “there is no requirement that the previously-litigated issue involve all

of the same parties.” *See* AT&T Reply in Support of Petition for Administrative Review at ¶30. Complainants already acknowledged this very point in their own Petition for Administrative Review. In their Petition, Complainants identified four elements for the collateral estoppel doctrine to apply:

(1) identical issues, (2) a final judgment on the merits; (3) the party ***against whom the plea is asserted*** must have been a party to or in privity with a party to the prior adjudication and (4) application of the doctrine must not work an injustice on the party against whom the doctrine is applied.

Complainants’ Petition for Administrative Review at ¶57 (emphasis added). The third element that Complainants set forth, thus, made clear that the previously litigated issue did not need to involve all the same parties. As Complainants previously recognized, the collateral estoppel doctrine applies whenever the party against whom the doctrine is being asserted – in this instance, the Complainants – was a party to the prior adjudication.

7. In reality, Complainants want to reply solely so they can now attempt to distort the collateral estoppel doctrine by falsely implying that collateral estoppel only applies if AT&T can show that it “won” the case in state court. Complainants’ Proposed Reply at ¶¶22-23. That is not correct. Complainants are prevented from relitigating the “contracting with” argument not because *AT&T won* in state court, but because *Complainants lost*. Complainants were a party to the prior proceeding, they had an opportunity to litigate the “contracting with” issue, and they lost. Under collateral estoppel, AT&T was not required to be a party and it was not required to have “won.” The purpose of collateral estoppel is to prevent Complainants from continuing to litigate the same issue over and over, which is precisely what they are attempting to do here.

8. As explained in AT&T’s reply brief, and as the ALJ correctly determined, Complainants tried and lost the “contracting with” issue before an *en banc* panel of the Washington Supreme Court, and the LEC defendants (Verizon, Qwest, and CenturyTel) were

dismissed from the case. *See Judd v. American Tel. and Tel. Co.*, 152 Wash.2d 195, 95 P.3d 337 (2004) (en banc); AT&T's Reply in Support of its Petition for Administrative Review at ¶¶22-33; and Initial Order at ¶¶114-15. The fact that AT&T also happened to be a respondent in the litigation at the time of that decision makes no difference. Complainants would be collaterally estopped from re-raising this argument regardless of whether AT&T was a party.

CONCLUSION

9. For all the foregoing reasons, AT&T respectfully requests that the Commission deny the Complainants' Motion to File a Reply in Further Support of their Petition for Administrative Review and disregard at least ¶¶13-24 of Complainants' proposed reply brief.

Dated: June 7, 2010

SUBMITTED BY:

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CERTIFICATE OF SERVICE

Pursuant to WAC 480-07-150, I hereby certify that I have this day, June 7, 2010, served this document upon all parties of record by e-mail and Federal Express overnight delivery at the e-mail addresses and mailing addresses listed below:

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Pursuant to WAC 480-07-145, I further certify that I have this day, June 7, 2010, filed MS Word and PDF versions of this document by e-mail, and twelve copies of this document by Federal Express, with the WUTC at the e-mail address and mailing address listed below:

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Pursuant to the Prehearing Conference Order 08 and Bench Request Nos. 5 & 6, I further certify that I have this day, June 7, 2010, provided a courtesy copy of this document, in MS Word, to ALJ Friedlander by e-mail at the following e-mail address: mfriedla@utc.wa.gov.

Dated: June 7, 2010

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