

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 FOR  
LEAVE TO FILE REPLY IN  
SUPPORT OF ITS 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 and through counsel, hereby moves for leave to file a brief reply in support of its Motion to Strike Portion of AT&T Reply or, in the Alternative, Motion for Leave to Respond, filed June 1, 2010 (“T-Netix Motion”).

**ARGUMENT**

1. T-Netix has moved to strike Paragraphs 38, 40, and 44 of the AT&T Reply in Support of Its Petition for Administrative Review, filed May 26, 2010 (“AT&T Reply”) and Exhibits 39 to 41 thereto. In the alternative, T-Netix moved for leave to respond to that portion of the AT&T Reply. Its proposed Reply was appended to the T-Netix Motion.

2. On June 7, 2010, AT&T filed its Response to T-Netix, Inc.'s Motion to Strike or, in the Alternative, Motion for Leave to Respond ("AT&T Response"). The AT&T Response is more accurately characterized as a further memorandum in support of the AT&T Petition for Administrative Review, but does contain a few paragraphs of responsive argument to which a brief reply is required. Specifically, AT&T makes assertions regarding the nature of the AT&T Reply to which T-Netix must respond in order to clarify the record. In addition, AT&T attempts to distinguish the authority on which the T-Netix Motion relies, and thus warrants a response. T-Netix will refrain from responding to the remaining 27 paragraphs of the AT&T Response which comprise what is now AT&T's third attempt to challenge Finding of Fact 4 of the Initial Order.

3. T-Netix must note that the AT&T Response now exacerbates the problem by inserting *more documents* into the discussion, new Exhibits 1 and 2, in addition to the other improper Exhibits 39 to 41. These two documents refute nothing in the T-Netix Motion, but rather plainly are intended as yet further attempts to bolster the AT&T Petition. This conduct must cease.

4. The parties to this case previously have been granted leave to file reply memoranda in support of motions. On December 24, 2008, ALJ Friedlander permitted Complainants, AT&T, and T-Netix to file reply memoranda in support of various motions, finding that "the replies each Party wishes to file would provide assistance to the Commission in resolving the Discovery Motions." *Judd v. AT&T*, Docket UT-042022, Order No. 13, 2008 WL 5380264 (WUTC Dec. 24, 2008). Here, T-Netix wishes to file a Reply that will correct the record and assist the Commission in understanding why Paragraphs 38, 40, and 44 and Exhibits 39 to 41 of the AT&T Reply are improper.

5. The Commission also accepted a reply memorandum in support of a motion to strike in Docket UT-043007, *Second Six-Month Review of Qwest Corporation's Performance Assurance Plan*, Order No. 12, 2004 WL 3419383 (WUTC Nov. 15, 2004) (granting Qwest motion to strike testimony).

6. The proposed T-Netix Reply in Support of its Motion to Strike Portion of AT&T Reply or, in the Alternative, Motion for Leave to Respond is appended as Attachment A hereto.

**CONCLUSION**

7. For all these reasons, the Commission should permit T-Netix to file a brief reply in support of its Motion to Strike Portion of AT&T Reply or, in the Alternative, Motion for Leave to Respond.

DATED this 8th day of June, 2010.

T-NETIX, INC.

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## CERTIFICATE OF SERVICE

I hereby certify that I have this 8th 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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# ATTACHMENT A

6 - T-NETIX, INC. MOTION FOR LEAVE TO FILE REPLY IN SUPPORT  
OF MOTION TO STRIKE PORTION OF AT&T REPLY OR, IN THE  
ALTERNATIVE, MOTION FOR LEAVE TO RESPOND

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[Service Date: June 8, 2010]

BEFORE THE  
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Respondent T-Netix, Inc. ("T-Netix"), pursuant to WAC 480-07-375 and through counsel, hereby files this reply memorandum in support of its Motion to Strike Portion of AT&T Reply or, in the Alternative, Motion for Leave to Respond, filed June 1, 2010 ("T-Netix Motion"). The T-Netix Motion requests that Paragraphs 38, 40, and 44 AT&T Reply in Support of Petition for Administrative Review, filed May 26, 2010 ("AT&T Reply") be stricken, along with Exhibits 39 to 41 thereto. AT&T concedes that these Exhibits were not part of the AT&T Petition, and in fact now requests that the record be re-opened to accept Exhibit 40. AT&T's assertion that these documents are necessary to respond to Complainants' opposition is belied by its own papers. AT&T thus fails to explain why the T-Netix Motion should not be granted.

1 - T-NETIX, INC. REPLY IN SUPPORT OF ITS MOTION TO STRIKE  
PORTION OF AT&T REPLY OR, IN THE ALTERNATIVE, MOTION  
FOR LEAVE TO RESPOND

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## ARGUMENT

### **I. AT&T ADMITS THAT EXHIBITS 39 TO 41 WERE IN ITS POSSESSION BUT NOT APPENDED TO THE AT&T PETITION FOR ADMINISTRATIVE REVIEW**

1. AT&T concedes, as it must, that Exhibits 39 to 41 were not part of the AT&T Petition. AT&T Response to T-Netix, Inc.'s Motion to Strike or, in the Alternative, Motion for Leave to Respond ¶ 6 (filed June 7, 2010) ("AT&T Response"). AT&T also concedes that these documents have been in its possession for months. *Id.* In fact, it now moves the admission of Exhibit 40 without any explanation as to why that document was not appended to the AT&T Petition.<sup>1</sup> AT&T Response ¶ 6 & n.3. Thus, AT&T admits the operative facts of the T-Netix Motion (Paragraphs 3 and 4).

2. As the T-Netix Motion explains, the Commission previously has instructed litigants that "there 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 . . . ." T-Netix Motion ¶ 1 (quoting *Puget Holdings, LLC*, Docket U-072375, Order No. 6 ¶ 8 (WUTC Nov. 5, 2008)). AT&T's attempt to distinguish *Puget Holdings* is unavailing: the point of that order is to emphasize that the ceaseless filing of new documents in support of motions is "poor practice," Order No. 6 n.1, particularly where, as here, the filing party fails to make a "separate motion specifically requesting permission to supplement the record," *id.*

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<sup>1</sup> AT&T states that this document, a supplemental T-Netix data response from February 2009, is "now essential to a fair determination" of the AT&T Petition. *Id.* n.3. But the document regards the very same purported "admission" that is featured as the first argument in the AT&T Petition (paragraphs 14 to 17) and responds to the very same Data Request No. 7 for which two previous T-Netix responses were submitted as Tab 16 and Tab 17 of the AT&T Petition.



3. Exhibits 39 to 41 are admittedly new and, as shown in Section II below, are used by AT&T to restate, as if for the first time, the argument that Finding of Fact 4 of the Initial Order is incorrect. As such, AT&T had no valid basis for submitting them on reply.

4. Moreover, the AT&T Response typifies the harm of which the Commission warned in *Puget Holdings*. It appends *two more documents* regarding Finding of Fact 4 that do not refute the T-Netix Motion, but rather are yet another attempt to support the AT&T Petition substantively. Like Exhibits 39 to 41, AT&T has had these documents for months and only now attempts to insert them into the Commission's review of the Initial Order. At this rate, the briefing on the AT&T Petition may never close. The AT&T Response thus itself demonstrates why the T-Netix Motion should be granted.

5. 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. CONTRARY TO ITS ASSERTION, AT&T DOES NOT RELY ON EXHIBITS 39 TO 41 TO REFUTE COMPLAINANTS' PETITION FOR REVIEW**

6. AT&T attempts to justify inserting additional documents into the AT&T Petition by asserting that “[a]ll the paragraphs and exhibits T-Netix seeks to strike are relevant to Complainants’ challenges to the ALJ’s Initial Order ... .” AT&T Response ¶ 3. That assertion is not true.

7. Complainants seek additional relief in the form of a finding that T-Netix owned the P-III Platform prior to the 1997 Contract.<sup>2</sup> Complainants’ Answer to AT&T Petition for Review and Petition for Review ¶¶ 46-47 (filed May 21, 2010). T-Netix has explained why that request is both irrelevant and barred as a matter of law. T-Netix Response to Complainants’

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<sup>2</sup> 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).

3 - T-NETIX, INC. REPLY IN SUPPORT OF ITS MOTION TO STRIKE PORTION OF AT&T REPLY OR, IN THE ALTERNATIVE, MOTION FOR LEAVE TO RESPOND

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Petition for Administrative Review ¶¶ 7-20 (May 21, 2010). But contrary to AT&T's assertion, Paragraphs 38, 40, and 44 and Exhibits 39 to 41 of the AT&T Reply do not regard that issue. Rather, those portions of the AT&T Reply again go to the underlying argument of the AT&T Petition — that T-Netix purportedly owned the P-III Platform despite the clear language of the 1997 Contract.

8. It is stunning that AT&T has attempted to characterize its argument as being responsive to Complainants. Those paragraphs and exhibits speak only to whether “the 1997 Agreement actually transferred ownership,” AT&T Reply ¶ 38, and what the “1997 Agreement required T-Netix” to do, *id.* ¶ 44. Complainants are never addressed in the offending paragraphs, nor is the pre-1997 Contract time period.

9. The portion of the AT&T Reply that T-Netix seeks to strike is not a responsive argument. It is a continuation of an argument from the AT&T Petition, and it reads as if AT&T is making the argument for the first time. As such, it should have been in the AT&T Petition in order that T-Netix and Complainants could respond appropriately and briefing on that petition could close.

10. As T-Netix noted in its motion for leave to file this Reply, filed contemporaneously herewith, most of the AT&T Response — all but five paragraphs — is substantive argument in support of the AT&T Petition. AT&T Response ¶¶ 7-33. Indeed, it includes two more documents that were not but could have been included in the AT&T Petition. T-Netix will refrain from responding to that argument, save to note that it provides no support for overturning any part of the Initial Order.

11. Because they are non-responsive and could have been included in the AT&T Petition, the Commission should strike Paragraphs 38, 40, and 44, and Exhibits 39 to 41 of the AT&T Reply.

**CONCLUSION**

12. 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 thereto.

DATED this 8th day of June, 2010.

T-NETIX, INC.

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