

**SIRIANNI YOUTZ
MEIER & SPOONEMORE**

November 16, 2004

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STATE OF WASH.
UTIL. AND TRANSP.
COMMISSION

Carole Washburn
Executive Secretary
WASHINGTON UTILITIES & TRANSPORTATION COMMISSION
P.O. Box 47250
Olympia, WA 98504-7250

RE: *Judd, et al., v. AT&T, et al.*
King County Superior Court Cause No. 00-2-17565-5 SEA

Dear Ms. Washburn:

On behalf of my clients Sandy Judd and Tara Herivel, I write to request a prehearing conference in a matter that has been referred to the Commission by the King County Superior Court under the doctrine of primary jurisdiction. In what follows, I will provide a brief overview of the case and its procedural history, as well as a description of the issues that have been referred to the Commission for adjudication. I have attached a number of exhibits that are useful in understanding the background of the litigation and the issues before the Commission.

OVERVIEW AND PROCEDURAL HISTORY

This case is a putative class action under Washington's Consumer Protection Act. The lawsuit seeks damages on behalf of a class of persons who accepted collect telephone calls from inmates incarcerated in Washington state prisons. In particular, plaintiffs contend that American Telephone & Telegraph Company (AT&T) and T-Netix, Inc. failed to disclose rates to the recipients of inmate-initiated collect calls, thereby violating WUTC regulations requiring such disclosure. Under state law, a violation of these regulations amounts to a *per se* violation of the Consumer Protection Act.

Plaintiffs filed this action in King County Superior Court in the summer of 2000 against five telecommunications companies: GTE Northwest (now Verizon), US West (now Qwest), Centurytel Telephone Utilities, Inc., T-Netix, and AT&T. *Exh. A* (First Amended Complaint). All five defendants immediately moved to dismiss the complaint, or, in the alternative, to stay the matter while the WUTC determined whether the companies violated the Commission's regulations related to rate disclosure. Judge Kathleen Learned dismissed outright three of the five defendants (Verizon, Qwest, and Centurytel).

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Plaintiffs appealed the dismissal of Verizon, Qwest and Centurytel. In the spring of 2003, Division One of the Washington Court of Appeals affirmed the trial court's dismissals. The Washington Supreme Court granted review and, in an opinion issued on July 29, 2004, affirmed the dismissals. *Exh. B*. These three defendants are now completely out of the case.

The two other defendants – AT&T and T-Netix – remain in the case. The trial court invoked the doctrine of primary jurisdiction, referring certain issues to the WUTC and staying further proceedings until the WUTC completes an adjudicative proceeding. The issues are described in detail below and arise solely out of intrastate calls.¹

FACTUAL BACKGROUND

Since at least 1992, the Washington State Department of Corrections has contracted with private operator service providers (OSPs) to provide "0+" operator services on the payphones used by prison inmates. Inmates are required to use the "0+" operator service provider assigned by contract to the prison from which the call is placed, and may place only collect calls.

At all times pertinent to this lawsuit, AT&T held an exclusive contract to provide long-distance and operator services to Washington State prisons. *Exh. C* (copy of contract and addenda). AT&T hired various subcontractors to help it carry out its contractual obligations to the Department of Corrections at various prisons. One of these subcontractors was T-Netix.

Plaintiff Sandy Judd received and paid for many intrastate long-distance collect calls from Washington State prison inmates, most often from her husband, Paul Wright, who was incarcerated in the Washington State Reformatory at Monroe and other Washington prisons.

Plaintiff Tara Herivel received and paid for intrastate long-distance collect calls from Washington State prison inmates. Specifically, Ms. Herivel received and paid

¹ One of the three named plaintiffs, Zuraya Wright, made only interstate calls. Because the issues referred to the WUTC involve intrastate calls only, this adjudicative proceeding involves only the interests of the other two named plaintiffs, Sandy Judd and Tara Herivel.

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for phone calls from Paul Wright in connection with articles she published about the prison system.

STATUTORY AND REGULATORY BACKGROUND

Plaintiffs' claims are based on statutes enacted in 1988 that require companies providing long-distance operator services at public telephones to disclose rates to consumers. RCW 80.36.520 directed the WUTC to issue regulations requiring any company operating as or contracting with an "alternate operator service company" to disclose its identity and the rate charged to a consumer:

The utilities and transportation commission shall by rule require, at a minimum, that any telecommunications company, operating as or contracting with an alternate operator services company, assure appropriate disclosure to consumers of the provision and the rate, charge or fee of services provided by an alternate operator services company.

The statute defines "alternate operator services company" (AOS company) to mean "a person providing a connection to intrastate or interstate long-distance services from places including, but not limited to, hotels, motels, hospitals, and customer-owned pay telephones." RCW 80.36.520 (*Exh. D*). Prisons are among the places covered by the statute. See WAC 480-120-141(2)(b) (1991).

The Legislature sought to give the statute some teeth by making a violation of these provisions a *per se* violation of the Consumer Protection Act. RCW 80.36.530 (*Exh. D*). Damages are presumed to be \$200 per call plus the cost of the service. *Id.*

In 1991, the WUTC issued regulations implementing the disclosure requirements. See WAC 480-120-141 (1991). The regulations contained a slightly different definition of AOS company:

[A]ny corporation, company, partnership or person other than a local exchange company providing a connection to intrastate or interstate long-distance or to local services from locations of call aggregators. The term "operator services"

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in this rule means any intrastate telecommunications service provided to a call aggregator location that includes as a component any automatic or live assistance to a consumer to arrange for billing or completion, or both, of an intrastate telephone call through a method other than (1) automatic completion with billing to the telephone from which the call originated, or (2) completion through an access code use by the consumer with billing to an account previously established by the consumer with the carrier.

WAC 480-120-021 (1991) (*Exh. E*).

Consistent with the statute, the regulations required AOS companies to disclose rates for a particular call "immediately, upon request, and at no charge to the consumer." WAC 480-120-141(5)(iii)(a) (1991) (*Exh. E*). The operator was required to provide "a quote of the rates or charges for the call, including any surcharge." *Id.*

In 1999, the WUTC amended the regulations. Rather than use the term "alternate operator services company," the new regulation tracked federal law and replaced the term AOS company with the term "operator services provider" or OSP. *See* WAC 480-120-021 (1999) (*Exh. F*). The substantive definition, however, remained unchanged.²

Disclosure requirements were strengthened in the 1999 regulation. The 1999 rules required automatic rate disclosure that is activated by pressing keys on the telephone keypad:

Before an operator-assisted call from an aggregator location may be connected by a presubscribed OSP, the OSP must verbally advise the consumer how to receive a rate quote, such as by pressing a specific key or keys, but no more than two keys, or by staying on the line . . . This rule applies to all calls from pay phones or other aggregator locations, including prison phones

² The 1999 regulation deleted the exception for "local exchange carriers" in the 1991 regulation. That change should have no effect on issues relating to AT&T or T-Netix, as neither is a local exchange carrier.

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WAC 480-120-141(2)(b) (1999) (*Exh. G*).

Both the 1991 and 1999 regulations are pertinent to the lawsuit because plaintiffs seek to recover damages for disclosure failures dating back to 1996.

ISSUES BEFORE THE WUTC

With regard to AT&T, the specific question to be determined by the WUTC is this: "[W]hether or not they [AT&T] are considered by the agency to be an OSP under the contracts at issue herein and if so if the regulations have been violated." *Exh. H*. In its order referring this issue to the WUTC, the trial court added that it retained jurisdiction over plaintiffs' Consumer Protection Act claim and that "class and damages issues" were stayed pending a decision from the WUTC. *Id.*

With regard to T-Netix, the court asked the WUTC "to determine if T-Netix has violated WUTC regulations." *Exh. I*. As with AT&T, the court stayed plaintiffs' Consumer Protection Act claims and class and damages issues. *Id.* While the court's request that the WUTC determine whether T-Netix has "violated WUTC regulations" appears vague on its face, the context is similar to the AT&T issue: in order to determine whether T-Netix violated WUTC regulations, the agency must determine whether T-Netix acted as an "operator service provider."

This is clear when one reviews the arguments of AT&T and T-Netix leading up to the court's referral of issues to the agency. Both companies argued that they should be dismissed from the lawsuit because they did not provide operator services. *Exh. J* (page 398); *Exh. K* (page 315 fn.4). Both companies also argued that the trial court should refer issues relating to intrastate telephone service to the WUTC. *Id.* at 400; *id.* at 321.

If the WUTC concludes that AT&T and/or T-Netix acted as an "operator services provider" for inmate calls, it must then determine whether these companies violated agency regulations by failing to disclose rate information. With respect to the 1991 regulation (in effect until January 1999), the agency would be required to determine whether recipients of inmate-initiated telephone calls handled by AT&T and/or T-Netix were able to obtain rate information "immediately, upon request, and at no charge to the consumer." WAC 480-120-141(5)(iii)(a) (1991) (*Exh. E*). Under the regulations, operators were required to provide "a quote of the rates or charges for the

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call, including any surcharge." *Id.* If these services were not available, the 1991 regulation was violated.

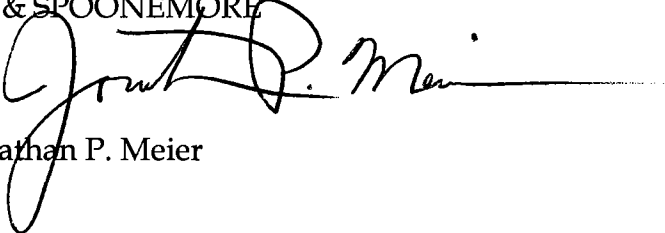
With respect to the 1999 regulation, the agency would be required to determine whether AT&T and/or T-Netix "verbally advise[d] the consumer how to receive a rate quote, such as by pressing a specific key or keys, but no more than two keys, or by staying on the line." WAC 480-120-141(2)(b) (1999) (*Exh. F*). If these services were not available, the 1999 regulation was violated.

CONCLUSION

Plaintiffs request a prehearing conference at the Commission's earliest convenience to discuss issues relating to discovery, scheduling, and other issues. If additional information would be helpful in advance of the conference, please let me know as soon as possible. Thank you for your assistance in this matter.

Very truly yours,

SIRIANNI YOUTZ
MEIER & SPOONEMORE


Jonathan P. Meier

JPM:tal

Enclosures

cc (w/encs.):

Clients (*Sandy Judd, Zuraya Wright, Tara Herivel*)
Donald H. Mullins (*for T-Netix*)
Charles H.R. Peters (*for AT&T*)
Kelly Twiss Noonan (*for AT&T*)