

[Service Date: October 27, 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 AND/OR EXCLUDE
EXHIBIT A TO COMPLAINANTS'
RESPONSE TO BENCH REQUEST
NO. 7**

Respondent T-Netix, Inc. ("T-Netix"), pursuant to WAC 480-07-375(1)(d) (evidentiary motions) and through counsel, hereby moves to strike and/or exclude Exhibit A to Complainants' Response to Bench Request No. 7 filed October 20, 2010. Exhibit A is purported to be portions of telephone bills received by Columbia Legal Services, an entity that is not and never has been a party to this proceeding or to the underlying civil action. Complainants have never submitted or produced these documents in any phase of this case, and plainly are attempting to salvage their case by adding new parties that may possibly have received calls that were subject to the requirements of WAC 480-120-141. It is well settled under Commission precedent and in this proceeding, via an order issued by Administrative Law Judge Ann Rendahl in 2005, that Complainants are prohibited from expanding the scope of this case in this manner.

1 - T-NETIX, INC. MOTION TO STRIKE EXHIBIT A TO COMPLAINANTS'
RESPONSE TO BENCH REQUEST NO. 7

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STANDARD OF REVIEW

1. Parties are not permitted to submit new evidence once a case reaches the full Commission absent “some compelling reason.” *In re Joint Application of Puget Holdings LLC & Puget Sound Energy, Inc. For an Order Authorizing Proposed Transaction*, No. U-072375, Granting Motions to Strike, Order No. 6, 2008 WL 4844060 (Nov. 5, 2008) (granting motion to strike). 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.” *Id.*, Order No. 6, 2008 WL 4844060, at *2.

2. In addition, the Commission will strike evidence that is not within the scope of the proceeding before it. *AT&T v. Verizon*, No. UT-020406, Fifth Supplemental Order ¶ 35, 2003 WL 24127683 (Feb. 2003). In *AT&T v. Verizon*, AT&T challenged Verizon’s access rates as being excessive and above their costs, and also alleged that Verizon was charging lower access rates to its long-distance affiliate than the access rates assessed on other interexchange carriers. In response, Verizon sought to introduce expert testimony to support its defense that it would employ “rate rebalancing” to offset access charges. Public Counsel moved to strike that testimony as being outside the scope of the issues raised in AT&T’s complaint, and the Commission granted that motion, stating that “[n]o rate issues are presented, and none will be addressed.” Fifth Supplemental Order ¶ 35.

3. Though WAC 480-087-830 permits parties in contested proceedings to move to reopen the record in order to submit new evidence, Complainants have not even alluded to this rule in their Responses, let alone made such a motion. Further, motions to reopen must demonstrate that the new evidence “is essential to a decision and that was unavailable and not reasonably discoverable with due diligence at the time of the hearing or for any other good and sufficient cause.” It stretches credulity to suppose that Complainants could not have unearthed telephone bills from January and February 2000 during their previous discovery efforts. Nor

does any “good and sufficient cause” appear likely to justify Complainants’ eleventh-hour evidence regarding an entity that was never a party to this dispute.

ARGUMENT

I. THE COMMISSION SHOULD STRIKE EXHIBIT A AS BOTH IRRELEVANT AND AN IMPROPER ATTEMPT TO EXPAND THE SCOPE OF THIS CASE

4. This proceeding commenced in November 2004, and stems from a lawsuit filed August 1, 2000. For Complainants now to attempt to introduce new parties into this case is improper and is a tactic that already has been rejected here. Having made this attempt, Complainants appear to concede that neither Ms. Judd nor Ms. Herivel has suffered any violation of WAC 480-120-141, and thus a new party is needed to salvage this case.

5. Exhibit A, according to the Declaration of Complainants’ counsel, Chris Youtz, is a compilation of “portions of” telephone bills received by Columbia Legal Services in January and February 2000. Decl. of Chris Youtz Re: Response to Bench Request No. 7 ¶ 2 (Oct. 20, 2010).¹ Columbia Legal Services purportedly “receives several collect calls from inmates in Washington prisons each month.” *Id.* Columbia Legal Services is not and never has been a party to this proceeding or to the underlying civil case, and Complainants do not even attempt to establish any possible connection that this entity could have to their existing case.

6. Complainants are well aware that they may not add new parties, or evidence regarding non-parties, in this proceeding. Complainants already tried to expand this case in 2005 when faced with the T-Netix Motion for Summary Determination which demonstrated that every call Ms. Judd and Ms. Herivel received was exempt from the rate disclosure requirements of

¹ Exhibits B and C to Complainants’ Responses are phone bills to Ms. Herivel and Ms. Judd and are included in the production that T-Netix provided with its Responses to Bench Requests Nos. 7 Through 9. Those calls are all local or intraLATA calls that were carried, rated, branded, and billed by US West/Qwest or GTE, both of which were exempt from WAC 480-120-141.

WAC 480-120-141. T-Netix appended this Motion to its Responses to Bench Requests Nos. 7 Through 9 filed October 20, 2010. T-Netix proved via sworn evidence that every call Ms. Judd and Ms. Herivel received was either local or intraLATA and was carried, rated, billed, and branded by US West or GTE — entities that were not subject to WAC 480-120-141 due first to an express exemption and later by waiver. There being no possible injury to Ms. Judd or Ms. Herivel, T-Netix argued, neither Complainant has standing to pursue relief under WAC 480-120-141.

7. In response to the T-Netix Motion, Complainants filed the declarations of two women, Suzanne Elliott and Maureen Janega, who purportedly also received inmate collect calls. T-Netix moved to strike those declarations on the ground that these women were not and never have been parties to this case. Administrative Law Judge Ann Rendahl granted that motion. Docket No. UT-042022, Order Denying T-Netix’s Motions for Summary Determination and to Stay Discovery; Denying Complainants’ Conditional Motion; Denying, in Part, T-Netix’s Motion to Strike; Granting AT&T’s Motion for Leave to File Response, Order No. 5 (July 18, 2005) (“2005 Order”).

8. In the 2005 Order, ALJ Rendahl explained at length what is the Commission’s role when accepting a primary jurisdiction referral from a Washington court. She noted that “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.” 2005 Order ¶ 35. For that reason, ALJ Rendahl felt constrained to deny T-Netix’s Motion for Summary Determination, because she reasoned that “the Commission does not have jurisdiction to decide the issue of standing.” *Id.* ¶ 36. She applied the same reasoning in striking the Elliott and Janega Declarations: because neither declarant was a party to the underlying civil action, those declarations were “outside the scope of the Superior Court’s primary jurisdiction referral to the Commission.” *Id.* ¶ 55. As such, ALJ Rendahl struck them as “irrelevant to this proceeding.” *Id.* That decision was not brought to the Commission for full review, because soon

afterward this proceeding was stayed in order that T-Netix could obtain summary judgment from King County Superior Court where the underlying civil action is pending.

9. The reasoning applied by ALJ Rendahl to the Elliott and Janega Declarations applies with equal force here to Exhibit A. Complainants cannot add new parties in order to present evidence of additional calls that they hope could support a finding of liability in this proceeding. This tactic was rejected by ALJ Rendahl and contravenes consistent Commission precedent. *Puget Holdings*, Order No. 6, 2008 WL 4844060, at *2; *AT&T v. Verizon*, Fifth Supplemental Order ¶ 35.

10. Moreover, Complainants are attempting here what they would never attempt in court. This case began in August 2000; were Complainants to attempt now to add a new party in the civil action, the court would reject the attempt out of hand: the Washington Consumer Protection Act has a four-year statute of limitations. RCW 19.86.120. Plainly the Commission cannot expand this proceeding when the court itself would not expand the lawsuit from which this proceeding arose. For all these reasons, Exhibit A to Complainants' Response to Bench Request No. 7 should be stricken, excluded, and otherwise not considered in this proceeding.

II. THE COMMISSION SHOULD STRIKE EXHIBIT A ON THE GROUND THAT COMPLAINANTS NEVER PRODUCED IT DURING EITHER DISCOVERY PHASE OF THIS CASE

11. Exhibit A was never produced, or even mentioned, by Complainants in either discovery phase of this case. In 2005, the parties exchanged discovery, and from Complainants' production of telephone bills T-Netix realized that none of the inmate collect calls they received were subject to WAC 480-120-141. When this proceeding recommenced in 2008, additional, extensive discovery was conducted, including several depositions. After several extensions of time, Administrative Law Judge Marguerite Friedlander issued a procedural order stating that all fact discovery must be completed by July 19, 2009, and expert discovery must be completed by

August 7, 2009. No. UT-042022, Order Granting Motion to Amend Procedural Schedule, Order No. 19 (May 29, 2009). Those deadlines passed over a year ago.

12. This proceeding is now in the procedural posture of awaiting the Commission's review of ALJ Friedlander's Initial Order. In a sense, it is in an appellate phase. In any event, this proceeding is well past the point where litigants can submit additional evidence. Were Complainants even to attempt to file a motion to reopen the record pursuant to WAC 480-07-830, there can be no reasonable basis for the Commission to accept non-party telephone bills at this late stage.

13. For all these reasons, Exhibit A to Complainants' Response to Bench Request No. 7 should be stricken, excluded, and otherwise not considered in this proceeding.

CONCLUSION

14. For all these reasons, the Commission should strike, exclude, and refuse to consider Exhibit A to Complainants' Response to Bench Request No. 7 filed October 20, 2010.

DATED this 27th day of October, 2010.

T-NETIX, INC.

By: 

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CERTIFICATE OF SERVICE

I hereby certify that I have this 27th day of October, 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 (5), of the foregoing document will be delivered to the WUTC, via the method(s) noted below, properly addressed as follows:

David Danner	<input type="checkbox"/>	Hand Delivered
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I hereby certify that I have this 27th day of October 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:

On Behalf Of AT&T Communications

Letty S.D. Friesen	<input type="checkbox"/>	Hand Delivered
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