BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

SANDRA JUDD, et al., Complainants, v. AT&T COMMUNICATIONS OF THE PACIFIC NORTHWEST, INC.; and T-NETIX, INC., Respondents.	DOCKET NO. UT-042022 COMPLAINANTS' RESPONSE TO T-NETIX MOTION TO STRIKE AND/OR EXCLUDE EXHIBIT A TO COMPLAINANTS' RESPONSE TO BENCH REQUEST NO. 7

A. T-Netix's Motion Ignores the Fact that the Commission Reopened the Record on Its Own Motion.

1. The bulk of T-Netix's motion consists of hyperbolic attacks on Complainants for submitting bills from Columbia Legal Services ("Columbia") because Complainants never moved to reopen the record. Specifically, T-Netix moves to strike *Exhibit A* to the *Declaration of Chris R. Youtz Re: Response to Bench Request No. 7* ("*Exhibit A*") because Complainants never moved, under WAC 480-087-830, "to reopen the record in order to submit new evidence" and do not have "good and sufficient cause" to do so. T-Netix Mot., ¶3. T-Netix's argument ignores the directive from the Commission.

2. On October 6, 2010, the parties received a "Notice of Reopening the Record and Bench Requests" informing them that the Commission "***on its own motion*** pursuant to WAC 480-07-830, ***reopens the record*** for the limited purpose of obtaining

specific additional information necessary to make a determination on review of the Initial Order in this proceeding . . . ."

3. Bench Request No. 7 - which was directed to all parties - requested, *inter alia,* "a copy of ***a sample bill sent to an end user customer***" that includes certain information.

4. Complainants, complying with this request, asked Columbia, a putative member of the plaintiffs' class pending in Superior Court, to supply them with exemplar copies of bills from the relevant time period responsive to Bench Request No. 7. Columbia is "an end user customer" who regularly receives collect telephone calls from inmates at correctional facilities in Washington State. It retained copies of bills, and supplied those bills to Complainants to turn over to the Commission. Complainants attached those bills as *Exhibit A* to its response to the Bench Request.

5. T-Netix's motion to strike and/or exclude should be denied. Complainants did nothing more than comply with the Commission's request for copies of sample bills from an end user customer. Complainants did not need to move to reopen the record in order to supply the Commission with these documents. The Commission reopened the record on its own motion.

B. Columbia is a Putative Class Member.

6. T-Netix's argues that "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." T-Netix Motion, ¶5. Columbia's connection to this case is obvious. Columbia is

a putative class member in the Superior Court action, who has a significant stake in this litigation. Complainants are not trying to add additional parties at this stage of the case, or in this venue, although that issue may be raised before the Superior Court at some later date. Complainants simply obtained additional information that the Commission requested from a putative class member.

7. In the action pending before the Superior Court, the class is defined in the Complainants' *First Amended Complaint* as follows: "[A]ll individuals who have received or will receive one or more long-distance intrastate or interstate collect calls from one or more Washington State prison inmates since June 20, 1996, except for those individuals who have received only interstate collect calls from Washington State prison inmates after November of 1999, and to whom timely disclosure of rates was offered." *See First Amended Complaint*, King County Superior Court Cause No. 00-2-17565-5, Docket No. 14, p. 3. Complainants' motion for class certification is on file but has been stayed pending this referral to the Commission. *See Motion for Class Certification*, King County Superior Court Docket No. 35.

8. Columbia is a putative class member. Prior to formal class certification, an individual or entity falling within the definition of a proposed class in a complaint is a putative class member. *See* FRCP 23(g)(3); *Vinole v. Countrywide Home Loans, Inc.*, 571 F.3d 935, 938 (9th Cir. 2009). Columbia received numerous long-distance intrastate collect calls from Washington State prison inmates since June 20, 1996. *See* Declaration of Chris R. Youtz Re: Response to Bench Request No. 7, ¶2 and *Exhibit A*.

9. T-Netix argues that the statute of limitations has run on Columbia's claims. T-Netix Mot., ¶10. T-Netix misapprehends class action law. As a putative class member, the statute of limitations has not run on Columbia's claims because the filing of a class action tolls the claims of all proposed class members. "[T]he commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action. . . ." *Am. Pipe & Const. Co. v. Utah*, 414 U.S. 538, 554, 94 S. Ct. 756, 766, 38 L. Ed. 2d 713 (1974). Not only are the claims of Columbia tolled, but the claims of all putative class members have been tolled while this case is pending:

> We conclude, as did the Court in *American Pipe,* that "the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action." [citation omitted] Once the statute of limitations has been tolled, it remains tolled for all members of the putative class until class certification is denied. At that point, class members may choose to file their own suits or to intervene as plaintiffs in the pending action.

Crown, Cork & Seal Co., Inc. v. Parker, 462 U.S. 345, 353-54, 103 S. Ct. 2392, 2397-98, 76 L. Ed. 2d 628 (1983). *See also Pickett v. Holland Am. Line-Westours, Inc.*, 101 Wn.App. 901, 913, 6 P.3d 63, 69 (2000), *rev'd on other grounds,* 145 Wn.2d 178, 35 P.3d 351 (2001) ("The statute remains tolled for all members of the putative class until class certification is denied.").

10. Class member are, in many ways, "parties" to a class action. "Nonnamed class members are, for instance, parties in the sense that the filing of an action on behalf of the class tolls a statute of limitations against them." *Devlin v. Scardelletti*, 536 U.S. 1,

10, 122 S. Ct. 2005, 2010-11, 153 L. Ed. 2d 27 (2002). *See also id.* at 9 ("Nor does considering nonnamed class members parties for the purposes of bringing an appeal conflict with any other aspect of class action procedure.).

11. Columbia, as a putative class member, may be included as an additional class representative in the Superior Court. Its cause of action has been tolled by Complainants' case, and it has significant interests in the outcome of the litigation. It is hornbook law that "intervention by absentee members is freely allowed in order to substitute them as class representatives." 1 NEWBERG ON CLASS ACTIONS § 2:26 (4th ed.). Trial courts should encourage substitution if, for some reason, the class representatives are inadequate. 5 NEWBERG ON CLASS ACTIONS § 16:9 (4th ed.) ("Should the class representative be disqualified or found to be inadequate, the court should encourage intervention by a class member for the purpose of substitution when the other class action requirements are satisfied."). Indeed, "the court may send Rule 23(d)(2) notice to potential class members inviting intervention for the purpose of assuming the responsibility of the class litigation." 1 NEWBERG ON CLASS ACTIONS § 2:26 (4th ed.). The addition of parties, however, is an issue that is outside of the referral to the Commission.

12. Columbia, however, has an obvious connection to this litigation even if it is not a named class representative. The charges incurred by Columbia form part of the damages sought by the putative class in the action pending in the Superior Court. Columbia has a clear, and significant, stake in this litigation.

13. In any event, Bench Request No. 7 did not just ask for copies of sample bills received by the Complainants/Class Representatives. It was broader, seeking copies of a sample bills "sent to ***an end user customer.***" Columbia is "an end user customer." Complainants supplied bills in response to that request.

C. There is No "Discovery Abuse."

14. T-Netix argues that Complainants have engaged in abusive discovery, arguing that "[i]t stretches credulity to suppose that Complainants could not have unearthed telephone bills from January and February 2000 during their previous discovery efforts." T-Netix Mot., ¶3. Complainants - or any other party, for that matter - could have certainly "unearthed" bills from Columbia earlier. But there was no bench request, nor any other request from any party, seeking copies of exemplar bills "from an end user consumer" prior to the Commission's Bench Request No. 7.

15. As detailed in *Complainants' Response to Responses by AT&T and T-Netix to Bench Requests 7, 8, 9, and 10*, Ms. Herivel did not have a copy of the bill that included Mr. Miliken's call from Airway Heights to her. *Id.* at ¶6. (She does, however, have a mountain of evidence that the interLATA call took place. *See Judd v. Am. Tel. & Tel. Co.*, 136 Wn. App. 1022 (Wash. Ct. App. 2006), *rev. denied*, 162 Wn.2d 1002.) Nor did Complainants retain copies of bills received from Clallam Bay. After receiving the Commission's Bench Request, Columbia was contacted in order to see if it had kept its bills of collect calls from 2000. It did, and its records show bills for collect calls from Airway Heights and other facilities, including Washington Correction Center for Women (which is part of the group of prisons that included Clallam Bay that was

transferred to T-Netix). Thus, Complainants were able to show the Commission how the billing looked for calls from Airway Heights to Seattle, as well as calls from the former PTI group of prisons. This is the type of information that Bench Request No. 7 specifically sought.

16. In short, the documents in *Exhibit A*, from a putative class member, are responsive to the request. There is no basis to strike or exclude them when they are precisely the type of documents requested by the Commission.

D. T-Netix's Standing Arguments Have Been Rejected By The Court of Appeals.

17. T-Netix argues that 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." T-Netix, yet again, is attempting to raise a standing issue. But, yet again, it ignores its loss before the Washington State Court of Appeals. *See Judd v. Am. Tel. & Tel. Co.*, 136 Wn. App. 1022 (Wash. Ct. App. 2006), *rev. denied*, 162 Wn.2d 1002 (A copy of the decision is attached as *Exhibit E* to Second Youtz Dec.). There, the Court ruled that Ms. Herivel provided specific and detailed information concerning an interLATA call she received from Airway Heights. *Id.* at *3. As the Court also noted, T-Netix's claim that its "records search" turned up no calls was easily explained because "this evidence falls short of proving the call did not take place both ***because the search does not cover the entire relevant time period*** and, even if it did, it presumes T-Netix's recordkeeping is infallible." *Id.* (emphasis added). As the Court explained, T-Netix's "record search" was far from thorough, inexplicitly omitting

10 months of relevant records. *Id.* ("respondents' evidence leaves 10 months unaccounted for").

18. At this stage of the proceedings, and before this venue, standing is not at issue. The only relevant questions are those contained in the primary jurisdiction referral. As the Court of Appeals directed:

> We reverse and remand this case to the superior court with directions to reinstate the primary jurisdiction referral to the WUTC to determine the issues originally before it: (1) whether AT & T or T-Netix were OSPs and (2) whether they violated the WUTC disclosure regulations.

Judd v. Am. Tel. & Tel. Co., 136 Wash. App. 1022 (Wash. Ct. App. 2006). T-Netix's standing arguments have no place here.

DATED: November 3, 2010.

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SERVICE LIST

Pursuant to WAC 480-07-150, I certify that on November 3, 2010, I served a copy of the foregoing on all counsel of record by e-mail and U.S. Mail at the below addresses:

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Pursuant to WAC 480-07-145, I further certify that on November 3, 2010, I filed MS Word and PDF versions of the listed documents by e-mail, and the original and 12 copies of the listed documents by overnight delivery (Federal Express or UPS), with the WUTC at the below address:

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Pursuant to the Prehearing Conference Order 08, I further certify that on November 3, 2010, I provided a courtesy copy of the listed documents, in MS Word, to Administrative Law Judge Marguerite E. Friedlander by e-mail to mfriedla@utc.wa.gov.

DATED: November 3, 2010, at Seattle, Washington.