[Service Date: April 21, 2005]

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.'S MOTION FOR SUMMARY DETERMINATION**

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1. Respondent T-NETIX, Inc. ("T-NETIX"), through counsel and pursuant to WAC 480-09-426, hereby moves for summary determination in this action on the ground that neither Judd nor Herivel, the sole Complainants, have standing to pursue their claims.

I. INTRODUCTION AND SUMMARY

2. Having for the first time engaged in discovery in this case, which as to T-NETIX had lain dormant for four years, Complainants have produced information demonstrating that they have suffered no cognizable harm in this case. All of the calls for which Complainants seek relief – inmate-initiated collect calls within the State of Washington – were local or intraLATA calls, and were carried by the resident local exchange carriers ("LECs"), either US West, GTE, or PTI (later known as CenturyTel). It is an undisputed fact that all of these carriers had waivers from the only rule at issue in this case – WAC 480-121-141, which governs "operator service providers." None of these carriers were required to "verbally advise the consumer how to receive a rate quote" under that rule (*id.*) for the local and intraLATA calls that they carried, including calls placed by inmates from prison phones. Accordingly, accepting as true their allegations that they did not receive rate information when accepting inmate-initiated calls, Complainants have suffered no cognizable injury. They certainly have suffered no cognizable injury because of T-NETIX because T-NETIX did not carry any of the calls about which the Complainants complain. Moreover, Complainants were owed no duty by the entities that carried their inmate-initiated calls, again by virtue of the exemptions and waivers from WAC 480-120-141. And, Complainants were owed no duty by T-NETIX. Complainants thus have failed to present any claim before this Commission and therefore lack standing to pursue their claims before this Commission, warranting dismissal of this proceeding.

II. STANDARD OF REVIEW

3. WAC 480-09-426 states that "[a] party may move for summary determination if the pleadings filed in the proceeding, together with any properly admissible evidentiary support, show that there is ***no genuine issue as to any material fact*** and the moving party is ***entitled to***

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summary determination in its favor." (Emphasis added.) The rule further provides that, on review of this motion, the Commission "will consider the standards applicable to a motion made under CR 56 of the civil rules for superior court." Rule 56 of the Washington Rules of Civil Procedure applies to summary judgment motions.[1] Washington courts will enter summary judgment where judgment for the movant "is proper." *Atherton Condo. Apartment-Owner Ass'n Bd. of Directors v. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990). That is, where "from all of the evidence, reasonable persons could reach but one conclusion." *Vallandigham v. Clover Park School District No. 400*, — P.3d —, 2005 WL 774378, at *3 (Wash. Apr. 7, 2005). In their review, courts – and thus this Commission – are required to view all facts and reasonable inferences in favor of the nonmovant. *Atherton*, 115 Wn.2d at 516.

III. EVIDENCE RELIED UPON

4. T-NETIX relies upon the following evidence in this motion:

   a. *Judd v. AT&T*, King County Superior Court Case No. 00-2-17565-5 SEA, Order Denying in Part Defendant T-NETIX, Inc.'s Motion to Dismiss First Amended Complaint – Class Action and Granting in Part and Referring to WUTC (November 8, 2000) (Exhibit 1).

   b. *Judd v. AT&T*, WUTC Docket No. UT-042022, Complaint (November 16, 2004) (Exhibit 2).

   c. Amendment No. 3 to Agreement Between State of Washington Department of Corrections and AT&T Corporation (Exhibit 3).

   d. Affidavit of Frances M. Gutierrez, Market Manager, AT&T Corp., WUTC Docket No. UT-042022, (December 24, 2004) (Exhibit 4).

   e. GTE Northwest Inc. Independent Contractor Agreement (Exhibit 5).

   f. US West Communications, Inc. Independent Contractor Agreement (Exhibit 6).

   g. Telephone Utilities of Washington, Inc. d/b/a PTI Communications Independent Contractor Agreement (Exhibit 7).

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[1] Rule 56 states that summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

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h. Letter from John Giannaula, T-NETIX, to Sandy Hornung, AT&T (March 10, 1998) (Exhibit 8).

i. Sandra Judd response to T-NETIX Data Request No. 3, WUTC Docket No. UT-042022 (April 4, 2005) (Exhibit 9).

j. Tara Herivel response to T-NETIX Data Request No. 3, WUTC Docket No. UT-042022 (April 4, 2005) (Exhibit 10).

k. Affidavit of Nancy Lee, Senior Vice President of Billing Services, T-NETIX, Inc., WUTC Docket No. UT-042022 (April 20, 2005) (Exhibit 11).

l. *Judd v. AT&T*, 116 Wash.App. 761, 66 P.3d 1102 (Ct. App. 2003) (Exhibit 12).

IV. PROCEDURAL BACKGROUND

5. Complainants Judd and Herivel initially brought this action in August 2000 as a civil claim in King County Superior Court against T-NETIX, AT&T Communications of the Northwest, GTE Northwest, US West and CenturyTel (formerly PTI) seeking damages and injunctive relief under the Washington Consumer Protection Act, RCW 19.86 ("CPA"). The predicate for this claim was alleged violations of regulatory statute RCW 80.36.520 and .530 related to telephone service. Complainants alleged that all defendants had violated this statute by failing to provide rate disclosure information in connection with inmate-initiated collect calls as required by WAC 480-120-141. None of Complainants' papers in the trial court stated the origin or the number of the inmate-initiated calls for which they requested relief.

6. GTE (now Verizon), US West (now Qwest) and CenturyTel were dismissed by the trial court with prejudice on the ground that they were exempt from WAC 480-120-141 under either the express language of the rule or through long-term waivers granted by this Commission. That dismissal was upheld by the Court of Appeals, and on July 29, 2004, was again upheld by the Washington State Supreme Court. *Judd v. AT&T*, 116 Wash. App. 761, 66 P.3d 1102, *aff'd* 152 Wn.2d 195, 95 P.3d 337 (2003).

7. On November 8, 2000, the trial court dismissed Complainants' claims against both T-NETIX and AT&T, without prejudice, pending a referral to this Commission of the question

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whether T-NETIX had violated WAC 480-120-141. Exhibit 1. On November 17, 2004, after the Supreme Court affirmed dismissal of GTE, US West and CenturyTel, Complainants initiated this proceeding to obtain a ruling on this question. Exhibit 2.

8. Respondent AT&T filed a Motion for Summary Determination in this proceeding on December 15, 2004. Briefing on that motion was suspended pending a scheduling conference, which was conducted by Administrative Law Judge Ann Rendahl on February 16, 2005. At that conference, ALJ Rendahl authorized the parties to conduct discovery, including written data requests and depositions, and established a schedule for the briefing and resolution of AT&T's motion. All parties propounded data requests on March 7, 2005. T-NETIX received Complainants' responses to its data requests on April 4, 2005.

V. FACTUAL BACKGROUND

9. T-NETIX was named in this suit as a subcontractor to AT&T. Exhibit 2 at p. 2. AT&T holds a contract with the Washington Department of Corrections ("DOC") to provide interLATA and international services to several DOC facilities. Exhibit 4 (Gutierrez Aff. ¶ 7). T-NETIX executed a subcontract with AT&T in 1997 by which it has provided software used for screening, validating and monitoring inmate calls to AT&T. Exhibit 3; Exhibit 4 (Gutierrez Aff. ¶ 11). GTE (now Verizon) and US West (now Qwest) are subcontractors to AT&T for the provision of local and intraLATA calls made from certain DOC facilities. Specifically, GTE contracted to serve the Twin Rivers Corrections Center, the Washington State Reformatory in Monroe, the Indian Ridge Corrections Center in Arlington, and the Special Offender Center in Monroe. Exhibit 5 at p. 2. US West contracted to serve the Washington Corrections Center in Shelton, the McNeil Island Detention Center, the Washington State Penitentiary in Walla Walla, Airway Heights Correctional Center, Tacoma Pre-Release, Cedar Creek Corrections Center and the Larch Corrections Center. Exhibit 6 at p. 2.

10. Prior to 1998, PTI (later known as CenturyTel) was also an AT&T subcontractor. Exhibit 7. PTI served several facilities, including the Clallam Bay Corrections Center. *Id.* at p.2.

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In March 1998, T-NETIX assumed only the local traffic under the PTI contract. Exhibit 8; Exhibit 4 (Gutierrez Aff. ¶ 11).

11. On April 4, 2005, Complainant Judd stated in verified responses to discovery that she received calls from the Washington State Reformatory in Monroe and the McNeil Island Detention Center. Exhibit 9. Complainant Herivel stated in verified responses to discovery that she received calls from the Washington State Reformatory in Monroe and Airway Heights Correctional Center. Exhibit 10. Complainants' discovery responses mark the first time that T-NETIX learned the origin of the calls at issue in Complainants' claim, either in court or in this Commission.

12. The facilities identified by Complainants' discovery responses were served by GTE and US West. GTE and US West were each exempt from complying with the rate disclosure requirements with respect to calls placed by inmates, as was PTI. Under the version of WAC 480-120-141 in place from 1991 to 1999, all LECs were expressly exempted from these requirements. In addition, when the rule was amended in 1999 to include LECs, US West and GTE obtained waivers of the rule from the Commission that extended through the fourth quarter of 2000. *Judd*, 66 P.3d at 769 & n.8 (Exhibit 12). It was for these reasons that US West and GTE were dismissed from this action. *Id.* at 770.

VI. ARGUMENT

A. THIS PROCEEDING SHOULD BE DISMISSED BECAUSE NEITHER COMPLAINANT HAS STANDING

13. Persons must have standing to bring a complaint to this Commission. *Stevens v. Rosario Utils.*, WUTC Docket No. UW-011320, Third Supp. Order at 19, 2002 WL 31730489 at *13 (Wash. U.T.C. July 12, 2002). *See also United & Informed Citizen Advocates Network v. Pacific Northwest Bell Telephone Co. d/b/a U S West Communications, Inc.*, WUTC Docket No. UT-960659, Third Supp. Order at pp. 6-7 (Feb. 1998)(holding that a party without a direct customer relationship lacks standing to complain ("*U&ICAN*"). The Commission applies a two-

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part test to determine whether a complainant has standing: (1) complainant must demonstrate injury, financial or otherwise ("injury in fact"); and (2) complainant must have an interest that is within the "zone of interest" of the type that the Commission regulation is designed to protect. *Stevens* 2002 WL 31730489 at *13 (citing *Save a Valuable Environment (SAVE) v. City of Bothell*, 89 Wn.2d 862, 576 P.2d 401, 403-404 (1978)). In any case, both the injury in fact and the zone of interest are defined by the statute sought to be enforced. *See id.* In this case, these criteria are defined by WAC 480-120-141. Complainants Herivel and Judd both fail to satisfy these criteria, requiring that this action against T-NETIX be dismissed.

1. Neither Complainant Has Suffered Injury in Fact

14. In order to have standing to pursue any claim against T-NETIX, Complainants Judd and Herivel must allege that they received a call that involved T-NETIX and were in some way injured by it. *Stevens*, No. UW-011320, Third Supp. Order at 19, 2002 WL 31730489 at *13. But neither Judd nor Herivel could have been injured by the calls they received from inmates that involved T-NETIX (which could have occurred only during the period of the AT&T/T-NETIX subcontract).

15. The material facts of this matter are now not subject to dispute. First, Complainants' phone bills indicate that all of the inmate-initiated calls they received were intraLATA calls. Second, all of these calls were carried by PTI, US West or GTE. Third, each of these carriers were exempt from or had received waivers from the rate disclosure requirements of WAC 480-120-141. These calls were not required to include rate disclosures. Thus, as a matter of law, Judd and Herivel are owed no relief for these calls.

a. Complainants identified three facilities for origination of inmate calls, each served by PTI, US West or GTE.

16. Complainants' written responses to discovery identify the correctional facilities from which the allegedly non-compliant calls originated. Complainant Judd identifies the Washington State Reformatory in Monroe and the McNeil Island Detention Center. Exhibit 9.

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Complainant Herivel stated in verified responses to discovery that she received calls from the Washington State Reformatory in Monroe and the Airway Heights Correctional Center. Exhibit 10. Thus, we now know that there are three facilities in Washington involved in this case.

17. Contracts filed in this record by both Complainants and AT&T identify the facilities that GTE served for purposes of local and intraLATA calls. They include the Washington State Reformatory in Monroe. Exhibit 5 at p. 2. US West served McNeil Island and Airway Heights for both local and intraLATA calls. Exhibit 6 at p. 2. Thus, as an initial matter, it is not subject to dispute that US West and GTE carried the local and intraLATA traffic from the three correctional facilities identified by Complainants as comprising the scope of their claims.

b. T-NETIX's research reveals that all inmate calls received by Complainants were local or intraLATA.

18. In order to verify that, as Complainants have stated, every inmate call that they received from these three facilities belonged to either US West or GTE, T-NETIX has researched all of the considerable number of phone bills that Complainants have produced. This research entails entering originating and terminating phone numbers into a database to learn whether a call is local, intraLATA, or interLATA. The attached affidavit of Nancy Lee, T-NETIX Senior Vice President of Billing Services, describes and verifies this research. Exhibit 11. Complainants' phone bills may be summarized as follows:

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Tara Herivel

Date	Terminating Phone Number	Originating Phone Number	Type of Call
November 11, 1999 - November 30, 2000	206-652-9415	360-794-5587	IntraLATA
		360-794-6099	IntraLATA
		360-794-6768	IntraLATA
		253-584-9846	IntraLATA
		253-584-9924	IntraLATA
		253-584-9932	IntraLATA
		253-584-9790	IntraLATA
		253-584-9989	IntraLATA
		253-584-9905	IntraLATA
		253-584-9850	IntraLATA
		253-584-9851	IntraLATA

Sandra Judd

Date	Terminating Phone Number	Originating Phone Number	Type of Call
February 26, 1996 - November 29, 1997	206-782-2867 (billing entity US West)	360-794-5705	IntraLATA
		360-794-4493	IntraLATA
		360-794-0872	IntraLATA
		360-794-1094	IntraLATA
		360-794-4343	IntraLATA
		360-794-0958	IntraLATA
		360-794-0585	IntraLATA
		360-794-1057	IntraLATA
		360-794-9460	IntraLATA
		360-794-4493	IntraLATA
		360-794-1057	IntraLATA
		360-794-6992	IntraLATA
		360-794-7880	IntraLATA
		360-794-9305	IntraLATA
		360-794-8328	IntraLATA
		360-794-5099	IntraLATA
		360-794-0119	IntraLATA
		360-794-4262	IntraLATA
		360-794-9716	IntraLATA
		360-794-7880	IntraLATA
		360-794-0958	IntraLATA
		360-794-1133[2]	IntraLATA

[2] This originating number (360-794-1133) belongs to the Clallam Bay Corrections Center, according to Ms. Judd's phone bill. The contract between AT&T and PTI (later known as CenturyTel) stated that PTI would carry local and intraLATA calls from this facility. Exhibit 7 at p. 2. The calls listed on Ms. Judd's phone bill occurred in July 1996, while PTI was the local and intraLATA carrier. Given that Ms. Judd did not identify Clallam Bay in her responses to discovery, it is not clear whether she seeks relief for the calls she received from that facility.

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Date	Terminating Phone Number	Originating Phone Number	Type of Call
December 1, 1997 – October 26, 1999	425-438-9082 (billing entity GTE)	360-794-6768	IntraLATA
		360-794-5587	IntraLATA
		360-794-4157	IntraLATA
		360-794-4005	IntraLATA
		360-794-4857	IntraLATA
		360-794-5503	IntraLATA
		360-794-0783	IntraLATA
		360-794-0647	IntraLATA
		360-794-4005	IntraLATA
		360-794-8328	IntraLATA
		360-794-0448	IntraLATA
		360-427-8469	IntraLATA
		360-794-7880	IntraLATA
		360-794-0585	IntraLATA
		360-794-4493	IntraLATA
		360-794-5705	IntraLATA
		360-794-1803	IntraLATA
		360-794-1804	IntraLATA
		360-794-1805	IntraLATA
		360-794-1806	IntraLATA
		360-794-1807	IntraLATA
		360-794-9708	IntraLATA
		360-794-6992	IntraLATA
		253-582-9698	IntraLATA
		253-582-9695	IntraLATA
		253-582-9697	IntraLATA
November 1999 – September 17, 2000	253-584-9380 (billing entity US West and T-Net)[3]	253-584-9924	Local
		253-584-9042	Local
		253-584-9907	Local
		253-584-9989	Local
		253-582-9694	Local
		253-584-9905	Local
		253-584-9995	Local
		253-584-9380	Local
		253-584-9790	Local
		253-584-9850	Local
		253-584-9906	Local

19. It is thus not subject to dispute that the calls for which Complainants seek relief were local or intraLATA calls.

[3] T-Net is not affiliated with T-NETIX in any way.

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c. All inmate calls received by Complainants were exempt from WAC 480-120-141.

20. The record demonstrates that all of the calls received by Complainants Judd and Herivel were carried by US West, PTI or GTE. In addition, as explained above, it is not subject to dispute that US West, PTI and GTE were exempt from all rate disclosure for inmate-initiated local and intraLATA calls through 2000. *Judd*, 66 P.3d at 769 & n.8 (Exhibit 12). Thus, if Complainants received no rate disclosure information for these calls, as they allege, that omission was permitted by this Commission.

21. The undisputed facts of this matter demonstrate that "reasonable persons could reach but one conclusion." *Vallandigham*, 2005 WL 774378, at *3. They show that, as a matter of law, Complainants were not entitled to receive rate disclosure information for any inmate-initiated calls they received. Accordingly, they have suffered no injury. And having suffered no injury, Complainants Judd and Herivel lack standing to pursue their claims, requiring dismissal of this matter. *See Stevens*, No. UW-011320, Third Supp. Order at 19, 2002 WL 31730489 at *13.

2. Neither Complainant Is In The Zone of Interest

22. Complainants Judd and Herivel must demonstrate that they were owed a duty by the entities that carried and delivered inmate-initiated calls to them. *Stevens*, No. UW-011320, Third Supp. Order at 19, 2002 WL 31730489 at *13. The duty is defined by the rule sought to be enforced, *id.*, which in this case is WAC 480-120-141, the operator services provider rule. Thus, if WAC 480-120-141 governed the conduct of the carriers of Complainants' calls, then Complainants were owed a duty from these carriers that they have the right to enforce.

23. PTI, GTE and US West were all exempt from WAC 480-120-141. *Judd*, 66 P.3d at 769 (Exhibit 12). These carriers owed no duty to Judd or Herivel under that rule. Accordingly, neither Judd nor Herivel are within the zone of interest of WAC 480-120-141, and they lack standing to enforce it. Accordingly, their claims should be dismissed. *See Stevens*, No. UW-011320, Third Supp. Order at 19, 2002 WL 31730489 at *13.

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B. DISMISSAL OF COMPLAINANTS' CLAIMS EXHAUSTS THE COMMISSION'S DUTIES UNDER THE COURT'S REFERRAL

24. This matter was brought before the Commission through Complainants' request for "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." Exhibit 1. As to T-NETIX, the King County Superior Court referred one question to this Commission: "to determine if T-NETIX has violated WUTC regulations." Exhibit 2. Until that question is resolved in Complainants' favor, that Court will not adjudicate Judd's and Herivel's claims against T-NETIX.

25. The doctrine of primary jurisdiction instructs that courts, when presented with a claim against a regulated entity, should defer consideration of that claim in order to obtain the expert opinion of the regulating agency regarding the defendant's conduct. The Washington State Supreme Court has followed this doctrine through strict adherence to the precedent of the United States Supreme Court. *In re Real Estate Brokerage Antitr. Litig.*, 95 Wn.2d 297, 622 P.2d 1185, 1188-89 (1980); *Schmidt v. Old Union Stockyards Co.*, 58 Wn.2d 478, 364 P.2d 23, 26-27 (1961). The Washington State Supreme Court has emulated that Court's description of the doctrine, stating that primary jurisdiction "'comes into play whenever enforcement of the claim ***requires resolution*** of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body[.]'" *Schmidt*, 364 P.2d at 27 (quoting *United States v. Western Pac. R.R. Co.*, 352 U.S. 59 (1956)) (emphasis added).

26. The Washington State Supreme Court has since developed a three-part test for determining whether a referral to an agency under primary jurisdiction is appropriate: (1) the agency would have the authority to resolve the issue had complainants brought the claim there; (2) the agency has "special competence" over the controversy that renders it more capable of resolving the dispute than the court; and (3) the claim must involve issues that are subject to "a pervasive regulatory scheme" such that "the danger exists that judicial action would conflict with the regulatory scheme." *Vogt v. Seattle-First National Bank*, 117 Wn.2d 541, 817 P.2d 1364, 1371-72 (1991) (citing *In re Real Estate*, 95 Wn.2d at 302-303).

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27. This test makes clear that the purpose of a primary jurisdiction referral is to assist the court in resolving only the case or controversy brought in a civil lawsuit. It is a narrow inquiry that, in essence, asks "what relief would the agency provide to this plaintiff?" In the underlying lawsuit here, Judd and Herivel seek damages under RCW 19.86 based on alleged failures to provide rate information for inmate-initiated collect calls. The King County Superior Court found that the necessary predicate to Judd's and Herivel's statutory claims is a violation of WAC 480-120-141.

28. The issue of whether T-NETIX violated this rule is not simply academic, but rather is necessary to the Court's understanding of Judd's and Herivel's claim. Thus, T-NETIX's conduct as it pertains to Judd and Herivel must form the outer bounds of the question before this Commission. Yet if Judd and Herivel have no standing to challenge T-NETIX's conduct, the Commission need not reach that question.

29. In addition, the King County Superior Court cannot hear claims for which a plaintiff lacks standing; *e.g.*, *SAVE*, 89 Wn.2d at 866. On the facts of this case, it is clear that Judd and Herivel indeed lack standing to pursue their statutory claims against T-NETIX. It would be at the least anomalous for the Commission to continue providing its expertise to the King County Superior Court for a case that cannot be adjudicated. It would moreover contravene the purpose of the primary jurisdiction doctrine for the agency to attempt to adjudicate claims not encompassed by the King County Superior Court's referral.

30. As demonstrated herein, neither Judd nor Herivel suffered any cognizable injury as a matter of law, according to their own evidence and admissions. Moreover, they were owned no duty by T-NETIX. Accordingly, they lack standing to pursue the question of whether T-NETIX violated rule any rules. Because Complainants lack standing, this Commission has no ability to adjudicate this matter, nor does it have any further duty to assist the King County Superior Court. Dismissal of this proceeding is therefore warranted.

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VII. CONCLUSION

31. For all these reasons, the Commission should enter summary determination for T-NETIX dismissing all claims and allegations against T-NETIX in this matter pursuant to WAC 480-09-426.

DATED this 21st day of April, 2005.

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By _____

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Attorneys for Respondent T-NETIX, Inc.

CERTIFICATE OF SERVICE

I hereby certify that I have this 21st day of April, 2005, served the true and correct original, along with the correct number of copies, of the foregoing document upon the WUTC, via the method(s) noted below, properly addressed as follows:

Carole Washburn
Executive Secretary
Washington Utilities and Transportation Commission
1300 S Evergreen Park Drive SW
Olympia, WA 98504-7250

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___ U.S. Mail (first-class, postage prepaid)
_X_ Overnight Mail (UPS)
___ Facsimile (360) 586-1150
_X_ Email (records@wutc.wa.gov)

I hereby certify that I have this 21st day of April, 2005, 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:

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Confidentiality Status: Highly Confidential

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On Behalf Of Commission:

Ann E. Rendahl ALJ
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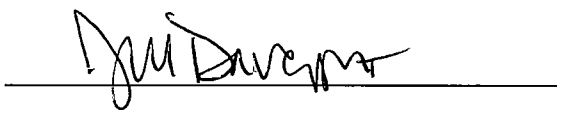
I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 21st day of April, 2005, at Seattle, Washington.



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