

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'S MOTION FOR STAY**

**-AND-**

**COMPLAINANTS' CONDITIONAL  
MOTION TO POSTPONE  
CONSIDERATION OF T-NETIX'S  
MOTION FOR SUMMARY  
DETERMINATION UNTIL  
COMPLAINANTS HAVE BEEN  
PERMITTED ADDITIONAL  
DISCOVERY**

**Introduction and Summary**

1. T-Netix and AT&T have both refused to participate in discovery while T-Netix's motion for summary determination is pending. In effect, T-Netix and AT&T have given themselves the relief that T-Netix sought from the Commission when it moved for a stay. As a practical matter, T-Netix's motion to stay discovery is largely mooted by this conduct. It is clear that neither defendant intends to cooperate in the discovery process until the Commission decides T-Netix's motion for summary determination.

2. This conduct should not be endorsed: WAC 480-07-380(d) unambiguously provides that a pending motion for summary determination does not

stay scheduled procedures. Unless and until the Commission grants a stay, T-Netix and AT&T were obligated to continue the discovery process. They didn't.

3. T-Netix's obstructionist approach to discovery did not begin with the filing of its motion and subsequent refusal to participate in further discovery. It appears to be part of T-Netix's defense strategy. T-Netix has refused to answer straightforward data requests. Examples are set forth below. These data requests seek information that is relevant to both the AT&T and T-Netix motions for summary determination.

4. In the event that T-Netix's motion for summary determination is not denied outright, Complainants request, and hereby move, for a continuance analogous to a Civil Rule 56(f) continuance under Washington's Rules for Superior Court. The Commission may disregard this motion if it denies T-Netix's motion for summary determination now.

### **Statement of Facts**

#### **A. T-Netix refuses to answer questions surrounding its conduct.**

5. Many data requests issued by Complainants to T-Netix seek information relating to who provided operator services, and when and where such services were rendered. This is the central issue in the proceeding. T-Netix has responded by objecting "on the ground that 'operator services' is a term defined by WAC 480-120-021 and thus it seeks a legal conclusion." Meier Decl., Exh. A. The following data request and response is illustrative:

Complainants' Data Request No. 38: Exhibit 10, page 2, requires the subcontractor to provide the following service: "Delivery of intraLATA

and interLATA traffic originating from Public Pay Telephones to AT&T's Point of Presence over switched access facilities." Did this language require the subcontractor to provide operator services for inmate-initiated calls from institutions covered by the subcontract? State the basis for your answer.

T-Netix's Response to Data Request No. 38:

T-Netix objects to this Request on the ground that "operator services" is a term defined by WAC 480-120-021 and thus it seeks a legal conclusion.

*Id.* This type of objection will not be sustained. See *Sonnino v. University Kansas Hosp. Authority*, 220 F.R.D. 633, 648 (D. Kan. 2004) ("That a discovery request 'calls for a legal conclusion' is not valid objection."); *Coles v. Jenkins*, 179 F.R.D. 179, 180-81 (W.D. Va. 1998) (same). See also Civil Rule 33(b) ("An interrogatory otherwise proper is not necessarily objectionable because an answer to the interrogatory involves an opinion or contention that relates to facts or the application of law to fact . . ."); WAC 480-07-400(c)(iii) ("Generally, data requests seek . . . a narrative response explaining a policy [or] position . . .").

6. In other responses, T-Netix refused to answer direct questions on the basis that "it is not relevant to the Motion for Summary Determination filed by AT&T in this proceeding." The following is illustrative:

Complainants' Data Request No. 48: With respect to inmate-initiated calls from T-Netix institutions, did you "verbally advise" consumers how to receive a rate quote pursuant to WAC 480-120-141(2)(b) (1999)?

(a) If you provided this service during part of the time period that WAC 480-120-141(2)(b) (1999) was in effect, please identify which time periods you did and did not provide this service.

(b) If you did not provide this service at all, please identify which company or entity, if any, provided

this service for inmate-initiated calls from T-Netix institutions.

T-Netix's Response to Data Request No. 48:

T-Netix objects to this Request, including all subparts, on the ground that the definition of "T-Netix institutions" is overly broad and seeks documents that are neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. T-Netix objects to this Request on the ground that it calls for a legal conclusion and for disclosure of privileged attorney client work product. T-Netix further objects to this Request, including all subparts, on the ground that it is not relevant to the Motion for Summary Determination filed by AT&T in this proceeding.

Meier Decl., Exh. A.

7. We are not quite sure what to make of these objections. A company that provides rate disclosure is a company that is providing operator services. *See* WAC 480-120-141 (1999). The issue of who provided operator services is central to AT&T's motion, which seeks a summary determination on the ground that it was not an operator services provider. As for the contention that information is privileged, T-Netix has not provided a privilege log. The other objections appear to be makeweight.

8. One theme is consistent throughout T-Netix's responses: if the question seeks information relating to operator services, T-Netix has either refused to answer the question or the answer it has given does not make it clear who is and who is not providing operator services. *See* Meier Decl., Exh. A.

**B. T-Netix withholds documents and refuses to hold a meet and confer discovery conference after filing its motion.**

9. When Complainants sought a telephone conference with T-Netix counsel to discuss T-Netix's objections, T-Netix refused to make itself available. Meier Decl.,

¶¶ 4-8. Although T-Netix promised to provide certain documents “as soon as practicable” in responding to certain data requests, it has now elected to withhold those documents. Meier Decl., ¶¶ 3, 9; Exh. B.

**C. AT&T refuses to participate in discovery.**

10. AT&T had committed, in an April 20 discovery telephone conference with counsel, to produce certain additional documents on April 25. Meier Decl., ¶¶ 10-11 . After T-Netix filed its motions, AT&T refused to produce the documents it had agreed to produce. *Id.*, ¶¶ 12-14 & Exhs. C-E. AT&T explains that its decision was driven by T-Netix’s concerns over production of “highly sensitive” commercial and security information. *Id.*, Exh. E.

11. After the April 20 discovery conference call, AT&T promised to consult with its client and promptly respond to issues raised by Complainants. *Id.*, ¶¶ 11, 14 & Exh. D. It has not done so. *Id.* & Exh. E.

**Statement of Issues**

12. (a) Does WAC 480-07-380(d), which provides that a motion for summary determination does not stay scheduled procedures, allow parties to unilaterally cease all discovery after one party files a motion for summary determination?

(b) Should discovery be stayed during the pendency of T-Netix’s motion when that motion is premised upon erroneous factual and legal assumptions?

(c) In the event that the Commission does not deny T-Netix’s motion for summary determination outright, should the Commission postpone consideration

of that motion in order to allow Complainants to conduct discovery relevant to the motion?

### **Evidence Relied Upon**

13. Declaration of Jonathan P. Meier.

### **Argument**

#### **A. T-Netix's request for a stay should be denied, and T-Netix and AT&T should be ordered to participate in discovery.**

14. By refusing to participate in discovery, T-Netix and AT&T are violating the substance and spirit of WAC 480-07-380(d). Although the stay T-Netix sought is moot, at least in part, given its unilateral decision to stop all discovery, the Commission should indicate that this conduct is not condoned.

15. Even if T-Netix's motion for summary determination had merit, Complainants still require discovery from T-Netix in order to respond to AT&T's motion for summary determination. This discovery should have gone forward regardless of the pendency or outcome of T-Netix's motion. T-Netix does not deny it possesses evidence relevant to AT&T's conduct. Both T-Netix and AT&T should be ordered to cooperate in good faith in the discovery process.

#### **B. If the Commission does not deny T-Netix's motion for summary determination outright, it should postpone consideration of that motion until after T-Netix fulfills its discovery obligations.**

##### **1. Rule 56(f) standards apply to this proceeding.**

16. WAC 480-07-380(2)(a) provides that the standards applicable to Rule 56 will be applied to motions for summary determinations. Rule 56(f) provides that a court "may order a continuance to permit affidavits to be obtained or depositions to be

taken or discovery to be had or may make such other order as is just.” This rule recognizes that a motion for summary judgment should not be considered before sufficient discovery has occurred:

Generally, the court should not entertain a motion for summary judgment until the completion of discovery on the issue or claim upon which the motion is brought. [citation omitted] A party is entitled to adequate discovery before a dispositive ruling is made on a motion for summary judgment.

Breskin, WASHINGTON PRACTICE, Civil Procedure Forms and Commentary § 56.72 (2000).

**2. If T-Netix’s motion is deemed to have any merit whatsoever, Complainants should be granted the right to obtain discovery on issues relevant to that motion.**

17. T-Netix has provided virtually no discovery disclosing who provided operator services at which facilities, or when those services were provided. It has avoided production of information that would allow this Commission to determine whether calls received by Complainants passed through its platforms, whether it provided rate disclosure, and if so, where and when. While refusing to provide relevant discovery, T-Netix has filed a motion for summary determination seeking adjudication of an issue that implicates the very facts it has refused to disclose. As explained in Complainants Response to T-Netix’s Motion for Summary Determination, any attempt to resolve standing issues would necessarily focus on fact questions relating to the provision of operator services, not on who “carried” a given telephone call.

18. When the very limited material produced by T-Netix in this proceeding is augmented by publicly available material and evidence filed by AT&T, there appears to be little doubt that T-Netix was providing operator services. Wilson Decl., ¶¶ 9-10; *see generally* Complainants’ Response to T-Netix’s Motion for Summary Determination. That evidence, and the various deficiencies in T-Netix’s motion that are outlined in Complainants’ Response, should be sufficient to deny the motion. If, however, the Commission does not deny T-Netix’s motion outright, it should postpone consideration of that motion and authorize discovery on the following topics: (a) whether T-Netix or AT&T provided operator services; (b) where such services were provided (specific correctional facilities); (c) when such services were provided, with respect to each facility; (d) whether rate disclosure occurred in connection with the provision of operator services; and (e) if so, how it occurred. Only after this discovery is complete and Complainants have been given an opportunity to submit that evidence to the Commission would T-Netix’s motion be ripe for consideration.

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