

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 REPLY IN
SUPPORT OF MOTION FOR
SUMMARY DETERMINATION**

1. Respondent T-NETIX, Inc. ("T-NETIX"), through counsel and pursuant to WAC 480-09-426, hereby replies to Complainants' Response ("Response") to its Motion for Summary Determination (the "Motion").

2. Despite the protestations of Complainants' attorneys, on the undisputed facts before this Commission, Judd and Herivel, the sole Complainants in this proceeding, lack standing as a matter of law to pursue their claim regarding lack of rate disclosures because all of the calls at issue were unequivocally exempt from (pursuant to waiver of) the applicable regulation. Therefore, as demonstrated herein, the Commission is obligated under settled law to enter summary determination for T-NETIX as to all claims in this matter, on referral from the King County Superior Court.

I. SUMMARY

3. The sole issue presented in the Motion is whether Complainants Judd or Herivel suffered any harm that is legally cognizable by this Commission. This question does not at all go to the merits of the Complaint, and it requires no facts beyond those already in the record. *Every* carrier and *every* call at issue in this case was exempt from providing rate disclosures. Assuming that they in fact heard no rate disclosures when receiving these inmate calls, as alleged, Complainants Judd and Herivel still plainly have not been injured because the telecommunications carriers serving the institutions in which the calling parties were incarcerated had been exempted expressly by this Commission, as local exchange carriers (“LECs”), from the rate quote requirement.

4. Complainants impliedly concede their lack of standing by attempting to add new “ready and willing” parties. In seeking out new persons who allegedly did not hear rate disclosures “until a few years ago,” Judd and Herivel indicate that they understand that the inmate calls they themselves received were not required to carry audible rate disclosures. Their request for leave to amend the Complaint to add new parties, which according to Complainants’ own rationale is not within the authority of this Commission to grant because the case comes to this agency from the Washington state court, simply underscores the fatal justiciability problem they face.

5. Disposition of the issue of standing resolves the entire controversy in this proceeding. Under Washington law, lack of standing precludes Judd and Herivel from obtaining any relief either from this Commission or from a Court. If they suffered no injury and are not within the zone of interest applicable to their allegations, this Commission has no legal basis to investigate further the allegations lodged against T-NETIX and AT&T. As Complainants themselves acknowledge, the jurisdiction of the Commission in this matter is derivative of the jurisdiction of the King County Superior Court – it cannot manufacture standing or provide what is purely an advisory opinion on behalf of persons with no right to relief. Accordingly, the Motion should be granted and Complainants’ claim must be dismissed with prejudice.

II. COMPLAINANTS WERE NOT ENTITLED TO RECEIVE AUDIBLE RATE DISCLOSURE INFORMATION FOR ANY CALLS THAT THEY RECEIVED

6. Complainants' opposition to the Motion concedes the operative facts of this matter: that all of the inmate calls they received were local or intraLATA, and that all Commission-regulated common carriers for these calls – the owners of the entire transmission path, including the connection to the public switched telephone network – had express exemptions or waivers of the only rule at issue in this case. Having made these concessions, Complainants acknowledge that, even if their allegations are true, they have suffered no harm. Therefore, they have no standing to pursue any claims against any party, either here or in court. The question whether T-NETIX complied with Commission rules – a point that T-NETIX did not address and because it is outside the scope of its Motion – is thus a matter that the Commission may not consider in this context. Complainants' persistent attempts to deflect attention to what they contend are the merits of this case are premature and legally irrelevant when they have no cognizable injury which confers standing to obtain relief for the regulatory violations they allege.¹

7. Complainants do not refute the fact that all of the inmate collect calls they received were local or intraLATA. Nor do they refute that GTE, PTI or US West provided both the local portion and the intraLATA portions of these calls. Nor do they refute that all three of these entities had no obligation to provide disclosures of their rates to Judd or to Herivel. Yet these facts lead inexorably to the only one conclusion, namely that neither Judd nor Herivel suffered

¹ The thrust of Complainants' Response goes to the merits of their claim, which is entirely outside the scope of the Motion and thus not relevant to the question of justiciability that T-NETIX has presented. T-NETIX therefore requests that the Commission not consider the substantive arguments included in the Response, which contend that T-NETIX must be an "operator service provider" merely because its Motion does not deny that allegation. But the question of whether T-NETIX, which provided hardware and services to the exempt LECs and other carriers (*see, e.g.*, Amendment 3 to the AT&T/DOC Contract (Motion Exh. 3)), was somehow an OSP under WAC 480-120-121 is not at all relevant to the question of standing, and thus was and remains superfluous to the Motion. T-NETIX would be pleased to brief this issue, in a proper procedural context, if the Commission desires it. For purposes of the present Motion, however, T-NETIX respectfully submits that (a) the Commission is required to and may permissibly decide only whether Complainants Judd and Herivel suffered a cognizable injury to establish standing, and (b) if standing is not established based on the undisputed facts of the present record, consideration of Complainants' merits argument is both premature and procedurally improper.

any harm in this case, and in fact could have been aware of that circumstance when this case was first dismissed by the Superior Court in 2000.

8. As explained in the Motion, the Commission will dismiss proceedings where complainants lack standing. *Stevens v. Rosario Utils.*, WUTC Docket No. UW-011320, Third Suppl. Order at 19, 2002 WL 31730489 (Wash. U.T.C. July 12, 2002) (citing *Save a Valuable Environment (SAVE) v. City of Bothell*, 89 Wn.2d 962, 576 P.2d 401, 403-404 (1978)). See *United & Informed Citizen Advocates Network v. Pacific Northwest Bell Tel. Co. d/b/a U S West Communs., Inc.*, WUTC Docket No. UT-960659, Third Suppl. Order (Feb. 1998) (“U&ICAN”). Contrary to Complainants’ suggestions, it matters not that this proceeding came to the Commission via primary jurisdiction referral rather than direct complaint. The Commission’s rationale in *Stevens* demonstrates that it does not provide advisory opinions; unless Complainants suffered a harm or were owed a duty, they cannot seek redress here. *Stevens*, 2002 WL 31730489 at * 18-19.

9. The Motion explains in detail that Complainants Judd and Herivel concededly received calls that were carried and terminated by GTE, PTI or US West. Those regulated LECs also billed, or procured the billing to, Judd and Herivel. The rates at issue were likewise necessarily the applicable GTE, PTI or US West rates. Yet under the express exemption from WAC 480-120-121 in place through 1999, and the waivers granted by this Commission lasting through December 2000, those rates were *not* required to be audibly disclosed to calling or called parties. Thus, if Judd and Herivel in fact did not receive such audible rate disclosures, as they allege, that is a result contemplated and approved by this Commission. They have suffered nothing. This lack of injury strips Judd and Herivel of the right to seek any Commission intervention or relief. See *Stevens*, 2002 WL 31730489 at * 18-19.

10. Nor were Judd and Herivel owed any duty under WAC 480-120-121. In drafting that rule, and in later granting waivers of that rule, the Commission found that GTE, PTI and US West should be excused as LECs from any duty to inmate callers and their called parties. Being

owed no duty, Judd and Herivel have no cause to seek relief or intervention from this Commission. *See id.*

III. COMPLAINANTS' LACK OF STANDING NULLIFIES THE SUPERIOR COURT'S PRIMARY JURISDICTION REFERRAL AND RELIEVES THE COMMISSION OF ITS DUTY

11. The Commission's role in this matter is solely to assist the Superior Court in adjudicating Complainants' claim that they were injured by virtue of violations of WAC 480-120-121. Motion ¶¶ 28-30. As Complainants themselves admit, the Commission has only "derivative" jurisdiction under the Judge Kathleen Learned's primary jurisdiction referral. Response ¶ 29. Thus, if Judd and Herivel lack standing to proceed, that status strips the state courts of jurisdiction, *see SAVE*, 576 P.2d at 404, and this Commission *a fortiori* does not have jurisdiction to resolve the question Judge Learned referred to it.

12. Complainants brought this case to the Commission after Judge Learned of the King County Superior Court granted T-NETIX's Motion to Dismiss and "referred" the matter to this Commission "to determine if T-NETIX has violated WUTC regulations." Motion Exh. 1. As T-NETIX explained in the Motion, the doctrine of primary jurisdiction is invoked where "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 v. Old Union Stockyards Co.*, 58 Wn.2d 478, 364 P.2d 23, 27 (1961).

13. But ***Complainants have no claim*** against T-NETIX because they have no injury and accordingly have failed to allege a justiciable controversy. Thus, what Complainants seek now is necessarily advisory opinion about defendants' conduct based on hypothetical service arrangements in unspecified correctional institutions. This Commission's consistent adherence to the standing requirement for administrative proceedings demonstrates that it will not engage in such *ad hoc* intervention. *See Stevens*, 2002 WL 31730489 at *12. Nor should the Commission be asked to expend resources for such aimless pursuits.

14. There is no injury here to vindicate and no wrongdoing to sanction. Judd and Herivel received calls from facilities served by common carrier LECs that had no obligation to disclose their rates audibly. That exemption was developed, approved and extended by this Commission. And although it may be frustrating, after five years, to learn that what Complainants believed was a legal violation is in fact the subject of a regulatory exception by this agency, that circumstance cannot create a justiciable controversy where none exists. Dismissal is thus the correct and only permissible outcome.

IV. COUNSEL CANNOT ADD NEW COMPLAINANTS TO CURE JUDD'S AND HERIVEL'S LACK OF STANDING

15. Complainants' attempt to add new parties to this primary jurisdiction proceeding should be rejected, for two reasons. First, the Commission does not have jurisdiction to permit joinder in a proceeding that is before it only through a primary jurisdiction referral. Secondly, such attempt is extremely prejudicial to defendants, as this case has been framed by Judd's and Herivel's claims for five years and, more pertinent to this proceeding, the period for written discovery has lapsed, precluding defendants from investigating the allegations that these purported complainants have just raised.²

16. Because this Commission's jurisdiction is "derivative" of the Superior Court's, Response ¶ 29, it cannot expand this matter to include purported new "ready and willing" complainants to remedy Judd's and Herivel's lack of standing. *Id.* ¶ 38. This case did not originate in this forum, and thus it is not for this Commission to change its scope. Indeed, as Complainants argue, this matter is "strictly limited to the questions referred to the Commission." Response ¶ 28. This restriction "precludes the agency from deciding issues outside the scope of the referral." *Id.*

17. Complainants' request for leave to amend, whether from this Commission or from the Superior Court, is simply an eleventh-hour attempt to save this matter – a matter that has

² T-NETIX separately moves to strike the new declarations on these and other grounds.

languished for five years. It is extremely and unfairly prejudicial to defendants to be faced with new plaintiffs and allegations after all this time. Perhaps more significantly, the Procedural Schedule set for this case bars all further written discovery, precluding defendants from investigating and thus defending themselves on the purported new claims and parties, which at this time are but murky assertions, of an entire non-profit legal aid organization and a criminal defense lawyer. In short, Complainants had years to seek leave from the Superior Court to add new parties as Plaintiffs; their belated and procedurally improper attempt to do so now unfairly constrains defendants' ability to defend this longstanding action.

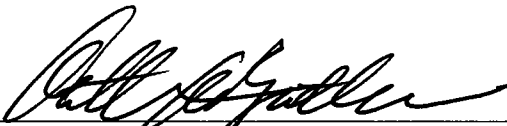
18. Finally, even if amendment were otherwise proper, Complainants have done nothing to establish that these new persons or entities have standing themselves. Their supporting declarations do not provide any terminating phone numbers or any definable time period within which defendants could conduct the kind of research necessary to determine the nature of the alleged inmate calls. Nor do they allege any facts supporting a conclusion that they received inmate calls from carriers other than those exempt LECs that were not subject to the Commission's rate disclosure requirement. Thus, rather than curing Judd's and Herivel's lack of standing, these new parties only raise additional, unresolved factual questions of injury and interest that at best demonstrate the new parties cannot cure the defects in the existing case and, at worst, reveal that Complainants' request to add new plaintiffs is an inexcusable evasion of the Commission's standing requirements and an shameful attempt to unfairly extend this proceeding by hiding the factual basis for their legal standing.

V. CONCLUSION

19. For all these reasons, the Commission must enter summary determination for T-NETIX as to all claims and allegations in this matter pursuant to WAC 480-09-426 and may not grant Complainants leave to amend in order to add new parties.

DATED this 10th day of May, 2005.

ATER WYNNE LLP

By 

Arthur A. Butler, WSBA #04678
601 Union Street, Suite 5450
Seattle, Washington 98101-2327
Tel: (206) 623-4711
Fax: (206) 467-8406
Email: aab@aterwynne.com

and

Of Counsel:
Glenn B. Manishin
Stephanie A. Joyce
Kelley Drye & Warren LLP
1200 19th Street, N.W., Suite 500
Washington, D.C. 20036

Attorneys for Respondent T-NETIX, Inc.

CERTIFICATE OF SERVICE

I hereby certify that I have this 10th day of May, 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	<input type="checkbox"/>	Hand Delivered
Executive Secretary	<input type="checkbox"/>	U.S. Mail (first-class, postage prepaid)
Washington Utilities and Transportation Commission	<input checked="" type="checkbox"/>	Overnight Mail (UPS)
1300 S Evergreen Park Drive SW	<input type="checkbox"/>	Facsimile (360) 586-1150
Olympia, WA 98504-7250	<input checked="" type="checkbox"/>	Email (records@wutc.wa.gov)

I hereby certify that I have this 10th day of May, 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:

Ms. Letty S. Friesen	<input type="checkbox"/>	Hand Delivered
AT&T Communications of the Pacific Northwest	<input checked="" type="checkbox"/>	U.S. Mail (first-class, postage prepaid)
Law Department	<input type="checkbox"/>	Overnight Mail (UPS)
919 Congress Avenue, Suite 900	<input type="checkbox"/>	Facsimile (303) 298-6301
Austin TX 78701-2444	<input checked="" type="checkbox"/>	Email (lsfriesen@att.com)

Confidentiality Status: Highly Confidential

On Behalf Of T-Netix:

Stephanie A. Joyce	<input type="checkbox"/>	Hand Delivered
Kelley Drye & Warren LLP	<input checked="" type="checkbox"/>	U.S. Mail (first-class, postage prepaid)
1200 19th Street NW, Suite 500	<input type="checkbox"/>	Overnight Mail (UPS)
Washington DC 20036-2423	<input type="checkbox"/>	Facsimile (202) 955-9792
	<input checked="" type="checkbox"/>	Email (sjoyce@kelleydrye.com)

Confidentiality Status: Highly Confidential

On Behalf Of T-Netix:

Glenn B. Manishin	<input type="checkbox"/>	Hand Delivered
Kelley Drye & Warren LLP	<input checked="" type="checkbox"/>	U.S. Mail (first-class, postage prepaid)
1200 19th Street NW, Suite 500	<input type="checkbox"/>	Overnight Mail (UPS)
Washington DC 20036-2423	<input type="checkbox"/>	Facsimile (202) 955-9792
	<input checked="" type="checkbox"/>	Email (gmanishin@kelleydrye.com)

Confidentiality Status: Public

On Behalf Of Judd & Herivel:

Jonathan P. Meier
Sirianni Youtz Meier & Spoonemore
719 Second Avenue, Suite 1100
Seattle WA 98104

Confidentiality Status: Highly Confidential

Hand Delivered
 U.S. Mail (first-class, postage prepaid)
 Overnight Mail (UPS)
 Facsimile (206) 223-0246
 Email (jon@syllaw.com)

On Behalf Of AT&T:

Charles H. Peters
Schiff Hardin LLP
233 South Wacker Drive
6600 Sears Tower
Chicago IL 60606

Confidentiality Status: Highly Confidential

Hand Delivered
 U.S. Mail (first-class, postage prepaid)
 Overnight Mail (UPS)
 Facsimile (312) 258-5600
 Email (cpeters@schiffhardin.com)

On Behalf Of Commission:

Ann E. Rendahl ALJ
Washington Utilities and Transportation
Commission
1300 S Evergreen Park Drive SW
PO Box 47250
Olympia WA 98504-7250

Hand Delivered
 U.S. Mail (first-class, postage prepaid)
 Overnight Mail (UPS)
 Facsimile (360) 586-8203
 Email (arendahl@wutc.wa.gov)

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

DATED this 10th day of May, 2005, at Seattle, Washington.

