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' REPLY TO AT&T'S RESPONSE JOINING IN T-NETIX'S MOTIONS**

AT&T's "Joinder" is a Separate Motion for Summary Determination

1. On Friday, May 6th, AT&T filed a document that it styles as a "response joining in" T-Netix's pending motion for summary determination. AT&T's filing is not a "joinder" in the usual sense. AT&T goes well beyond the issues raised and relief sought in T-Netix's motion and instead seeks affirmative relief (dismissal) for itself. In doing so, it urges the Commission to "apply" T-Netix's evidence to AT&T and reargues evidence it submitted earlier. AT&T's "joinder" is an attempt to accelerate its own motion for summary determination, and pretermit discovery that was deemed appropriate and necessary by the Commission when it ordered that "discovery will be conducted" on AT&T's pending motion. Prehearing Conference Order dated February 22, 2005.

AT&T Highlights Why Discovery Is Necessary

2. The bulk of AT&T's filing repeats arguments it made in its earlier motion for summary determination and in T-Netix's separate motion. But AT&T makes one assertion that bears scrutiny because it illustrates why AT&T and T-Netix should be participating in discovery right now to determine who provided operator services and when and where those services were provided.

3. T-Netix has assumed, for purposes of its motion for summary determination and its standing argument, that the only calls "involving" T-Netix are calls that took place after it entered into a subcontract with AT&T in 1997. *See* T-Netix Motion for Summary Determination, ¶ 14; *see also* Exh. 3 to T-Netix Motion (subcontract). Thus, T-Netix claims that it is absolved of responsibility for a call that Ms. Judd received from the Clallam Bay Corrections Center in July 1996 because "PTI was the local and intraLATA carrier" for that call. T-Netix Motion, ¶ 18 n.2.

4. AT&T has now thrown T-Netix's claim that it was not involved in calls before its 1997 subcontract with AT&T into doubt:

> AT&T disagrees with T-Netix's assertion that "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)" ***because T-Netix provided services related to prison calls prior to its replacement of PTI.***

AT&T Joinder at 5 n.4 (quoting T-Netix's Motion for Summary Determination at ¶ 14) (emphasis added).

5. AT&T's allegation that T-Netix was providing "services related to prison calls" *before* its 1997 subcontract with AT&T raises a number of questions: What was

T-Netix doing before 1997? If it was an operator services provider, when and where was it providing these services? Did it provide OSP services at Clallam Bay in July 1996? Were Judd and Herivel (and many others) injured because it was not disclosing rates? These are questions that go to the heart of the questions referred to the Commission.

6. They are also directly relevant to AT&T's and T-Netix's "standing" argument. If T-Netix was providing operator services before assuming the contractual obligations of PTI in 1997, it would trigger disclosure obligations under WAC 480-120-141(5)(iii)(a) (1991). Whether T-Netix was the operator service provider on calls received by Complainants is a fact question that T-Netix has avoided in discovery and is a live issue based on AT&T's assertion that T-Netix was providing services before 1997. AT&T's suggestion that T-Netix could have injured Complainants conflicts with T-Netix's position on the facts and precludes summary determination for both T-Netix and AT&T.

Contrary to the Factual Allegations of Both AT&T and T-Netix, Ms. Herivel Did Receive an InterLATA Call For Which No Rate Disclosure Occurred

7. Both AT&T and T-Netix contend, repeatedly, that "[a]ll of the prison calls at issue were local or intraLATA calls." AT&T Joinder, ¶ 6 (citing T-Netix Motion, ¶¶ 18-19 and charts). AT&T relies on this allegation when it asserts that dismissal is warranted because the evidence shows that calls received by Ms. Judd and Ms. Herivel "never touched" AT&T's network and that "AT&T cannot be the OSP."

AT&T Joinder, ¶¶ 8, 12. The only calls that traversed its network, AT&T argues, were interLATA calls. AT&T Joinder, ¶¶ 10-11.

8. AT&T and T-Netix have possessed information since early April indicating that Ms. Herivel did receive an interLATA call. As Exhibit 10 to T-Netix's Motion makes clear, Ms Herivel responded to a T-Netix data request by stating that she received a call from Airway Heights Correctional Center. Airway Heights is located approximately 10 miles from Spokane. It is in the Eastern Washington LATA. *See* UTC News & Views (Winter 2002) (describing three LATAs in Washington, one of which covers virtually all of Eastern Washington, and one of which covers virtually all of Western Washington). In 1998, while living in Seattle, Ms. Herivel received a phone call from an inmate at Airway Heights. Herivel Decl. She does not recall hearing any rate disclosure on this call. *Id.* Because this call was between two LATAs, Ms. Herivel received an inmate-initiated, interLATA call.

9. T-Netix apparently missed this because it focused only on the *phone bills produced by* Ms. Judd and Ms. Herivel. *See* Lee Aff., ¶¶ 3-4 (Exh. 11 to T-Netix Motion). The universe of inmate-initiated calls actually received by Complainants is larger than the universe of calls listed on the limited set of phone bills that were in the possession of Complainants and produced by them. Ms. Herivel did not produce phone bills from 1998 because she does not have any and could not obtain the bills from Qwest. Herivel Decl.

10. Ms. Herivel's receipt of an interLATA call undermines the factual basis for AT&T's joinder, as well as the basis for T-Netix's motion. A fact issue exists with

respect to whether AT&T or T-Netix provided operator services for interLATA calls. AT&T indicates, in sworn testimony, that T-Netix provides "the operator interface between the called party and the collect call announcement or the access to rate quotes." Gutierrez Aff., ¶ 9 (Exh. 4 to T-Netix Motion). If AT&T is correct, then Complainants have standing, even if one assumes that the legal analysis of AT&T and T-Netix is correct on the standing issue, because a fact issue exists with respect to T-Netix's (and AT&T's) involvement in interLATA calls.

11. Ultimately, the role that AT&T and T-Netix played in all types of calls must be answered in discovery, regardless of what AT&T or T-Netix may allege at this stage of the proceedings. The Commission ordered discovery so that the parties could review documents, analyze responses to data requests, and depose witnesses to determine precisely who provided what type of service, and where and when those services were provided. The record is not nearly complete enough to answer these questions now.

AT&T's "Standing" Argument, Like That of T-Netix, Is Based on a Misreading of the Statute and Regulations

12. Like T-Netix's motion, AT&T's standing argument depends on an erroneous reading of the statute and regulations. AT&T repeats T-Netix's error when it focuses on entities that "carried" a call (AT&T Joinder, ¶ 1) or were "responsible for providing service" (*id.*, ¶ 6). The key question on standing is: Who provided operator service and at which correctional facilities? Complainants were harmed if T-Netix or AT&T, while serving as an OSP, failed to provide rate disclosure on calls that

Complainants received. That is why the merits of this case cannot be divorced from the standing issue. *See* Complainants' Response to T-Netix Motion, ¶¶ 17-22.

13. If the Commission determines it has the authority to reach the standing issue, it is Complainants' claims in the trial court that must define the scope of the inquiry. As plaintiffs in the trial court, Complainants assert that T-Netix and AT&T are liable under the Consumer Protection Act by virtue of RCW 80.36.530, which states that a "violation" of RCW 80.36.510 and .520 "constitutes an unfair or deceptive act in trade or commerce in violation of chapter 19.86 RCW, the consumer protection act . . ." RCW 80.36.520, in turn, provides that:

> The utilities and transportation commission shall by rule require, at a minimum, that any telecommunications company, ***operating as or contracting with an alternate operator services company,*** assure appropriate disclosure to consumers of the provision and the rate, charge or fee of services provided by an alternate operator services company.

14. In 1991, the WUTC began requiring alternate operator services companies to disclose rates for a particular call "immediately, upon request, and at no charge to the consumer." WAC 480-120-141(5)(iii)(a) (1991). The operator was required to provide "a quote of the rates or charges for the call, including any surcharge." *Id.* The disclosure obligation applies specifically to alternate operator services companies, *id.*, which are defined as "any corporation, company, partnership or person other than a local exchange company ***providing a connection to intrastate or interstate long-distance or to local services*** from locations of call aggregators." WAC 480-120-021 (1991) (emphasis added).

15. In 1999, the WUTC amended its regulations. It began using the term "operator service provider," or OSP, instead of "alternate operator services company," or AOSC. WAC 480-120-021 (1999). The definition remained the same, with one important exception: the exemption for local exchange companies was eliminated. *Id.* New disclosure obligations were put into effect. OSPs were required to "verbally advise the consumer how to receive a rate quote, such as by pressing a specific key or keys, but no more than two keys, or by staying on the line." WAC 480-120-141(2)(b) (1999).

16. Based on these regulations, AT&T and T-Netix are liable under the Consumer Protection Act if, with respect to inmate-initiated calls, they:

- were an AOSC (under the 1991 regulations) or an OSP (under the 1999 regulations); ***OR***
- "contracted with" an AOSC or OSP; ***AND***
- either failed to make rate disclosure as prescribed by the regulations or contracted with an AOSC or OSP that failed to make such disclosure.

17. The "contracting with" basis for liability derives directly from the statute, which unambiguously states that "any telecommunications company, operating as ***or contracting with*** an alternate operator services company," must "assure appropriate disclosure." RCW 80.36.520. The regulations are silent with respect to the "contracting with" basis for liability. They cannot contradict the statute, however, and must be harmonized with it. *Caritas Serv., Inc. v. Department of Social &*

Health Serv., 123 Wn.2d 391, 415, 869 P.2d 28 (1994). The only interpretation of the regulations that is consistent with the statute is a reading that makes entities "contracting with" an AOSC or OSP liable if there is no rate disclosure.

18. The Commission is charged, in this primary jurisdiction referral, with determining whether T-Netix or AT&T were OSPs (post-1999) or AOSCs (pre-1999). It must also determine whether T-Netix or AT&T violated the regulations, either because they failed to make rate disclosure as an OSP or AOSC or because they contracted with an OSP or AOSC that failed to make rate disclosure. Because the Commission has been asked whether T-Netix or AT&T violated its regulations, it must necessarily determine whether those regulations were violated because either entity contracted with an OSP that failed to make rate disclosure.

19. Neither AT&T nor T-Netix focus on the proper questions. AT&T adopts T-Netix's standing analysis, which focuses on who "carried" the call or who owned the "transmission path" for the call. T-Netix Motion, ¶ 2, 15; T-Netix Reply, ¶ 6. The regulations, however, do not require the "carrier" of the call or the "owner of the transmission path" to disclose rates. Those obligations are placed squarely on the shoulders of the OSP. *See* WAC 480-120-141(2)(b) (1999) ("***the OSP*** must verbally advise the consumer how to receive a rate quote . . .") (emphasis added); WAC 480-120-141(5)(iii)(a) (1991) ("***The alternate operator services company shall***: . . . immediately, upon request, and at no charge to the consumer, disclose to the consumer: a quote of the rate or charges for the call, including any surcharge") (emphasis added).

20. Accordingly, the appropriate questions for standing are: Did Complainants receive any calls for which either T-Netix or AT&T were the OSP? Alternatively, did Complainants receive any calls for which rate disclosure did not occur and for which T-Netix or AT&T contracted with an OSP?

21. AT&T ignores these questions. Instead, it states that the LECs agreed to be responsible for providing operator service at various facilities. AT&T Joinder, ¶ 9. Even if they did, it does not necessarily follow that the LECs actually functioned as OSPs. They may have subcontracted this function to an OSP like T-Netix. Regardless of whether another entity assumed responsibility, the regulations required OSPs to disclose rates.

22. On this record, fact questions exist with regard to whether AT&T (or T-Netix) was an OSP on calls received by Complainants. AT&T admits it provided service on interLATA calls. The question is whether it or T-Netix provided the "connection to intrastate or interstate long-distance or to local services" that triggers OSP status and therefore triggers disclosure obligations under the regulation. WAC 480-120-021 (1999).

23. We know that T-Netix was an OSP. *See* Complainants' Response to T-Netix Motion, ¶¶ 12-14. The only question is whether it was an OSP on calls received by Complainants. T-Netix documents suggest the answer is "yes," because those documents show that T-Netix was providing "Inmate Calling Services" (its operator platform) at the Washington State Reformatory and McNeil Island, facilities from which Sandy Judd and Tara Herivel received calls. *See* Complainants' Response to T-

Netix Motion, ¶¶ 22-26. If T-Netix or AT&T provided operator services, they are liable regardless of whether another entity might have "carried" the call or was "responsible" for it.

24. Moreover, fact questions exist with respect to whether AT&T or T-Netix contracted with an OSP that failed to make rate disclosure. If Complainants received any such calls, they have standing. Neither AT&T nor T-Netix have addressed this issue.

The Commission Should Refrain from Reaching the Standing Issue in this Primary Jurisdiction Referral

25. AT&T's attempt to seek a ruling on standing grounds may also be rejected because it is directed to the wrong forum. *See* Complainants' Response to T-Netix Motion, ¶¶ 27-35. The Commission has no authority to "dismiss" any party in a primary jurisdiction referral. Moreover, standing is an issue for the trial court, which can expeditiously deal with it under the civil rules. *Id.*, ¶¶ 36-37.

If the Commission Concludes that AT&T's Standing Argument Has Merits, It Should Permit Amendment of the Complaint

26. While AT&T's joinder can and should be rejected on any of the grounds above, Complainants have identified a person who indisputably received multiple calls for which AT&T provided service, and on which no rate disclosure occurred. *See* Elliott Decl. re AT&T Joinder. Ms. Elliott's declaration is relevant only if the Commission (a) does not reject AT&T's joinder on the merits; and (b) concludes that it has the power to "dismiss" AT&T on standing grounds despite the primary jurisdiction referral. If that occurs, the Commission should do what a trial court

would do in the same circumstances: permit amendment of the complaint. See Complainants' Response to T-Netix Motion, ¶¶ 36-39.

Discovery Should Not Be Stayed

27. AT&T's joinder in T-Netix's motion to stay, like its joinder on standing, seeks affirmative relief not sought by T-Netix. Specifically, AT&T seeks "an order staying discovery until the Commission resolves AT&T's and T-Netix's respective Motions for Summary Determination." AT&T Joinder, ¶ 15 (emphasis added). AT&T thus makes it crystal clear that it seeks to overturn this Commission's earlier decision (and AT&T's previous position) that discovery is warranted on AT&T's pending motion for summary determination.

28. As noted in connection with T-Netix's motion, AT&T has usurped the role of the Commission and granted itself a stay while the motion to stay is pending. *See* Complainants' Response to T-Netix Motion to Stay Discovery; Meier Decl., ¶¶ 10-14. That conduct flaunts the Commission's order that "discovery will be conducted" and it flaunts WAC 480-07-380(2)(d), which provides that a pending motion will not stay discovery by itself. AT&T complains about the burden of producing confidential information, but it has yet to produce a single confidential document. Meier Decl., ¶¶ 10-14. We are a few weeks away from the discovery cut-off ordered by the Commission. AT&T's decision to grind discovery to a halt on its own motion for summary determination is improper and it should be ordered to cooperate in discovery immediately.

Conclusion

29. Complainants respectfully request that the Commission deny AT&T's attempt to stay all discovery and obtain dismissal of this proceeding.

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