

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 TO STRIKE**

**Complainants' Entire Response Should Not Be Stricken**

1. Complainants' email filing on Friday, May 6 was late. Counsel underestimated the time it would take to address the details of complying with the confidentiality provisions required by the Protective Order. This was our first filing involving such materials, and counsel's hard-working and conscientious staff stayed late on a Friday to ensure all the i's were dotted and t's crossed. Counsel, of course, takes full responsibility for the late filing and will endeavor to make sure it does not happen again.

2. Complainants timely filed a paper copy of the entire filing, per the Commission's Notice of Opportunity to Respond, by Monday, May 9<sup>th</sup>. The Commission received that filing before 9 am on May 9<sup>th</sup>. Meier Decl. re: Motion to Strike.

3. T-Netix seeks a harsh sanction. It has not been prejudiced. T-Netix has submitted full replies and responses to all papers submitted by Complainants. The issues will be argued in June. Everyone will have had their say, and the Commission should have the benefit of a full record on a motion that seeks to dismiss Complainants from this proceeding. Put simply, the punishment does not fit the crime.

**Nothing Should be Stricken from the Response to T-Netix's Stay Motion**

4. In the first nine paragraphs of Complainants' Response to T-Netix's Motion to Stay Discovery, we made the following points:

- T-Netix has not engaged in a good-faith effort to resolve discovery disputes;
- Discovery may not be halted simply because a party has moved for summary determination and believes discovery is irrelevant to that motion; and
- T-Netix has objected to data requests that are relevant to its own motion for summary determination as well as that of AT&T and has refused to produce documents that it said it would produce "as soon as practicable."

5. T-Netix claims these points are "irrelevant and prejudicial." Complainants believe that when a party moves to stay discovery and then resists good faith efforts to resolve discovery disputes or produce documents that it said it would produce, that is a fact that should be brought to the Commission's attention. As to the

issue of whether the discovery Complainants have sought is relevant to T-Netix's standing argument, that is an issue that the Commission can determine for itself.

6. The points outlined in paragraphs 1-9 are not irrelevant or prejudicial and they should not be stricken.

#### **The Elliott and Janega Declarations Should Not Be Stricken**

7. T-Netix argues that the Elliott and Janega declarations submitted with Complainants' Response to T-Netix's Motion for Summary Determination should be stricken because they "constitute non-party testimony to facts outside the complaint." Motion to Strike, ¶ 8. No authority is cited.

8. T-Netix's arguments for striking the declarations are really arguments as to why, in T-Netix's opinion, the Commission should not grant leave to amend the complaint to add a new complainant. In other words, T-Netix does not focus on any evidentiary deficiencies in the declarations or some other legal basis for striking the declarations, but instead offers argument as to why the Commission should not permit a new complainant at this stage of the proceedings.

9. For example, T-Netix argues that it would be prejudicial to permit amendment where the deadline for propounding and responding to data requests has come and gone and T-Netix would be unable to investigate the basis for a new complainant's claims. Motion to Strike, ¶ 13. This is not an argument for striking the declaration. It is an argument on the merits of Complainants' request to amend the complaint should the Commission conclude that standing is lacking. Responding on the merits, we are willing to have any new complainant answer the same data requests

that T-Netix propounded to Ms. Judd and Ms. Herivel if and when the Commission issues a new scheduling order. No prejudice will ensue.

10. As for prejudice resulting from the age of the case, T-Netix forgets that the case is still in its infancy in a procedural sense. T-Netix has not even answered the complaint in the trial court. It has not engaged in discovery in the trial court, and only began to do so here. The claim that would be asserted by a new complainant such as Ms. Elliott is the same claim that T-Netix has faced all along: that it is liable under the Consumer Protection Act because it failed to disclose rates for inmate-initiated calls. A trial court may grant leave to amend the complaint to add a party plaintiff, and may do so in the class action context as well. *See* Complainants' Response to T-Netix's Motion for Summary Determination, ¶ 36. No prejudice would accrue as a result of amendment.

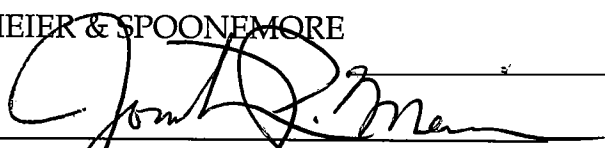
11. T-Netix argues that the Commission has no authority to permit amendment of the complaint because its jurisdiction, under a primary jurisdiction referral, is derivative of that of the trial court. We agree. The same reason should preclude the Commission from reaching the merits of the standing issue. Complainants have been clear that their request that the Commission permit them to amend the complaint need be acted on *only* if the Commission concludes that it may reach the merits of the standing question *and* that Complainants lack standing. *See* Complainants' Response to T-Netix Motion, ¶ 9. Complainants have consistently argued that the Commission should either not reach the standing issue because it lacks authority to do so or deny T-Netix's motion outright.

12. T-Netix's position is logically inconsistent. On one hand, it argues that the Commission has the ability to step into the shoes of the trial court and determine whether it has jurisdiction over the case because lack of standing strips the trial court of jurisdiction and therefore strips the Commission of its derivative jurisdiction as well. T-Netix Reply in Support of Motion for Summary Determination, ¶ 11. On the other hand, it agrees with Complainants that the Commission's purview is "strictly limited to the questions referred to the Commission" and argues that the Commission is not permitted to add claims or plaintiffs to this proceeding. Motion to Strike, ¶ 11. T-Netix can't have it both ways. Either the Commission has authority to reach standing and all related issues, including amendment of the complaint, or it does not.

13. Complainants respectfully request that the Commission deny, in its entirety, T-Netix's motion to strike.

DATED: May 13, 2005.

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