

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

SANDY JUDD, et al.,

Complainant,

v.

**AT&T Communications of the Pacific Northwest,
Inc. and T-Netix, Inc.,**

Respondents.

Docket No. UT-042022

NOTICE OF FILING

TO: Counsel of Record Listed on Certificate of Service

PLEASE TAKE NOTICE that on Tuesday, May 17, 2005, AT&T caused to be filed with the Executive Secretary of the Washington Utilities and Transportation Commission, AT&T's Additional Response in Support of Its Objection to Complainants' Expert Designation in the above-referenced proceeding, a copy of which is attached hereto and served upon you.

Dated: May 17, 2005

**AT&T COMMUNICATIONS OF
THE PACIFIC NORTHWEST, INC.**

By: /s/ Letty S.D. Friesen (by David C. Scott)

Letty S.D. Friesen
AT&T
919 Congress Avenue, Suite 900
Austin, TX 78701-2444
(303) 298-6475
(303) 298-6301 (fax)

One of the attorneys for AT&T

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**AT&T'S ADDITIONAL RESPONSE IN SUPPORT OF ITS
OBJECTION TO COMPLAINANTS' EXPERT DESIGNATION**

Introduction

1. During the May 10 hearing on AT&T's objection to Complainants' designation of Kenneth L. Wilson ("Mr. Wilson") and in the May 11 Notice of Changes to Procedural Schedule, the ALJ requested, and Complainants agreed to provide, a description of the specific topics that Mr. Wilson will address and information he will review as Complainants' expert in this proceeding. Complainants have utterly failed to comply with the ALJ's request. Rather than identify specific issues, Complainants simply assert that Mr. Wilson will analyze everything from "local and long-distance networks" to "business relationships between the parties" to whether AT&T was offering local service anywhere in Washington. Complainants' Surreply at ¶ 3; Supplemental Declaration of Kenneth L. Wilson ("Wilson Suppl. Decl.") at ¶¶ 2-4. And instead of pointing to specific information Mr. Wilson will review, Complainants suggest that he will review, *without limitation*, documents, responses to data requests, and deposition transcripts. Complainants' Surreply at ¶ 2. In sum, Complainants have neither complied with the ALJ's directive (thereby denying AT&T of the opportunity to meaningfully tailor Mr. Wilson's role such that he will not improperly use AT&T's confidential and trade secret information) nor addressed how Mr. Wilson will avoid using confidential and trade secret information he has

admittedly learned over his nearly twenty years working on AT&T's network. Indeed, Complainants essentially suggest that Mr. Wilson will have wide latitude to address *every issue* arising in this proceeding and review *all information* produced in discovery.

2. Nevertheless, in this brief, pursuant to the ALJ's request, AT&T will identify issues that Mr. Wilson simply cannot address and information that he simply cannot review without compromising his obligations to preserve the integrity of AT&T's confidential and trade secret information.

Argument

3. Mr. Wilson has previously testified before this Commission that he has over twenty years of experience working on AT&T's local and long distance telephone networks. *See* Ex. A at ¶¶ 3-5, Affidavit of Kenneth L. Wilson Regarding Interconnection, Collocation and Resale, in Docket Nos. UT-003022 and UT-003040¹; *see also* Suppl. Responsive Testimony of Kenneth Wilson (11/13/98) in Docket Nos. UT-960369, UT-960370, and UT-960371 (published on Commission's website), at 2-3; Testimony of Kenneth Wilson, at 12/7/98 Hr'g in Docket Nos. UT-960369, UT-960370, and UT-960371 (published on Commission's website), at 2050-54 (Vol. 7) (Mr. Wilson testified that he has "a lot of experience with the AT&T long distance network" including how it is designed and engineered). Mr. Wilson has described his experience as an employee of and consultant to AT&T to include the following:

- Working on the network architecture and network planning for AT&T's long distance service (one of the networks Complainants have put at issue in this proceeding);
- Leading a team responsible for network performance planning and assurance for AT&T Business Markets;

¹ Only the relevant pages of the cited affidavit (which is over 100 pages long) are attached, but AT&T will provide the full affidavit at the Commission's request.

- Leading a team responsible for network infrastructure alternatives for entering local telecommunications markets;
- Working on local network and interconnection planning, OSS interface architectures, and the technical aspects of product delivery; and
- Working on interconnection, collocation, and resale issues.

See Ex. 1 at ¶¶ 3-5; see also Suppl. Responsive Testimony of Kenneth Wilson (11/13/98), *supra*, at 2-3.

4. Mr. Wilson admits that, through this extensive experience, he has gained access to AT&T's confidential and trade secret information, including information related to AT&T's network and operations in the State of Washington. Wilson Suppl. Decl. at ¶ 6. Accordingly, there is no dispute that Mr. Wilson *possesses* AT&T's confidential and trade secret information. Furthermore, Mr. Wilson admits that the confidential and trade secret information to which he gained access is *relevant* to this proceeding and that he *intends to utilize this information* to buttress and direct Complainants' case against AT&T.²

5. Mr. Wilson states that the information "relevant in this case . . . would include [among other things] the connectivity [of AT&T's network] . . . to DOC locations." Wilson Suppl. Decl. at ¶ 13. Further, Mr. Wilson admits that he has gained access to AT&T's confidential and trade secret information related to its "connectivity." In an earlier WUTC proceeding, Mr. Wilson reviewed and analyzed AT&T's confidential and trade secret information on "special access trunks" in Washington, among other states, which may relate to AT&T's network "connectivity" and therefore, according to Mr. Wilson, is potentially relevant

² Complainants' suggestion that AT&T has somehow waived the right to object to Mr. Wilson as an expert by not doing so in other proceedings *in which AT&T was not a party* does not pass the straight-face test. See Complainants' Surreply at ¶ 17. In those other proceedings that did not involve AT&T, there was little risk that Mr. Wilson would actually use any AT&T confidential and trade secret information. Here there is not only a risk that he will use AT&T's confidential and trade secret information, but that he will use it against AT&T.

to this case. *Id.* at ¶¶ 6, 13. As the ALJ knows, special access trunks are trunks AT&T utilizes to gain access to customers. While AT&T does not necessarily concur in Mr. Wilson’s assessment regarding the relevance of such trunks in this proceeding, Complainants clearly believe that those trunks have relevance and AT&T acknowledges that Mr. Wilson has had extensive access to AT&T’s confidential data related to such trunks in Washington as well as AT&T’s confidential business strategies and uses for these trunks. In addition, Mr. Wilson “was the lead technical and business negotiator for AT&T” “in the negotiations for AT&T’s interconnection agreements with Qwest in Washington.” *Id.* at ¶ 8. Whether implementation of interconnection and connectivity “was managed by a different organization within AT&T,” as Mr. Wilson claims (*id.* at ¶ 10), there is no dispute that Mr. Wilson *led the negotiation* of interconnection and connectivity contracts *in the State of Washington*. *Id.* at ¶¶ 8, 10. In that role, he plainly possessed and utilized AT&T’s confidential and trade secret information. Indeed, by asserting that he did not “divulge AT&T confidential information to MCI and Qwest” regarding interconnection, Mr. Wilson implicitly admits that he gained access to such information, and he utterly fails to reveal precisely how it is possible for him to separate such information from his general knowledge so as to prevent its improper use here. *Id.* at ¶ 8.³

6. Mr. Wilson’s declarations demonstrate not just that he had access to relevant, confidential and trade secret AT&T information, but that he intends to use this information against AT&T. For example, Mr. Wilson states that the confidential and trade secret information

³ Mr. Wilson claims that “if [he] could be trusted at that time to no divulge AT&T confidential information to MCI or Qwest, when the information was in [his] hands and current, [he] see[s] no reason to believe there is any risk in [his] divulging . . . information given to him in this case.” Wilson Suppl. Decl. at ¶ 8. It is troubling that Mr. Wilson views his past status as an employee of AT&T in the same light as his current status as a potential expert witness adverse to AT&T. Moreover, aside from the disclosure question, Mr. Wilson does not explain how he would avoid misusing the confidential and trade secret information he possesses regarding AT&T’s interconnections in his proposed expert analysis here.

related to AT&T's special access trunks and connectivity to which he gained access "might be interesting in this case." *Id.* at ¶ 6. He further states that, while he no longer possesses the actual data, he and Complainants *intend to request this information in discovery.* *Id.* In other words, Mr. Wilson intends to utilize confidential and trade secret information related to AT&T's special access trunks and connectivity, by telling Complainants exactly what specific information and data they should pursue from AT&T. Not only does this demonstrate Mr. Wilson's willingness and intent to compromise the integrity of AT&T's confidential and trade secret information, but the fact that he has made such a suggestion shows that he has done so already in an effort to guide Complainants' case against AT&T. Indeed, Mr. Wilson previously raised the issue of trunking in his declaration responding to T-Netix's summary determination motion. Declaration of Kenneth L. Wilson in Support of Complainants' Response to T-Netix, Inc.'s Motion for Summary Determination ("Wilson Summ. Determ. Decl.") at ¶ 7.

7. Similarly, Mr. Wilson states that he will analyze the "business facts" and "business relationships" in this case (Wilson Suppl. Decl. at ¶¶ 2-3), even though he is familiar with AT&T's confidential and trade secret information related to its business planning and strategies through his past experience as an employee and consultant. *See, e.g., id.* at ¶¶ 8, 10.

8. As demonstrated above, like the *Wang Laboratories* and *Uniroyal* cases cited in AT&T's Reply, and unlike the cases relied upon by Complainants in their Surreply, Mr. Wilson gained access to AT&T's confidential and trade secret information that is directly at issue in this proceeding. *See also United States v. Larkin, Hoffman, Daly and Lindgren*, Civ. No. 3-92-789, 1994 WL 627569, at *2 (D. Minn. 1994) (disqualification appropriate where prior relationship has clear connection to subject of present litigation); *Marvin Lumber & Cedar Co. v. Norton Co.*, 113 F.R.D. 588, 591 (D. Minn. 1986) (disqualification rules designed to guard against even

potential breach of confidences by experts who had confidential relationship with party seeking disqualification). Indeed, Mr. Wilson has admitted as much and even brazenly states that he intends to utilize this information to guide Complainants' case against AT&T.

9. Complainants' only response is that while Mr. Wilson had access in the past to confidential and trade secret AT&T information that is relevant to this proceeding, that should not be a problem because he can no longer remember it. Nonsense. AT&T should not be required to rest on Mr. Wilson's professed memory lapse. In reality, there is no way that Mr. Wilson can segregate in his mind the confidential and trade secret information that he already possesses from anything new he might learn through reviewing discovery or otherwise; and, just as important, there is no way that the ALJ can ensure that he does so.⁴ This problem undercuts Complainants' and Mr. Wilson's argument that any AT&T confidential and trade secret information that Mr. Wilson possesses is old and stale, for even if that were true,⁵ as with any witness, reviewing documents and other discovery would refresh his memory and call up the very information Mr. Wilson may not use or disclose.⁶

⁴ See, e.g., *Solutech Corp., Inc. v. Agnew*, No. 16105-6-III, 1997 WL 794496, at *8-9 (Wash. Ct. App. Dec. 30, 1997) (upholding injunction prohibiting threatened misappropriation of trade secret under inevitable disclosure doctrine) (citing *Pepsico, Inc. v. Redmond*, 54 F.3d 1262, 1268 (7th Cir. 1995) (seminal case on inevitable disclosure doctrine)). Complainants do not argue that the inevitable disclosure doctrine does not apply here — in fact, its reasoning is compelling under these circumstances — but instead attempt to distinguish these cases on procedural grounds. Complainants' Surreply at ¶ 22.

⁵ The confidential and trade secret information Mr. Wilson possesses about AT&T's network is not obsolete, as AT&T's network has not changed dramatically since Mr. Wilson ceased his work for AT&T.

⁶ As an expert witness for AT&T in previous cases, Mr. Wilson gained access to and knowledge of AT&T's competitors' networks (e.g., Qwest Corporation). Because this proceeding implicates, and the discovery demands, an analysis of the interconnection of various carriers' networks, including AT&T's and Qwest's, it is likewise difficult to determine how the Commission could police Mr. Wilson's nondisclosure of such information and continued compliance with the relevant confidentiality orders.

10. For all of these reasons, AT&T urges that Mr. Wilson cannot participate in this proceeding as Complainants' expert without violating his obligation to preserve the integrity of AT&T's confidential and trade secret information. However, if Mr. Wilson is permitted to act as Complainants' expert, AT&T respectfully requests that his participation be restricted solely to the analysis of T-Netix's platform, about which Mr. Wilson has already testified in this proceeding. *See* Wilson Summ. Determin. Decl. at ¶¶ 9-13; Wilson Suppl. Decl. at ¶ 2. Mr. Wilson should be barred from addressing issues and reviewing information related to, among other things, AT&T's points of presence, points of interconnection, special access trunks, switch locations, transport routes, physical facilities, networks, infrastructure, local and long-distance billing, and business strategy.

11. Accordingly, the ALJ should sustain AT&T's objection to Complainants' designation of Mr. Wilson as an expert in this proceeding or, in the alternative, restrict the issues he may address and the information he may review in such a way that protects AT&T's interest in preserving the integrity of its confidential and trade secret information.

Dated: May 17, 2005

**AT&T COMMUNICATIONS OF
THE PACIFIC NORTHWEST, INC.**

By: /s/ Letty S.D. Friesen (by David C. Scott)
Letty S.D. Friesen
AT&T
919 Congress Avenue, Suite 900
Austin, TX 78701-2444
(303) 298-6475
(303) 298-6301 (fax)

Laura Kaster
AT&T
One AT&T Way
Room 3A213
Bedminster, NJ 07921
(908) 532-1888
(832) 213-0130 (fax)

Of Counsel:
Charles H.R. Peters
SCHIFF HARDIN, LLP
6600 Sears Tower
Chicago, IL 60606
(312) 258-5500
(312) 258-5600 (fax)

CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby certifies that on May 17, 2005, he served the true and correct original, along with the correct number of copies, of the foregoing document upon the WUTC via email and Federal Express, properly addressed as follows:

Carole Washburn
Executive Secretary
Washington Utilities and Transportation Commission
1300 S. Evergreen Park Drive SW
P.O. Box 47250
Olympia, WA 98504-7250
records@wutc.wa.gov

The undersigned, an attorney, further certifies that on May 17, 2005, he served a true and correct copy of the foregoing document upon counsel of record via email and Federal Express, properly addressed as follows:

Stephanie A. Joyce
Kelley Drye & Warren LLP
1200 19th Street NW, Suite 500
Washington, DC 20036-2423
sjoyce@kelleydrye.com

Glenn B. Manishin
Kelley Drye & Warren LLP
8000 Towers Crescent Drive, Suite 1200
Vienna, VA 22182
gmanishin@kelleydrye.com

Arthur A. Butler
Ater Wynne LLP
601 Union Street, Suite 5450
Seattle, WA 98101
aab@aterwynne.com

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

By email only:

Ann E. Rendahl ALJ
Washington Utilities and Transportation Commission
1300 S. Evergreen Park Drive NW
P.O. Box 47250
Olympia, WA 98504-7250
arendahl@wutc.wa.gov

Dated: May 17, 2005

 /s/ David C. Scott
David C. Scott