

BEFORE THE WASHINGTON STATE  
UTILITIES AND TRANSPORTATION COMMISSION

SANDY JUDD AND TARA	)	
HERIVEL,	)	DOCKET NO. UT-042022
	)	
Complainants,	)	ORDER NO. 03
	)	
v.	)	
	)	
AT&T COMMUNICATIONS OF	)	ORDER DENYING OBJECTION
THE PACIFIC NORTHWEST, INC.,	)	TO DESIGNATION OF EXPERT;
AND T-NETIX, INC.,	)	DENYING REQUEST TO
	)	DISQUALIFY EXPERT WITNESS
Respondents.	)	
	)	
.....	)	

1 **SYNOPSIS.** *This Order denies AT&T's objection to the designation of Mr. Kenneth Wilson as an outside expert who may review confidential information in this proceeding, as well as AT&T's request to disqualify Mr. Wilson as an expert in the proceeding. While Mr. Wilson is a former employee and consultant of AT&T and had access to confidential information during his employment and service as a consultant, AT&T has not shown good cause for restricting access of confidential information in this proceeding to Mr. Wilson or for disqualifying Mr. Wilson as an expert witness.*

2 **NATURE OF PROCEEDING.** Docket No. UT-042022 is a complaint filed by recipients of inmate-initiated calls against AT&T Communications of the Pacific Northwest, Inc. (AT&T), and T-Netix, Inc. (T-Netix), alleging that AT&T and T-Netix failed to disclose rates for the calls, violating the Commission's rules governing disclosure. The complaint was filed with the Commission after the King County Superior Court referred the matter to the Commission under the doctrine of primary jurisdiction to allow the Commission to complete an adjudication into the matters alleged.

3     **PROCEDURAL HISTORY.** The complaint initiating this proceeding was filed  
with the Commission on November 17, 2004. On December 15, 2004, AT&T filed  
a Motion for Summary Determination, and on December 16, 2004, AT&T filed a  
response to the formal complaint.

4     On December 21, 2004, and December 29, 2004, respectively, the Complainants  
and T-Netix requested additional time to file a response to AT&T's Motion for  
Summary Determination. By notices dated December 22, 2004, and January 3,  
2005, the Commission granted the Complainants and T-Netix an extension of  
time until February 1, 2005, to respond to AT&T's motion. On January 25, 2005,  
Complainants requested an additional continuance. On January 27, 2005, the  
Commission canceled the deadline to file responses to AT&T's motion to allow  
the Commission to establish a procedural schedule during a scheduled  
prehearing conference.

5     During a prehearing conference held on February 16, 2005, before Administrative  
Law Judge Ann E. Rendahl, the parties agreed to a procedural schedule in the  
proceeding, including a schedule for discovery. The Commission adopted the  
schedule in Order No. 01 in this proceeding, a prehearing conference order.

6     On March 18, 2005, the Commission entered Order No. 02 in this proceeding, a  
protective order.

7     After disclosure by Complainants of the designation of Mr. Kenneth Wilson as an  
outside expert and receiving copies of Exhibit B and C to the Protective Order  
signed by Mr. Wilson, AT&T sent a letter to Complainants' counsel on April 29,  
2005, objecting to designation of Mr. Wilson as an outside expert who may  
review confidential information.

8 On May 4, 2005, Complainants filed with the Commission a Response to AT&T's Objection to Designation of Expert together with the Declaration of Kenneth L. Wilson Re: Confidentiality. On May 6, 2005, the Commission issued a notice scheduling a telephonic conference for May 10, 2005, to hear arguments concerning AT&T's objection. On May 10, 2005, AT&T filed a Reply in Support of Its Objection to Complainants' Expert Designation.

9 During the May 10, 2005, conference, and subsequently by notice served May 11, 2005, the administrative law judge established a schedule for Complainants to file a surreply to AT&T's Reply, and for AT&T and T-Netix to file an Additional Response to the Surreply. Complainants filed their Surreply and an additional declaration by Mr. Wilson by submitting the pleadings electronically to the Commission on Friday, May 13, 2005. AT&T electronically submitted its Additional Response in Support of its Objection to Complainants' Expert Designation on Tuesday, May 17, 2005.

10 **APPEARANCES.** Jonathan P. Meier, Sirianni Youtz Meier & Spoonemore, Seattle, Washington, represents Tara Herivel and Sandy Judd, Complainants. Letty Friesen, AT&T Law Department, Austin, Texas, and Charles Peters and David C. Scott, Schiff Hardin, LLP, Chicago, Illinois, represent AT&T. Arthur A. Butler, Ater Wynne LLP, Seattle, Washington, and Stephanie Joyce, Kelley Drye & Warren LLP, Washington, D.C., represent T-Netix.

#### MEMORANDUM

11 AT&T raises two issues for the Commission's consideration. First, whether Mr. Wilson should be denied access under paragraph 6 of the Protective Order in this proceeding to confidential and highly confidential information, and Second, whether Mr. Wilson should be disqualified or excluded as a witness in the proceeding. These issues are addressed separately below.

- 12 **A. Objection Pursuant to the Protective Order.** Paragraph 6 of the Protective Order, Order No. 02 in this proceeding, provides that a party may object to “the designation of any outside expert as a person who may review Confidential or Highly Confidential Information.” Paragraph 6 further provides that “[f]or good cause shown, the Commission may order that the information not be disclosed.”
- 13 The protective order defines confidential information as “information that (1) might compromise a party’s ability to compete fairly or that otherwise might impose a business risk if disseminated without the protections provided in this Order, or (2) reflect Customer Proprietary Network Information, as defined by 47 U.S.C. § 222.” *Order No. 02*, ¶ 3. Highly confidential information is defined under the protective order as including network, security and anti-fraud information. *Id.*
- 14 AT&T objects to the Complainants’ designation of Mr. Wilson as an outside expert who may review confidential or highly confidential information. *See April 29, 2005, Objection Letter.* AT&T objects to Mr. Wilson reviewing confidential or highly confidential information on the following grounds: First, Mr. Wilson is a former employee of AT&T and since leaving AT&T has served as a consultant to AT&T. Second, during his employment and consulting work, Mr. Wilson had access to AT&T’s confidential and trade secret information, and “assumed obligations not to disclose or improperly use such information.” *Id.*
- 15 AT&T requests that the Commission disqualify Mr. Wilson as a witness, or in the alternative, restrict Mr. Wilson solely to analyzing T-Netix’s platform. *AT&T Additional Response*, ¶ 10. AT&T requests that the Commission bar Mr. Wilson from addressing and reviewing information relating to “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.” *Id.*

16 While AT&T focuses its argument primarily on supporting its request to disqualify Mr. Wilson as an expert witness in the proceeding, AT&T's arguments are also applicable to its request to restrict access to confidential information. AT&T relies on Mr. Wilson's Curriculum Vitae, as well as his May 11 Declaration, and an affidavit Mr. Wilson submitted in the Commission's Section 271 proceeding in Docket Nos. UT-003022 and UT-003044, to assert that Mr. Wilson has extensive knowledge of AT&T's network architecture and planning, and AT&T's interconnections with other carriers, including confidential information of these matters. *AT&T Reply*, ¶¶ 8-9; *see also AT&T Additional Response*, ¶¶ 3-4. AT&T asserts that "[c]omplainants have raised issues and sought information that relates directly to AT&T's network structure and interconnections," and that Mr. Wilson is obligated not to disclose any confidential information he gained about these matters. *AT&T Reply*, ¶ 9.<sup>1</sup>

17 AT&T is concerned that Mr. Wilson had access to AT&T confidential information relevant to this proceeding and will use it against AT&T in this proceeding. *AT&T Additional Response*, ¶ 4, n.2, ¶ 6. AT&T objects to Mr. Wilson advising Complainants to request this same confidential information through discovery and then using the information against AT&T, asserting that Mr. Wilson's discussion of trunking and connectivity in the context of declarations in this proceeding is evidence of his using and compromising AT&T confidential information in this proceeding. *Id.*, ¶ 6.

18 AT&T asserts that Mr. Wilson is unable to provide an expert opinion in this proceeding without the inevitable disclosure or improper use of AT&T's proprietary or confidential information. *AT&T Reply*, ¶¶ 1, 9, *citing Solutec Corp., Inc., v. Agnew*, 88 Wash. App. 1067, No. 16105-6-III, 1997 WL 794496, \*8-9 (Wash. Ct.

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<sup>1</sup> AT&T relies on statements made in a Declaration of Mr. Wilson filed with the Commission to address T-Netix's Motion for Summary Determination. *See AT&T Reply*, ¶ 5; *see also Exhibit C to AT&T's Reply*. T-Netix's motion will be addressed separately following additional briefing and oral argument.

*App. Dec. 30, 1997*). AT&T asserts that Mr. Wilson “holds within his brain the information he cannot disclose or be reasonably expected to ignore in analyzing the issues in this case.” *Id.*, ¶ 9. AT&T asserts that courts may disqualify experts where the expert had a prior confidential relationship with an adverse party and the expert possessed confidential information of the adverse party. *AT&T Additional Response*, ¶ 8, citing *United States v. Larkin Hoffman, Daly and Lindgren*, Civ. No. 3-92-789, 1994 WL 627569, at \*2 (D. Minn. 1994); *Marvin Lumber & Cedar Co., v. Norton Co.*, 113 F.R.D. 588, 591 (D. Minn. 1986); see also *AT&T Reply*, ¶ 9, citing *Wang Laboratories, Inc. v. CFR Associates, Inc.*, 125 F.R.D. 10, 13 (D. Mass. 1989); *Uniroyal Goodrich Tire Co. v. Hudson*, 873 F. Supp. 1037 (E.D. Mich. 1994), *aff’d by 97 F.3d 1452*, 1996 WL 520789, \*9 (6<sup>th</sup> Cir. Mich. 1996).

19 Complainants assert that the only issue the Commission must address is AT&T’s objection to Mr. Wilson under paragraph 6 of the protective order. *Surreply*, ¶ 4. Complainants assert that an objection to designation of an expert under paragraph 6 should be denied unless the objecting party demonstrates good cause for barring disclosure to the expert. *Complainants’ Response*, ¶ 4. Complainants assert that the issue is whether Mr. Wilson’s access to confidential information presents a risk of competitive injury to AT&T. *Surreply*, ¶ 5. Complainants assert that no party in the proceeding is a competitor of AT&T, and that Mr. Wilson has agreed to abide by the terms of the protective order. *Surreply*, ¶ 6. Complainants assert that AT&T has not demonstrated or identified any specific competitive harm that would result from disclosure of confidential information to Mr. Wilson. *Id.*; *Complainants’ Response*, ¶¶ 4, 8-9.

20 Complainants rely on two declarations of Mr. Wilson to support their position: The Declaration of Kenneth L. Wilson Re: Confidentiality, attaching a copy of Mr. Wilson’s extensive Curriculum Vitae, and the Supplemental Declaration of Kenneth L. Wilson Re: AT&T’s Objection to Expert Designation. In these declarations, Mr. Wilson states that, while employed with AT&T, he did not work for the part of the company that handled the contract for the Washington

Department of Corrections and has no knowledge of the contract or confidential information relating to the contract. *May 2, 2005, Wilson Declaration, ¶ 3.* Mr. Wilson states that he has returned or destroyed what little confidential information he obtained while participating in four cases before the Commission as consultant to AT&T and a competitor, and does not remember any of the confidential information. *May 11, 2005, Wilson Declaration, ¶¶ 6-9, 11; See also May 2, 2005, Wilson Declaration, ¶ 7.*

21 Mr. Wilson states that he is not aware of any confidentiality agreement as a result of his employment with AT&T that would preclude his participation in the proceeding and has returned any confidential information to AT&T. *May 2, 2005, Wilson Declaration, ¶ 4.* Mr. Wilson acknowledges that his consulting firm signed a nondisclosure agreement with AT&T, but states that he received only limited confidential information from AT&T, the information has been returned, and none of the information is relevant to this proceeding. *Id., ¶ 6.*

22 Mr. Wilson states that the information involved in the proceeding, *e.g.*, configuration of the Department of Corrections network, location of operator services platforms and types of calls going in and out of the platforms, does not require special knowledge, and can be evaluated by any competent telecommunications engineer. *May 11, 2005, Wilson Declaration, ¶¶ 2, 5.* Mr. Wilson states that any confidential information he obtained concerning AT&T's network structure and interconnection is at least five to ten years old, and if relevant in the proceeding, would not have much value to a competitor. *Id., ¶¶ 12-13.* Mr. Wilson states that he has already rendered an opinion in the proceeding in his May 2, 2005, Declaration in Response to T-Netix's Motion for Summary Determination without divulging any confidential information, and that he will maintain his integrity in this proceeding as he has in numerous other proceedings. *Id., ¶¶ 18-20, 24-29.*

- 23 *Discussion and Decision.* What is clear from the parties' pleadings and the three declarations Mr. Wilson has filed is that Mr. Wilson is a qualified expert in the field of telecommunications. Mr. Wilson has 25 years of experience in the telecommunications industry, primarily as an employee of Bell Labs and AT&T. Mr. Wilson has extensive experience and knowledge in the areas of network design and planning, and development of the local telecommunications market. In the course of his employment and consulting relationship with AT&T, however, Mr. Wilson has had access to the confidential and proprietary information of AT&T and other telecommunications companies.
- 24 AT&T must demonstrate good cause under paragraph 6 of Order No. 02 for this Commission to prohibit Mr. Wilson from reviewing confidential information under the protective order in this proceeding. Other than claiming, generally, that Mr. Wilson had access to AT&T's – and Qwest's – confidential and proprietary information, that Mr. Wilson retains that information in his head, and that Mr. Wilson may use that information against AT&T in this proceeding, AT&T does not point to any particular confidential information the dissemination of which would compromise competition or impose a business risk.
- 25 This proceeding does not address competitive issues, nor are Complainants competitors of AT&T. Mr. Wilson identifies the information he intends to review and evaluate as an expert witness for the Complainants, including " how the network was configured for the Department of Corrections (DOC), how calls were processed, and where the operator services functions were performed for calls from each DOC location," "the location of operator services platforms, the types of calls going in and out of those platforms, exactly what the platforms did and didn't do, the connectivity of the platforms to both local and long distance switches, and other specific information on the local and long distance networks connecting to the DOC locations," as well as the business relationships between the parties. *May 11, 2005, Wilson Declaration*, ¶ 2. While all of these topics appear



to be valid items for discovery in this proceeding, none of these appear to raise issues that might compromise AT&T's ability to compete or impose business risks not protected under Order No. 02 in this proceeding.

26 No party has questioned Mr. Wilson's integrity or his ability to comply with the protective order in this proceeding or protective orders, generally: AT&T specifically asserted during the May 10, 2005, argument that it does not question Mr. Wilson's professional integrity. As Mr. Wilson states in his declaration, he has worked as a consultant for AT&T and its competitors without compromising AT&T's proprietary information. There is no basis in this record to question Mr. Wilson's integrity or ability to comply with the protective order.

27 General knowledge of AT&T's network and interconnection activity and knowledge of confidential information about AT&T's and Qwest's networks does not, by itself, establish good cause under paragraph 6 of the protective order to justify restricting Mr. Wilson from reviewing confidential information in this proceeding. There must be some likelihood of competitive harm or business risk due to disclosure not protected by Order No. 02. Because the likelihood of competitive harm or business risk is not present in this situation, AT&T's objection under paragraph 6 of the protective order is denied.

28 **B. General Objection to Mr. Wilson as a Witness.** In its Reply in Support of its Objection, AT&T registers a broader objection, stating that it "objects to Complainants' designation of [Mr. Wilson] as their expert in this proceeding." *AT&T Reply*, ¶ 1. AT&T asserts "Mr. Wilson cannot participate in the proceeding as the Complainants' expert without violating his obligations to preserve the integrity of AT&T's confidential and trade secret information." *AT&T Additional Response*, ¶ 10. In addition to the arguments AT&T makes about inevitable disclosure of AT&T's proprietary and confidential information, AT&T asserts that "[c]ourts routinely prohibit former employees from testifying as expert witnesses against their former employers where there are risks that the former

employees will disclose confidential information and violate their duty to maintain its integrity.” *AT&T Reply*, ¶ 9, citing *Wang*, 125 F.R.D. at 13; *Uniroyal*, 873 F. Supp, at 1048.

- 29 AT&T asserts that Mr. Wilson possesses AT&T’s confidential and proprietary information, whether or not he professes to remember it, and that the confidential information is directly relevant to the issues in this proceeding. *AT&T Additional Response*, ¶¶ 4-9. AT&T argues that Mr. Wilson should be disqualified as a witness under the standards for evaluating disqualification. *Id.*, ¶ 8, citing *Larkin*, 1994 WL 627589, \*1; *Marvin Lumber*, 113 F.R.D., at 591.
- 30 Complainants assert that there is no per se rule preventing parties from hiring expert witnesses who have worked for or served as an expert for the party’s opponent, or who have signed a non-disclosure agreement with the objecting party. *Surreply*, ¶ 8, citing *Greene, Tweed of Delaware, Inc. v. DuPont Dow Elastomers, LLC*, 202 F.R.D. 426, 429 (E.D. Penn. 2001); *Chamberlain Group, Inc. v. Interlogix, Inc.*, No. 01 C 6157 2002 WL 653893, \*3 (N.D. Ill. 2002). Complainants assert that disqualifying an expert is a drastic measure that should be rarely used. *Id.*, citing *Hewlett-Packard Co. v. EMC Corp.*, 330 F. Supp. 2d 1087, 1092 (N.D. Cal. 2004).
- 31 Complainants assert that AT&T must establish “(a) that Mr. Wilson currently possesses AT&T confidential information; (b) that AT&T has not waived its right to maintain the confidentiality of that information; and (c) that any confidential information in his possession bears a substantial relationship to the specific issues raised in this proceeding.” *Id.*, ¶¶ 9, 18, citing *Greene*, 202 F.R.D. at 429; *Chamberlain*, 2002 WL 653893, \*3; *Viskase Corp. v. W.R. Grace & Co.*, No. 90 C 7515 1992 WL 13679, \*2 (N.D. Ill. 1992).

32 Complainants assert that AT&T's vague allegations that Mr. Wilson had access to confidential information concerning AT&T's network infrastructure and interconnection are not sufficient to demonstrate that Mr. Wilson retains confidential information concerning AT&T. *Id.*, ¶¶ 10-16. Relying on Mr. Wilson's May 11 Declaration, Complainants assert that Mr. Wilson may have had access to a limited amount of confidential information in the past, but has returned or destroyed the information, or no longer remembers it. *Id.*, ¶¶ 11-14. Complainants assert that AT&T may have waived confidentiality by not objecting to Mr. Wilson's participation in other cases involving competitors. *Id.*, ¶ 17. Finally, Complainants assert that AT&T cannot meet its burden to show with specificity that the confidential information bears a substantial relationship to opinions he may offer in the proceeding. *Id.*, ¶¶ 18-24. The Complainants assert that Mr. Wilson's May 11 Declaration establishes that he does not retain or remember any confidential information relevant to the issues in this proceeding. *Id.*, ¶¶ 19, 21, 24.

33 ***Discussion and Decision.*** AT&T first raises its objection to Mr. Wilson as an expert witness in the proceeding in its reply pleading. Requests for disqualification are appropriately raised in a motion to the Commission, rather than arguing the issue in a responsive pleading.<sup>2</sup> Complainants have, however, been given the opportunity to brief the issue and AT&T has been allowed an additional opportunity to respond. Given that the matter has been fully briefed, the Commission will consider AT&T's request.

34 Disqualification is considered "a drastic measure which courts should hesitate to impose except when absolutely necessary." *Chamberlain*, 2002 WL 653893, \*2. In determining whether it is appropriate to disqualify a witness from a proceeding, courts generally apply a two-step inquiry: First, whether the party seeking

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<sup>2</sup> By contrast, in the cases cited by both Complainants and AT&T, the party has either filed a claim for misappropriation of trade secrets, or an injunction to prevent disclosure of confidential information or trade secrets.

disqualification had a confidential relationship with the expert, and Second, whether the party seeking disqualification disclosed confidential or privileged information to the expert that is relevant, or substantially related, to the proceeding. *See Greene, Tweed*, 202 F.R.D. at 428; *Chamberlain*, 2002 WL 653893, \*2; *see also Wang*, 125 F.R.D., at 13.

35 Courts also consider the underlying basis for disqualification, *i.e.*, preventing the potential breach of confidences, preventing conflicts of interest, and maintaining judicial integrity, and will evaluate the likelihood that the expert will compromise trade secrets or other confidential information. *See Marvin Lumber*, 113 F.R.D., at 591; *PepsiCo, Inc. v. Redmond*, 54 F.3d 1262, 1269 (7<sup>th</sup> Cir. 1995); *Viskase*, 1992 WL 13679, \*2; *Chamberlain*, 2002 WL 653893, \* 4.

36 The declarations of Mr. Wilson filed in this proceeding establish the following facts. Mr. Wilson had a confidential relationship with AT&T, both as employee and consultant, and in fact signed a non-disclosure agreement as a consultant to AT&T. Mr. Wilson had access to confidential information from AT&T, and others, during his employment and as a consultant. Based on these two facts, AT&T's concerns are understandable. The question, however, is not simply whether Mr. Wilson is a former AT&T employee and had access to confidential information, but whether the confidential or proprietary information is substantially related to the issues in the current proceeding.

37 Mr. Wilson identifies in his May 11, 2005, declaration the types of information he would encourage the Complainants to seek in discovery and that are relevant to the proceeding. This information, *e.g.*, network configuration, the details of how calls were processed for the Department of Corrections, and the business relationship between AT&T and T-Netix, is basic information that any telecommunications expert would seek. Other than claiming that Mr. Wilson was responsible for network planning and negotiations over interconnection with other carriers, AT&T has not identified, with specificity, the confidential

information Mr. Wilson possesses. AT&T relies solely on Mr. Wilson's declarations and an affidavit filed in the Commission's Section 271 proceeding in Docket Nos. UT-003022 and UT-003040 as support for its arguments. In fact, AT&T asserts that by discussing the need to learn about the trunking and connectivity between AT&T, T-Netix, and other companies, Mr. Wilson shows his knowledge of confidential AT&T network information. Any telecommunications engineer would inquire into such subjects, regardless of their knowledge of AT&T's network. If AT&T could move to disqualify witnesses based on such generalized allegations, AT&T could prevent Mr. Wilson from participating in any number of proceedings.

38 In addition, the policy interests underlying disqualification do not appear to be present. While AT&T's concern of inevitable disclosure is understandable, this proceeding is different from other trade secret cases that the parties rely on: The parties are not competitors and there is no risk of competitive harm. The proceeding is a complaint by individuals against two telecommunications companies alleging violation of Commission rules and statute. In order to resolve the issues on the merits of this case, the parties need to understand the basic structure of the relationship and network connecting AT&T and T-Netix to the Department of Corrections. Given AT&T's lack of specificity about the types of information Mr. Wilson allegedly had access to, the potential for a conflict of interest in Mr. Wilson assisting the Complainants in this proceeding cannot be substantiated.

39 Finally, Mr. Wilson has participated in a great number of proceedings, presumably involving confidential information, on behalf of competing telecommunications companies, without any party raising concerns of conflict of interest. During the May 10, 2005 conference, AT&T asserted that it did not question Mr. Wilson's professional integrity. Mr. Wilson's statements concerning his ability to protect confidential information are credible. AT&T's generalized concerns of "inevitable" disclosure are simply not supported.

40 For the reasons discussed above, AT&T's request for disqualification of Mr. Wilson as an expert witness for the Complainants is denied.

**ORDER**

**THE COMMISSION ORDERS:**

- 41 (1) AT&T Communications of the Pacific Northwest, Inc.'s objection, pursuant to paragraph 6 of Order No. 02, to Complainants' designation of Kenneth L. Wilson as an outside expert who may review Confidential or Highly Confidential Information is denied.
- 42 (2) AT&T Communications of the Pacific Northwest, Inc.'s request that Kenneth L. Wilson be excluded or disqualified as an expert witness for complainants is denied.

43 **NOTICE TO PARTIES: This is an Interlocutory Order. Administrative review may be available through a petition for interlocutory review, filed within 10 days of the service of this Order pursuant to WAC 480-07-810.**

Dated at Olympia, Washington, and effective this 20th day of May, 2005.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

ANN E. RENDAHL  
Administrative Law Judge