

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 ITS MOTION TO
STRIKE**

Respondent T-NETIX, Inc. (“T-NETIX”), through counsel and pursuant to WAC 480-07-375(d), hereby replies to Complainants’ Response (“Response”) to T-NETIX’s Motion to Strike (“Motion”).

**I. COMPLAINANTS CONCEDE THAT THEY FAILED TO COMPLY WITH THE
APRIL 25 PROCEDURAL ORDER**

1. Complainants concede that their “email filing on Friday, May 6 was late.” In fact, as the Motion demonstrates, Complainants’ response papers were almost three hours late, being filed at 7:51 p.m. Pacific time. Motion ¶ 2 & Attachment 1.

2. Counsel explains that the reason for their failure to file their response papers timely was “to ensure all the i’s were dotted and t’s crossed.” Response ¶ 1. Yet counsel did not “cross the ‘t’” of obtaining leave to file late, a request that surely would have been granted and

1 would have forewarned T-NETIX to expect a later filing. As such, Complainants have twice
2 displayed an unwillingness to follow procedure.

3 3. Moreover, Complainants' tardiness was likely the product of their attempt to
4 insert new allegations into the record through the declarations of Suzanne Elliott and Maureen
5 Janega. As explained in Paragraphs 8 through 14 of the Motion, and in Section III herein, these
6 declarations are superfluous and improper. For Complainants to have arrogated extra time – in
7 addition to the two weeks already allotted – to make their filing, in order that they may attempt
8 to prejudice T-NETIX and AT&T with extraneous evidence, is simply unreasonable and unjust.
9 Complainants should not be assisted in such efforts by having these papers submitted for
10 consideration.

11 4. Complainants made no attempt to ensure that even a part of their responsive
12 papers were either filed timely or subject to leave of the Commission. Accordingly, all of their
13 papers should be stricken.

14 **II. THE COMMISSION SHOULD STRIKE PARAGRAPHS 1 THROUGH 9 OF THE**
15 **RESPONSE TO T-NETIX'S MOTION TO STAY, BECAUSE THEY ARE**
16 **NONRESPONSIVE AND PREMATURE**

17 5. Complainants fail to explain why their 9-paragraph diatribe regarding T-NETIX's
18 conduct was properly included in their Response to Motion to Stay Discovery ("Motion to
19 Stay"). Nor do they acknowledge what is clear from the email correspondence appended to T-
20 NETIX's Reply: T-NETIX did **not** refuse to engage in a discovery conference, but only asked
21 that Complainants provide – as parties routinely do – a written summary of the perceived
22 infirmities in T-NETIX's production. Complainants thus provide no reason that paragraphs 1
23 through 9 of their Response to Motion to Stay should not be stricken.

24 6. If Complainants Sandra Judd and Tara Herivel do not have standing – if they lack
25 injury and are not within the zone of interest – they have no right to pursue this case. *See* T-
26 NETIX Motion for Summary Determination ¶¶ 13-23 (Apr. 21, 2005); Reply in Support of

1 Motion for Summary Determination ¶¶ 6-10 (May 10, 2005). Standing is a preliminary issue of
2 justiciability and has no bearing on any fact other than Complainants' purported injury. As such,
3 discovery of facts related to anything other than injury – defendants' conduct, defendants'
4 affirmative defenses – is unnecessary, as anything it would unearth is irrelevant.

5 7. Complainants' Response to the Motion to Stay does not begin to reach that
6 question until Paragraph 12. It includes only two paragraphs supporting Complainants' position
7 as to why discovery is needed in order to dispose of a preliminary question of law. But the first
8 11 paragraphs – 9 of which pertain to T-NETIX – regard Complainants' view of Defendants'
9 compliance with discovery. That narration is indeed, as T-NETIX stated, "irrelevant." Motion ¶
10 4.

11 8. Paragraphs 1 through 9 of the Response belong in a motion to compel – a
12 procedural vehicle not available to Complainants at this time. *See* Motion ¶ 7. Even if the
13 allegations in the Response were true, which T-NETIX's Reply in Support of Motion to Stay
14 demonstrates is not the case, they have no bearing on whether Complainants have the right to
15 continue merits discovery when they likely have no standing to pursue their claims at all. This is
16 the question on which Complainants should have focused their Response to the Motion to Stay.

17 9. Complainants do not deny that Paragraphs 1 through 9 were intended to impugn
18 T-NETIX's counsel. *See* Motion ¶ 7. Indeed, their Response to the Motion recites
19 Complainants' allegations again, and yet does not explain the relevance of those allegations to
20 the Motion to Stay. It is thus plain that counsel's motives are questionable and that Paragraphs 1
21 through 9 are, as T-NETIX characterized them, "prejudicial." Motion ¶ 4. They are moreover
22 unfair and unhelpful to the question before this Commission. As such, they should be stricken.

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1 **III. THIS COMMISSION CANNOT ADD JANEGA AND ELLIOTT TO THIS**
2 **PROCEEDING, AND THUS THEIR DECLARATIONS WERE IMPROPERLY**
3 **SUBMITTED**

4 10. Suzanne Elliott and Maureen Janega cannot become parties to this proceeding,
5 because this Commission has no authority to expand the scope of this case beyond that which the
6 trial court stayed and referred. Its jurisdiction is, as Complainants characterize it, "derivative."
7 Response ¶ 12. Accordingly, Complainants had no leave or cause to insert declarations of these
8 non-parties into the record, and they should be stricken.

9 11. The Commission will strike declarations that are not relevant to the question or
10 questions before it. For example, in *Washington Utilities and Transportation Commission v. US*
11 *West Communications, Inc.*, Docket No. UT-980340, Order (WUTC Oct. 14, 1998), the
12 Commission struck the declaration of a US West witness on the motion of Commission Staff.
13 The declaration, the Commission found, regarded a matter of implementation that was "not
14 relevant to this stage of the proceeding," which regarded whether US West was generally
15 obligated to provide intraLATA toll dialing parity. The declaration, which detailed US West's
16 attempts to implement dialing parity, spoke to issues that "should be addressed in US West's
17 implementation plan," and thus the Commission agreed with Staff that it "introduce[d] new
18 evidence which is beyond the scope of this proceeding." Therefore, for purposes of that
19 complaint proceeding, the Commission struck the declaration.

20 12. The Janega and Elliott declarations plainly and without apology introduce new
21 evidence beyond the scope of this proceeding. They attempt to cure Judd's and Herivel's lack of
22 standing by identifying purported new Complainants, rather than address the question whether
23 Judd and Herivel suffered any cognizable injury, which is the sole question in T-NETIX's
24 Motion for Summary Determination. The declarations of course fail in this attempt, because
25 they include no information to indicate that Janega and Elliott received calls for which rule
26 waivers or exemptions did not apply. See Motion ¶ 13. As such, these declarations are relevant
only to the merits of Complainants' allegations and not to the T-NETIX Motion for Summary

1 Determination. Like the declaration in the *US West* case, they are unhelpful here and should not
2 be considered.

3 13. Complainants' response to this argument is simply that the Commission should
4 join these women as new complainants and move on. Yet the Commission has no authority to
5 add new parties to a claim that resides in the Superior Court.

6 14. T-NETIX's position on this matter is not "logically inconsistent." Response to
7 Motion ¶ 12. This Commission has authority over matters as they are presented. *See* Motion ¶
8 11. Where individuals bring a matter to it, the Commission has jurisdiction over the utilities
9 involved and the claims cited. *See id.* In this case, the matter was received via a primary
10 jurisdiction referral from a case in which Ms. Judd and Ms. Herivel were the sole plaintiffs. The
11 Commission's task is thus to assist the trial court in adjudicating those plaintiffs' claims: whether
12 they were injured, and to what degree, by violations of the Washington Consumer Protection
13 Act. Motion ¶ 11. The question before the Commission is whether T-NETIX violated WAC
14 480-120-121 as a predicate act to such violations. The claims of Judd and Herivel necessarily
15 frame that discussion.

16 15. Once a proceeding is commenced here, this Commission has the authority to
17 dismiss any action if the Complainants have no standing. Motion for Summary Determination ¶
18 13 (citing *Stevens v. Rosario Utils.*, WUTC Docket No. UW-011320, Third Suppl. Order, 2002
19 WL 31730489 (WUTC July 12, 2002)). As demonstrated in T-NETIX's Motion for Summary
20 Determination, Judd and Herivel lack standing because this Commission had found it appropriate
21 to delay compliance with WAC 480-120-121. *Id.* ¶ 14-15. Thus, the Commission can and
22 should decline to pursue this matter further, as its role under the Superior Court's referral was to
23 assist in adjudicating a case. The Commission is not required to provide an advisory opinion
24 based on hypothetical service at hypothetical correctional facilities.

25 16. This authority to dismiss attaches to any action before the Commission. What
26 does not attach is any authority for the Commission to expand the adjudication by adding new

1 parties. The allegations of Janega and Elliott were not before Judge Learned in the Superior
2 Court – for some reason they were excluded from the complaint – and thus they cannot be before
3 the Commission now. The Commission is now “strictly limited to the questions referred” to it,
4 as Complainants have argued. Response to Motion for Summary Determination ¶ 28. And those
5 questions do not regard any claim or allegation from either Janega or Elliott.

6 17. Were the Commission to arrogate to itself the authority to join Janega and Elliott
7 in this proceeding, it would create the anomalous situation in which Judge Learned is greeted, at
8 the close of this proceeding, by more parties than she initially sent here. Plaintiffs would have
9 amended their Initial Complaint without leave of Court. Thus, unless and until Janega and
10 Elliott are joined to this action by the Superior Court which, as Complainants state, retained
11 jurisdiction over this matter (*id.* ¶ 27), the allegations of Janega and Elliott cannot be heard in
12 this proceeding. Their declarations were therefore improperly filed and should be stricken.

13 IV. CONCLUSION

14 18. For all these reasons, the Commission should strike all of the papers filed by
15 Complainants on May 16, 2005, or in the alternative should strike Paragraphs 1 through 9 of
16 Complainants’ Response to the Motion to Stay of Discovery and the declarations of Maureen
17 Janega and Suzanne Elliott.

18 DATED this 20th day of May, 2005.

19
20 KELLEY DRYE & WARREN, LLP

21
22 By 

Stephanie A. Joyce, Esq.

Of Counsel:

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Attorneys for Respondent T-Netix, Inc.

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that I have this 20th day of May, 2005, served the true and correct
3 original, along with the correct number of copies, of the foregoing document upon the WUTC,
4 via the method(s) noted below, properly addressed as follows:

5 Carole Washburn _____ Hand Delivered
6 Executive Secretary _____ U.S. Mail (first-class, postage prepaid)
7 Washington Utilities and Transportation _____
8 Commission x Overnight Mail (UPS)
9 1300 S Evergreen Park Drive SW _____ Facsimile (360) 586-1150
10 Olympia, WA 98504-7250 x Email (records@wutc.wa.gov)

11 I hereby certify that I have this 20th day of May, 2005, served a true and correct copy of
12 the foregoing document upon parties of record, via the method(s) noted below, properly
13 addressed as follows:

14 ***On Behalf Of AT&T:***

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21 *Confidentiality Status: Highly Confidential*

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Confidentiality Status: Public

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

DATED this 20th day of May, 2005, at Seattle, Washington.


