

**BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION**

**SANDY JUDD, et al.,**  
**Complainant,**  
  
**v.**  
  
**AT&T Communication of the Pacific Northwest,**  
**Inc. and T-Netix, Inc.**  
  
**Respondents**

**Docket No. UT-042022**  
  
**Oral Argument Requested**

**NOTICE OF FILING**

TO: Counsel of Record Listed on Certificate of Service

**PLEASE TAKE NOTICE** that on Friday, May 20, 2005, AT&T caused to be filed with the Executive Secretary of the Washington Utilities and Transportation Commission, AT&T's Surreply in Support of Its Response Joining in T-Netix's Motions for Summary Determination and to Stay Discovery in the above-referenced proceeding, a copy of which is attached hereto and served upon you.

Dated: May 20, 2005

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

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**AT&T’S SURREPLY IN SUPPORT OF ITS RESPONSE JOINING IN T-NETIX’S  
MOTIONS FOR SUMMARY DETERMINATION AND TO STAY DISCOVERY**

1. Respondent AT&T Communications of the Pacific Northwest, Inc. (“AT&T”), pursuant to the Notice of Changes to Procedural Schedule issued by the ALJ on May 11, 2005, respectfully submits this surreply in support of its response joining in T-Netix’s motions for summary determination and to stay discovery.

**Introduction**

2. Complainants’ reply to AT&T’s response joining in T-Netix’s motions demonstrates why AT&T does not belong in this proceeding. Complainants do not dispute that Sandy Judd lacks standing to assert any claims against AT&T. The evidence presented in this case makes clear that Ms. Judd received only local and intraLATA prison calls; thus she received no prison calls upon which she can base a claim against AT&T. Rather, the sole basis for any complainant to assert that she has standing is *a single inter-LATA call* allegedly received by Tara Herivel. See Complainants’ Reply to AT&T’s Response Joining in T-Netix’s Motions (“Complainants’ Reply to AT&T’s Joinder”) at ¶¶ 7-11; Declaration of Tara Herivel in Support of Complainants’ Reply to AT&T’s Response Joining in T-Netix’s Motions (“Herivel Decl.”) at ¶¶ 2, 4-5.

3. However, assuming for purposes of this motion that Ms. Herivel did, in fact, receive this professed call, she contends it originated from Airway Heights Correctional Center (“Airway Heights”) and the contracts at issue explicitly (and undisputedly) designate US West Communications, n.k.a. Qwest Corporation (“US West”) as the party responsible for connecting interLATA calls from that facility to AT&T’s Point of Presence. *See* AT&T’s Motion for Summary Determination (“AT&T’s Mot. for Summ. Determin.”), Ex. 8 at 2. Accordingly, under the unambiguous WUTC regulations, there is no question that US West (or a party retained by US West), *and not AT&T*, was the Operator Service Provider (“OSP”) for the only prison call upon which either Complainant could possibly base a claim against AT&T.

4. Under these circumstances, there is no reason to prolong AT&T’s involvement in this proceeding. Indeed, no doubt recognizing this, Complainants tellingly focus much of their reply on explaining why they have claims *against T-Netix*. *See, e.g.*, Complainants’ Reply to AT&T’s Joinder at ¶¶ 3-6, 21, 23 (“We know that T-Netix was an OSP.”). As a result, Complainants’ claims against AT&T should be dismissed outright.

### Argument

#### **Complainants Point to Only One Prison Call for Which They Might Have Standing.**

5. T-Netix’s motion for summary determination and AT&T’s response joining T-Netix’s motion established that all of the prison calls at issue here (at least, according to Complainants, all of the calls reflected in the documents produced by Complainants) were either local or intraLATA calls. T-Netix’s Motion for Summary Determination (“T-Netix’s Mot. for Summ. Determin.”) at ¶¶ 18-19 (and charts); AT&T’s Response Joining in T-Netix’s Motions (“AT&T’s Joinder”) at ¶ 6.

6. Under the relevant contracts, AT&T was not responsible for local or intraLATA calls. AT&T's Joinder at ¶¶ 8-9. Moreover, these local or intraLATA calls never even touched AT&T's network. *Id.* at ¶¶ 8, 10.

7. Complainants do not dispute any of this. Rather, Complainants merely point to a *single call* that Ms. Herivel allegedly received in Seattle from Airway Heights, which Complainants claim is located across a LATA-line near Spokane. Complainants' Reply to AT&T's Joinder at ¶¶ 7-11; Herivel Decl. at ¶¶ 2, 4-5.

8. Although Ms. Herivel claims to have received an interLATA prison call, Ms. Judd received only local and intraLATA calls, and therefore she has no basis for asserting any claim against AT&T. As a result, Ms. Judd's claims against AT&T should be dismissed.

**AT&T Was Not an OSP with Regard to the One Call from Airway Heights.**

9. Ms. Herivel's claims should similarly be dismissed because, even accepting as true her claim that she received one interLATA call, that call originated from Airway Heights and US West indisputably was responsible for connecting interLATA calls from Airway Heights to AT&T's Point of Presence. In other words, US West (or a party retained by US West), and not AT&T, was the OSP for the one interLATA call allegedly received by Ms. Herivel. The OSP is defined as the party "providing the connection to intrastate or interstate long-distance or local service from locations of call aggregators." *See* AT&T's Mot. for Summ. Determ. at ¶¶ 5-8. US West's contract explicitly provides that it shall be responsible for "[d]elivery of interLATA traffic . . . to AT&T's Point of Presence." *Id.*, Ex. 8 at 2. Accordingly, even for the lone interLATA call that Ms. Herivel alleges she received from Airway Heights, there is no question that AT&T was not the OSP because US West (or a party retained by US West) was responsible for connecting the calls to AT&T's Point of Presence. Therefore, Ms. Herivel, like Ms. Judd, has no basis for asserting a claim against AT&T.

**The WUTC Regulations Unambiguously Establish that AT&T Was Not an OSP.**

10. Finding no support for their claims against AT&T in the relevant facts, contracts, and regulations, Complainants fall back on a derivative liability argument based on the enabling statute that authorizes the WUTC to make rules regulating the disclosure of rate information by OSPs and Alternate Operator Services Companies (“AOS Companies”). Complainants’ Reply to AT&T’s Joinder at ¶¶ 13, 16, 24. Complainants argue that they might have standing to assert claims against AT&T if AT&T “contracted with” an OSP or AOS Company because the enabling statute authorizes the WUTC to make rules regulating companies that contract with OSPs and AOS Companies. *Id.*

11. Complainants’ argument, however, ignores the Court of Appeals’ holding earlier in this litigation that “[i]t is within the purview of the WUTC to direct how, when, or to whom the disclosure [of rate information] is made” and that “in order for there to be a failure to disclose [rate information] that is actionable under the [Consumer Protection Act], the failure must violate the rules adopted by the WUTC.” Ex. A, 4/14/03 Opinion of Washington Court of Appeals, at 11. The Court of Appeals rejected Complainants’ reliance on the language of the enabling statute and found that only the WUTC’s rule could create liability. *Id.* at 10-12. Thus, Complainants’ may not rely upon the enabling statute for their derivative liability argument, but only upon the WUTC regulations, and the regulations defeat their claim.

12. The specific regulation at issue here — the definition of an OSP — is crystal clear: An OSP is the party “providing the connection to intrastate or interstate long-distance or local service from locations of call aggregators.” *See* AT&T Mot. for Summ. Determin. at ¶¶ 5-8. Complainants’ admit that “[t]he question is whether [AT&T] or T-Netix provided the ‘connection to intrastate or interstate long-distance or to local services’ that triggers OSP status.” Complainants’ Reply to AT&T’s Joinder at ¶ 22. As described above, and in AT&T’s other

filings (including its summary determination motion), other entities such as US West connected prison calls (including interLATA calls) and delivered them to AT&T's Point of Presence. Accordingly, AT&T was not and could not have been the OSP under the WUTC's unambiguous definition of that term.

13. Contrary to Complainants' suggestion, the WUTC's definition of an OSP does not contradict the enabling statute. *See* Complainants' Reply to AT&T's Joinder at ¶ 17. Rather, as the Court of Appeals held, the WUTC was charged with promulgating rules regulating the disclosure of rate information by OSPs, but "[w]hat was in fact 'appropriate' was left to the discretion of the WUTC." Ex. A at 16. The Court of Appeals found that the WUTC did not exceed its authority under the enabling statute by enacting the rules at issue here, but instead properly exercised its "discretion." *Id.*<sup>1</sup>

14. Accordingly, Complainants' attempt to rewrite the unambiguous language of the WUTC's definition of an OSP must fail.

**There Is No Reason to Prolong AT&T's Involvement Here and Permit Further Discovery.**

15. As described above, Complainants do not have a viable claim against AT&T. There is no reason to prolong AT&T's involvement in this proceeding. AT&T should not be forced to bear the burden and additional costs associated with preparing for, and attending, a full hearing on Complainants' claims, when it is already apparent that there is no valid claim against AT&T. The claims against AT&T should be dismissed.

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<sup>1</sup> Complainants' citation to *Caritas Services, Inc. v. Department of Social and Health Services, Inc.*, 123 Wn. 2d 391, 869 P.2d 28 (1994) is inapposite. *Caritas* held that a regulation could not operate retroactively where the enabling statute was prospective — in other words, the regulation plainly contradicted the statute. As the Court of Appeals held in this litigation, the WUTC regulations at issue here are consistent with and do not contradict the enabling statute. Moreover, even if the regulations did contradict the enabling statute, AT&T's good faith reliance on the validity and plain language of the definition of an OSP — which plainly does not encompass AT&T — would provide a defense to Complainants' claims. *See* Ex. A at 16.

**Conclusion**

For all of the reasons stated above and in AT&T's previous filings, Complainants' claims against AT&T should be dismissed.

Dated: May 20, 2005

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

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

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## **CERTIFICATE OF SERVICE**

The undersigned, an attorney, hereby certifies that on May 20, 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:

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The undersigned, an attorney, further certifies that on May 20, 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:

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