

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 EMERGENCY
(1) OPPOSITION TO
COMPLAINANTS' MOTION TO
FILE SUPPLEMENTAL WILSON
DECLARATION AND (2) MOTION
TO STRIKE OR, IN THE
ALTERNATIVE, FOR RIGHT OF
REPLY AND CONTINUANCE OF
JUNE 7 HEARING**

1. Respondent T-NETIX, Inc. ("T-NETIX"), through counsel and pursuant to WAC 480-07-375(1)(d), 480-07-375(4), and 480-07-385, hereby opposes Complainants' Motion for Leave to File Supplemental Wilson Declaration and moves to strike the that declaration ("Supplemental Declaration" or "Suppl. Wilson Decl.") on the ground that it is unnecessarily untimely and prejudicial to T-NETIX. In the alternative, T-NETIX moves for leave to file a response to the Supplemental Wilson Declaration and to continue the hearing on its Motion for Summary Determination, presently scheduled for June 7, 2005, to occur after T-NETIX's filing on a date mutually agreeable to the parties.

**I. THE SUPPLEMENTAL WILSON DECLARATION COULD HAVE BEEN FILED
IN ACCORDANCE WITH THE AGREED UPON BRIEFING SCHEDULE**

2. On April 21, 2005, T-NETIX filed its Motion for Summary Determination which raises the sole question of whether Complainants Sandra Judd and Tara Herivel have standing to pursue their claim before the Commission. Complainants filed their response to that Motion at 7:51 pm on Friday, May 6, 2005. The papers included a declaration from Kenneth Wilson.

They were due at 5:00 pm on that day, and presently are subject to a Motion to Strike by T-NETIX, filed May 10, 2005.

3. Complainants agreed to and were afforded a suitable period to respond to the Motion to Strike. At the request of ALJ Ann E. Rendahl, on May 10, 2005, counsel contacted Complainants' counsel Jonathan Meier to ask whether the following briefing schedule was acceptable: Responses to the Motion to be due Friday, May 14, 2005; T-NETIX's Reply to be due Friday, May 20, 2005. *See* Affidavit of Stephanie A. Joyce ¶ 4 (May 31, 2005). Mr. Meier responded by e-mail on that same day to state that this proposed schedule was acceptable. Joyce Aff. Attachment 1. Ms. Joyce notified ALJ Rendahl of this agreement immediately. Joyce Aff. ¶ 5. Based on this agreement, ALJ Rendahl issued an order on May 10, 2005, directing Complainants to file their response to the T-NETIX Motion to Strike on May 13, 2005. A hearing on both the Motion for Summary Determination and the Motion to Strike is set for June 7, 2005, and counsel for both T-NETIX and AT&T have stated that they are traveling June 6 to attend this hearing.

4. The Supplemental Wilson Declaration purports to respond, again, to the T-NETIX Motion for Summary Determination. Wilson asserts in his Supplemental Declaration that he was not able to make this declaration prior to May 20, 2005, due to AT&T's objection to his appearing as an expert witness. Wilson Suppl. Decl. ¶ 3. This premise is false.

5. Wilson's executed Confidentiality Agreement was filed April 29, 2005. T-NETIX had produced documents responsive to Complainants' data requests on April 18, 2005. Joyce Aff. ¶ 3. According to the Protective Order filed in this case, T-NETIX and AT&T had three (3) business days to lodge objections to Wilson's appearance. AT&T objected, T-NETIX did not. Wilson was thus permitted to appear as an expert regarding T-NETIX, and to receive T-

NETIX's Confidential and Highly Confidential documents, on the morning of May 5, 2005.

Complainants' response papers to the Motion for Summary Determination were due at 5pm May 6, and Wilson was among the declarants for those papers. Complainants never sought an extension on those papers in order that Wilson could review documents or write a longer declaration.

6. Three full weeks after their May 6 response, Complainants have filed the Supplemental Declaration, purporting that Wilson was unable to respond properly prior until now. Yet the documents upon which Wilson relies in the Supplemental Declaration were produced on April 18, 2005, and were confidential only as to T-NETIX. T-NETIX has never objected to Wilson's participation in this proceeding. Thus, Wilson has been free to review T-NETIX's document production and opine on the significance of these documents in Complainants' initial response to the Motion for Summary Determination for weeks. He did not.

7. Nor are the additional opinions expressed in the Supplemental Declaration based in anything new. Rather, they represent yet another attempt by Complainants to adjudicate the issue of standing based on the merits of their claim – a legally irrelevant and superfluous exercise. Complainants appear to be determined to reach the merits of AT&T's Motion for Summary Determination – which centers on the merits of the claim – rather than the preliminary issue of justiciability raised by T-NETIX that preempts consideration of the merits. *See* T-NETIX Reply in Support of Motion for Summary Determination ¶ 6 (May 10, 2005); T-NETIX Motion to Strike ¶¶ 10, 12 (May 10, 2005).

8. Complainants' attempt again to circumvent this Commission's procedural orders should be rejected. They never raised any concern about Wilson's inability to review pertinent documents – concerns that in any event would have been unfounded – until their filing on May

27. Nor did Complainants request, during these last three weeks, an opportunity to provide another response to T-NETIX's motion. Rather, Complainants readily agreed to the May 6 briefing date and attempted to comply with it. It is unfair in the extreme for them to drop a new substantive declaration into this record a mere 5 business days prior to the hearing on T-NETIX's motions. Accordingly, the Supplemental Wilson Declaration should be stricken and given no consideration.

II. IF THE SUPPLEMENTAL DECLARATION IS NOT STRUCK, T-NETIX SHOULD BE AFFORDED AN ADEQUATE OPPORTUNITY TO RESPOND

9. If the Commission determines that the Supplemental Wilson Declaration is properly in the record regarding T-NETIX's motion on standing, T-NETIX respectfully requests that it be afforded an opportunity to respond. Wilson has opined on T-NETIX's equipment architecture as expressed in its technical manuals. He moreover purports to reach conclusions of law in this declaration regarding T-NETIX's equipment.

10. T-NETIX, as the author of these manuals and provider of service in Washington, should likewise be permitted to provide a declaration on this subject. In so doing, T-NETIX does not concede that the merits of Complainants' claims or of AT&T's Motion for Summary Determination are poised for the Commission's determination at this time. To the extent that the Supplemental Wilson Declaration regards Complainants' purported injury, T-NETIX is owed a right of reply.

11. T-NETIX was not expecting to be forced to respond to additional declarations at this time. Accordingly, it respectfully requests an adequate period of time to respond to the Supplemental Wilson Declaration. We suggest a period of 10 calendar days from the date on which the instant emergency motion is resolved.

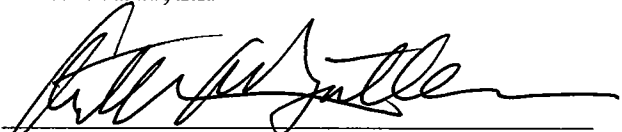
12. The hearing on the T-NETIX Motion for Summary Determination and Motion to Strike thus requires a continuance. T-NETIX suggests that the hearing be continued until a date that is mutually convenient for the parties.

CONCLUSION

13. For all these reasons, the Commission should strike the Supplemental Wilson Declaration filed by Complainants on May 27, 2005, or in the alternative, should permit T-NETIX to respond to that declaration no later than 5:00 pm PDT on the 10th calendar day after this motion is resolved. The hearing on T-NETIX's Motion for Summary Determination and Motion to Strike should accordingly be continued until after T-NETIX's response on a date that is mutually convenient for the parties.

DATED this 31st day of May, 2005.

ATER WYNNE, LLP

By 
Arthur A. Butler, WSBA # 04678

Of Counsel:
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Stephanie A. Joyce
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Attorneys for Respondent T-Netix, Inc.

CERTIFICATE OF SERVICE

I hereby certify that I have this 31st day of May, 2005, served the true and correct original, along with the correct number of copies, of the foregoing document upon the WUTC, via the method(s) noted below, properly addressed as follows:

Carole Washburn Executive Secretary Washington Utilities and Transportation Commission 1300 S Evergreen Park Drive SW Olympia, WA 98504-7250	<input type="checkbox"/> Hand Delivered <input type="checkbox"/> U.S. Mail (first-class, postage prepaid) <input checked="" type="checkbox"/> Overnight Mail (UPS) <input type="checkbox"/> Facsimile (360) 586-1150 <input checked="" type="checkbox"/> Email (records@wutc.wa.gov)
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I hereby certify that I have this 31st day of May, 2005, served a true and correct copy of the foregoing document upon parties of record, via the method(s) noted below, properly addressed as follows:

On Behalf Of AT&T:

Ms. Letty S. Friesen AT&T Communications of the Pacific Northwest Law Department 919 Congress Avenue, Suite 900 Austin TX 78701-2444	<input type="checkbox"/> Hand Delivered <input checked="" type="checkbox"/> U.S. Mail (first-class, postage prepaid) <input type="checkbox"/> Overnight Mail (UPS) <input type="checkbox"/> Facsimile (303) 298-6301 <input checked="" type="checkbox"/> Email (lsfriesen@att.com)
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Confidentiality Status: Highly Confidential

On Behalf Of T-Netix:

Stephanie A. Joyce Kelley Drye & Warren LLP 1200 19th Street NW, Suite 500 Washington DC 20036-2423	<input type="checkbox"/> Hand Delivered <input checked="" type="checkbox"/> U.S. Mail (first-class, postage prepaid) <input type="checkbox"/> Overnight Mail (UPS) <input type="checkbox"/> Facsimile (202) 955-9792 <input checked="" type="checkbox"/> Email (sjoyce@kelleydrye.com)
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Confidentiality Status: Public

On Behalf Of Judd & Herivel:

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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 31st day of May, 2005, at Seattle, Washington.