

3 **PROCEDURAL HISTORY.** The complaint initiating this proceeding was filed
with the Commission on November 17, 2004. On December 15, 2005, AT&T filed
a Motion for Summary Determination, and on December 16, 2004, AT&T filed a
response to the formal complaint.

4 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.

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

6 On April 21, 2005, T-Netix filed with the Commission a Motion for Summary
Determination and a Motion to Stay Discovery.

7 After disclosure by Complainants of the designation of Mr. Kenneth L. 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 Pursuant to the Commission's April 25, 2005, notice, AT&T and Complainants on
May 6, 2005, filed responses to T-Netix's motions. AT&T joined in T-Netix's
motions, and Complainants filed a number of declarations supporting their
response, as well as a Conditional Motion to Postpone Consideration of T-Netix's
Motion for Summary Determination until Complainants have been Permitted
Additional Discovery.

- 9 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, as well as to address scheduling for T-Netix's pending motions.
- 10 On May 10, 2005, AT&T filed a Reply in Support of Its Objection to Complainants' Expert Designation, and T-Netix filed its Reply in Support of its Motions for Summary Determination and to Stay Discovery, a response to the Complainant's conditional motion, an affidavit in support of the Motion for Stay of Discovery, a Motion to Strike, and a declaration in support of the Motion to Strike.
- 11 Following a teleconference call held on May 10, 2005, the administrative law judge learned of T-Netix's filing with the Commission and requested T-Netix's counsel to coordinate responsive pleading deadlines with counsel for Complainants.
- 12 The Administrative Law Judge issued a notice on May 11, 2005, establishing a schedule allowing parties to file additional responsive pleadings to address AT&T's objection to designation of Mr. Wilson as an expert witness, Complainants' conditional motion and T-Netix' motion to strike, and scheduling oral argument on T-Netix's motions for June 7, 2005.
- 13 Pursuant to the May 11, 2005, notice, Complainants filed with the Commission on May 16, 2005, a response to T-Netix's Motion to Strike, with a supporting declaration, and a Reply to AT&T's response joining in T-Netix's motions, with supporting declarations.¹ On May 20, 2005, T-Netix filed a reply in support of its

¹ The May 11, 2005, notice provided for parties to submit electronic copies of the pleadings with the Commission by 5:00 pm on May 13, 2005, with paper copies to be filed on May 16.

Motion to Strike, and AT&T filed a surreply in support of its response joining in T-Netix's motions.

- 14 Also on May 20, 2005, the Administrative Law Judge entered Order No. 03, an order denying AT&T's objection to designation of Mr. Wilson as an expert witness and denying AT&T's request to disqualify Mr. Wilson as an expert witness.
- 15 On May 31, 2005, Complainants filed a Highly Confidential Motion for Leave to File Supplemental Declaration of Kenneth L. Wilson dated May 27, 2005, and the Highly Confidential Supplemental Declaration of Kenneth L. Wilson in support of Complainants' response to T-Netix's motion for summary determination and Complainant's reply to AT&T's Response.
- 16 Also on May 31, 2005, T-Netix submitted by electronic mail an 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.
- 17 On June 1, 2005, Complainants filed a Response to T-Netix's Emergency Motion and Motion to Strike.
- 18 **APPEARANCES.** Jonathan P. Meier, Sirianni Youtz Meier & Spoonemore, Seattle, Washington, represents Sandra Judd and Tara Herivel, Complainants. Letty Friesen, AT&T Law Department, Austin, Texas, and Charles H.R. Peters and David C. Scott, Schiff Hardin, LLP, Chicago, Illinois, represent AT&T. Arthur A. Butler, Ater Wynne LLP, Seattle, Washington, and Glenn B. Manishin and Stephanie Joyce, Kelley Drye & Warren LLP, Washington, D.C., represent T-Netix.

Complainants submitted electronic copies to all parties and the Commission at 7:51 and 7:54 p.m. on May 13.

MEMORANDUM

19 The Complainants request leave to supplement the record in the proceeding with a short declaration by Mr. Wilson and several highly confidential documents produced by T-Netix.² The Complainants assert that good cause exists for filing a supplemental declaration: (1) Mr. Wilson could not review confidential or highly confidential information produced in the proceeding until after the Commission resolved AT&T's objection to his designation as an expert witness; (2) the information and opinions in the supplemental declaration are highly relevant to the issues in the proceeding; and (3) the information may assist the Commission in resolving the pending motions.³

20 Complainants' assert that Mr. Wilson was not able to review any documents marked by T-Netix as confidential or highly confidential before May 20, 2005, when the Commission allowed his review of confidential and highly confidential documents.⁴ Complainants also assert that the highly confidential documents discussed in Mr. Wilson's supplemental declaration provide additional support for the Complainant's response to T-Netix's Motion for Summary Determination and AT&T's joinder in T-Netix's motion.⁵

21 T-Netix objects to the Complainants' motion and moves to strike the supplemental declaration asserting that it is untimely and prejudicial to T-Netix.⁶ T-Netix asserts that only AT&T filed an objection to Mr. Wilson's designation as an expert witness, and that Mr. Wilson was not precluded from reviewing confidential or highly confidential materials provided by T-Netix.⁷ T-Netix

² Complainants Motion for Leave to File Supplemental Declaration of Kenneth L. Wilson, ¶ 2.

³ *Id.*

⁴ *Id.*, ¶ 1.

⁵ *Id.*, ¶ 2.

⁶ 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.

⁷ *Id.*, ¶¶ 4, 6.

asserts that it provided documents, including confidential and highly confidential documents, to Complainants on April 18, 2005.⁸

22 T-Netix asserts that the additional opinions expressed in Mr. Wilson's supplemental declaration do not provide anything new, but address the merits of the Complainants' claim rather than the issue of standing raised in T-Netix's Motion for Summary Determination.⁹ T-Netix also asserts that Complainants filed a late response to T-Netix's motion for summary determination on May 6, 2005, which response is subject to a Motion to Strike.¹⁰ T-Netix asserts that counsel for Complainants agreed to the schedule for filing responses to the Motion to Strike, and did not raise the issue of the need to file a supplemental declaration.¹¹ T-Netix argues that Complainants should not be allowed to circumvent the Commission's procedural orders.¹²

23 T-Netix requests the opportunity to file a response to Mr. Wilson's Supplemental Declaration if the Commission does not strike the Supplemental Declaration.¹³ T-Netix asserts that Mr. Wilson's Supplemental Declaration addresses T-Netix's technical manuals, and reaches conclusions about T-Netix's equipment, matters about which T-Netix should be allowed to respond.¹⁴ T-Netix requests that its response be due 10 calendar days from the date of the Commission's decision on Complainants' motion.¹⁵ T-Netix further requests the oral argument scheduled to be held in Olympia on June 7, 2005, be continued until a date that is mutually convenient to all parties.¹⁶

⁸ *Id.*, ¶ 5.

⁹ *Id.*, ¶ 7.

¹⁰ *Id.*, ¶ 2.

¹¹ *Id.*, ¶¶ 3, 8.

¹² *Id.*, ¶ 26.

¹³ *Id.*, ¶ 9.

¹⁴ *Id.*, ¶¶ 9-10.

¹⁵ *Id.*, ¶ 11.

¹⁶ *Id.*, ¶ 12.

- 24 In reply, Complainants assert that paragraph 6 of the protective order forbids a proposed expert from reviewing any confidential or highly confidential information after a party has objected to the designation of the expert.¹⁷ Complainants assert that Mr. Wilson did not review any confidential information, including T-Netix's until after the Commission allowed him to do so in Order No. 03, entered on May 20, 2005.¹⁸
- 25 Complainants agree that T-Netix should be able to submit a declaration in reply to Complainants' Supplemental Declaration.¹⁹ Complainants object, however, to T-Netix's request for 10 business days to respond to the declaration as inconsistent with Commission rules governing responses.²⁰ Complainants further object to T-Netix's request to continue the oral argument.²¹
- 26 ***Discussion and Decision.*** Complainants should not be prejudiced by Mr. Wilson's compliance with the terms of the Protective Order, Order No. 02 in this proceeding. Paragraph 6 of the Order provides that "While any objection is pending, no Confidential or Highly-Confidential Information may be shown to the proposed expert." The Order does not preclude the proposed expert from reviewing confidential or highly confidential information produced by the party objecting to the designation, but precludes review of *any* confidential or highly confidential information. Although Complainants had access to T-Netix's confidential and highly confidential information prior to AT&T's objection, and only AT&T objected to Mr. Wilson's designation as an expert witness, Mr. Wilson appears to have properly followed the terms of the protective order. Complainants should be allowed to supplement Mr. Wilson's earlier declaration to include information that he was precluded from reviewing at the time the declaration was prepared.

¹⁷ Complainants' Response to T-Netix's Emergency Motion and Motion to Strike, ¶¶ 3-4.

¹⁸ *Id.*, ¶ 5.

¹⁹ *Id.*, ¶ 6.

²⁰ *Id.*, ¶¶ 7-9, *citing* WAC 480-07-375(4).

²¹ *Id.*, ¶¶ 9-10.

- 27 It would have been preferable for Complainants to raise the issue of a supplemental declaration at the time the parties agreed to the schedule for resolving T-Netix's motions. Complainants' should have the opportunity, however, to file a supplemental declaration to ensure that all of the appropriate information available to the parties is presented to the Commission for consideration. For these reasons, Complainants' Motion for Leave to File a Supplemental Declaration is granted and T-Netix's Motion to Strike is denied.
- 28 Given that Mr. Wilson addresses and opines in his Supplemental Declaration about T-Netix's technical manuals and equipment, T-Netix should have the opportunity to file a responsive declaration. T-Netix may submit electronically with the Commission by 5:00 p.m. on Monday, June 13, 2005, a response to the May 27, 2005, Supplemental Declaration of Kenneth L. Wilson, and file paper copies with the Commission by the close of business on Tuesday, June 14, 2005. While the Complainants are correct that the Commission's rules provide for a five-day period in which parties may file responses to motions, the rules also allow the presiding officer to establish different time periods for responses.²² As there is no time limit for resolving the issues in this proceeding, and the discovery schedule in the proceeding will likely require revision due to AT&T's and T-Netix's motions, T-Netix's request is appropriate.
- 29 The oral argument scheduled for June 7, 2005, at 9:30 a.m. is canceled to allow T-Netix to file a responsive pleading. Parties must contact Judge Rendahl by electronic mail (arendahl@wutc.wa.gov) or telephone (360-664-1144) by the close of business on Monday, June 6, 2005, to identify dates and times that counsel are available for oral argument during the weeks of June 20 and June 27, 2005. The Commission will issue a notice rescheduling the oral argument after determining a date mutually convenient to all parties.

ORDER

THE COMMISSION ORDERS:

- 30 (1) Complainants' Motion for Leave to File Supplemental Declaration of
Kenneth L. Wilson Dated May 27, 2005, is granted.
- 31 (2) T-Netix, Inc.'s Emergency Motion to Strike is denied.
- 32 (3) T-Netix, Inc.'s Motion, in the Alternative, for Right of Reply and
Continuance of June 7 Hearing, is granted.
- 33 (4) T-Netix, Inc. may file with the Commission a Response to Complainant's
Motion for Leave to File Supplemental Declaration of Kenneth L. Wilson
by 5:00 p.m. on Monday, June 13, 2005.
- 34 (5) The oral argument scheduled for Tuesday, June 7, 2005, at 9:30 a.m. at the
Commission's offices in Olympia, Washington is canceled.

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

Dated at Olympia, Washington, and effective this 2nd day of June, 2005.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

ANN E. RENDAHL
Administrative Law Judge

²² See WAC 480-07-375(4).