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1 P R O C E E D I N G S

2 JUDGE RENDAHL: Let's be on the record. I'm  
3 Ann Rendahl, the administrative law judge presiding  
4 over this proceeding. We are here before the  
5 Washington Utilities and Transportation Commission on  
6 Tuesday, June 28th, for an oral argument in Docket No.  
7 UT-042022, which is a formal complaint filed by Sandy  
8 Judd, J-u-d-d and Tara Herivel, H-e-r-i-v-e-l, against  
9 AT&T and T-Netix, Inc.

10 T-Netix filed two motions on April 21, a  
11 motion for summary determination and a motion to stay  
12 discovery, and since that time, the parties have filed  
13 numerous pleadings with various affidavits and other  
14 attachments, and I've entered two orders, one  
15 addressing the objection to the Complainants'  
16 designation and the expert witness, and the other  
17 addressing the propriety of Complainants' submission of  
18 a supplemental affidavit. So suffice it to say, these  
19 matters have not been litigated on paper, but we are to  
20 going to have an oral argument on T-Netix' motions and  
21 other motions that arose through this issue.

22 But before we get there, we are going to take  
23 appearances, and since all of you have given your full  
24 appearance in this matter, if you just state your name  
25 and the party you represent, that would be helpful.

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1 MS. JOYCE: Stephanie Joyce. I represent  
2 T-Netix, Inc.

3 MR. BUTLER: Arthur A. Butler representing  
4 T-Netix.

5 MR. PETERS: Charles Peters on behalf of  
6 AT&T.

7 MS. FRIESEN: Letty Friesen for AT&T.

8 MR. MEIER: John Meier for Complainants.

9 JUDGE RENDAHL: While we are off the record,  
10 we discussed that 20 minutes of argument per party  
11 would be appropriate. We are going to start with  
12 Ms. Joyce and then go to Mr. Meier and then to  
13 Mr. Peters, and Ms. Joyce, if you wish to reserve time,  
14 that's acceptable, so we will begin with you.

15 MS. JOYCE: Good morning. Thank you. I will  
16 be arguing T-Netix's motions for summary determination,  
17 its motion for stay of discovery, and its motion to  
18 strike as related to Complainants' responsive papers  
19 that were filed on May 6th of this year, and I would  
20 like to reserve five minutes for rebuttal at the close  
21 of AT&T's and Mr. Meier's arguments. I'll begin with  
22 the motion for summary determination.

23 The standard applied in this commission to a  
24 motion for summary determination is borrowed from Civil  
25 Rule 56 governing summary judgement motions, and that

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1 standard regards whether, and I quote, "from all of the  
2 evidence, a reasonable person could reach but one  
3 conclusion." In this case, all evidence in this record  
4 points to one conclusion, that being the two  
5 complainants in this case, Sandra Judd and Tara  
6 Herivel, have no standing to pursue their claim, either  
7 in this commission or in a court of law.

8 The question before us today is singular and  
9 rather easy. Did Sandra Judd or Tara Herivel suffer a  
10 cognizable legal injury, and are they within the zone  
11 of interest of Commission Rule 480-120-141, which I  
12 will term the rate disclosure rule, and as such, do  
13 they have standing to pursue their claim here.

14 This is a preliminary question as to whether  
15 this case is justiciable. In the first instance, it  
16 requires no peak at the merits, and all the evidence in  
17 this case indicates that the resounding answer is no,  
18 they do not have standing.

19 Let's begin with some undisputed facts.  
20 First, that T-Netix was not the common carrier for any  
21 of the calls that Sandra Judd or Tara Herivel received  
22 or alleged to have received in this case during the  
23 relevant period. The relevant period, is, of course,  
24 August '96 to August of 2000. That period is defined  
25 by the date on which Complainants first filed their

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1 case in court before Judge Learned in King County  
2 Superior Court.

3           Also undisputed, the GTE, US West and PTI  
4 were exempt from the rate disclosure rule through '99  
5 and that they later when the rule was amended were  
6 given individual waivers from that rule through the end  
7 of 2000, well after the relevant period of this case.  
8 As we know, GTE became Verizon. US West became Qwest.  
9 PTI became CenturyTel, but the exemptions and waivers  
10 nonetheless applied.

11           This is law of the case at this point in this  
12 proceeding. These waivers were adjudicated before  
13 Judge Learned and at the Court of Appeals and at the  
14 Supreme Court of Washington. Their applicability and  
15 their validity is no longer subject to challenge.

16           Also undisputed is that Ms. Judd received  
17 only intraLATA calls during the relevant period of this  
18 case. At Page 3 of T-Netix's motion, we provided a  
19 chart listing every single call that she received as  
20 depicted on the bill produced to T-Netix. Every single  
21 one of them was either local or intraLATA. That means  
22 that every single one of them was either carried by  
23 GTE, US West, or PTI, or their successors.

24           As to Ms. Herivel, during the briefing on  
25 T-Netix's motion, it was not disputed that Ms. Herivel

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1 had received only intraLATA calls. Again at Page 3 of  
2 the T-Netix motion, you will see our depiction of the  
3 list of calls that she received that were reflected on  
4 the phone bills produced to us. They were all  
5 intraLATA. That was in our April 21st motion.

6 On May 6th, Complainants filed a response to  
7 that motion. They did not dispute that Mrs. Herivel  
8 had received anything other than intraLATA calls. On  
9 May 10th, T-Netix filed its reply in support of its  
10 motion noting that concession, noting that Ms. Herivel  
11 did not at all challenge that conclusion.

12 On May 11th in response to an AT&T filing,  
13 Ms. Herivel submitted a declaration. She says she got  
14 calls somewhere between October 1 and December 31,  
15 1998, to her home from Airway Heights Correctional  
16 Center. She did not provide phone bills. She does not  
17 provide originating phone numbers, nor does she provide  
18 the terminating phone numbers. She asserts these calls  
19 must have been interLATA.

20 The Complainant also asserts the fact that  
21 she may have received an intraLATA call has  
22 significance as to AT&T, but again, we hadn't heard of  
23 them until May 11th. And as I will later discuss,  
24 T-Netix has done research of its own to try to find  
25 these calls and can't find any record of them.

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1           Let's move on to the test for standing. The  
2 Supreme Court of Washington has a two-part test. It  
3 was articulated in a few cases, one of them being the  
4 Save a Valuable Environment versus the City of Bothell,  
5 otherwise known as the "Save" case. The test is first,  
6 does the claimant have a cognizable legal injury. That  
7 is their burden to show. Secondly, are the claimants  
8 within the zone of interest of the statute of the rule  
9 that they are seeking to enforce. This commission has  
10 applied this "Save" test. It did so in the Stevens  
11 versus Rosario utility case, which was cited and quoted  
12 in our papers.

13           The Commission also applied the standing test  
14 in the case United and Informed Citizens Advocates  
15 Network, which has been shortened to the U&ICAN case.  
16 The ALJ in that case said that a nonprofit organization  
17 had no standing to pursue relief for its members. The  
18 full Commission affirmed that finding. It went to the  
19 Court of Appeals. The judgement was affirmed on the  
20 ground that the order was interlocutory and not  
21 appealable, but nonetheless, it stands. This  
22 commission applies standing to its own cases.

23           These two cases, Stevens and U&ICAN,  
24 demonstrate that this commission can and will discuss  
25 standing on its own, and it is not in the business of



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1 giving advisory opinions to people that have no relief  
2 owed to them, to people that have no injury.

3 JUDGE RENDAHL: Ms. Joyce, how do the Stevens  
4 case and U&ICAN case, did they differ at all from this  
5 case in terms of how the case was brought to the  
6 Commission? What I'm saying is in the U&ICAN and the  
7 Stevens case, those were cases directly filed with this  
8 commission, but in this case, we have it on referral  
9 from the King County Superior Court, and does that  
10 affect standing and our ability to address standing as  
11 to preliminary issue?

12 MS. JOYCE: It does not affect the issue of  
13 standing or this commission's ability to address it.  
14 Standing is a matter of justiciability. If a case came  
15 directly to this commission, it's going to look at  
16 standing. No injury, no zone of interest, you are  
17 dismissed.

18 Yes, we are here on a primary jurisdiction  
19 referral. That in a way only highlights the importance  
20 in assuring standing, and this is why. To go to court  
21 you need standing. Ms. Judd and Ms. Herivel went to  
22 court and they wanted relief. That case was stayed.  
23 It was sent here. It was sent here for one question:  
24 Is T-Netix in violation of a rule, the rate disclosure  
25 rule. I think she also asked whether AT&T is an OSP.

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1 These are two discreet questions that she has asked  
2 this commission to help her with. She lists the  
3 primary jurisdiction doctrine, which is recognized by  
4 the Supreme Court of Washington. We discuss it in our  
5 papers.

6 The question, and I quote, comes into play,  
7 "whenever enforcement of the claim requires resolution  
8 of issues which under a regulatory scheme have been  
9 placed within the special competence of an  
10 administrative body." She's asking you for help, but  
11 how do we help these girls.

12 JUDGE RENDAHL: How is the issue of standing  
13 an issue that's particular to this commission as  
14 opposed to an issue that King County, the Superior  
15 Court, and Judge Learned can decide once the Commission  
16 resolves any underlying factual issues or legal issues  
17 that's within the agency's specific expertise?

18 MS. JOYCE: The question is within its  
19 expertise, but these women are not entitled to relief.  
20 We happen to be in this commission, but the requirement  
21 of standing doesn't go away. Justiciability doesn't go  
22 away. If we had been before Judge Learned, had we had  
23 discovery, had we gotten anywhere past the 12(b)(6)  
24 stage, we would have brought this motion to her, but we  
25 are here.

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1           These women are seeking relief. They are  
2 seeking relief both in the form of a Commission  
3 sanction and an answer. If they don't have standing,  
4 there is nothing to decide. They have no injury to  
5 discuss, and there is no point in going forward, both  
6 as a matter of primary jurisdiction and as a matter of  
7 this commission's own precedent.

8           The question is this: If these girls don't  
9 have standing, why should the Commission help Judge  
10 Learned decide a case that isn't worthy of a decision?  
11 We do happen to be here. It is in your lap, but it  
12 does not erase the fact that this commission does not  
13 give advisory opinions. This commission does apply the  
14 "Save" test. It does look for standing. It has the  
15 ability to say, We can't help you. You have no injury.  
16 We must dismiss. It makes no difference which forum we  
17 sit in as to whether standing matters. Standing always  
18 matters. Have I properly addressed your question?

19           JUDGE RENDAHL: Yes.

20           MS. JOYCE: Let's apply the test for standing  
21 as to Ms. Judd. Undisputed; she received only  
22 intraLATA calls. Undisputed; they were all carried by  
23 a LEC. Undisputed; these LECs had waivers.

24           What do the waivers mean, these exemptions?  
25 They are a message from the Commission. GTE, PTI, US

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1 West, your rates don't have to be disclosed. We have  
2 this rule, but your rates don't have to be disclosed.  
3 First it was written into the rule and then it was  
4 codified via a waiver. This may apply, but not to you.  
5 Callers don't deserve to hear your rates, not yet, not  
6 until January 1st, 2001, and that is our decision.

7           So Ms. Judd got all intraLATA calls from all  
8 or one of these carriers. If she didn't hear rate  
9 disclosures, that was this commission's decision.  
10 They felt that that was permissible or appropriate for  
11 whatever reason. So if Ms. Judd did not hear these  
12 waivers, it's because the Commission said, That's okay.  
13 The Commission said, That's no injury, no problem. She  
14 has no standing. She's not protected by a rule that  
15 doesn't apply to these carriers. She just is not  
16 within the zone of interest.

17           As to Ms. Herivel, same argument applies to  
18 all of her intraLATA calls. These are calls that are  
19 documented. We have phone bills for them. We can  
20 research them. We can test those allegations. These  
21 interLATA calls, we don't know how many there were. We  
22 don't have phone bills. Ms. Herivel admits that she  
23 cannot and will likely never be able to produce those  
24 bills because Qwest deleted them. They don't exist  
25 anymore.

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1           T-Netix did its own research. That research  
2 is reflected in the supplemental affidavit of Nancy  
3 Lee, and it was filed yesterday. Very simple. We  
4 figured out, because they weren't provided in the  
5 declaration, one of the originating phone numbers that  
6 belonged to Airway Heights.

7           And then we looked at all three of the phone  
8 numbers that Ms. Herivel said were hers at some point.  
9 These numbers are (206) 652-9415. (360) 714-8119,  
10 (360)738-8903. We ran those through a database,  
11 hand-punching them in, for the period of October 1  
12 through December 31, 1998. That's the period she says  
13 they occurred. Found nothing. No record of any call  
14 at all.

15           I don't know what that means. To me it means  
16 we can't test the allegations that she received the  
17 call. I don't know how to do it. If there is no call  
18 record, there are no bills. It may mean the calls were  
19 done by somebody else. The result is the same, but  
20 T-Netix had nothing to do with them. Ms. Herivel is  
21 owed nobody from T-Netix for those calls, if they  
22 indeed existed.

23           So we've demonstrated lots of evidence in  
24 this record, lots of charts, lots of calls, all of them  
25 covered by a waiver, the ones that we know of. Those

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1   waivers, in effect, say to Ms. Judd and Ms. Herivel,  
2   You don't need to hear these rate quotes. You pick up  
3   the phone. You get an inmate call. If there is no  
4   rate quote, we say it's okay. There is no injury.

5           The fact that these women lack standing is  
6   the end of the matter, and I think I've discussed this  
7   in response to your question, Judge Rendahl. Primary  
8   jurisdiction is about sending a case to a commission to  
9   figure out how we deal with these claims. If there is  
10  no standing, the case goes no farther. It would be an  
11  imposition on this commission to ask it to assist in a  
12  case that can't go any further. It's a waste of time.

13           So both as a matter of primary jurisdiction  
14  and how that works and as a matter of this commission's  
15  own precedent under the Stevens case and under the U&I  
16  case, it doesn't make sense to go forward. Lack of  
17  standing means the end of the ball game. Nothing more  
18  to discuss. You have no injury, nothing to complain  
19  about. No need to expend any more resources of counsel  
20  or companies or this commission.

21           Let me emphasize again that the waivers and  
22  exemptions provided to GTE, US West, and PTI are  
23  dispositive. Commission says those rates don't need to  
24  be disclosed. All the rates paid or charged in this  
25  case were of GTE, PTI, and CenturyTel. Those rates

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1 belonged to them. They were billed by them, and paid  
2 to them.

3 Now, Complainants are going to argue that the  
4 question of standing, it's not really about were they  
5 injured. It's about what role did T-Netix play. If  
6 T-Netix was the OSP, magically, they have standing.  
7 Let's think about that. That puts the cart before the  
8 horse. The question is is there an injury. Then we  
9 decide who did it.

10 I was discussing with my cocounsel this  
11 morning that on the plane, I finally got to see  
12 "Million Dollar Baby," so I've got boxing on the brain  
13 right now. But it comes down to this: First you  
14 decide if you got punched, and then you decide who did  
15 it. These girls didn't get punched as a matter of law.  
16 If they didn't hear rate quotes, that's fine. So let's  
17 keep our eyes on the ball.

18 The question is were they injured by not  
19 hearing rate quotes. This commission by virtue of the  
20 exemptions and the waivers says no, they have no  
21 injury. We don't need to go farther.

22 JUDGE RENDAHL: Did you want to reserve five  
23 minutes?

24 MS. JOYCE: I do. Let me talk briefly about  
25 the new complainants. In what is an apparent

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1 concession that this case is in trouble, on May 6th,  
2 the Complainants filed three new declarations. I think  
3 in themselves they demonstrate that there is an issue  
4 here, because if Ms. Judd and Ms. Herivel were properly  
5 before the Commission, they wouldn't need to come up  
6 with new declarants, but even looking at their  
7 substance, they are not helpful.

8           We have Maureen Janega, a paralegal at what  
9 appears to be a legal services firm. The office is in  
10 Seattle. She says she got a bunch of phone calls from  
11 different institutions in Washington. No terminating  
12 phone numbers, no phone bills, no originating phone  
13 numbers. More importantly, there is a big question  
14 here as to whether she would even be a real party in  
15 interest. She's a paralegal. She doesn't pay the  
16 bills. So there is a real question as to even if it  
17 were proper to add her to this case, which it patently  
18 is not, she's not even entitled to any relief. She  
19 herself would not pass standing.

20           Suzanne Elliott, she's an attorney. She  
21 lives in Seattle. She said she got calls from Clallam  
22 Bay. Again, no phone numbers, no phone bills, no  
23 originating phone numbers, but let's look at this,  
24 because there is an analog already in the record.  
25 Seattle has a 206 area code. Clallam Bay has a 360



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1 area code. We know this if you look at the chart.  
2 Ms. Judd got a call from Clallam Bay, listed right  
3 there on her phone bill actually. Clallam Bay to  
4 Seattle is an intraLATA call. It does nothing to help  
5 the standing issue. All her calls were subject to  
6 waivers as well.

7 Paul Wright, former husband of Ms. Judd, and  
8 he phoned both Judd and Herivel from prison between  
9 1992 and 2000. Again, we have an issue because he  
10 couldn't have been the ratepayer. Calls are collect  
11 from prisons in this state, and certainly this one. So  
12 is he a real party in interest? He is not.

13 When an inmate places a call, it is the  
14 receiving party that hears the disclosure and then pays  
15 the rates. Mr. Wright provided no phone numbers and no  
16 bills. We can't test the allegations. Even if we  
17 could, he couldn't be a complainant either, even if it  
18 were proper to add complainants at this stage before  
19 this commission, which it is not.

20 So again, these three declarations are  
21 superfluous. They are outside the record. They are  
22 unhelpful. They are subject to the motion to strike  
23 for reasons explained in those papers that I'll touch  
24 on briefly, so they do nothing to help the lack of  
25 standing in this case.

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1           And finally, the Kenneth Wilson declarations,  
2 T-Netix moved to strike them. They speak to the merits  
3 of who did what to whom and who is a configurate with  
4 whom and who connects to who. It doesn't matter. But  
5 because it's the T-Netix equipment at stake here, we  
6 requested and were provided an opportunity to respond,  
7 and so Mr. Allen Schott, who is T-Netix's expert,  
8 addressed several of the opinions of Mr. Wilson to set  
9 the record straight.

10           First, the three platforms that Mr. Wilson  
11 discusses are not all the same. They can be looked at  
12 the same. Secondly, the POP configuration was not used  
13 for intraLATA calls. All the calls in this case that  
14 we can point to were intraLATA. The POP configuration  
15 has no part in this case. Third, the adjunct system  
16 was never used in Washington. We finally found out  
17 that fact, and we put it in a supplemental affidavit,  
18 so adjunct system, not part of this case.

19           Fourth, the premise system, the third of the  
20 three systems, the only platform that did intraLATA  
21 calls in this state, Mr. Wilson has a few opinions  
22 about this platform. They are incorrect. First, the  
23 premise platform does not route calls. The premise  
24 system is a static, hard-wired, one-to-one,  
25 phone-to-trunk configuration. Routing implies

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1 intelligent, dynamic, choosing of pathways. Premise  
2 does not do that. It's not a routing system.

3           It also, contrary to Mr. Wilson's opinion, it  
4 does not provide a connection to the network. Premise  
5 is a phone and software system. A connection to the  
6 network is provided, as we know in this commission and  
7 as telecom lawyers, by a loop. The loop in the premise  
8 configuration is provided by the LEC, paid for by the  
9 LEC, so these are two additional incorrect statements  
10 that we would just like to correct.

11           In closing, there is no standing here. There  
12 is no injury. Under the test in "Save" applied by this  
13 commission consistently, neither Ms. Judd nor  
14 Ms. Herivel have standing here. The new declarations  
15 don't save it. This case should not go forward. I  
16 respectfully ask that our motion for summary  
17 determination be granted.

18           JUDGE RENDAHL: Mr. Meier?

19           MR. MEIER: Thank you, Your Honor. Like  
20 Ms. Joyce, I will not be addressing the various  
21 procedural motions and will instead focus on the  
22 T-Netix motion for summary determination as well as  
23 what I think is fairly characterized as a separate  
24 motion for summary determination by AT&T.

25           There are really two issues raised by these

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1 two motions for summary determination. The threshold  
2 issue, as Your Honor has recognized, is the question of  
3 whether the Commission can even reach the merits of a  
4 standing issue in the context of a primary jurisdiction  
5 referral, and then the second question, which need be  
6 reached only if the first question is answered in the  
7 affirmative, is whether Complainants do have standing,  
8 so that's what I'll be focusing on.

9 First with regard to the -- and by the way, I  
10 would be more than happy to spend all my time answering  
11 your questions, if you have any, so feel free to jump  
12 in. With respect to primary jurisdiction, standing is  
13 a component of the trial court's subject matter  
14 jurisdiction. Primary jurisdiction referral such as we  
15 have here does not deprive the trial court of its  
16 subject matter of jurisdiction. Instead, the trial  
17 court simply refers specific questions, typically of a  
18 factual nature, that the agency addresses using its  
19 expertise, and the agencies' jurisdiction to do so is  
20 derivative of that of the trial court.

21 Now, T-Netix in its briefing appeared to  
22 agree that the Commission's jurisdiction is derivative  
23 of that of the trial court but nevertheless maintained  
24 that standing was an issue that could be reached by the  
25 Commission. We respectfully disagree. This is an

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1 issue that should be addressed by a trial court if and  
2 when it is raised there. That court retained  
3 jurisdiction over Plaintiff's CPA claim. It is in a  
4 position to hear all the arguments that would be raised  
5 in the context of a standing motion, including  
6 arguments that the Complaint should be amended to add  
7 any new plaintiffs who may have claims, and that could  
8 cure any standing problem.

9 JUDGE RENDAHL: So you are conceding in a  
10 sense that amending the claim would have to be done in  
11 King County?

12 MR. MEIER: That is our primary position,  
13 yes. That any amendment should be done in the trial  
14 court, not in the Commission. We only offer that  
15 argument as a backup argument, essentially, if the  
16 Commission determines that it can reach the standing  
17 issue. But we do not agree that this is the proper  
18 forum to decide either standing or amendment of the  
19 Complaint issues. In that sense, I think we are being  
20 consistent where I think T-Netix is not.

21 Finally, I think Your Honor is onto something  
22 when you note that the authority that T-Netix points to  
23 with respect to Commission cases, those authorities do  
24 not involve a primary jurisdiction referral, and we  
25 have yet to see any authority from either T-Netix or

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1 AT&T where the Commission has addressed a standing  
2 issue in the context of a primary jurisdiction  
3 referral.

4           So I would submit that there is no on-point  
5 authority for the position that both AT&T and T-Netix  
6 have taken here. In fact, I'm not aware of any  
7 authority involving any agency that has addressed a  
8 standing issue in the context of a primary jurisdiction  
9 referral, be it state, federal, Washington, non  
10 Washington. That authority simply has not been cited  
11 to the Commission.

12           Now, if the Commission reaches the standing  
13 issue, and I suppose that even if the Commission  
14 determined that it did not have jurisdiction to reach  
15 that issue, it could reach it in terms of an  
16 alternative holding. If the Commission reaches the  
17 standing issue, the analysis has to start with the  
18 statute and the regulations.

19           Complainants suffer injury in fact if they  
20 received instate-initiated calls and those calls fail  
21 to include rate disclosure. I agree with Ms. Joyce's  
22 statement that standing -- well, that is there an  
23 injury, that that is the central question in a standing  
24 analysis. We have a dispute about how to approach that  
25 question.

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1           The statute in the regulations place the onus  
2 of providing rate disclosure on operator service  
3 providers or what were originally termed "alternate  
4 operator service companies." Now, we have a dispute  
5 about how to approach that injury question. Do we look  
6 at who carried the calls as T-Netix argues? Ms. Joyce  
7 pointed out that T-Netix is not a common carrier. Do  
8 we look at who, quote, "was responsible" for the  
9 calls -- that's language that is taken from AT&T's  
10 briefing -- or do we look at who was the operator  
11 services provider?

12           The statute and the regulations answer the  
13 question. It is the OSP, the operator service  
14 provider, that is responsible for rate disclosure. So  
15 what that means is if Complainants did receive a call  
16 and one of these two companies, T-Netix and/or AT&T,  
17 was the operator service provider and there was no rate  
18 disclosure, they have suffered an injury in fact. That  
19 conclusion flows directly from the regulations.

20           Ms. Joyce discussed the question or pointed  
21 out that various local exchange companies, PTI, GTE,  
22 US West, obtained waivers or were exempted from the  
23 regulations and then concluded that the Commission  
24 effectively was saying to the public that your rates,  
25 "your," meaning these local exchange companies' rates,

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1 don't have to be disclosed on those calls.

2           We disagree. We think what the Commission is  
3 saying is that the LEC's don't have to disclose rates,  
4 but the OSP still has that responsibility under the  
5 regulations, and if there is a company other than the  
6 local exchange company that is providing operator  
7 services in connection with those calls, they do not  
8 have an exemption. They don't have a waiver. They are  
9 still responsible for making that disclosure, and that  
10 is the basis of our complaint is that these companies  
11 acting as operator service providers or contracting  
12 with operator service providers, and I'll get to that a  
13 little later, were responsible for providing rate  
14 disclosure and did not.

15           JUDGE RENDAHL: I have a question for you,  
16 Mr. Meier. Ms. Joyce spoke of several undisputed  
17 facts, and I'm wondering if, in fact, there is a  
18 dispute. The issue has to do with whether or not the  
19 calls were intraLATA or local, and I understood  
20 Ms. Joyce to state that for Ms. Judd, they were  
21 intraLATA calls and that there is some question as to  
22 whether there was an interLATA call for Ms. Herivel.  
23 Did the Complainants believe that the facts are in  
24 dispute as to the nature of the calls for Ms. Judd and  
25 Ms. Herivel?



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1           MR. MEIER: They appear to be, certainly as  
2 of yesterday when we received the T-Netix declaration  
3 stating that they are essentially disputing that  
4 Ms. Herivel received an interLATA call. For the  
5 record, we do move to strike the declarations that were  
6 filed with the Commission yesterday on procedural  
7 grounds. They are simply too late, and there is a  
8 question of how many bites at the apple you get,  
9 particularly on the eve of hearing, but even if that  
10 declaration is accepted, all it does is create a  
11 factual dispute that precludes granting of a motion for  
12 summary determination.

13           It is Complainants' position that Ms. Herivel  
14 did receive an interLATA call from Airway Heights in  
15 the fall of 1998. That puts us in a factual dispute  
16 that will require some more discovery and ultimately  
17 could require a decision from the Commission.

18           JUDGE RENDAHL: Aside from Ms. Herivel's  
19 claim that she received an interLATA call or interLATA  
20 calls, which that issue arose in the various pleadings,  
21 as to the intraLATA calls, is there any dispute as to  
22 that fact, that the calls to Ms. Judd and other calls  
23 to Ms. Herivel were intraLATA calls?

24           MR. MEIER: That appears to be the case.

25           JUDGE RENDAHL: That there is not a dispute

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1 as to that fact, that the calls were intraLATA calls?

2 MR. MEIER: To the best of my knowledge, that  
3 is correct.

4 JUDGE RENDAHL: But my understanding is that  
5 the Complainants assert that whether or not there were  
6 intraLATA calls, the issue is not the fact of an  
7 intraLATA call but the question of what role the OSP  
8 played in that intraLATA call. Am I summarizing your  
9 argument correctly?

10 MR. MEIER: I believe you are. We do not  
11 believe the question of whether there were exclusively  
12 interLATA calls or intraLATA calls is dispositive here.  
13 We believe it does turn on whether either of these  
14 entities were OSP's or contracted with OSP's.

15 JUDGE RENDAHL: Thank you.

16 MR. MEIER: Now, T-Netix does not dispute  
17 that it was an OSP. It did provide the platform at  
18 various facilities that performed operator facilities.  
19 By "facilities," I mean various prisons in Washington  
20 state, and that platform provided a connection, the  
21 connection that is referred to in the regulations  
22 describing operator service providers. Nor does  
23 T-Netix dispute that it failed to provide a rate  
24 disclosure here.

25 There are a multitude of fact questions here

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1 that highlight the need for discovery and demonstrate  
2 why these motions for summary determination should not  
3 be granted. Broadly speaking, the broad fact questions  
4 are whether T-Netix was an OSP, whether AT&T was an  
5 OSP, whether T-Netix was an OSP and during which time  
6 period or where T-Netix was an OSP and during which  
7 time periods and where AT&T was an OSP and during which  
8 time periods, and all of that needs to be sorted out in  
9 discovery.

10           There are some very specific factual  
11 questions that preclude summary determination. With  
12 regard to T-Netix, there is a question as to whether it  
13 was an OSP for the calls received by Sandy Judd and  
14 Tara Herivel from the Washington State Reformatory.  
15 The evidence on that is that both Ms. Judd and  
16 Ms. Herivel received calls from Washington State  
17 Reformatory during the relevant time period.

18           T-Netix's own documents list this facility as  
19 one of the institutions in which T-Netix has a  
20 platform. For that, I refer you to Exhibit H of my  
21 declaration that we filed with a response to T-Netix's  
22 motion. AT&T also says that T-Netix was providing  
23 services related to prison phone calls before it  
24 replaced PTI in 1997. That raises the question of what  
25 services T-Netix was providing and where were they

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1 providing those services.

2           There is another factual question as to  
3 whether T-Netix was an OSP for calls received by Sandy  
4 Judd and Tara Herivel from McNeil Island. The  
5 evidence is that both Ms. Judd and Ms. Herivel received  
6 calls from McNeil Island; that T-Netix's own documents  
7 list this prison as one of the institutions where  
8 T-Netix has a platform, and again, that AT&T says that  
9 T-Netix was providing services before 1997.

10           There is another factual question as to  
11 whether T-Netix and/or AT&T was an operator services  
12 provider for at least one call received by Tara Herivel  
13 from Airway Heights. We've already discussed whether  
14 Ms. Herivel received that telephone call is in dispute.  
15 Again, that highlights the need for further discovery.  
16 If she did, and of course the facts must be viewed in  
17 Complainant's favor at this stage of the proceedings,  
18 then this is an interLATA call. It does implicate  
19 AT&T's services, and whether AT&T was an operator  
20 services provider on this call is a question of fact.

21           AT&T responds by saying that, Well, look at  
22 the contracts. They delineated who was responsible for  
23 operator services, and it was the LEC or the LEC's  
24 contractor. It wasn't us. Well, that's an issue for  
25 discovery. That is the very same argument that AT&T

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1 raised in its December 2004 motion for summary  
2 determination. They said look to the contracts. Those  
3 are the documents they provided in conjunction with  
4 that motion.

5 In February, the Commission determined that  
6 those arguments, the issues raised by AT&T's motion for  
7 summary determination, was an appropriate subject for  
8 discovery. Well, we haven't had that discovery. It  
9 has been terminated, essentially, unilaterally by AT&T  
10 and T-Netix. We haven't received a single document  
11 from AT&T since the initial small batch of voluntarily  
12 produced documents in January. It simply is a question  
13 of fact that needs to be worked through in depositions.  
14 Our expert needs to look at documents produced by AT&T,  
15 T-Netix review depositions, and out of that process, we  
16 can determine whether AT&T was an OSP.

17 Now, the fact that the contract states that  
18 US West will deliver interLATA traffic to AT&T's point  
19 of presence, which is something that AT&T relies on,  
20 suggested that US West was carrying local or intraLATA  
21 traffic, but it does not prove that AT&T was not  
22 functioning as an OSP. Again, that's a conclusion that  
23 must be supported by evidence, be subject to  
24 cross-examination and scrutiny by Complainants' expert,  
25 and whether T-Netix served Airway Heights is also a

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1 question of fact, served Airway Heights as an OSP, is a  
2 question of fact on which there is no evidence to date  
3 and on which, again, we need discovery.

4           Now, an additional factual question is  
5 whether T-Netix was an OSP for the Clallam Bay facility  
6 in 1996 when T-Netix's own records show that Ms. Judd  
7 received a phone call from Clallam Bay. Again, AT&T  
8 says that T-Netix was providing services related to  
9 prison phone calls before it replaced PTI in 1997. We  
10 know that PTI was serving Clallam Bay, but we don't  
11 know who the OSP was in 1996. This is an issue for  
12 discovery.

13           Finally, there are issues of fact regarding  
14 whether AT&T contracted with an OSP that failed to make  
15 rate disclosure, whether T-Netix contracted with an OSP  
16 that failed to make rate disclosure and whether AT&T  
17 received intraLATA authority in Washington, and whether  
18 it, in fact, carried intraLATA calls from prisons and  
19 provided operator services on those calls. Again, an  
20 issue for discovery.

21           If Your Honor is interested, I would be happy  
22 to discuss what we believe is a separate basis for  
23 liability, which is our contracting-with argument that  
24 we believe if the Commission does reach the standing  
25 issue must be dealt with.

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1           JUDGE RENDAHL: This is something you've  
2 raised in your pleadings, I'm assuming?

3           MR. MEIER: It is.

4           JUDGE RENDAHL: You have one more minute, so  
5 if you want to, you may delve into it, but you are  
6 running out of time.

7           MR. MEIER: It will be quick. The statute  
8 says that the Commission shall require any telecom  
9 company, quote, "operating as or contracting with an  
10 OSP to assure appropriate disclosure." That's a  
11 statutory directive, and the Commission's regulations  
12 must be read to the extent possible to be consistent  
13 with that directive.

14           Now, the regulations regarding operator  
15 services providers are silent on this contracting-with  
16 basis for liability, but we all know that an  
17 implementing regulation cannot contradict the statute  
18 that authorized it.

19           JUDGE RENDAHL: Wouldn't this be an issue for  
20 you to argue in King County, because the issue that's  
21 before us is whether T-Netix has violated the rules and  
22 whether AT&T is an OSP. So wouldn't this  
23 contracting-with argument as another basis for  
24 liability be an issue for King County under your  
25 arguments for primary jurisdiction?

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1           MR. MEIER: I appreciate that instinct, but  
2   our position is that the contracting-with basis for  
3   liability is necessarily incorporated into the  
4   regulation so that in the course of determining whether  
5   the regulation has been violated, the Commission needs  
6   to determine whether, in fact, it has been incorporated  
7   into the regulation, and if so, whether that is a  
8   separate basis for finding a violation of regulation.  
9   Our position is that the regulation must be consistent  
10  with the statute that authorizes it, and it does  
11  necessarily incorporate it, so that is our answer  
12  there.

13           JUDGE RENDAHL: I think you are out of time  
14  at this point.

15           MR. MEIER: That's fine.

16           JUDGE RENDAHL: Thank you very much.  
17  Mr. Peters?

18           MR. PETERS: Before I get to the merits, I  
19  want to start with one housekeeping matter that I don't  
20  think is in dispute. We had filed a motion for leave  
21  to file a response to the supplemental declaration of  
22  Ken Wilson, and I don't think that Mr. Meier, I'm  
23  confident that he did no object to it, so I wanted to  
24  make sure the record is clear that we have filed that.

25           JUDGE RENDAHL: Given that the order allowing



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1 T-Netix to respond to Mr. Wilson's declaration, since  
2 AT&T stands in a similar position, it was not  
3 inappropriate. It was within the same time period  
4 reasonably allowed for T-Netix to respond, so at this  
5 point, yes, I would grant leave for AT&T to file its  
6 response, so that is not an issue.

7 MR. PETERS: Thank you. I think it's helpful  
8 in dealing with this issue to actually break out  
9 Ms. Judd and Ms. Herivel's standing separately and talk  
10 about them separately. I think it's just analytically  
11 easier to do it that way, and I'm going to focus first  
12 on Ms. Judd.

13 What we see from the papers and what I think  
14 Mr. Meier confirmed for you today is there is no  
15 dispute that Ms. Judd received only either local or  
16 intraLATA phone calls, and that really isn't in  
17 dispute. As a result of that, we also know that the  
18 calls never touched AT&T's network. We know that  
19 because the Department of Corrections' contract calls  
20 for the LEC to handle those intraLATA and local calls.

21 Now, I think it's important to keep in mind  
22 what standard is. We are here on a motion for summary  
23 determination, which is essentially a summary judgment  
24 motion. What the US Supreme Court said in the Lujan  
25 case, which was adopted by Washington courts in, I

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1 believe it was Allen versus the University of  
2 Washington, at the summary judgement stage, it's just  
3 not an academic exercise. In order to establish  
4 standing, you've got to come forward to the summary  
5 judgement stage. You have to come forward with some  
6 evidence, some proof, and there really isn't any  
7 dispute in focusing now on the calls to Ms. Judd.  
8 There isn't any dispute that those calls never touched  
9 AT&T's network.

10           Which then takes us to the whole standing  
11 issue. That standing is a doctrine that is meant to  
12 demonstrate whether or not the plaintiff has a  
13 sufficient stake or an interest in the outcome. Well,  
14 not just a stake in the outcome but a stake in the  
15 outcome towards the party being sued.

16           To use a more simple case, if there is a car  
17 crash -- Mr. Meier runs into my car and injures me --  
18 Ms. Friesen who is standing next to there doesn't have  
19 standing to complain against Mr. Meier because she  
20 doesn't have a stake in it. She doesn't have any  
21 interest in it.

22           Well, here, if the calls never touched AT&T's  
23 networks, Ms. Judd doesn't have any standing to  
24 complain at all about AT&T's conduct because she never  
25 had any dealing, any relationship at all with AT&T.

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1 She can't have standing to complain that she was  
2 injured by AT&T's failure to fulfill its duties as an  
3 OSP when AT&T never touched the call. The OSP  
4 definition in the regulation is that the OSP is the  
5 party that connects the call from the call aggregator  
6 to either the local or long-distance service provider.

7 JUDGE RENDAHL: What is the basis for your  
8 statement that there is no dispute that the calls never  
9 touched AT&T's network?

10 MR. PETERS: There has been no allegation  
11 that they ever touched it and there has been no  
12 evidentiary proof that it came through. We know that  
13 they are intraLATA calls, and all of the evidence shows  
14 that the intraLATA calls were handled by a LEC.

15 JUDGE RENDAHL: But the issue here, at least  
16 the issue that the Superior Court has asked us, is  
17 whether T-Netix violated the Commission's rules and  
18 whether AT&T is an OSP.

19 MR. PETERS: Yes. And also whether or not  
20 AT&T violated any rules.

21 JUDGE RENDAHL: It appears to me that using  
22 the contract to say that there is no basis that the  
23 calls ever touched AT&T's network, there is an issue  
24 there to me as to whether we even reach the issue of  
25 AT&T as an OSP and what the nature of AT&T's network is

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1 as an OSP. The contract can't be dispositive of that.

2 MR. PETERS: The Plaintiff can't keep saying,  
3 We think AT&T may have had some involvement in these  
4 calls. It had to come forward with some proof at some  
5 point. What the court said is that they referred  
6 certain questions to you as you identified, but you do  
7 have the special expertise to determine whether or not  
8 these calls touched AT&T's network.

9 JUDGE RENDAHL: Has AT&T provided information  
10 to the Complainant to help the Complainant resolve that  
11 dispute?

12 MR. PETERS: We have filed tariff information  
13 when T-Netix filed the motion to stay discovery. We  
14 didn't want to unilaterally violate, basically trump  
15 their order and stay discovery, so we have not fully  
16 complied with all of the outstanding discovery  
17 requests.

18 But nonetheless, there has to be some basis.  
19 Standing is a professional issue, and there has to be  
20 some basis for the Plaintiff to be able to allege or  
21 put forth some reason to believe that AT&T, in fact,  
22 did touch these calls, and I'm focusing particularly on  
23 Ms. Judd's claims, and there simply isn't any basis to  
24 do that.

25 Anybody could just come before the Commission

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1 who had no dealing with AT&T and say AT&T is violating  
2 some rule. There has to be some relationship, some  
3 nexus between the complainant and the carrier in order  
4 for there to be standing to raise these issues, and  
5 there just isn't any. If the reg defines the OSP as  
6 the party that connects the call and we never touched  
7 the call, we can't by nature be the OSP, purely as a  
8 matter of definition.

9           In regard to Ms. Herivel, she's really in the  
10 same position as Ms. Judd with the exception of this  
11 one professed interLATA call, and in regard to that one  
12 interLATA call that she claims came from Airway  
13 Heights, there is also no dispute that that was a call  
14 that was carried by US West or Qwest. We know that  
15 because Ms. Herivel's own declaration talks about her  
16 trying to find billing records for that and saying that  
17 US West doesn't have any billing records, so we know  
18 that that once again is a call that never touched  
19 AT&T's networks.

20           In fact, the contract calls, once again, for  
21 US West to bring the call from the call aggregator to  
22 AT&T's point of presence. AT&T can't be the OSP if the  
23 LEC, in this case US West, is responsible for bringing  
24 the call to AT&T's point of presence. I say that  
25 because it can't be the person connecting the call from

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1 the call aggregator if someone else is bringing the  
2 call to its point of presence.

3 JUDGE RENDAHL: Now, when you say "call  
4 aggregator" -- I've been doing telecom for years.  
5 There are some terms that still confuse me. Is the  
6 call aggregator different in a sense from the OSP? Who  
7 is the call aggregator?

8 MR. PETERS: I think the call aggregator is  
9 the Department of Corrections facility. They are the  
10 person providing the individual pay phones. It may be  
11 the OSP, but it doesn't necessarily have to be the OSP.

12 JUDGE RENDAHL: Does the contract identify  
13 that issue?

14 MR. PETERS: The contract does not identify  
15 who the call aggregator is, but I'm sort of analogizing  
16 it to the conventional call aggregators with hotels or  
17 airports, shopping malls, that type of thing, but the  
18 facility where the pay phones are being provided is in  
19 this case the Department of Corrections.

20 But as I said, Ms. Herivel admits that it was  
21 US West who was providing all of the billing here, and  
22 as a result of that, I really don't think there is any  
23 genuine dispute as to whether or not AT&T can be deemed  
24 to be the OSP.

25 JUDGE RENDAHL: Even if US West or some LEC

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1 is the billing agency since they might bill for this  
2 call, doesn't US West reimburse an OSP who might be a  
3 part of that call so that the OSP is not going to be  
4 billing --

5 MR. PETERS: The OSP doesn't necessarily need  
6 to be the billing party.

7 JUDGE RENDAHL: But it could be on US West's  
8 bill.

9 MR. PETERS: We know that Herivel declaration  
10 in terms of looking for US West that the call was  
11 carried by US West to AT&T, and that's, I think, what's  
12 important is that if the call was carried by somebody  
13 else to AT&T's point of presence, which is all that we  
14 are talking about here, then by definition, AT&T can't  
15 be the OSP because the OSP is defined as the person who  
16 connects the call from the call aggregator to either  
17 the interstate or intrastate local or long-distance  
18 provider.

19 Somebody else is bringing that call to AT&T's  
20 point of presence, and because somebody else is  
21 bringing it to AT&T's point of presence before they  
22 ever touch it, it, by definition, can't be the person  
23 that is connecting the call from the call aggregator  
24 location.

25 I want to quickly address what I refer to as

0055

1 two supplemental arguments that the Plaintiff has made.  
2 The first is that the contracting language --

3 JUDGE RENDAHL: Someone just joined us on the  
4 conference bridge?

5 (Discussion off the record.)

6 JUDGE RENDAHL: Go ahead, Mr. Peters.

7 MR. PETERS: I want to focus on the  
8 contracting. What Mr. Meier and the Complainants are  
9 relying upon there is the argument that the statute,  
10 which was an enabling statute, directs the Commission  
11 to adopt rules governing OSP's for an OSP or party who  
12 contracts with an OSP. This is an issue they raised  
13 already in the trial court and was dealt with by the  
14 Washington Court of Appeals in the decision we gave to  
15 you.

16 JUDGE RENDAHL: So the contracting-with  
17 language is in the enabling statute, not in the other  
18 statute.

19 MR. PETERS: It's in the enabling statute and  
20 not in the regulations. It defined what the OSP is and  
21 defined what it is that the OSP is required to do. To  
22 help you find the -- are you looking for the reg or for  
23 the Washington Court of Appeals decision?

24 JUDGE RENDAHL: I'm looking for the statute,  
25 and I have them, so go ahead.



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1           MR. PETERS:  What the Washington Court of  
2 Appeals said when this argument was raised before it  
3 already is you do not look to that enabling statute who  
4 is an OSP or what rules are required.  It is just that.  
5 It's an enabling statute, and ultimately in terms of  
6 who is an OSP and what the responsibilities are of the  
7 OSP, you need to look at the actual regulation itself,  
8 which makes sense, because ultimately when the  
9 Commission exercises its authority in terms of rule  
10 making, it made the determination that in order to  
11 regulate rate disclosures, it would impose the  
12 regulation directly on the OSP, and there wasn't a need  
13 to deal with any party who contracts with the OSP's.  
14 That's what the Washington Court of Appeals said in its  
15 decision.  That argument has already been rejected by  
16 the Washington Court of Appeals.

17           Two arguments as well that I want to quickly  
18 deal with.  The first is this adjunct platform  
19 argument, that somehow AT&T should be held responsible  
20 or should stay in the case because their expert has  
21 seen training manuals that suggest that in certain  
22 instances that T-Netix' platform is directly connected  
23 to an AT&T switch.  That is, to be a little proverbial,  
24 a red herring, because we now know, and there is no  
25 dispute, that that adjunct platform is not in use and

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1 not servicing Washington state at all. We know that  
2 through the Schell affidavit and the Schott affidavit.

3 JUDGE RENDAHL: Weren't those affidavits  
4 filed -- after the initial Schott affidavit was filed,  
5 and I've allowed that in, but there is no provision for  
6 further discussing these facts that are alleged in the  
7 affidavits.

8 MR. PETERS: The Schell affidavit is part of  
9 the motion that we got that Mr. Meier is not, that you  
10 just gave us leave to file.

11 JUDGE RENDAHL: So Mr. Schell is with AT&T  
12 and Mr. Schott is with T-Netix.

13 MR. PETERS: Right. The Schell affidavit was  
14 filed with AT&T as part of the response to the Wilson  
15 declaration. The Schott affidavit -- and there is two  
16 of them. What you are referring to, I think, is the  
17 supplemental Schott affidavit -- it was filed within  
18 the last day or two, but all that does is essentially  
19 say the same thing that was in the Schell affidavit,  
20 which says that the adjunct platform doesn't connect to  
21 any switch that services Washington state, so it really  
22 is a red herring, and there is enough issues. We don't  
23 want to cloud the water with issues that really don't  
24 have any bearing at all on this.

25 JUDGE RENDAHL: Does the fact that we are

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1 getting into these kind of factual details and  
2 affidavits on a standing motion raise any issues as to  
3 whether there is facts in dispute?

4 MR. PETERS: Ultimately, it really doesn't,  
5 because what the Plaintiff's burden is is to establish  
6 that they have some reason to believe that there is a  
7 genuine issue as to whether or not they suffered injury  
8 by the party from whom they are complaining. They  
9 can't do that just by pure speculation. That's what  
10 the Lujan court talks about. The Wilson declaration in  
11 terms of the adjunct platform is nothing more than  
12 sheer speculation as to whether or not AT&T may be  
13 connected to some switch somewhere.

14 It's always very sort of tempting to say  
15 there are factual issues that remain, but in some ways,  
16 we really are dragging out, shall I say, the  
17 inevitable, that there is no factual basis to believe  
18 that AT&T had any connection at all to the local or  
19 intraLATA calls that we know from the phone bills.

20 We've had enough discovery, and the question,  
21 to rephrase your question if you give me the liberty  
22 to, is what's changed since you granted leave on the  
23 motion for summary determination. Why are we in a  
24 different position now than we were before? What's  
25 changed is we are now more focused. We know exactly

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1 what calls it is or calls from what facility that we  
2 are talking about, and we know that from the phone  
3 bills that are produced that now we are focusing on  
4 specific calls from certain facilities, and as we get  
5 that sharpened focus, we are able to determine that  
6 yes, as an initial threshold matter, we can tell that  
7 these calls just didn't touch AT&T's network, and if  
8 they never touched AT&T's network, I think it's  
9 perfectly appropriate and required of you to say they  
10 don't have standing to complain of AT&T.

11 That doesn't mean you have to throw the  
12 Complainants out all together and they don't get any  
13 ability to get a remedy. You are exercising your  
14 expertise in terms of referral to say they didn't have  
15 any connection to AT&T. They can proceed against other  
16 parties --

17 JUDGE RENDAHL: Is that the question on  
18 referral?

19 MR. PETERS: The question on referral is, in  
20 terms of AT&T, are they an OSP, and if they are an OSP,  
21 did they violate any rules, but if the Complainant  
22 doesn't have standing to deal with whether AT&T was an  
23 OSP, they are not the party to raise it.

24 What would be appropriate procedurally is for  
25 you to say, Your Honor, I've looked at this, and

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1 applying the Commission's expertise, we can say that  
2 these complainants do not have sufficient standing to  
3 raise any question as to AT&T. That would then go back  
4 to the trial court.

5 At the trial court level, Mr. Meier is left  
6 with a decision. He can seek leave to amend his  
7 Complaint to find somebody who may have sufficient  
8 contact, and then the court can decide what they want  
9 to do about it, or he can say, I've seen enough. It's  
10 pretty apparent to me that AT&T really isn't the OSP,  
11 and I really shouldn't be spending my time and money,  
12 but we know from the Stevens case that standing is a  
13 threshold obligation of this commission, that there is  
14 that obligation for the court to determine whether or  
15 not there is standing.

16 JUDGE RENDAHL: Isn't that the same question  
17 I asked Ms. Joyce? What's the difference in Stevens  
18 and U&ICAN is that those were issues and complaints  
19 filed directly with the Commission, not based on a  
20 primary jurisdiction referral, and isn't there an issue  
21 there as to whether we have the primary jurisdiction as  
22 the Commission to dismiss the case for standing or not  
23 reach the question that was posed to us, and send it  
24 back to say, No, we don't think they have standing.  
25 Doesn't that raise an issue that they might send it

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1 back to us and say, But you didn't answer the question.

2 MR. PETERS: I completely understand your  
3 concern and the distinction you are drawing, and I  
4 think it's legitimate to raise it, but ultimately,  
5 standing is a threshold, and you aren't telling the  
6 court that you are not willing to exercise your powers.  
7 What you are saying is this plaintiff or complainant  
8 doesn't have a sufficient state to complain against  
9 AT&T.

10 You have to determine whether there is  
11 standing. If they don't have a stake in the outcome,  
12 they are not the right party to adjudicate it, and  
13 that's something that's perfectly appropriate for you  
14 as an ALJ on the Commission to write in terms of  
15 responding to the primary jurisdiction referral, and  
16 then it's up to the Complainant to decide how they want  
17 to react to that.

18 But if all of a sudden, somebody came in off  
19 the street on this referral and started complaining  
20 about somebody they had no dealing with, I don't think  
21 it would even be a tough issue. The reason why it's a  
22 tough issue is because the standing argument wasn't  
23 raised back at the trial court level, and the reason  
24 why it wasn't raised at the trial court level is we  
25 didn't have that focus we now have in terms of the

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1 billing, that you've gotten more information, and as  
2 you've gotten that information, you are able to focus  
3 the inquiry and respond to it.

4 JUDGE RENDAHL: I have gone over time here.  
5 Ms. Joyce, you kind of used up your 20 minutes. You  
6 have a couple of minutes.

7 MR. BUTLER: Can we take a couple of minutes  
8 before we get back to you?

9 JUDGE RENDAHL: We will be off the record for  
10 two minutes and then we will go back.

11 (Discussion off the record.)

12 JUDGE RENDAHL: Ms. Joyce?

13 MS. JOYCE: We are here on a standing issue.  
14 Mr. Meier's remarks began with a statement that we  
15 should not reach the merits of the standing issue. I  
16 think that that phrase in itself is an oxymoron and  
17 typifies the way they responded to T-Netix's motion for  
18 summary determination.

19 Standing is not a merits issue. Standing is  
20 a justiciability issue. It's a threshold issue, so  
21 talk of who connected to whom, what the configuration  
22 of the platforms are is irrelevant now. All that's  
23 relevant is injury, and what we've seen that is  
24 undisputed is that Ms. Judd only received intraLATA  
25 calls. Mr. Meier is not going to dispute -- stating

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1 that they were intraLATA calls.

2 IntraLATA calls were carried by LEC's. This  
3 commission told those LEC's, Your rates do not need to  
4 be disclosed. That is the end of the matter, because  
5 let's think about this. Those rates don't need to be  
6 disclosed. Why would T-Netix as providing the software  
7 have a greater obligation than the carriers whose rates  
8 they are, the carriers getting the money and setting  
9 those rates.

10 Also, let's think about this: If it was not  
11 the LEC's rates that were exempted or needed to be  
12 exempted from disclosure, why did all three LEC's ask  
13 for waivers? Why would they do that if they thought  
14 they weren't subject to disclosure or if they thought  
15 their rates might have to be disclosed? They got  
16 waivers because it was their rates at stake, and they  
17 were given those waivers, so that in itself  
18 demonstrates that the Commission in looking at those  
19 waiver requests said, These rates don't need to be  
20 disclosed for whatever reason, doesn't need to happen.

21 So if Ms. Judd and Ms. Herivel didn't hear  
22 these rates as they've alleged, and T-Netix has not  
23 even begun to address those allegations because that's  
24 a merits issue, not to be glib, but no harm, no foul.  
25 They didn't hear the rates. The Commission said they



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1 didn't have to. They are not injured here, and the  
2 reason the Commission today has the authority to  
3 dismiss this case is again two-fold. This commission  
4 is not in the business of giving advisory opinions for  
5 people who have no injury.

6           Judge Learned would say the same thing if  
7 this were before her. It isn't because it's kind of a  
8 strange procedural posture we're in. Standing was  
9 never raised at the trial court because the Complaint  
10 included no specific facts that T-Netix was able to  
11 investigate as to who got calls when and to which  
12 numbers and from which facilities. We had these  
13 bare-bones allegations, and that's what we dealt with.

14           It seems emotionally strange or anomalous  
15 that we are sitting here five years after the Complaint  
16 was filed talking about standing. It's too late for  
17 this. Well, it's really not because we have a  
18 12(b)(6)stage immediately in November of 2000. We got  
19 the referral to this commission. Nothing happened for  
20 four years at all regarding AT&T and T-Netix.

21           The first shot we got, we got that discovery  
22 to try to figure out what went on here, and what went  
23 on here was that these women received calls. Maybe  
24 they didn't contain rate disclosures. We haven't been  
25 able to investigate that yet, but all those rate

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1 disclosures were exempt anyway. So it seems anomalous  
2 it's absolutely the proper result to dismiss at this  
3 time.

4           Again, to highlight something Mr. Meier said,  
5 he said that today is not the proper time to discuss  
6 standing, but when would be the proper time? Again,  
7 it's a threshold issue. The bulk of his argument again  
8 focused on the discovery he needs to determine who was  
9 connected to whom and etcetera, etcetera, but discovery  
10 is for justiciable claims. It's not a fishing  
11 expedition.

12           The reason that the standing doctrine exists  
13 is to preserve the resources of parties and their  
14 counsel and tribunals, both this commission and the  
15 court, from adjudicating claims where nothing went  
16 wrong, and in this case, with these two women, nothing  
17 went wrong.

18           We have these three declarants who purport to  
19 be ready and willing complainants. Huge questions  
20 about whether they are in the real parties' interest,  
21 whether they were even injured at all, and it would be  
22 inappropriate for this commission to swap out  
23 plaintiffs, send them back to Judge Learned, and  
24 suddenly she's got three new people standing in front  
25 of her.

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1                   What needs to happen, and what I think  
2 Mr. Meier conceded, is he needs to go back to court and  
3 find out if he's allowed to do that, but in this  
4 commission, you are faced with two Complainants. They  
5 don't have standing. So under both Lujan, the "Save"  
6 case, the U&ICAN case, this commission has the ability  
7 to say, We are not doing it. Don't waste our time. We  
8 would help you if you had injury. If you don't, there  
9 is nothing to be done.

10                   Judge Learned doesn't need our expertise in  
11 this case because there is no case, and that's simply  
12 the fact of the matter. There is no evidence to the  
13 contrary. Thank you.

14                   JUDGE RENDAHL: I appreciate your answering  
15 my questions both about the legal issues and the facts,  
16 because there have been so many flying in the various  
17 pleadings, but I did give some thought to this prior to  
18 the argument, and it's a difficult question, but  
19 looking at the law on primary jurisdiction and the  
20 cases the parties have cited, I just do not feel  
21 comfortable in the Commission's role on a referral in  
22 primary jurisdiction in telling the Superior Court that  
23 this should be dismissed on that basis. It may be a  
24 valid point to raise to the Superior Court when the  
25 Commission reaches the issues that the Superior Court

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1 has asked us to raise, and I think you are all correct  
2 that it is an important consideration for Judge Learned  
3 in deciding what to do with this case when it comes  
4 back to her, but it is not the Commission's role to  
5 dismiss this case.

6           We do not give advisory opinions, but a  
7 referral from the King County Superior Court is a  
8 request for an opinion on the law and the facts that  
9 are presented in the case. So I'm denying T-Netix's  
10 motion for summary determination first on the primary  
11 jurisdiction issue, and second because I think there  
12 are some, in my mind, facts in dispute that relate to  
13 the role of the parties.

14           So much of the facts in this case have come  
15 out on these flying-back-and-forth affidavits on  
16 preliminary discovery, and while I understand the  
17 desire to avoid exchanging confidential and highly  
18 confidential information if the parties feel it's not  
19 necessary and this issue can be addressed on standing,  
20 I think the back-and-forth affidavits addressing facts  
21 that can't really be tested unless you have further  
22 discovery just also leads me to deny a motion to stay  
23 discovery, even though it has been effectively stayed  
24 in this case. So I really do think that if AT&T and  
25 T-Netix are clear that they have no responsibility or

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1 liability in this case, then let's have a discovery.

2           Let's discover the facts and be clear and  
3 have it be clear that, in fact, T-Netix and AT&T don't  
4 bear responsibility. So we need to go back to the  
5 position we were prior to the T-Netix motion, and let's  
6 get the underlying facts set up. Let's have some  
7 depositions. Let's test the issues that were addressed  
8 in this affidavit.

9           You have all focused the issue. You have  
10 worked to some degree to focus what the issues are. I  
11 think there is an issue that we need to look into. We  
12 need to be responsible to Judge Learned and say, Is  
13 T-Netix in violation. Is AT&T in violation of the  
14 rule, and even if they were an OSP and even if both  
15 parties are OSP's in violation of some rule, which  
16 also, is there standing for Judd and Herivel, that's an  
17 issue for Judge Learned to decide.

18           I can raise the issue or the Commission can  
19 point out, Well, the parties have raised this issue and  
20 there is some question, and that's an issue that I'm  
21 sure you all would address very first when going back  
22 to Judge Learned and saying, We don't think there is  
23 standing, even if we were in violation hypothetically  
24 as to these parties. That's an issue for the King  
25 County Superior Court to deal with. Our role is really

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1 to resolve the issue that's been posed to us.

2           So I'm denying the motion for summary  
3 determination, denying the motion for stay of  
4 discovery, and we need to establish a schedule that is  
5 going to get us the discovery. You've already done  
6 some. We may not need the same period of time for  
7 discovery and depositions that was required before, but  
8 we need to do some discovery.

9           MS. JOYCE: Your Honor, are you prepared to  
10 rule on the motion to strike?

11           JUDGE RENDAHL: I am. I'm just looking at my  
12 notes here. The parties are also protected by the  
13 protective order that addresses both confidential and  
14 highly confidential information, so there shouldn't be  
15 any bar to exchanging information at this point, and in  
16 fact, if the parties get into disputes over discovery,  
17 I suggest you bring them to me immediately if you can't  
18 resolve them. Now, that doesn't mean if somebody  
19 opposes discovery, objects to discovery, then the  
20 person who has propounded the discovery immediately  
21 calls me.

22           I do expect some discussion between you all  
23 and some effort to try to resolve the issue and explain  
24 what your concerns are before it comes to me, but I do  
25 want this to come to me as soon as possible if there

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1 are disputes so we don't get into this delay we are in  
2 now. We've obliterated the schedule we had before.

3 As to the motions to strike, the Elliott and  
4 Jenega (phonetic) declarations, for the reasons you may  
5 have picked up in my questions, I'm granting the motion  
6 to strike those two declarations because of the primary  
7 jurisdiction. If the Complainants want to add those  
8 two parties when this goes back to Judge Learned, the  
9 Complainants can do so, but this is not the forum to do  
10 that.

11 As to Mr. Wilson's affidavits, I don't  
12 believe it's appropriate to strike those at this point.  
13 There is relevant information going back and forth. I  
14 think those issues can be tested in the next process,  
15 but I don't think it's inappropriate information and  
16 doesn't need to be stricken.

17 I did address AT&T's motion for leave.  
18 That's granted. Are there any other outstanding  
19 motions that need to be resolved at this point?

20 MR. MEIER: I made an oral motion this  
21 morning to strike the declarations that were submitted  
22 yesterday. In light of your decision, I'm not sure it  
23 really matters. That will just be further fodder for  
24 discovery, I think.

25 JUDGE RENDAHL: Exactly. As Mr. Peters

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1 suggested, you all have begun to focus your efforts. I  
2 think all the affidavits flying back and forth give you  
3 a starting point and go forward from there.

4           So given I'm still trying to resolve the  
5 Verizon arbitration order and get that out by the end  
6 of next week, you won't see a written order from me on  
7 this oral argument documenting my decision until mid  
8 July, but I will get a written order out. If we do  
9 reach a schedule today, I will send out a notice with  
10 the schedule separately and try to get that out as soon  
11 as possible so you have that, but is there any  
12 questions about my decision at this point before we go  
13 on to schedule?

14           MS. JOYCE: No.

15           JUDGE RENDAHL: In terms of schedule, let's  
16 go off the record for a moment.

17           (Discussion off the record.)

18           JUDGE RENDAHL: While we are off the record,  
19 I proposed a variety of options, but given the parties'  
20 schedules and the fact that Mr. Peters is trying to  
21 figure out his schedule for a matter in New York, we  
22 decided it was best to defer the scheduling conference  
23 until Friday the 29th of July at 9:30 a.m. It will be  
24 a telephonic prehearing conference. The parties are  
25 going to endeavor to reach agreement on a schedule, and



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1 if they can reach agreement on a schedule, they've  
2 agreed to send it to me in advance, hopefully by the  
3 28th, and if there is an agreed schedule, there may not  
4 be a need for the conference on the 29th, so I will  
5 await the schedule you all propose, and as I mentioned  
6 before, I will be entering an order based on my oral  
7 decision today mid July, and I think that concludes the  
8 hearing today. Is there anything else we need to  
9 discuss? You all have coordinated with the court  
10 reporter. Thank you very much. This hearing is  
11 adjourned.

12 (Prehearing adjourned at 11:10 a.m.)

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