REDACTED CONFIDENTIAL PER PROTECTIVE ORDER IN WUTC DOCKET NO. UT-042022

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

SANDRA JUDD, et al., Complainants, v. AT&T COMMUNICATIONS OF THE PACIFIC NORTHWEST, INC.; and T-NETIX, INC., Respondents.	DOCKET NO. UT-042022 **COMPLAINANTS' RESPONSE TO T-NETIX'S PETITION FOR ADMINISTRATIVE REVIEW AND MOTION FOR STAY**

Introduction and Summary

1. T-Netix's petition for interlocutory review of Judge Rendahl's denial of its motion for summary determination should be rejected for three independent reasons. First, T-Netix neglected to inform the Commission that it has simultaneously requested the King County Superior Court to rule on the exact same issue it asks the Commission to review. It therefore invites the real possibility of inconsistent results from two different forums on the same issue. Because Complainants do not oppose T-Netix's motion to lift the stay in King County Superior Court, the Superior Court will in fact decide the issue. It would be a colossal waste of Commission resources to accept review of an appeal on an issue that the Superior Court will decide.

2. Second, Judge Rendahl was correct in concluding that only the Superior Court has jurisdiction to determine whether Complainants have standing. We are

here on a primary jurisdiction referral. The case law is clear: the agency's jurisdiction is confined to answering questions that were referred to it by the Superior Court. T-Netix offers no authority whatsoever for its argument that an administrative agency may determine issues of standing when its jurisdiction is derivative of that of the trial court.

3. Third, T-Netix is dead wrong on the merits of the standing issue. Although T-Netix would like to pretend that Judge Rendahl did not reach this issue, Judge Rendahl clearly and explicitly held that even if the Commission had jurisdiction to determine standing, questions of material fact exist with respect to the role of T-Netix and AT&T in connecting inmate calls received by Complainants. That conclusion is based on a boatload of evidence that T-Netix was, in fact, an operator services provider on calls received by Sandy Judd and Tara Herivel. Neither T-Netix nor AT&T provided any rate disclosure on these calls during the relevant time period. That is precisely the type of harm that Complainants alleged in their complaint in the trial court. It is the type of harm that is redressable under the Consumer Protection Act.

4. The Commission should reject T-Netix's petition and its ill-founded request to stay all proceedings.

What This Case Is About

5. In 1988, the state Legislature declared that an operator service provider's failure to identify "the services provided or the rate, charge or fee" for a long distance, collect telephone call is an unfair trade practice and a *per se* violation of the Consumer

Protection Act. RCW 80.36.510 - .530. The Legislature directed the Washington Utilities and Transportation Commission to enact regulations governing the disclosure requirements. The Commission did so in 1991. WAC 480-120-141(5)(iii)(a) (1991). Failure to comply with the disclosure requirements gives rise to a claim under the Consumer Protection Act, with damages presumed to be $200 per call plus the cost of the service. RCW 80.36.530.

6. Over the next nine or ten years, the defendants in this case—T-Netix and AT&T—failed to disclose the required rate information to friends and families of Washington state inmates. The recipient of an inmate call was given two choices: (1) accept the call without any disclosure of rate information; or (2) hang up.

7. As reported in the Wall Street Journal and elsewhere, prisons and the companies that provide operator services turned to inmate collect calls in the 1990s as a lucrative profit center.

> In 1992, the state of Washington opened the Airway Heights Corrections Center, a 2,000-man, medium security prison near Spokane. It furnished the prison with 142 pay phones—one for every 14 inmates—and allowed prisoners to use them virtually anytime they were not asleep or otherwise confined in their cells. During December 1997, inmates spent $458,581 calling home for Christmas—an average bill, per inmate, of more than $200.

Prison as Profit Center, WALL ST. JOURNAL, March 15, 2001, at B1-B4. Rates charged by defendants are extremely high. *See* Warren Cornwall, *Inmate's Family Sues Over Collect Call Fees*, EVERETT HERALD, July 27, 2000. Rate disclosure is an essential consumer protection afforded by Washington law.

8. Plaintiff Sandy Judd is the former spouse of former inmate Paul Wright. Plaintiff Tara Herivel is a Seattle attorney who received telephone calls from inmates. Neither was provided rate disclosure on calls from Washington state inmates. Complainants seek to certify a class of thousands of consumers who were called by inmates between 1996 and 2000, but who were not provided the required disclosures.

9. The central question in this referral to the WUTC is whether T-Netix and/or AT&T were operator service providers for inmate calls, and therefore subject to the rate disclosure requirements. There are two pending motions for summary determination before Judge Rendahl that focus on these questions. Discovery is taking place now on these issues.

10. The issue raised by T-Netix in its interlocutory appeal—whether Complainants have standing—is inextricably bound up with the question of whether T-Netix and/or AT&T were operator service providers or contracted with such providers.

Statement of Facts

A. Procedural Background

11. T-Netix's petition arises out of Judge Rendahl's decision to deny T-Netix's motion for summary determination with regard to Complainants' standing to pursue this case. Judge Rendahl's order details the procedural history in the Commission and will not be repeated here.

12. Four years before this case ever reached the Commission, Complainants filed this lawsuit as a putative class action in King County Superior Court.

Complainants named five telephone companies as defendants. Three of those companies (Qwest, Verizon, and CenturyTel) were dismissed by the trial court. Complainants appealed and eventually argued their case in the Washington Supreme Court, which affirmed the dismissals. *Judd v. American Tel. & Tel. Co.*, 95 P.3d 337 (Wash. 2004).

13. Contrary to T-Netix's statement in its Petition, the trial court did not "dismiss" Complainants' claims against T-Netix and AT&T. T-Netix Petition, ¶ 11. Rather, the trial court denied their motions to dismiss and referred certain questions to the Commission. T-Netix Petition, *Exh. 7.* Specifically, the trial court asked the Commission to determine whether T-Netix and AT&T were operator service providers and whether they had violated WUTC regulations. *Id.* The trial court stayed further proceedings until the WUTC adjudicated the questions referred to it, and explicitly retained jurisdiction of matters not encompassed within the questions referred to the Commission. *See id.* In November 2004, after Complainants had exhausted their appellate options with respect to the three other defendants, they requested the Commission to accept the King County Superior Court's referral.

14. T-Netix mischaracterizes Judge Rendahl's order rejecting its standing argument. T-Netix asserts that Judge Rendhahl's decision was based on a single ground: that the Commission does not have jurisdiction to adjudicate Complainants' standing. *See* Petition, ¶ 3 (Judge Rendahl did not consider the "substance" of T-Netix's standing argument); ¶ 24 (Judge Rendahl did not "squarely" address

questions of standing); ¶ 26 (never analyzed standing). In fact, Judge Rendahl rejected T-Netix's standing argument on two very different, alternative grounds.

15. In their briefing and in argument to Judge Rendahl, Complainants identified numerous disputed issues of material fact that went to the merits of the standing issue. Specifically, Complainants produced evidence that T-Netix was an operator services provider that had failed to provide required rate disclosure on telephone calls received by Ms. Judd and Ms. Herivel.[1] After reviewing all of this evidence, Judge Rendahl announced the first of her two alternative holdings denying T-Netix's motion for summary determination:

> After considering the numerous pleadings and affidavits presented by the parties and making all reasonable inferences from the facts in the light most favorable to the nonmoving party, T-Netix' motion for summary determination is denied. ***There is a genuine issue of material fact in dispute and T-Netix is not entitled to judgment as a matter of law.***

T-Netix Petition, *Exh. 1*, ¶ 33 (emphasis added).

16. Judge Rendahl elaborated on this reasoning in the following paragraph, which leaves no doubt that her first alternative holding reached the merits of the standing issue:

> The issue in this proceeding is whether T-Netix and AT&T provided service as operator service companies on the calls at issue in

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[1] This evidence is included in a separate attachment to this filing. If the Commission is interested in reviewing the evidence, Complainants direct it to Exhibit A, ¶¶ 10-14 and 21-26; Exhibit B; Exhibit C; Exhibit D (exhibits F, G and H); Exhibit E, ¶¶ 5-11 and 22-24; Exhibit F; Exhibit G; and Exhibit H. We also direct the Commission to the transcript of the hearing before Judge Rendahl, where Complainants' counsel specified a number of outstanding factual questions surrounding the question of Complainants' standing. *See* Petition, Exhibit 4, pp. 41-45.

> this proceeding. While T-Netix asserts that only US West and GTE carried the calls in question, ***Complainant's affidavits and pleadings raise questions as to the role of T-Netix and AT&T in connecting the calls between the correctional institutions and the Complainants. The parties' dueling and numerous affidavits identify several issues of fact concerning AT&T and T-Netix's network and their involvement in the calls in question.***

Id., ¶ 34 (emphasis added). Judge Rendahl clearly found, as Complainants had argued, that material questions of fact precluded summary determination because the role of T-Netix and AT&T in connecting the calls—in other words, their role in functioning as operator services providers—raised questions that were relevant to Complainants' standing.

17. Only after announcing this first holding did Judge Rendahl reach her second alternative holding, which focused on the primary jurisdiction doctrine: "***Even if*** there were no genuine issue of material fact in dispute, as T-Netix asserts, T-Netix is not entitled to judgment as a matter of law." *Id.*, ¶ 35 (emphasis added). Judge Rendahl goes on to explain that the trial court retained jurisdiction over all matters not referred to the Commission, and that the Commission does not have jurisdiction to determine standing issues. *Id.*, ¶¶ 35-38.

18. The first alternative holding on the merits of the standing issue is embodied in Conclusion of Law No. 2. *Id.*, ¶ 68. The second alternative holding is embodied in Conclusions of Law Nos. 3 through 6. *Id.*, ¶¶ 69-72. The fact that Judge Rendahl did reach the merits of the standing issue is also reflected in the hearing transcript, where she ruled from the bench: "So I'm denying T-Netix's motion for summary determination first on the primary jurisdiction issue, and second because I

think there are some, in my mind, facts in dispute that relate to the role of the parties." Petition, *Exh. 4*, p. 67. To successfully argue that Judge Rendahl's decision should be reversed, T-Netix must address both holdings.

19. T-Netix fails, however, to address *any* of the disputed factual issues that formed the basis of Judge Rendahl's holding on the merits. Indeed, the remedy that T-Netix seeks from the Commission—that Judge Rendahl's decision be vacated so that she may "substantively review whether Complainants have standing to proceed" (Petition, ¶ 4)—assumes that she has *not* reached the merits of the standing issue. That assumption is belied by the record.

B. Judge Rendahl considered substantial evidence indicating that material issues of fact existed regarding the role of T-Netix and AT&T in connecting inmate calls received by Complainants.

20. Judge Rendahl concluded that "Complainant's affidavits and pleadings raise questions as to the role of T-Netix and AT&T in connecting the calls between the correctional institutions and the Complainants." Petition, *Exh. 1*, ¶ 34. A summary of that evidence follows.

21. A telephone call made by an inmate is generally routed as follows:

- An inmate, who may only make a collect call, dials a 0+ telephone number and a unique inmate identifier and passcode. Attachments to Complainants' Response ("Attachments"), *Exh. C*, ¶ 7.

- The call is connected to a special call processor and inmate call control platform. This platform is designed to provide operator services functions. *Id.*

• The platform performs a variety of functions including: (1) screening the dialed number against a list of prohibited numbers; (2) connecting the call to a LEC or IXC switch by launching a call with the same ten digit dialed number, prefixed with 1+ instead of 0+; (3) asking the inmate to state his or her name; (4) completing the call to the dialed telephone by one or more LEC and/or IXC switches; (5) playing a prerecorded message to a call recipient stating that they have a call from the inmate and by playing the inmate's recording; (6) giving the recipient of the call the option of either accepting or rejecting the call by pressing a number on the keypad of their phone; (7) connecting the call if accepted by the recipient, or disconnecting the call if rejected; and (8) recording the date, time, originating phone number, terminating phone number, length of call, and distance of call. *Id.*

22. T-Netix provides this inmate operator services platform at certain facilities. The platform provides a "connection" [2] as that term is used in WAC 480-120-021 (1999):

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[2] The regulation defines an OSP as follows:

> Operator Service Provider (OSP) – ***any corporation***, company, partnership, or person ***providing a connection to intrastate*** or interstate ***long-distance or to local services from locations of call aggregators.*** The term "operator services" in this rule means ***any intrastate telecommunications service provided to a call aggregator location that includes as a component any automatic*** or live ***assistance to a consumer to arrange for billing or completion, or both, of an intrastate telephone call*** through a method other than (1) automatic completion with billing to the telephone from which the call originated, or (2) completion through an access code used by the consumer with billing to an account previously established by the consumer with the carrier.

WAC 480-120-021 (1999) (emphasis added).

> The T-Netix platform provides part of the transmission path for every telephone call made by an inmate. The T-Netix platform provides connection to intrastate and interstate long-distance providers and to local service providers from all correctional facilities where the T-Netix platforms are located. Calls from inmates in correctional institutions can not be made without going through the T-Netix platform. Calls are not connected, except by the platform.

Attachments, *Exh. C*, ¶ 10. This platform constitutes operator services:

> The T-Netix platform performs operator services functions on each call dialed by an inmate. Specifically, the platform provides automatic assistance to a consumer to arrange for billing and completion of an intrastate telephone call, as specified in the WUTC definition of operator services.

Id., ¶ 9.

23. During the relevant time period[3], the T-Netix platform did not provide rate disclosures required by statute and regulation. Attachments, *Exh. F*, ¶ 5; *Exh. K.* Indeed, T-Netix has never argued that it *did* provide these disclosures.

24. T-Netix provides its inmate operator services platform at a number of different correctional facilities. The T-Netix platform was operational, at a minimum, at the following prisons during the relevant time period:

Attachments, *Exh. A*, ¶¶ 24-25; *Exh. D* (exhibit H); *Exh. E*, ¶¶ 7-11; *Exh. F.* Either Sandy Judd or Tara Herivel received inmate calls from each of these prisons. Petition, *Exh. 2*, ¶¶ 16, 18 n.2; Attachments, *Exh. A*, ¶¶ 24-25; *Exh. B*; *Exh. F.* No rate disclosure was provided. Attachments, *Exh.*

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[3] This lawsuit seeks damages dating back to calls made in 1996. Although recipients of inmate-initiated calls are now receiving rate disclosure, the question of when rate disclosure began is a fact question to be determined in this proceeding.

F, ¶ 5; *Exh. K.* Consequently, Complainants have suffered injury in a manner that precisely tracks their claims in this lawsuit.

Argument

A. T-Netix's request that the Commission review the very same issue that will be reviewed by King County Superior Court is wasteful and counterproductive.

25. T-Netix filed its Petition one day after it filed two motions in King County Superior Court. One of those motions sought to lift the stay in that court. The other was a motion for summary judgment on the same standing issue adjudicated by Judge Rendahl and appealed herein. *See Exhs. I* and *J.* T-Netix thus asks two different forums to decide—simultaneously—the same issue. T-Netix has neglected to inform either the Commission or the Superior Court of its intentions and actions in the other forum. It explicitly invites the possibility of inconsistent results.

26. In arguing that the trial court should decide the issue of standing, T-Netix "requests that the Court resume control of this case in order to do what the WUTC felt it could not" and claims that Judge Rendahl's "decision on standing is actually not to decide." *Exh. J,* pp. 11-12. T-Netix ignores Judge Rendahl's decision on the merits in an effort to convince the trial court that it should step in where the Commission allegedly did not.

27. The issue of standing will be litigated in King County Superior Court. Complainants have not opposed T-Netix's motion to lift the stay and will respond to its motion for summary judgment in that forum. Consequently, it makes no sense for the Commission to accept review of this interlocutory appeal.

28. T-Netix does not appear to have thought about the potential consequences of asking two forums to decide the same issue at the same time. What if the Commission accepts review and there is an appeal from the Commission's decision? Does that appeal go to King County Superior Court? What if King County has already issued a decision on the issue? What if that decision is at odds with the Commission's decision? Would an appeal from the WUTC's decision go to another court? What happens then to the King County decision?

29. T-Netix asks the Commission to accept review because it will allegedly save the agency substantial effort and expense. Petition, ¶¶ 3, 6. But T-Netix says nothing about the effort and expense that would be wasted in reviewing an appeal of an issue that will be adjudicated by the trial court. Because this issue will be decided (where it should be) in King County Superior Court, this is a clear case where T-Netix cannot meet the only standard it has relied on in attempting to persuade the Commission to accept review. In short, T-Netix cannot demonstrate that interlocutory review would "save the commission and the parties substantial effort or expense." WAC 480-07-810. Interlocutory review would do precisely the opposite. The Commission can and should reject the Petition on this ground alone.

B. When the Commission accepts a primary jurisdiction referral from Superior Court, it may not adjudicate issues outside the questions referred to it by the Superior Court.

30. This case came to the Commission as a referral from King County Superior Court under the doctrine of primary jurisdiction. In referring the question of whether T-Netix violated WUTC regulations, the trial court did not relinquish

jurisdiction. *Chaney v. Fetterly,* 100 Wn. App. 140, 148, 995 P.2d 1284 (2000). Rather, it stayed proceedings before it, retained jurisdiction over class certification, CPA claims, and damages issues, and referred specific issues to the Commission so that it could avail itself of the agency's expertise. Petition, *Exh. 7.* Primary jurisdiction "does not displace the jurisdiction of a court, but merely allocates power between courts and agencies to make *initial* determinations; the court normally retains power to make the *final* decision." *Jaramillo v. Morris,* 50 Wn. App. 822, 828, 750 P.2d 1301 (1988) (emphasis in the original).

31. Those initial determinations are strictly limited to the questions referred to the Commission. *See Dioxin/Organochlorine Center v. Department of Ecology,* 119 Wn.2d 761, 775, 837 P.2d 1007 (1992) (agency's role is to determine "some question or some aspect of some question arising in the proceeding before the court"). This is true even where a party raises a separate issue would normally result in dismissal if the matter had been initiated in the agency. *See International Ass'n of Heat & Frost Insulators and Asbestos Workers v. United Contractors Ass'n, Inc.,* 483 F.2d 384 (3d Cir. 1973). In *United Contractors Association,* the court observed that a primary jurisdiction referral does not invoke the independent jurisdiction of the agency. *Id.* at 401. The lack of an independent jurisdictional base precludes the agency from deciding issues outside the scope of the referral:

> A corollary thesis under the doctrine of primary jurisdiction is that the relevant agency's statute of limitation is not applicable in such a judicial certification. This results from the fact that the independent jurisdiction of the agency is not invoked. Rather, ***jurisdiction in a referral is derivative from that of the court in which the action is pending. The***

> ***agency has no power to enter a binding order against the parties because it never acquires independent statutory jurisdiction over the parties.*** Consequently, the application of the doctrine is not foreclosed here, even though the Unions did not file this action until the Board's limitation period had possibly expired.

Id. (citations omitted) (emphasis added). The situation is analogous to a federal court's certification of a question of state law to the Washington Supreme Court. In that circumstance, the jurisdiction of the Supreme Court is strictly limited to consideration of the question certified. *See Kitsap County v. Allstate Ins. Co.*, 136 Wn.2d 567, 577, 964 P.2d 1173 (1998) ("[T]his court answers only the discrete question that is certified and lacks jurisdiction to go beyond the question presented.").

32. As Judge Rendahl noted, T-Netix agreed that the agency's jurisdiction is derivative of that of the trial court. Petition, *Exh. 1*, ¶ 24. Indeed, T-Netix argued that the agency had no jurisdiction to allow Complainants to add additional plaintiffs to the action because of the primary jurisdiction doctrine.[4] Petition, *Exh. 5*, p. 6 at ¶ 15. The derivative nature of an agency's authority under the primary jurisdiction doctrine means that an agency may not determine a question that implicates the trial court's jurisdiction. Standing is one such issue. *See High Tide Seafoods v. State*, 106 Wn.2d 695, 702, 725 P.2d 411 (1986) ("If a plaintiff lacks standing to bring a suit, courts lack jurisdiction to consider it."). By requesting the Commission to dismiss T-Netix on the

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[4] In a bizarre twist, T-Netix now claims that Judge Rendahl erred in Conclusion of Law No. 6, which finds that the Commission does not have jurisdiction to determine whether Complainants may amend their pleadings. *See* Petition, ¶ 2. It was T-Netix that urged this position on Judge Rendahl!

ground that Complainants lack standing, T-Netix asks the Commission to decide a question that is necessarily and inextricably bound up in the trial court's jurisdiction and therefore outside the scope of the primary jurisdiction referral. As Judge Rendahl put it, the trial court "retains jurisdiction over the dispute itself and all other issues in dispute." Petition, *Exh. 1*, ¶ 35 (citing 2 R. Pierce, ADMINISTRATIVE LAW TREATISE § 14.1).

33. T-Netix's reliance on WUTC orders in the *Stevens* and *United & Informed Citizen Advocates Network* cases (T-Netix Petition, ¶¶ 22-23) is misplaced. Neither case involved a primary jurisdiction referral. When the Commission *does* receive such a referral, it has hewed closely to the questions presented. *See, e.g., Washington Exchange Carrier Ass'n v. Localdial Corp.*, WUTC Docket No. UT-031472, Final Order Granting Motions for Summary Determination ¶¶ 1, 13 (June 11, 2004) (sticking to questions referred by federal district court while expressly declining to address broader legal and policy issues).

34. Indeed, T-Netix fails to support its Petition with *any* authority—administrative law, case law, or otherwise—indicating that an agency has jurisdiction to consider a standing question on a primary jurisdiction referral. We have found none.

35. Judge Rendahl's decision is based on solid legal authority. The Commission should deny T-Netix's Petition on this separate and independent ground.

C. Plaintiffs have come forward with overwhelming evidence that T-Netix and AT&T were operator services providers or contracted with such providers, and that they failed to ensure that rate disclosure occurred on inmate calls received by Sandy Judd and Tara Herivel.

36. Although the Commission need not consider the merits of the standing question to deny T-Netix's Petition, the facts demonstrate that Complainants do indeed have standing to pursue their claims.

37. T-Netix's argument on the merits proceeds as follows: (1) all inmate calls that Complainants received were either local or intraLATA; (2) all such calls were "carried by" local exchange companies (GTE, US West, or PTI); (3) the LECs were either exempt from the disclosure requirements or obtained waivers from those requirements; therefore, (4) Complainants suffered no injury because the LECs were under no obligation to disclose rates. Petition, ¶¶ 34-35.

38. There are several basic flaws in this reasoning. First and foremost, T-Netix assumes that Complainants were not entitled to receive rate information as long as the phone company that "carried" the call was either exempt or had obtained a waiver from disclosure requirements. The dispositive question, however, is not who "carried" a call, but rather who provided operator services. If T-Netix was an operator service provider—and the evidence clearly shows that it was—then it was required to disclose rates regardless of whether a different company "carried" the call. The regulatory exemption, and any waivers obtained from the Commission, applied only to specific companies. T-Netix cannot "piggyback" on the waivers or exemptions of

other companies by claiming that simply because an exempt company carried a particular call, then all entities involved in the call are exempt.

39. This conclusion flows ineluctably from the statutes and regulations that the Commission is charged with interpreting and applying in this proceeding. In their trial court complaint, Complainants assert that T-Netix and AT&T are liable under the Consumer Protection Act by virtue of RCW 80.36.530, which states that a "violation" of RCW 80.36.510 and .520 "constitutes an unfair or deceptive act in trade or commerce in violation of chapter 19.86 RCW, the consumer protection act . . ." RCW 80.36.520, in turn, provides that:

> The utilities and transportation commission shall by rule require, at a minimum, that any telecommunications company, ***operating as or contracting with an alternate operator services company,*** assure appropriate disclosure to consumers of the provision and the rate, charge or fee of services provided by an alternate operator services company.

40. In 1991, the WUTC began requiring alternate operator services companies to disclose rates for a particular call "immediately, upon request, and at no charge to the consumer." WAC 480-120-141(5)(iii)(a) (1991). The operator was required to provide "a quote of the rates or charges for the call, including any surcharge." *Id.* The disclosure obligation applies specifically to alternate operator services companies, *id.*, which are defined as "any corporation, company, partnership or person other than a local exchange company ***providing a connection to intrastate or interstate long-distance or to local services*** from locations of call aggregators." WAC 480-120-021 (1991) (emphasis added).

41. In 1999, the WUTC amended its regulations. It began using the term "operator service provider," or OSP, instead of "alternate operator services company," or AOSC. WAC 480-120-021 (1999). The definition remained the same, with one important exception: the exemption for local exchange companies was eliminated. *Id.* New disclosure obligations were put into effect. OSPs were required to "verbally advise the consumer how to receive a rate quote, such as by pressing a specific key or keys, but no more than two keys, or by staying on the line." WAC 480-120-141(2)(b) (1999).

42. Based on these regulations, AT&T and T-Netix are liable under the Consumer Protection Act if, with respect to inmate-initiated calls, they:

- were an AOSC (under the 1991 regulations) or an OSP (under the 1999 regulations); ***OR***
- "contracted with" an AOSC or OSP; ***AND***
- either failed to make rate disclosure as prescribed by the regulations or contracted with an AOSC or OSP that failed to make such disclosure.

43. By focusing on who "carried" a particular call (Petition, ¶¶ 13, 18, 34), T-Netix ignores the issue that determines whether Complainants have standing. The regulations do not place the rate disclosure requirement on the "carrier" of the call—those obligations are placed squarely on the shoulders of the OSP. *See* WAC 480-120-141(2)(b) (1999) ("***the OSP*** must verbally advise the consumer how to receive a rate quote . . .") (emphasis added); WAC 480-120-141(5)(iii)(a) (1991) ("***The alternate operator services company shall***: . . . immediately, upon request, and at no charge to

the consumer, disclose to the consumer: a quote of the rate or charges for the call, including any surcharge") (emphasis added).

44. Accordingly, the appropriate questions for standing are: Did Complainants receive any calls for which either T-Netix or AT&T were the OSP? Alternatively, did Complainants receive any calls for which rate disclosure did not occur and for which T-Netix or AT&T contracted with an OSP?[5]

45. When *those* questions are examined, the evidence is clear. As we have shown in detail in the Statement of Facts section of this brief, T-Netix was an operator services provider at all relevant times. Not only was it an OSP, the evidence indicates that its operator services platform (a) was used at prisons from which inmates made calls to Tara Herivel and Sandy Judd, and (b) failed to provide any rate disclosure during the relevant time period. Because this is precisely the type of harm that is redressable under the Consumer Protection Act, RCW 80.36.510-30, in conjunction with WUTC regulations, Complainants have standing to pursue their claims.

46. T-Netix contends that the question of T-Netix's "role" is "immaterial" to the standing issue because "Complainants have suffered no injury in the first place." Petition, ¶ 30. But whether Complainants have suffered injury depends on whether T-Netix is an operator services provider that failed to provide rate disclosure on calls

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[5] In determining whether T-Netix or AT&T violated the regulations, the Commission must determine whether AT&T or T-Netix "contracted with" an OSP or AOSC that failed to make rate disclosure. This requirement flows directly from RCW 80.36.520, which requires the agency to promulgate rules that include the "contracting with" basis for liability.

received by Complainants. Under the CPA and applicable regulations, T-Netix's "role" in providing operator services is critical to understanding whether Complainants were harmed.

47. In summary, since 1991 WUTC regulations have required operator service providers to provide real-time rate disclosure to recipients of operator-assisted, collect calls. WAC 480-120-141(2)(b) (1999). T-Netix is and was an operator service provider because it "provid[ed] a connection to intrastate or interstate long-distance or to local services from locations of call aggregators" (like prisons). WAC 480-120-021 (1999). Under a plain reading of the regulations, it does not matter whether another company was exempt or obtained a waiver as long as T-Netix was providing operator services. What matters is that T-Netix did so and failed to provide rate disclosure to these Complainants until very late in the game—a decade or so after the regulation went into effect. Complainants were harmed.

48. If T-Netix's argument is taken at face value, it is clear that one of the essential building blocks of that argument is its allegation that all of the inmate calls received by Complainants were either local or intraLATA calls. Petition, ¶¶ 18, 34. But T-Netix misstates the facts. Ms. Herivel received an interLATA call from Airway Heights Correctional Center in 1998. Attachments, *Exh. F.* T-Netix attempts to explain this away by asserting that it cannot find a record of the call. Petition, ¶ 34 n.3. But T-Netix's attempt to dispute the evidence only creates a fact question. And, although not part of the WUTC record, Complainants have obtained a declaration from the

inmate who called Ms. Herivel in 1998 and will submit that to the King County Superior Court.

49. The significance of the interLATA call is that, even if one accepts all of T-Netix's other arguments (which are flawed), Ms. Herivel's receipt of this call raises fact questions with regard to whether AT&T or T-Netix provided operator services for interLATA calls. AT&T, which is indisputably involved in interLATA calls, has already indicated, in sworn testimony, that T-Netix provides "the operator interface between the called party and the collect call announcement or the access to rate quotes." Petition, *Exh. 2* (Gutierrez Aff., ¶ 9). Complainants have standing because fact issues exist with respect to T-Netix's (and AT&T's) involvement in interLATA calls.

50. Ultimately, the role that AT&T and T-Netix played in all types of calls must be adjudicated by Judge Rendahl.

D. The Commission should not stay discovery.

51. T-Netix also requests the Commission to stay all proceedings pending its review of the Petition. Judge Rendahl, however, found that the "numerous pleadings and affidavits in this matter indicate that there is a continuing need for discovery to resolve issues of material fact in the proceeding." Petition, *Exh. 1*, ¶ 45. Indeed, the judge was critical of T-Netix and AT&T, both of whom shut down discovery unilaterally after T-Netix filed its motion for summary determination:

> T-Netix and AT&T did not wait for the Commission to resolve either motion before staying discovery on their own. Such conduct is not acceptable. The Commission expects the parties to follow the procedural

rules in Chapter 480-07 WAC and will not tolerate such flagrant violations. The parties must meaningfully respond to Complainants' discovery requests. If T-Netix and AT&T are correct that they are not OSPs and had no role in the inmate-initiated calls in question, then they should be willing to disclose in discovery all relevant information in the proceeding.

52. A stay of all proceedings will shut down currently pending discovery and will prejudice Complainants. T-Netix's request should be denied.

Conclusion

53. For all of the reasons discussed above, T-Netix's petition for administrative review and motion for stay should be denied.

DATED: August 12, 2005.

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CERTIFICATE OF SERVICE

I certify, under penalty of perjury and in accordance with the laws of the State of Washington, that on August 12, 2005, I served a copy of the foregoing document on all counsel of record in the manner shown and at the addresses listed below:

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