[Service date: **September 4, 2008**]

BEFORE THE
WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION

SANDY JUDD and TARA HERIVEL, Complainants, v. AT&T COMMUNICATIONS OF THE PACIFIC NORTHWEST, INC., and T-NETIX, INC., Respondents	Docket No. UT-042022 **INITIAL BRIEF OF T-NETIX, INC. ON DISCOVERY**

1. Respondent T-Netix, Inc. ("T-Netix"), by its attorneys and pursuant to Order No. 08, hereby submits its opening brief regarding the legal and procedural status of discovery in this primary jurisdiction referral proceeding before the Washington Utilities and Transportation Commission (the "Commission").

I. PROCEDURAL BACKGROUND

2. Complainants Judd and Herivel filed a civil damages lawsuit, arising under the Washington Consumer Protection Act, in King County Superior Court in the summer of 2000. The complaint was styled as a putative class action against five telephone companies. Complainants alleged they were recipients of inmate-initiated collect calls and that the telephone company defendants, including both incumbent local exchange carriers ("ILECs") and

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interexchange carriers ("IXCs"), failed to provide oral disclosure of the applicable rates for those calls, upon request, as required by Commission rules.

3. Three of the five defendants (all ILECs) were dismissed from the lawsuit due to waivers or exemptions earlier granted by the Commission from the rate-disclosure regulations. Respondents AT&T Communications of the Pacific Northwest, Inc. ("AT&T") and T-Netix remain in the case. A class has not been certified.

4. After three years of litigating an appeal, ultimately affirmed, regarding the former ILEC defendants, at Complainants' request the Superior Court referred two issues to this Commission pursuant to the doctrine of primary jurisdiction. For the calls alleged by Complainants to have been accepted without requested rate disclosures, the Commission was asked to determine (a) whether T-Netix or AT&T were operator service providers ("OSPs") under the Commission's regulations, and (a) whether T-Netix or AT&T violated the applicable regulations.

5. On April 21, 2005, T-Netix filed a Motion for Summary Determination requesting that the Commission dismiss Complainants' claims against T-Netix for lack of standing. The gist of that motion was that in the absence of proof of intrastate interLATA calls, there could be no injury to either Judd or Herivel from any regulatory violation, as the Commission does not have jurisdiction over interstate traffic and local calls carried by the ILECs had been exempted from the rate disclosure obligation. AT&T subsequently joined in the motion.

6. On July 18, 2005, the presiding ALJ denied the T-Netix motion in Order No. 05, finding that where a complaint proceeding is brought before the Commission on a primary jurisdiction referral, the agency lacks authority to address standing.

7. On July 27, 2005, T-Netix filed with a Motion to Lift Stay with the Superior Court, asking that the trial court address by way of summary judgment the issue of Complainants' standing.

8. T-Netix subsequently filed with the Commission a Petition for Administrative

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Review and Motion for Stay seeking interlocutory review of Order No. 05 and a stay of the procedural schedule, including discovery. On August 18, 2005, the Commission entered Order No. 06 accepting T-Netix's request for interlocutory review and staying the procedural schedule.

9. The Superior Court lifted the stay of its proceedings and, on September 7, 2005, entered an order granting summary judgment in favor of T-Netix, finding that neither Judd nor Herivel had adduced sufficient evidence, beyond one late-filed and uncorroborated affidavit, of any interLATA calls to sustain their standing. The Superior Court later clarified that plaintiffs also lacked standing to bring claims against AT&T.

10. On October 17, 2005, Judge Ramsdell of the Superior Court entered an order rescinding the primary jurisdiction referral to the Commission; on October 28, 2005, the Commission accordingly entered Order No. 07 dismissing this proceeding.

11. Judd and Herivel appealed from Judge Ramsdell's decision. The Court of Appeals reversed, finding a disputed issue of material fact about whether one alleged interLATA call to Herival was made and another disputed issue, based on conflicting expert declarations, of whether AT&T or T-Netix acted as an OSP for that call. The Court of Appeals remanded the case with directions to reinstate the primary jurisdiction referral to the Commission to decide the issues originally before it.

12. T-Netix petitioned the Supreme Court of Washington for discretionary review. That petition was denied in December 2007.

13. The Superior Court then reinstated its referral of this matter to the Commission on the same issues originally before it.

II. STATUS OF COMMISSION DISCOVERY

14. At the prehearing conference held on August 21, 2008, ALJ Russell sought the position of each party with respect to the status of discovery in light of the fact that this primary jurisdiction referral had previously been dismissed on October 28, 2005 and has again, after

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appeal, been referred back to the Commission.

15. Complainants proposed taking further discovery, including a second round of data requests as well as depositions, arguing that the Commission should place this proceeding back into the same status it was before the stay and dismissal of 2005. T-Netix opposes Complainant's fishing expedition.

16. Even if the Commission were to move back to its pre-dismissal status for this proceeding, that would not justify additional discovery. The most recent procedural schedule was issued via a Notice of Revised Procedural Schedule on July 29, 2005. That schedule was then stayed, pursuant to Order No. 06, on August 18, 2005. Consequently, as of 2005 there was no outstanding discovery permitted before the Commission because, as further discussed below, the dispositive motions to which discovery was directed had been decided or were mooted.

17. T-Netix proposes that in light of the procedural history of this matter, the Commission now enter an Order setting a new procedural schedule beginning with the customary prefiling of written direct testimony by Complainants, with subsequent data requests and discovery limited to that testimony and the responsive and rebuttal testimony, if any, that follow.

III. DISCOVERY HISTORY

18. AT&T filed a Motion for Summary Determination in this proceeding on December 14, 2004, less than a month after the initial referral to the Commission.

19. The first procedural schedule was entered by the Commission as Appendix B to Order No. 01 on February 22, 2005.

20. That procedural schedule was entered after the parties convened for a prehearing conference on February 16, 2005. According to the Commission's Notice, dated January 20, 2005, the "purpose of the prehearing conference is to take interventions, establish dates for distribution of evidence and workpapers and other scheduling matters, consider formulating the

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issues in the proceeding and to determine other matters to aid in its disposition." The Notice did not include discovery.

21. At that prehearing conference, Complainants requested discovery on the issues raised in AT&T's Motion for Summary Determination.

22. The discovery procedure proposed by Complainants deviated from the typical procedure before this Commission in adjudicative proceedings. Typically, the Commission requires that a petitioner prefile written direct testimony, to which discovery is then to be directed. See WAC 480-07-460.

23. In light of the early filing of AT&T's motion, ALJ Rendahl granted the requested discovery, issuing a procedural schedule providing for data requests and depositions on the issues raised in AT&T's motion. A later revised procedural schedule, issued on July 29, 2005, similarly provided for data requests and "Depositions re: AT&T / T-Netix Motions."

24. It is therefore apparent that the discovery permitted earlier in this proceeding was limited in scope and represented a unique departure from this Commission's ordinary procedures. Presumably, if the Commission had denied the then-pending AT&T and T-Netix motions, it would subsequently have held another prehearing conference to develop a new schedule adhering to its typical, testimony-driven procedures. The time to revert to those ordinary procedures is now because there are no more dispositive motions pending before the Commission.

IV. DATA REQUESTS

25. Complainants served data requests on March 4, 2005. T-Netix responded to this first set of data requests on April 18, 2005. T-Netix served supplemental responses on July 25, 2005 and August 8, 2005.

26. Complainants propounded a second set of data requests on August 12, 2005. T-Netix did not answer these requests because the entire proceeding was stayed by the

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Commission the following week. Contrary to the assertions of Complainants' counsel at the August 21, 2008 prehearing conference before ALJ Russell, T-Netix has not "refused" to comply with or otherwise engaged in "self-help" with respect to these second data requests, because the stay and later dismissal means that responses were never due.

27. No response is either appropriate or necessary now to Complainants' second set of data requests because (a) there are no longer any pending motions for summary determination, and (b) Complainants abused the Commission's limited authorization of discovery by seeking information far beyond the scope of the then-pending dispositive motions.

28. This matter was dismissed by the Commission in Order No. 07 on October 28, 2005. The Superior Court reinstated its referral on March 21, 2008. The reinstatement by the Superior Court does not reverse the effects of the dismissal by the Commission; therefore, AT&T's dispositive motion from 2005 is no longer pending.

29. Because the Court of Appeals found a disputed issue, based on conflicting expert declarations, about whether either Respondent was an OSP for the calls allegedly received by Complainants, AT&T would no longer have any valid basis to request summary disposition of this referral proceeding even if it submitted additional testimony or documents. The ground for AT&T's motion (like a similar motion filed by AT&T with, but withdrawn from, the Superior Court a few months ago) was that there was no question for adjudication by the Commission as to which party was an OSP because the underlying facts were clear. That position is obviously incorrect as a consequence of the Court of Appeals' reversal. As a result, the limited discovery authorized by the Commission in the July 29, 2005 procedural schedule, restricted to the issues raised in AT&T's motion, is no longer justified or appropriate.

30. Moreover, Complainants' discovery requests grossly abused the Commission's limited authorization of discovery. Beginning with their first set of data requests to T-Netix, Complainants ignored the Commission's grant of early discovery in order to conduct a fishing expedition designed to obtain evidence to support their factually uncorroborated claims and to

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justify the certification of a class in Superior Court. Those are not the matters referred to this Commission for decision.

31. For instance, Complainants sought information for all Washington state prisons in which T-Netix provided any services or equipment, rather than those correctional facilities from which calls were allegedly placed to Complainants Judd or Herivel. Such matters are beyond the scope of the issues referred by the Superior Court and outside the Commission's power to address in this primary jurisdiction referral. If Complainants or their counsel wish to file a complaint alleging that AT&T or T-Netix violated the rate disclosure regulations at other prisons or for calls placed to other parties, they can do so by following this Commission's complaint procedures. Before the Commission, one is not permitted first to assert formal complaints and then, only later, seek discovery to assemble the evidentiary support for the testimony offered on that complaint.

32. In their second set of data requests, and without first seeking leave from the ALJ, Complainants shockingly augmented their attempt to expand the scope of discovery into an unbounded free-for-all. For instance, Request No. 1 provides:

Please identify each T-NETIX INSTITUTION and with regard to each, identify when T-NETIX began providing equipment or services at the T-NETIX INSTITUTION, whether T-NETIX continues to provide equipment or services to the T-NETIX INSTITUTION, and if it no longer provides equipment or services, when T-NETIX stopped providing equipment or services at the T-NETIX INSTITUTION.

The term "T-NETIX INSTITUTION" is explicitly defined by Complainants as:

all Washington Department of Corrections correctional institutions for which T-Netix (as the term is defined above) (a) was contractually responsible for providing services or equipment in connection with inmate-initiated calls; or (b) actually provided some type of service or equipment.

33. This Request, like many others, applies to all of the correctional facilities in the

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state of Washington, rather than the few at issue from which Complainants allegedly received collect calls without rate disclosures. It blatantly exceeds the scope of the issues raised in AT&T's now-moot motion. It blatantly exceeds the scope of the issues referred to this Commission by the Superior Court. It plainly seeks to discover information on other potential plaintiffs and other calls, rather than those calls accepted and paid for by Complainants Judd or Herivel. Such information is useful only for the putative class action in Superior Court, not the Commission's far narrower responsibilities in this primary jurisdiction proceeding.

34. Complainants should not be permitted to transform the Commission's specially permitted discovery into a tool for obtaining evidence they ought to have assembled before initiating their lawsuit. These two individuals have, to date, spent eight years (causing all parties to incur very substantial legal fees) litigating claims that rate disclosures were not provided on OSP-handled inmate-initiated collect calls they received in Washington without offering any evidence, beyond one mere affidavit, that even remotely suggests a regulatory violation by any of the five telephone company defendants. When put to the test in 2005 they identified only a single purported intrastate interLATA "call" and, realizing their miscalculation, then sought by the end-run of administrative discovery to find the evidence they failed to marshal before filing their lawsuit in 2000.

35. There is no basis to resume discovery under the prior July 29, 2005 procedural schedule because there now are no pending motions for summary determination. And even if such discovery were resumed, it would clearly not encompass the irrelevant and meritless requests by counsel for Complainants to substitute Commission-ordered discovery for the process of class certification governed by the Superior Court and its own, separate discovery practice. Accordingly, the Commission should formally rescind the 2005 procedural schedule and start from square one to fashion a schedule beginning with the typical prefiling of proposed direct testimony by Complainants. See WAC 480-07-460.

36. Further, the schedule should restrict, as is appropriate, discovery that may be

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taken to the issues actually raised in the proposed testimony of the parties.

V. DEPOSITIONS

37. No depositions have been taken in this matter.

38. The revised 2005 procedural schedule provided deadlines for depositions relating to the parties' dispositive motions. Because there are no pending dispositive motions remaining in this proceeding, there is no need for such depositions.

39. Moreover, there is no reason to reinstate any deadlines for depositions because no potential witnesses or deponents have yet been identified either by Complainants or Respondents.

40. WAC 480-07-410(1) provides:

A party may depose any person identified by another party as a potential witness. A party may depose a person who has not been identified as a potential witness, if the presiding officer approves the deposition on a finding that the person appears to possess information significant to the party's case.

41. No party has identified any potential witnesses in this proceeding. Therefore, Complainants may not conduct depositions without prior approval of the presiding ALJ based on an express finding that the requested deponent appears to possess information "significant to" Complainants' case. No such showing was even purported to have been made by counsel for complainants before ALJ Russell during the August 21, 2008 prehearing conference.

42. Because Complainants have not proposed particular deponents, the Commission cannot at this time make a finding with respect to whether any particular deposition may be authorized under WAC 480-07-410(1).

43. Further, and equally importantly, the applicable procedure for requesting depositions in an adjudicatory proceeding before this Commission begins with giving notice to the Commission and all parties of the intention to depose one or more persons. WAC 490-07-

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410(2). The Commission may then schedule a deposition conference to facilitate the deposition process. Id. Since Complainants have not indicated who they intend to depose, how many people they intend to depose, and why such depositions are needed, notice would be meaningless and a deposition conference at this point futile.

44. Accordingly, unless and until Complainants present the information required in a notice of intent to take depositions under WAC 490-07-410(2), the Commission should not at this time include any depositions in a procedural schedule.

VI. CONCLUSION

45. For all the foregoing reasons, the Commission should formally rescind the revised July 29, 2005 procedural schedule and fashion a new schedule, beginning with the typical prefiling of proposed direct testimony by Complainants under WAC 480-07-460. Discovery should in turn be limited to the issues raised in each party's direct or rebuttal testimony. Depositions should be limited to persons identified as potential witnesses by a party absent the prior showing of need required for particular, non-witness deponents required by WAC 480-07-410(1) upon notice by Complainants pursuant to WAC 490-07-410(2).

RESPECTFULLY SUBMITTED this 4th day of September, 2008.

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CERTIFICATE OF SERVICE

I hereby certify that I have this 4th day of September, 2008, served via e-filing a true and correct copy of the foregoing, with the WUTC Records Center. The original, along with the correct number of copies (4), of the foregoing document will be delivered to the WUTC, via the method(s) noted below, properly addressed as follows:

Carole Washburn
Executive Secretary
Washington Utilities and Transportation Commission
1300 S Evergreen Park Drive SW
Olympia, WA 98504-7250

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I hereby certify that I have this 4th day of September, 2008, served a true and correct copy of the foregoing document upon parties of record, via the method(s) noted below, properly addressed as follows:

On Behalf Of AT&T Communications

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