

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

SANDY JUDD, et al.,

Complainant,

v.

**AT&T Communication of the Pacific Northwest,
Inc. and T-Netix, Inc.**

Respondents

Docket No. UT-042022

AT&T'S MOTION FOR SUMMARY DETERMINATION

Introduction

1. In 2000, Sandy Judd and Tara Herivel, along with another individual who is not a party to this proceeding, filed a putative class action in the Superior Court of Washington for King County. The complaint alleges that several telecommunications companies failed to provide the required rate information to individuals receiving calls from Washington state prisons since June 20, 1996. A copy of the complaint is attached as Exhibit 1. In its response to the complaint, AT&T asked the court to refer to the Commission, under the doctrine of primary jurisdiction, the question of whether AT&T is an Operator Service Provider ("OSP"). On November 8, 2000, the court granted AT&T's request and referred to the Commission the issue of whether AT&T is "considered by the agency to be an OSP under the contracts at issue and if so, if the regulations have been violated." A copy of the court's November 8, 2000 Order is attached as Exhibit 2.

2. AT&T is not now, and never has been, an OSP or Alternate Operator Service Provider company ("AOS company") to any Washington state prison or correctional facility. The Commission's rules impose rate disclosure obligations on OSPs (and previously upon AOS

companies), but those same rules have consistently limited the definition of OSPs and AOS companies to those entities that connect calls from a call aggregator, such as a prison, to a local or long distance service provider. The agreements between the Washington Department of Corrections, AT&T and other telecommunications companies demonstrate unequivocally that other entities have always delivered traffic from those facilities to AT&T and provided the operator services, including the rate disclosure announcements. As a result, the Commission should make a summary determination that AT&T is not an OSP or AOS company and, correspondingly, has not violated the Commission's rate disclosure obligations.

RELIEF REQUESTED

3. AT&T requests that the Commission make a summary determination finding that
 - a. AT&T has not served as an OSP or AOS company to any Washington state prison or correctional facility since June 20, 1996, and
 - b. AT&T has not violated any of the Commission's regulations applicable to an OSP or AOS company at those prison and correctional facilities since June 20, 1996.

STATEMENT OF FACTS

Regulatory Background

4. The plaintiffs' complaint in this case depends upon the assertion that AT&T has obligations that have never existed. Indeed, plaintiffs' assertions are inconsistent with Commission regulations. Since at least 1989, the Commission has directly regulated the disclosure of rates to public telephone consumers. At no time, however, have those regulations applied to a person or entity other than one responsible for providing a connection from call aggregators to long-distance or local service providers. Because AT&T has never provided that connection in Washington, it cannot bear any liability for any alleged failure to comply with those regulations.

5. In 1989, the Commission enacted a regulation that required notices to be posted on public telephones to alert consumers that rates for services from that telephone may be higher than normal and to provide dialing directions so the consumer could obtain specific rate information. WAC 480-120-141 (1989), attached as Exhibit 3. That regulation applied to AOS companies, which the Commission defined as:

any corporation, partnership, or person providing a connection to intrastate or interstate long-distance or to local services from places including but not limited to, hotels, motels, hospitals, campuses, and customer-owned pay telephones. Alternate operator services companies are those with which a hotel, motel, hospital, campus, or customer-owned pay telephone etc. contracts to provide operator services to its clientele.

WAC 480-120-021 (1989), attached as Exhibit 3.

6. In 1991, the Commission amended this regulation in at least two significant ways. First, it made explicit that the AOS company was obligated to disclose to a consumer, at no charge, rate information upon the consumer's request. WAC 480-120-141 (1991), attached as Exhibit 4. Second, it modified the definition of an AOS company to exclude local exchange carriers. WAC 480-120-021 (1991), attached as Exhibit 4. While excluding local exchange carriers from the definition, the Commission made clear that an AOS company was still limited to those entities "providing a connection to intrastate or interstate long-distance or to local services from locations of call aggregators." Id.

7. In 1999, the Commission further amended the rate disclosure obligations. For the first time the Commission required regulated entities to instruct the consumer verbally, before the call was connected, how the consumer could obtain a rate quote with no more than two key strokes. WAC 480-120-141(2)(b) (1999), attached as Exhibit 5. The Commission also changed the definition of who was required to provide the required information. The Commission eliminated the term AOS company from its regulation and instead, required OSPs to provide the

verbal disclosure. Id. Although the term changed, the Commission still limited OSPs to “any corporation, company, partnership, or person providing a connection to intrastate or interstate long-distance or to local services from locations of call aggregators.” WAC 480-120-021 (1999) attached as Exhibit 5.

8. In 2003, the Commission adopted the current version of the regulation. The 2003 amendment recodifies the disclosure obligations and requires OSPs to verbally advise consumers of the actual rate to be charged, before the call is completed, if the rate exceeds a Commission established benchmark. WAC 480-120-262, attached as Exhibit 6. If the rate does not exceed the benchmark, the OSP is required to advise the consumer how to obtain a rate quote by pushing two or less keys. Id. The definition of OSP, however, remains unchanged.

The Provision of Public Telephone Service to Washington Correctional Facilities

9. In 1992, the Washington Department of Corrections (the “DOC”) entered into an agreement (the “DOC Contract”) for the provision of telephone service from state prisons and work release facilities. A copy of the March 16, 1992 agreement between the DOC and AT&T is attached as Exhibit 7. The DOC Contract divided responsibility for the phone services between AT&T and three local exchange companies (“LECs”): (1) GTE Northwest Inc., n.k.a. Verizon Northwest Inc. (“Verizon Northwest”), (2) US West Communications, n.k.a. Qwest Corporation (“Qwest”), and (3) Telephone Utilities of Washington, Inc., d.b.a. PTI Communications (“PTI”). The DOC Contract specified that AT&T would provide only interLATA and international service. DOC Contract, Exhibit 7, at 2. It did not contemplate that AT&T would provide any local service or connect the calls from telephones at the facilities to AT&T’s Point of Presence (“POP”). Rather, it contemplated that the LECs would provide those services. The DOC Contract divided the prisons and work release facilities into three groups. As to all of the facilities in each group, it specified that one of the LECs “shall install and maintain

public telephone sets, all associated equipment, lines, call timing and call blocking software

” The DOC Contract was also explicit that the LECs “shall also provide local and intraLATA telephone service and operator service to the [LEC’s] Public Telephones” at the specified locations. Id. at 2-4. Thus, the DOC Contract made clear that AT&T would not be providing the operator services.

10. Each of the three LECs identified in the DOC Contract entered into a separate contract with AT&T by which it committed to connect calls to AT&T’s POP and provide operator services. For example, a contract between Verizon Northwest and AT&T dated March 16, 1992 (the “Verizon Contract”) specified that Verizon Northwest would provide public telephones at each of the facilities assigned to it in the DOC Contract, as well as cabling and associated equipment. Verizon Contract, attached as Exhibit 8, at 2. The Verizon Contract further stated that Verizon Northwest “shall provide . . . [d]elivery of interLATA traffic originating from the Public Pay Telephones to AT&T’s Point of Presence over switched access facilities” and “[c]ompletion of all “0+ local and intraLATA calls from all Public Pay Telephones.” Id. The Verizon Contract also specified that Verizon Northwest would provide certain “live or mechanical operator announcements” and other services. Id. at 3. The recitals to the Verizon Contract explained that the DOC had agreed to select AT&T as a vendor on the basis of AT&T’s proposal to use Verizon Northwest and the other LECs to provide local and intraLATA service within their specified territories. Id. at 1. Qwest and PTI entered into separate agreements with AT&T that contained virtually identical language and obligations for those facilities assigned to them. A copy of the March 16, 1992 agreement between AT&T and Qwest (the Qwest Contract”) is attached as Exhibit 9, and the March 16, 1992 agreement between AT&T and PTI (the “PTI Contract”) is attached as Exhibit 10.

11. Several years after AT&T entered into the DOC Contract, the DOC amended the contract to replace one of the three original LECs, PTI, with T-Netix, Inc. Amendment No. 3 to the DOC Contract, attached as Exhibit 11, states that the contract was being amended for several reasons including “to delete Telephone Utilities of Washington, Inc. dba PTI Communications (PTI) as a subcontractor, and to include T-Netix Inc. as the station provider.” Amendment No. 3 at 1. The amendment further specifies that T-Netix was to pay the DOC a monthly commission rate of 27% on local calls from the facilities that PTI previously served.¹ Id. On March 10, 1998, T-Netix wrote to AT&T to confirm the parties’ respective responsibilities at the sites “where T-Netix is carrying the local traffic on AT&T’s behalf.” A copy of the March 10, 1998 letter is attached as Exhibit 12. T-Netix recognized that its responsibilities included “provision[ing] local traffic on AT&T’s behalf” and “perform[ing] or caus[ng] to be performed the administrative services required on behalf of AT&T.” Id.

12. In addition to handling local service from facilities previously served by PTI, T-Netix also has provided the automated operator services, including rate announcements. Gutierrez Aff., Ex. 13 at ¶¶6, 9. In order to prevent inmates from using telephones to harrass witnesses, judges or the general public, inmate calls may be monitored, blocked or recorded. Id. at ¶6. Inmates are generally restricted to calling numbers on a pre-approved list. Id. In order to prevent inmates from manipulating operators to circumvent the system, inmates at Washington state prisons are prevented from speaking with live operators. Id. Instead, the security system screens the number to make sure it is on the inmate’s pre-approved list. Id. If it is, the calls is routed to the called party and the called party is informed via an automated announcement that

¹ The facilities previously served by PTI were Clallam Bay Corrections Center, Washington Corrections Center for Women, Olympic Corrections Center, Pine Lodge Work Pre-Release, Coyote Ridge Corrections Center and Larch Correctional Center. Amendment No. 3 to DOC Contract, Ex. 11, at ¶5.

they have received a call from a particular inmate, provided access to a rate quote and given the opportunity to accept or reject the call. Id. All of these services are provided through software that T-Netix owns, maintains and provides. Id. at ¶¶6, 9. AT&T does not own or provide any of this operator interface software or equipment. Id.

13. Shortly after the Commission amended its rules in 1999 to require OSPs to verbally advise consumers how to receive a rate quote, Verizon Northwest and Qwest petitioned the Commission for waivers. Both entities explained that they would not have the technology available to provide the verbal disclosures until September 30, 2000 and sought a temporary waiver until then. See Order Granting Temporary Waiver to GTE Northwest, attached as Exhibit 14, at 2, and Order Granting Full and Partial Temporary Waiver to Qwest, attached as Exhibit 15, at 2. They both also sought and received a permanent waiver from any obligation to disclose rates to the person initiating the call from a prison telephone. Order Granting GTE Northwest Waiver In Part of WAC Rule 480-120-141 (2)(b), attached as Exhibit 16, at 1, Order Granting Qwest Permanent Partial Waiver of WAC 480-120-141 (2)(b), attached as Exhibit 17, at 1. They explained that safety, security and anti-fraud concerns prevented them from using live operators to provide the rate quotes, and instead, required them to use automated technology. Id. The automated technology, however, did not permit the inmate to initiate the rate quote. It only permitted the party receiving the call to initiate the quote. Id. The Commission granted Qwest's and Verizon Northwest's petitions for both a temporary waiver, granting them additional time to implement the verbal rate disclosure, and the permanent waiver, excusing them from providing inmates with the ability to initiate rate quotes. At no time did the Commission suggest that Qwest or Verizon Northwest was not an OSP.

STATEMENT OF ISSUES

14. Whether AT&T has been an OSP or AOS company since June 20, 1996, and if so, when and at what facilities?

EVIDENCE RELIED UPON

15. AT&T relies upon the following evidence that is attached as exhibits hereto:
- a. First Amended Complaint in Judd et al. v. AT&T et al., No.. 00-2-17565-5-SEA, pending in the Superior Court of King County (Exhibit 1);
 - b. November 8, 2000 Order, granting, in part, AT&T's Motion to Dismiss (Exhibit 2);
 - c. 1989 Washington State Register, Issue 89-04 (Exhibit 3);
 - d. 1991 Washington State Register, Issue 91-13 (Exhibit 4);
 - e. 1999 Washington State Register, Issue 99-02 (Exhibit 5);
 - f. WAC 480-120-262 (2003) (Exhibit 6);
 - g. March 16, 1992 Agreement between Washington Department of Corrections and AT&T (Exhibit 7);
 - h. March 16, 1992 Agreement between AT&T and GTE Northwest (Exhibit 8);
 - i. March 16, 1992 Agreement between AT&T and U.S. West (Exhibit 9);
 - j. March 16, 1992 Agreement between AT&T and Telephone Utilities of Washington d.b.a. PTI (Exhibit 10);
 - k. Amendment 3 to Agreement between Washington DOC and AT&T (Exhibit 11);
 - l. March 10, 1998 letter from T-Netix to AT&T (Exhibit 12);
 - m. Affidavit of Frances M. Gutierrez (Exhibit 13);

- n. Order Granting Temporary Waiver to GTE Northwest (Exhibit 14);
- o. Order Granting Full and Partial Temporary Waiver to Qwest (Exhibit 15);
- p. Order Granting GTE Northwest Waiver in Part of WAC 480-120-141(2)(b) (Exhibit 16);
- q. Order Granting Qwest Permanent Partial Waiver of WAC 480-120-141(2)(b) (Exhibit 17); and
- r. October 10, 2000, Partial Decision on Summary Judgment and Order for Further Briefing entered in Judd et al. v. AT&T (Exhibit 18).

ARGUMENT

I. AT&T WAS EXEMPT FROM ANY DISCLOSURE OBLIGATIONS PRIOR TO 1999.

16. The Plaintiff's underlying complaint asserts claims on behalf of a putative class of individuals who received calls since June 20, 1996. First Amended Complaint, attached as Ex. 1, at ¶7. The Commission rules in effect from 1991 until 1999, however, excluded LECs from the Commission's disclosure obligations. The regulations in effect at that time defined an AOS as follows:

Alternate operator services company – 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). The comments to the new rule made clear that the Commission sought to focus on non-LECs because they could “be seen as entering and existing [sic] markets at will” and “often charge higher rates than LECs.” Ex. 4 at 106-107.

17. From 1996, to the present, AT&T has been a certified LEC. See Guttierrez Aff., attached as Exhibit 13, at ¶12. AT&T cannot, therefore, be found to be an AOS company for this time period or to be liable for failing to make disclosures that only AOS companies were

obligated to make. The Commission can and should make a summary determination on these points.

II. **AT&T DID NOT SERVE AS AN OSP OR AOS COMPANY TO ANY WASHINGTON CORRECTIONAL FACILITIES.**

18. Wholly apart from its status as a LEC, AT&T cannot be held responsible for any failure to make disclosures because it has never provided the connection from the prison facility to the local or long distance provider. Throughout the relevant time, the party required to make the required disclosures, whether it is defined as an AOS company or an OSP, has always been limited to the party “providing a connection to intrastate or interstate long-distance or local service from locations of call aggregators” See ¶¶5-8, supra.

19. At the prisons where Verizon Northwest and Qwest handled local and intraLATA service, they were contractually obligated to connect the calls from their equipment at the prison and provide operator services. Both the Verizon Northwest and Qwest Contracts specified that they would install their own equipment and cabling at the prisons, complete the intraLATA calls and provide other operator services such as the provision of operator announcements. Verizon Northwest Contract, Ex. 8, at 2-3 and Qwest Contract, Ex. 9, at 2. Significantly, they were also obligated to deliver interLATA traffic originating from their phones at the prison to AT&T’s POP. Id. AT&T could not possibly provide the connection from the prison phones when Qwest and Verizon were responsible for transporting the signal from those phones to AT&T’s POP.

20. Qwest’s and Verizon’s requests for, and receipt of, waivers from the OSP disclosure obligations only confirm that they served as the OSPs. When Qwest and Verizon sought a waiver from those obligations, they acknowledged that they were serving as OSPs. When the Commission granted those waiver requests, it recognized the same. For example, when it granted Verizon’s request for a temporary waiver, the Commission ordered the staff to

conduct an investigation into the practices of Verizon's "operator services" at a later date. Ex. 14 at 2. Similarly, when it granted Qwest's request for a permanent waiver of any obligation to permit inmates to initiate rate quotes, the Commission made clear that the waiver only applied to the inmate originating the call, and Qwest was still obligated to permit the person receiving the call to initiate a rate quote through its proposed automated technology. Ex 17 at 2. Therefore, the Commission considered Qwest to be the OSP; otherwise there would have been no need for that limitation. Having treated Qwest and Verizon as the OSPs at the Washington prisons they serve, it would be inconsistent to determine now that it was AT&T and not Qwest or Verizon that was the OSP at the very Washington prisons that Qwest and Verizon served. Consistency is part of the duty of a an administrative agency. Vergeyle v. Employment Security Dep't, 28 Wash. App. 399, 404, 623 P.2d 736, 739-40 (1st Div. 1981), disapproved of on other grounds by Davis v. Employment Sec. Dep't, 108 Wash. 2d 272, 737 P.2d 1262 (1987)(administrative agency's discretion is limited by a "duty of consistency" and must treat similar situations similarly); Sanchez v. Department of Labor & Indus., 39 Wash. App. 80, 86 n.3, 692 P.2d 192, 196 n.3 (3d Div. 1984)(same). The Commission has already applied the same regulations at issue here to the same underlying contractual relationship. It should not revisit the issue. Qwest and Verizon Northwest served as the OSPs for the Washington prisons they served.

21. Moreover, although the ruling applied only to Qwest and Verizon, its rationale applies equally to PTI, which served the remaining Washington prisons. AT&T's status is not materially different at the prisons initially served by PTI. When PTI operated at those prisons, it operated under virtually identical contractual obligations as Verizon Northwest and Quest, and served the same key function as those carriers. Compare PTI Contract, Ex. 10, at 2-3 to Qwest Contract, Ex. 9, at 2 and Verizon Northwest Contract, Ex. 8, at 2-3. Just like Qwest and Verizon,

PTI agreed to complete local calls, provide operator announcements, and connect the interLATA traffic from the prison phones to AT&T's POP. Because it connected the calls from the prison phones, it served as the OSP, not AT&T.

22. Similarly, when T-Netix replaced PTI, it assumed the same function. Like Verizon Northwest, Qwest and PTI, T-Netix directed the calls from the prison telephones to the appropriate carrier and provided automated operator announcements. *Gutierrez Aff.*, Ex. 13 at ¶¶6, 9. It is T-Netix equipment, programmed by T-Netix, that makes the rate disclosures at those facilities. *Id.* If there were mistakes made in regard to those rate disclosures, as the plaintiffs allege, they would be the responsibility of T-Netix because T-Netix serves as the OSP at those facilities.

23. Although AT&T has entered into contracts with Verizon, Qwest, PTI and T-Netix, those contracts do not transform AT&T into an OSP, or render AT&T liable for the conduct of an OSP. The Commission's regulations have consistently imposed disclosure obligations only upon OSPs and AOS companies. *See* Exhibits 3 to 6. They have never imposed disclosure obligations on a party that contracts with an OSP or AOS company. *Id.* The court that referred this matter to the Commission has already ruled that a cause of action exists only "for violations of the regulations promulgated by the Washington Utilities and Transportation Commission ('WUTC') and [the legislature] did not create a cause of action for actions beyond or outside of the regulations." *Partial Decision On Summary Judgment and Order for Further Briefing*, attached as Exhibit 18, at 1. As a result, language in RCW 80.36.520 that suggested the Commission adopt regulations sufficient to assure that companies "operating as or contracting with an alternate operator services company" make "appropriate disclosure" cannot serve as a basis to extend liability not specified in the regulations themselves. The

Commission enacted regulations to define what disclosures it considered “appropriate,” and chose to impose specific disclosure obligations only upon OSPs and, before them, AOS companies. That was certainly reasonable because the OSP, as the party connecting the call from the phone to the local or long-distance service provider, has the most direct contact with the consumer. Moreover, there is less need to impose additional disclosure obligations on regulated telecommunications companies, such as AT&T, because they already disclose their rates through publicly filed and approved tariffs, which the public is “conclusively presumed to know.” Hardy v. Claircom Communications Group, 86 Wn. App. 488, 492, 937 P.2d 1128, 1131 (1997). The Plaintiffs cannot now second-guess the Commission and seek to extend those disclosure obligations beyond the rule to a party other than an OSP.

24. AT&T is not, and never has been, responsible for connecting any calls from phones in any Washington prison to either the long-distance or local provider. It has always relied on others to fulfill that role. As such, it is not an OSP under the Commission’s rules and cannot be held responsible for meeting obligations imposed upon OSPs.

AT&T Communications of the Pacific
Northwest, Inc.

By: S / Letty S.D. Friesen by Charles H.R. Peters

Letty S.D. Friesen
AT&T
919 Congress Avenue, Suite 900
Austin, TX 78701-2444
(303) 298-6475
(303) 298-6301 (fax)

Laura Kaster
AT&T
One AT&T Way
Room 3A213
Bedminster, NJ 07921
(908) 532-1888
(832) 213-0130 (fax)

Of Counsel:
Charles H.R. Peters
SCHIFF HARDIN, LLP
6600 Sears Tower
Chicago, IL 60606
(312) 258-5500
(312) 258-5600 (fax)

CH2\1171451.1