

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' REPLY
BRIEF RE: DISCOVERY
PROCEDURES

Introduction

1. This brief is submitted in response to the briefs on discovery procedures filed by respondents AT&T and T-Netix.

There is no need to change procedures

2. At the first pre-hearing conference in this matter, all parties agreed that a full range of discovery should be available. Discovery was proceeding until a stay was issued that preceded the superior court's order on standing. We agree with AT&T that discovery should pick up where it left off. We disagree with AT&T is that we should immediately proceed into depositions. Discovery was not completed before the proceedings were stayed, which is why we propose a two week period to resolve any outstanding discovery issues on the first data requests. It makes more sense to complete most of the written discovery before taking depositions so that the parties can be better

prepared for the depositions and appropriate exhibits can be selected for use at the depositions.

3. Further, there are data requests that were served but not answered because of the stay. This is not reflected in the schedule referenced by AT&T, which was not the current schedule when the stay was entered. On July 29, 2005, a revised procedural schedule was issued, which set a date for the respondents to provide responses to our second data requests. A copy of that schedule is attached as Exhibit A to this brief.

4. T-Netix claims that this second set of data requests “shockingly augmented” the scope of discovery because it covers all the Washington prisons that T-Netix serviced and that the requests were issued without approval of the ALJ. See T-Netix brief at 7, par. 32. In fact, our first data requests also applied to all institutions that T-Netix was responsible for providing services in connection with inmate-initiated calls. See Exhibit B which states the definition of “T-Netix Institutions” from our first data requests. T-Netix did not complain to the Commission that the first data requests were too broad. Nor could it. The scope of the referral from the superior court did not limit the inquiry to a specific prison. Further, the parties and the ALJ were aware that these requests would be issued. These requests were discussed at the July 29, 2005, hearing where the parties agreed on a date by which the complainants would serve the second data requests (August 12) and the respondents would respond (September 15). See TR 81-82. Judge Rendahl then memorialized this schedule in a notice issued that day. See

Notice of Revised Procedural Schedule, July 29, 2005. (Attached as Exhibit A to this brief).

5. T-Netix also argues that the discovery requests were intended to address AT&T's motion for summary adjudication, which T-Netix says no longer exists because this proceeding was dismissed. T-Netix apparently contends that when the referral was reinstated that we have to start all over again and that a different procedure is warranted.

6. First, there is no legal or practical reason to disregard what has been done. If AT&T wants to pursue its motion for summary determination—as it seems to want to do—it would be a waste of time and money to require it to refile the motion.

7. Second, regardless of whether AT&T pursues its motion for summary determination or not, the discovery schedule contemplated by the parties and Judge Rendahl makes the most sense to resolve the issue of whether AT&T and T-Netix are OSPs and whether they failed to provide the required disclosures to recipients of collect telephone calls from inmates. Most of the information needed to answer these questions is held by the respondents. Respondents know what equipment they used to handle these calls, what recordings were made, what options were made available to recipients of telephone calls, whether these companies held themselves out as OSPs, etc. As can be seen by the prior filings in this case, most of the technical information provided that helps answer these questions was classified as “confidential” or “highly confidential” by T-Netix or AT&T. This information is not publicly available and would not have been accessible to Ms. Judd or Ms. Herivel except through discovery.

8. T-Netix now insists that the complainants first put on their case by submitting direct written testimony before depositions or any other discovery is taken. In other words, T-Netix wants to force the complainants to make their case without complete discovery. T-Netix argues “[t]ypically the Commission requires that a petitioner prefile written direct testimony, to which discovery is then to be directed,” citing WAC 480-07-460.

9. T-Netix is apparently referring to subpart (1) of that provision, which states:

(1) Predistribution of evidence. The commission may require parties to distribute their proposed evidence to other parties before the start of the evidentiary hearing. *In general rate proceedings for electric, natural gas, pipeline, and telecommunications companies, the petitioner must prefile its proposed direct testimony and exhibits at the time it files its rate increase request, in accordance with WAC 480-07-510.* The commission may convene a prehearing conference shortly before a scheduled hearing and require all parties to predistribute their proposed cross-examination exhibits.

WAC 48-07-460(1) (emphasis added).

10. As shown by the highlighted portion of the regulation, the requirement that a petitioner file direct testimony as part of its initial filing is required only in rate proceedings. This requirement is contained in WAC 48-07-510, mentioned above, which details the testimony and documents that must be filed when requesting a rate increase. Beyond that, the provision simply permits the Commission to require the

parties to exchange proposed exhibits and other evidence before the hearing begins—a procedure followed by most courts and tribunals.

11. Further, there is nothing in the regulation that limits the timing of discovery, other than for rate proceedings.

12. T-Netix also argues that depositions should not be permitted because it has not identified witnesses who will testify and we have not sought approval to take depositions of specific witnesses. The prior schedule provided a block of time for the parties to take depositions. It assumed that the parties would work out a schedule among themselves and seek resolution from the Commission should there be a dispute.

13. T-Netix identified witnesses in response to the data requests who were knowledgeable about the issues and who were likely to testify. See attached Exhibit C.

14. T-Netix also claims that it before depositions may be taken that the complainants must give general notice of intent to take depositions under WAC 480-07-410(2). Under that provision, the presiding officer then consults with the parties and may set a scheduling conference. It is obvious that adequate notice of intent to take depositions was given since every procedural order issued by the Commission in this matter includes a time period for depositions. Both the complainants and AT&T recognize the need for depositions as did T-Netix before the primary jurisdictional referral was reinstated. The Commission should continue to permit depositions to be taken as part of the discovery process.

What this case is and what it is not

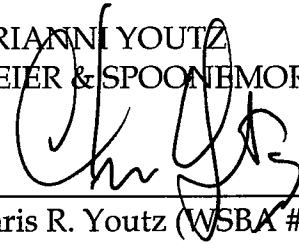
15. Lastly, a comment on T-Netix' statements about Ms. Judd and Ms. Herivel. These individuals brought this class action in King County Superior Court on behalf of persons who were not provided proper rate disclosures when they received collect calls from prison inmates. The Court of Appeals has now resolved T-Netix' attack on their standing to bring these claims. T-Netix, however, wants the Commission to treat this matter as though these individuals had filed personal claims in this forum. This is not an original action filed by the complainants seeking relief for only themselves, as T-Netix suggests. This is a referral from a court asking the Commission to apply its expertise to determine whether AT&T and T-Netix are OSPs and, if so, whether they complied with the disclosure requirements contained in the regulations. The Commission is not being asked to determine the scope of relief that may flow from that decision or whether the plaintiffs are appropriate representatives of the class of persons who received collect telephone calls from inmates. Those issues are for the court to address once the Commission responds to the court's inquiry.

Conclusion

16. For the reasons stated above, the complainants request that the parties complete the discovery propounded to date, and that the Commission issue a scheduling order consistent with the order proposed by complainants in our opening brief.

DATED: September 11, 2008.

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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 September 11, 2008, 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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DATED: September 11, 2008, at Seattle, Washington.

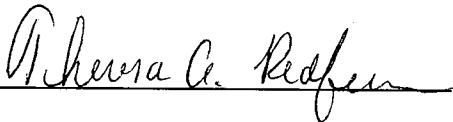


Exhibit A

[Service Date July 29, 2005]

July 29, 2005

NOTICE OF REVISED PROCEDURAL SCHEDULE

RE: *Sandra Judd et al. v. AT&T Communications of the Pacific Northwest, Inc.,
and T-Netix, Inc.*; Docket No. UT-042022.

TO PARTIES OF RECORD:

During the scheduling conference held on Friday, July 29, 2005, the parties agreed to a revised procedural schedule in this matter. By this notice, the Commission revises Appendix B originally attached to Order No. 01 in this proceeding. The revised Appendix B is attached to this notice.

Sincerely,

ANN E. RENDAHL
Administrative Law Judge

APPENDIX B

REVISED PROCEDURAL SCHEDULE

DOCKET NO. UT-042022

<u>EVENT</u>	<u>DATE</u>	<u>INTERVAL</u>
Responses to T-Netix's Petition for Interlocutory Review / Motion for Stay	August 15, 2005	17 Days
Decision on Petition/Motion for Stay	By September 9, 2005	25 Days
Written Discovery Cutoff	August 12, 2005	--
Responses to Data Requests Due	September 16, 2005	35 Days
Depositions re: AT&T / T-Netix Motions Complete	November 18, 2005	63 Days
Answers to AT&T's/T-Netix's Motions for Summary Determination, Complainants' Motions for Summary Determination due	December 16, 2005	28 Days
Reply Discovery Cutoff	January 20, 2006	35 Days
Responses to Reply Discovery Due	February 10, 2006	21 Days
Depositions re: Complainant Motion Complete	March 10, 2006	28 Days
AT&T/T-Netix Reply Briefs, Answers to Complainants' Motion due	April 21, 2006	42 Days
Complainant's Reply	May 12, 2006	21 Days
Decision on Motions	June 9, 2006	28 Days

Exhibit B

1 using "Inmate Public Telephones" as that term is defined in Exhibit 7, page 2 to AT&T's
2 Motion for Summary Determination, filed on or about December 15, 2004.

3 4. The term "institution" or "institutions" means all Washington correctional
4 institutions covered by Exhibit 7, page 2 to AT&T's Motion for Summary Determination,
5 filed on or about December 15, 2004, and any amendments thereto.

6 5. The term "T-Netix institutions" means all Washington correctional
7 institutions for which T-Netix was contractually responsible for providing services in
8 connection with inmate-initiated calls.

9 6. The term "contract" or "contracts" or "subcontract" or "subcontracts"
10 means all contractual agreements governing the provision of inmate-initiated calls.

11 7. The term "operator services" is to be construed identically to the definition
12 of operator services in WAC 480-120-021 (1991), WAC 480-120-021 (1999), and WAC
13 480-120-262 (2003).

14 8. The term "consumer" or "consumers" is to be construed identically to the
15 definition of "consumer" in WAC 480-120-021 (1991), WAC 480-120-021 (1999), and
16 WAC 480-120-262 (2003).

17 9. The term "CenturyTel" means CenturyTel of Washington, Inc., CenturyTel
18 Telephone Utilities, Inc., Northwest Telecommunications, Inc., or PTI Communications,
19 Inc.

20 10. The terms "document" or "documents" means any writing of any
21 description including without limitation paper, electronic, digital and other forms of
22 recording, email and other electronic documents that may reside on hard drives, servers or
23
24
25
26

Exhibit C

**WASHINGTON UTILITIES & TRANSPORTATION COMMISSION
RESPONSE TO DATA REQUEST**

Response Date: April 18, 2005
Docket No.: UT-042022
Requestor: Complainants
Respondent: T-Netix, Inc.
Prepared by: Arthur A. Butler, 206-623-4711

COMPLAINANTS' DATA REQUEST NO. 64: Please identify former employees or agents with knowledge relating to the provision of operator services under the contracts and subcontracts.

T-NETIX'S RESPONSE TO DATA REQUEST NO. 64:

T-NETIX objects to this Request on the ground that "operator services" is a term defined by WAC 480-120-021 and thus it seeks a legal conclusion. T-NETIX further objects that this Request does not specify any correctional facilities or time period and is thus vague, ambiguous, overly broad and unduly burdensome. T-NETIX also objects on the ground that the contracts in Complainants' possession speak for themselves. Subject to and without waiving any objection stated herein, T-NETIX identifies the following persons:

Alan Schott
John Poss
John Giannaula
Katja Christensen
Shannon Fennimore

**WASHINGTON UTILITIES & TRANSPORTATION COMMISSION
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Docket No.: UT-042022
Requestor: Complainants
Respondent: T-Netix, Inc.
Prepared by: Arthur A. Butler, 206-623-4711

COMPLAINANTS' DATA REQUEST NO. 65: Please identify any witnesses, including expert witnesses, who you intend to use (*i.e.*, by submitting an affidavit, declaration, or other form of testimony) in connection with AT&T's Motion for Summary Determination. For each witness, please provide a description of the expected testimony of that witness, any opinions that will be elicited from the person, and the basis for the opinion.

T-NETIX'S RESPONSE TO DATA REQUEST NO. 65:

T-NETIX identifies the following persons as potential witnesses in this matter:

Scott Passe (regarding technical operation of the T-NETIX platform)
John Poss (regarding technical operation of the T-NETIX platform)
Nancy Lee (regarding contracts between AT&T and T-NETIX)