

**BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION**

SANDY JUDD AND TARA)	DOCKET UT-042022
HERIVEL,)	
)	
Complainants,)	ORDER 09
)	
v.)	ORDER ESTABLISHING
)	DISCOVERY AND BRIEFING
AT&T COMMUNICATIONS OF THE)	SCHEDULES
PACIFIC NORTHWEST, INC., AND)	
T-NETIX, INC.,)	
)	
Respondents.)	
.....)	

- 1 **SYNOPSIS.** *This Order sets forth a briefing schedule for the Motions for Summary Determination filed by AT&T Communications of the Pacific Northwest, Inc. (AT&T) and T-Netix, Inc. (T-Netix), and settles a dispute among the parties by putting in place a schedule for conducting discovery.*

- 2 **NATURE OF PROCEEDING.** Docket UT-042022 involves a formal complaint filed with the Washington Utilities and Transportation Commission (Commission) by Sandy Judd and Tara Herival (Complainants) against AT&T and T-Netix (collectively with AT&T, Respondents), requesting that the Commission resolve certain issues of fact and law under the doctrine of primary jurisdiction and referred by the Superior Court of Washington for King County.

- 3 **APPEARANCES.** Chris R. Youtz, Sirianni Youtz Meier & Spoonemore, Seattle, Washington, represents Complainants. Letty Friesen, AT&T Law Department, Austin, Texas, and Charles H. R. Peters, Schiff Hardin, LLP, Chicago, Illinois, represent AT&T. Arthur A. Butler, Ater Wynne LLP, Seattle, Washington, and Glenn B. Manishin, Kelley Drye & Warren LLP, Washington, D.C., represent T-Netix.

4 **PROCEDURAL HISTORY.** This matter has an extensive history, dating back to when the complaint was originally filed in 2000 in King County Superior Court. Since the King County Superior Court first referred this matter to the Commission in 2004, the matter returned to Superior Court to address issues of standing and has now been referred back to the Commission, after review by the state court of appeals. As the parties raised questions about the status of discovery in this matter on its return to the Commission, this Order recounts the full procedural history of this matter to address the parties' arguments.

5 In 2000, Complainants filed a suit against AT&T and T-Netix¹ in King County Superior Court alleging that the Respondents violated the Commission's rule² requiring operator service providers (OSPs) to make verbal rate disclosures for inmate-initiated collect calls, and thus that Respondents committed *per se* violations of the Washington Consumer Protection Act.³ Respondents moved for dismissal of the action, and the Superior Court denied the motions and referred two questions to the Commission, under the doctrine of primary jurisdiction.⁴ The two questions referred to the Commission included: 1) whether AT&T was operating as an OSP,

¹When the action was first brought in 2000, Complainants named five telecommunications companies in the suit. In addition to Respondents, Verizon Northwest, Inc. (formerly GTE Northwest, Inc., hereinafter Verizon), Qwest Corporation (formerly U.S. West Communications, Inc., hereinafter Qwest), and CenturyTel Telephone Utilities, Inc. (formerly CenturyTel Telephone Utilities, Inc. and Northwest Telecommunications, Inc., d/b/a PTI Communications, Inc., hereinafter CenturyTel) were also named as defendants in the lawsuit. *Judd v. Am. Tel. & Tel. Co.*, 152 Wash.2d 195, 198, 95 P.3d 337 (2004). Verizon, Qwest, and CenturyTel were subsequently dismissed from the action because the companies are local exchange carriers exempt from the Commission's disclosure requirements. *See, Id.* Complainants appealed the dismissal of Verizon, Qwest, and CenturyTel from the lawsuit to Division One of the Washington Court of Appeals, which affirmed the trial court's ruling. *See, Complaint*, filed with the Commission, at 2. The Washington Supreme Court granted review and affirmed the dismissals.

²Former WAC 480-120-141(1999), which provided that:

[b]efore an operator-assisted call from an aggregator location may be connected by a presubscribed OSP, the OSP must 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. This message must precede any further verbal information advising the consumer how to complete the call, such as to enter the consumer's calling card number.

³*See, RCW 80.36.530.*

⁴*Judd v. Am. Tel. & Tel. Co.*, No. 57015-3-I, 2006 WL 3720425, at *2 (Wash. Ct. App., Div. 1, Dec. 18, 2006).

and 2) if so, whether Respondents violated the Commission's rate disclosure regulations.⁵

6 On November 17, 2004, Complainants filed a formal complaint with the Commission against Respondents under the court's referral. AT&T filed an answer to the formal complaint on December 15, 2004. Also on December 15, 2004, AT&T filed a Motion for Summary Determination, requesting that the Commission find that AT&T was not an OSP during the time period in question and that AT&T had not violated the Commission's regulations applicable to OSPs (OSP Motion). On December 16, 2004, T-Netix filed its answer to the formal complaint.

7 The Commission convened a prehearing conference in this docket at Olympia, Washington, on February 16, 2005, before Administrative Law Judge Ann E. Rendahl. At the prehearing, T-Netix proposed that discovery be conducted in two phases. T-Netix recommended that the first phase of discovery focus on AT&T's OSP Motion, and the second phase would address the merits of the case.⁶ Additionally, the parties agreed that the first phase of discovery would include time set aside for propounding data requests and taking depositions in relation to AT&T's OSP Motion.⁷

8 On March 18, 2005, the Commission entered Order 02 in this proceeding, a protective order.

9 T-Netix filed a request for an extension of time to respond to data requests on April 4, 2005. The parties did not object to T-Netix's request, and Judge Rendahl granted an extension of the data request response deadline to April 18, 2005.

10 On April 22, 2005, T-Netix filed a Motion for Summary Determination, arguing that the Complainants lack standing to bring their claim (Standing Motion), and a Motion to Stay Discovery (collectively with Standing Motion, Motions). On May 6, 2005,

⁵*Id.* The Superior Court referred two questions to the Commission with regard to AT&T, but only referred one question, whether T-Netix has violated the Commission's regulations and specifically WAC 480-120-141, to the Commission with regard to T-Netix. *See, T-Netix's Motion for Summary Determination*, at 11. However, in the Superior Court's 2008 referral, the Commission was asked to decide whether both AT&T and T-Netix are OSPs.

⁶Butler, TR 10:25-11:5.

AT&T joined in T-Netix's Motions. AT&T stated that, "[i]n addition to joining in T-Netix's [M]otions, AT&T incorporates and reasserts the arguments from its own motion as an independent basis for dismissing Complainants' claims against AT&T."⁸

- 11 Also on May 6, 2005, Complainants filed their Response to T-Netix's Motions and filed a number of declarations supporting their Response, as well as a Conditional Motion to Postpone Consideration of T-Netix's Motion for Summary Determination (Conditional Motion) requesting a respite until Complainants have been permitted additional discovery.
- 12 On May 10, 2005, T-Netix filed its Reply in Support of T-Netix's Motions, a Response to the Complainant's Conditional Motion, an affidavit in support of the Motion to Stay Discovery, a Motion to Strike, and a declaration in support of the Motion to Strike.
- 13 Judge Rendahl issued a notice on May 11, 2005, establishing a schedule which allowed the parties to file additional responsive pleadings to address T-Netix's Motion to Strike, and scheduling oral argument on T-Netix's Motions for June 7, 2005.
- 14 On May 16, 2005, Complainants filed a Response to T-Netix's Motion to Strike, with a supporting declaration, and a Reply to AT&T's Response joining in T-Netix's Motions, with supporting declarations. On May 20, 2005, T-Netix filed a Reply in support of its Motion to Strike, and AT&T filed a Surreply in support of its Response joining in T-Netix's Motions.
- 15 On May 31, 2005, Complainants filed a Highly Confidential Motion for Leave to File Supplemental Declaration of Kenneth L. Wilson, and the Highly Confidential Supplemental Declaration of Kenneth L. Wilson in support of Complainants' Response to T-Netix's Motion for Summary Determination and Complainant's Reply to AT&T's Response.

⁷Rendahl, TR 12:2-18.

⁸*AT&T's Response Joining in T-Netix's Motions for Summary Determination and to Stay Discovery*, filed on May 6, 2005, at 2, n1.

- 16 Also on May 31, 2005, T-Netix submitted by electronic mail an Emergency Opposition to Complainants' Motion to File Supplemental Wilson Declaration and Motion to Strike or, in the Alternative, for Right of Reply and Continuance of June 7, 2005, hearing.
- 17 On June 1, 2005, Complainants filed a Response to T-Netix's Emergency Motion and Motion to Strike.
- 18 In Order 04, entered on June 2, 2005, Judge Rendahl granted Complainants' Motion for Leave to File a Supplemental Declaration, and denied T-Netix's Motion to Strike, allowing T-Netix and AT&T to file responses to the Supplemental Declaration. The Order also granted the Complainant's Motion to Continue the June 7, 2005, oral argument.
- 19 On June 6, 2005, the Commission issued a Notice rescheduling the oral argument until June 28, 2005.
- 20 On June 13, 2005, T-Netix filed with the Commission a Highly Confidential Affidavit of Alan Schott in Support of T-Netix's Motions. On June 15, 2005, AT&T filed a Highly Confidential Motion for Leave to File its Response to the Supplemental Declaration of Kenneth L. Wilson (Motion for Leave), as well as a Declaration of John D. Schell, Jr.
- 21 On June 20, 2005, Complainants filed a Highly Confidential Response to AT&T's Motion for Leave
- 22 On June 24, 2005, T-Netix filed with the Commission a Highly Confidential Supplemental Affidavit of Alan Schott in Support of T-Netix's Motions. On June 27, 2005, T-Netix also filed a Supplemental Affidavit of Nancy Lee.
- 23 On June 28, 2005, the Commission convened another prehearing conference before Judge Rendahl. At the prehearing, during oral argument on T-Netix's Motions,⁹ AT&T noted that, "we have not fully complied with all of the outstanding discovery

⁹AT&T's Motion was not addressed at the prehearing conference.

requests.”¹⁰ Judge Rendahl issued a ruling on the T-Netix Motions at the close of the prehearing conference, denying both the Standing Motion and Motion to Stay Discovery, and stating that:

I really do think that if AT&T and T-Netix are clear that they have no responsibility or liability in this case, then let's have discovery. Let's discover the facts and be clear and have it be clear that, in fact, AT&T and T-Netix don't bear responsibility. So we need to go back to the position we were prior to the T-Netix motion, and let's get the underlying facts set up. Let's have some depositions.¹¹

- 24 On July 28, 2005, T-Netix filed another Motion for Summary Determination (OSP Motion), a Petition for Administrative Review of Order 05 (Petition); and a Motion to Stay Discovery. In its OSP Motion, much like that of AT&T, T-Netix alleged that it was not an OSP for the calls in question and that the exemptions of GTE, US West, and PTI should preclude liability for T-Netix.¹² T-Netix's Petition requested that the Commission reverse Order 05, grant T-Netix's Standing Motion, and stay discovery and the procedural schedule.¹³
- 25 The Commission convened a scheduling conference on July 29, 2005, at which time the parties agreed to a discovery schedule with deadlines for data requests, responses, and depositions.
- 26 On August 18, 2005, the Commission entered Order 06 granting in part and denying in part T-Netix's Petition.¹⁴ Specifically, the Commission stated that the Superior Court's referral did not extend to deciding the issue of Complainants' standing and denied this portion of T-Netix's Petition. The Commission also interpreted T-Netix's Motion to Stay as a Petition for Interlocutory Review of Judge Rendahl's decision to deny T-Netix's request to stay the discovery.¹⁵ The Commission granted T-Netix's

¹⁰Peters, TR 51:13-17.

¹¹Rendahl, TR 67:24-68:7. The ruling was also memorialized in this docket in Order 05, issued on July 18, 2005.

¹²*T-Netix's Motion for Summary Determination*, filed on July 28, 2005, at 1.

¹³*T-Netix's Petition for Administrative Review and Motion for Stay*, filed on July 28, 2005, at 2 and 12.

¹⁴*Judd v. Am. Tel. & Tel. Co.*, Order 06.

¹⁵*Id.*, at 10.

Petition and issued a stay of the proceedings in this docket pending a decision by the King County Superior Court on the issue of Complainants' standing.¹⁶

- 27 Concurrently, T-Netix filed a Motion for Summary Judgment with the King County Superior Court, alleging that the Complainants had suffered no injury and therefore lacked standing to bring the action.¹⁷ On September 6, 2005, the Superior Court granted T-Netix's Motion for Summary Judgment and revoked its referral to the Commission.¹⁸ The Superior Court later clarified that the ruling also applied to AT&T.¹⁹
- 28 On September 7, 2005, T-Netix filed a Motion to Dismiss with the Commission. On October 28, 2005, the Commission issued Order 07, granting T-Netix's motion to dismiss the complaint against both T-Netix and AT&T and found that, "a primary jurisdiction referral does not invoke an agency's independent jurisdiction, but is derivative of that of the court in which the matter is pending."²⁰
- 29 On December 18, 2006, the Washington Court of Appeals, Division One, reversed the lower court's decision on T-Netix's motion for summary judgment and remanded the case back to the Superior Court. On December 4, 2007, the Supreme Court of Washington denied T-Netix's Petition for Review. On March 21, 2008, the King County Superior Court issued an Order reinstating the referral to the Commission for the determination of the issues: 1) whether AT&T and T-Netix are OSPs, and 2) if so, whether AT&T and T-Netix violated the Commission's rate disclosure regulations.
- 30 On August 21, 2008, the Commission convened a prehearing conference before Administrative Law Judge Marguerite E. Russell. During discussion of the referral issues in the case, it became clear that the parties did not agree on the status of

¹⁶*Id.*, at 11.

¹⁷ *Judd v. Am. Tel. & Tel. Co.*, King County Superior Court, No. 00-2-17565-5 SEA, *T-Netix's Motion for Summary Judgment*, July 26, 2005.

¹⁸ *Judd v. Am. Tel. & Tel. Co.*, King County Superior Court, No. 00-2-17565-5 SEA, *Order Granting Defendant T-Netix' Motion for Summary Judgment*, September 6, 2006.

¹⁹ *Judd v. Am. Tel. & Tel. Co.*, No. 57015-3-I, 2006 WL 3720425, at *2 (Wash. Ct. App., Div. 1, Dec. 18, 2006).

²⁰ *Judd v. Am. Tel. & Tel. Co.*, Order 07, at 5, quoting *International Ass'n of Head and Frost Insulators and Asbestos Workers v. United Contractors Ass'n, Inc.*, 483 F.2d 384, 401 (3rd Cir. 1973).

discovery as it existed when the Superior Court rescinded its referral and dismissed the suit on September 6, 2005.

- 31 Given the circuitous history of the proceeding and the parties' disagreement as to the status and scope of discovery in the proceeding, the Commission directed the parties to brief the issues surrounding discovery. The parties filed initial briefs on September 4, 2008, and reply briefs on September 11, 2008.

MEMORANDUM

- 32 AT&T and Complainants argue that the Commission should take up the docket where it left off procedurally, e.g., with continued discovery, and that AT&T's OSP Motion is still pending before the Commission. They do not agree on precisely where the parties were in the discovery process: AT&T asserts that discovery was halted when the parties were readying to take depositions, Complainants argue that discovery was cut short while the parties were still propounding data requests. T-Netix, on the other hand, opines that AT&T's OSP Motion is no longer before the Commission, and Complainants should be prevented from continuing discovery and should be required to put forth their case.
- 33 **A. Complainants.** During the August 21, 2008, conference Complainants asserted that the Respondents had effectively halted any exchange of discovery when T-Netix's filed its Standing Motion.²¹ Complainants argue that Judge Rendahl's Order 05 provides additional support for this claim:

A matter of concern, however, is T-Netix's and AT&T's actions in ceasing discussions with [C]omplainants over outstanding data requests and refusing to provide answers to pending data requests until the Commission resolved the pending motions . . . Such conduct is not acceptable . . . If T-Netix and AT&T are correct that they are not OSPs and had no role in the inmate-initiated calls in question, they should be willing to disclose in discovery all relevant information in the proceeding.²²

²¹Youtz, TR 102:25-103:5.

²²*Id.*, at 3-4, quoting Order 05, at 14.

- 34 As a result, Complainants argued, they had not received complete responses to their first set of data requests and had received no response to their second set of data requests.²³ Furthermore, Complainants stated that the Commission never addressed AT&T's OSP Motion and that it is still pending in this matter.²⁴
- 35 In rebutting T-Netix's claim that no witnesses have been named and thus Complainants have no one to depose, Complainants argued that WAC 480-07-410 also allows the presiding officer to approve a request to depose any individual, whether or not they have been identified as a witness, if the individual possesses information necessary to the party's case.²⁵ Complainants assert that, before witnesses had been identified, the previous procedural schedules anticipated the taking of depositions by allotting time for that endeavor.²⁶
- 36 In their initial brief, Complainants dispute T-Netix's argument that, pursuant to WAC 480-07-460, the Complainants are not allowed discovery and should be required to prefile their direct testimony immediately. Complainants assert that T-Netix's suggestion would result in the complaint resembling a rate case, and, "[u]nlike a rate proceeding where the utility possesses the studies and information to support its request for a rate, it is the [R]espondents who have much of the information needed to show that they were [OSPs]."²⁷
- 37 Complainants contend that T-Netix's objections to their second set of data requests as overbroad are unfounded since the first set of data requests were equally encompassing and T-Netix did not raise an issue with their scope.²⁸ Complainants contend that it would be unwise for the Commission to start the case all over again and disregard the vast history of the prior proceedings, as T-Netix suggests.²⁹
- 38 Complainants suggest that the Commission should order the parties to meet within two weeks of the issuance of a discovery order to resolve any disputes regarding

²³*Id.*, TR 103:23-4 and TR 111:11-12.

²⁴*Id.*, TR 103:11-15.

²⁵Youtz, 112:2-7.

²⁶*Id.*, at 5.

²⁷*Id.*

²⁸*Id.*

²⁹*Id.*, at 3.

Complainant's first set of data requests.³⁰ Complainants also request that the Commission require AT&T and T-Netix to respond to Complainants' second set of data requests after which Complainants would have 28 days to file any motions to compel.³¹

- 39 **B. AT&T.** At the conference and in its initial brief, AT&T agreed with Complainants that discovery should resume where it left off before the matter was dismissed. AT&T, however, argued that the parties had finished with written discovery and were preparing to depose potential witnesses when the action was terminated.³²
- 40 AT&T states that it responded to the data requests propounded by Complainants and T-Netix on April 4, 2005, with supplemental responses provided on July 26, 2005.³³
- 41 AT&T further asserts that its OSP Motion is still pending before the Commission. AT&T, in its Reply Brief, contends that Judge Rendahl "never had the opportunity to rule on [the OSP] Motion."³⁴ Further, AT&T asserts that the Court of Appeals did not rule on AT&T's OSP Motion but dealt only with T-Netix's Standing Motion.³⁵
- 42 AT&T recommends that the Commission allow the parties to resume discovery at the point of taking depositions and require that: 1) Any depositions needed to address AT&T's OSP Motion be taken within a 60 day window and comport with WAC 480-07-410, 2) Answers to AT&T's OSP Motion should be filed 28 days following the deposition deadline, 3) AT&T should be required to complete its reply discovery 57 days after the filing of any Answers, and 4) AT&T must file its Reply within 21 days following the reply discovery deadline.³⁶
- 43 **C. T-Netix.** T-Netix argued at the conference that the majority of discovery had already occurred.³⁷ According to T-Netix, the company responded to Complainants'

³⁰*Id.*, at 6.

³¹*Id.*

³²Peters, TR 104:11-14.

³³AT&T's Initial Brief, at 2.*Id.*

³⁴AT&T's Reply Brief, 2008, at 1.

³⁵*Id.*

³⁶*Id.*, at 2-3.

³⁷Manishin, TR 108:1-2.

first set of data requests on April 18, 2005, with supplemental responses on July 25, 2005, and August 8, 2005.³⁸ T-Netix admits to not responding to Complainants' second set of data requests, "because the entire proceeding was stayed by the Commission the following week."³⁹

44 T-Netix argues that Complainants have already had a chance to take depositions, and they should be required to put forth their proof, just as they would be in a typical complaint case.⁴⁰ Citing to WAC 480-07-410, T-Netix further asserted that depositions are only available for persons that have been identified by a party as a witness.⁴¹ As no potential witnesses have been identified, depositions should not be authorized.⁴²

45 T-Netix argued that the Commission should not allow the Complainants to use these proceedings as a substitute for judicial discovery in the matter before the Superior Court in order to gain class status.⁴³ T-Netix asserts that Complainants have used the limited discovery the Commission authorized "to obtain evidence to support their factually uncorroborated claims and to justify the certification of a class in Superior Court."⁴⁴

46 T-Netix further objects to Complainants' prior attempts at discovery, claiming their efforts are "fishing expeditions."⁴⁵ T-Netix cites to a data request from Complainants' second set of data requests as an example of Complainants' overbroad requests. This data request sought information on all Washington state prisons to which T-Netix provides services instead of requesting information only relating to Washington state prisons from which the calls to Complainants originated.⁴⁶

³⁸*Id.*, at 5.

³⁹*Id.*, at 5-6.

⁴⁰*Id.*, TR 108:7-12.

⁴¹Butler, TR 108:17-19, 109:24-25.

⁴²*Id.*

⁴³Manishin, TR 113:5-7 and 14-15.

⁴⁴*Id.*, at 6-7.

⁴⁵T-Netix's Initial Brief, at 4.

⁴⁶*Id.*, at 7.

47 T-Netix recommends that the Commission set a new procedural schedule starting with Complainants producing prefiled direct testimony.⁴⁷ T-Netix points to WAC 480-07-460 in arguing that the Commission typically requires that a petitioner prefile testimony before discovery occurs.⁴⁸ T-Netix asserts that, “discovery permitted earlier in this proceeding was limited in scope and represented a unique departure from this Commission’s ordinary procedures.”⁴⁹

48 With regard to AT&T’s OSP Motion, T-Netix opines that the Commission’s dismissal of the case in Order 07 served to nullify that pleading. T-Netix argues that the limited discovery authorized by the Commission in the July 29, 2005, procedural schedule related to AT&T’s OSP Motion and since that motion is no longer pending, the limited discovery regarding the OSP Motion is not appropriate.⁵⁰ T-Netix goes further and argues that AT&T’s OSP Motion is barred as a matter of law since the Court of Appeals found a disputed issue of fact, namely whether AT&T is an OSP.⁵¹ T-Netix argues that depositions are not needed nor could the Commission authorize them since Complainants have not suggested any individuals they seek to depose.⁵²

49 **D. Discussion and Decision.** This case was originally filed with the King County Superior Court, not the Commission. The Superior Court referred two specific questions to the Commission because the questions are highly technical and require the Commission’s expertise to resolve. The referral requests that the Commission determine: 1) Whether AT&T or T-Netix were OSPs and 2) Whether they violated the Commission’s disclosure regulations.

50 The Superior Court relied on the doctrine of primary jurisdiction in referring the matter to the Commission. Primary jurisdiction “applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body.”⁵³ Primary jurisdiction

⁴⁷*Id.*, at 7.

⁴⁸*Id.*, at 5.

⁴⁹*Id.*

⁵⁰*Id.*, at 6.

⁵¹*Id.*, at 3.

⁵²*Id.*, at 9.

⁵³*Int’l. Ass’n. Of Heat and Frost Insulators v. United Contractors Ass’n.*, 483 F.2d 384, 400 (3rd Cir., 1973).

accords the administrative agency only limited powers and jurisdiction. In fact, the courts have said that, “[t]he agency has no power to enter a binding order against the parties because it never acquires independent statutory jurisdiction over the parties.”⁵⁴

51 Thus, the Commission’s one responsibility upon referral is to efficiently exercise its particular expertise in rendering a thorough determination for the referring court. As the Commission has previously noted, “[w]e do not give advisory opinions, but a referral from the King County Superior Court is a request for an opinion on the law and the facts that are presented in the case.”⁵⁵

52 The Commission finds that AT&T’s OSP Motion and T-Netix’s OSP Motion have not been addressed and are both still pending before the Commission. Additionally, since Respondents ceased complying with the discovery schedule, to which all parties agreed, prior to responding to Complainants’ second set of data requests, the Commission finds that discovery should resume at that point.

53 ***Pending Motions.*** Having reviewed the extensive procedural history in this matter, it is clear that AT&T’s OSP Motion is still pending before the Commission. Neither the administrative law judge nor the full Commission addressed the motion before staying the proceedings. Further, the Commission did not rule on the motion when, in Order 07, it dismissed the matter based on the Superior Court’s rescission of its referral.

54 The Commission is not persuaded by T-Netix’s argument that AT&T’s motion is nullified by the Court of Appeals’ December 18, 2006, order. The Court of Appeals overturned the Superior Court’s grant of T-Netix’s Standing Motion by finding the existence of an issue of material fact as to the standing of Complainants. The Court of Appeals did not rule on AT&T’s OSP Motion, nor did it forestall the Commission from doing so.

55 AT&T’s motion is not the only intervening request still pending before the Commission. On July 28, 2005, T-Netix also filed a Motion for Summary Determination based on the OSP question. Much like AT&T’s OSP Motion, T-Netix

⁵⁴*Id.*, at 401.

⁵⁵Rendahl, TR 67:6-9.

asked the Commission to find that the company is not an OSP subject to the provisions of WAC 480-120-141. Neither the Administrative Law Judge nor the Commission ruled on T-Netix's motion.

56 The Commission finds that both AT&T's and T-Netix's OSP Motions are still pending before the Commission. Since the parties have not had an opportunity to respond to the motions, the Commission finds that, following the completion of discovery, the parties should have until 5:00 p.m. on Wednesday, January 28, 2009, to file any responses to the motions.

57 ***Discovery Schedule.*** The other issue the parties raise is the status of discovery in this matter. Contrary to T-Netix's argument, discovery in this matter is not solely based upon and limited to AT&T's OSP Motion.

58 WAC 480-07-400(2)(b)(iv) provides the Commission with the power to determine that discovery is essential for the adjudication of the issues in the case.

59 After reviewing the procedural history in this matter and the parties' arguments, we find that discovery must resume as it was at the time the Commission stayed the proceeding.

60 The Commission's ultimate responsibility in this case is to provide the Superior Court with the technical expertise it has requested and to answer the referred questions. Discovery is of the utmost importance for the Commission to fulfill this responsibility to the Superior Court, and thus, discovery must resume.

61 The Commission does not find persuasive T-Netix's argument that Complainants have already had a chance to conduct discovery and take depositions. The record supports Complainants' assertion that the Respondents unilaterally quashed discovery shortly after T-Netix filed its Standing Motion. AT&T's assertion that it has responded to Complainants' data requests does not address with significant specificity whether the company filed responses to the second set of data requests. Both the Commission and the Court of Appeals found questionable discovery practices by Respondents, and even AT&T admitted at the June 28, 2005, prehearing conference that the company had not fully complied with Complainants' data requests.

62 As the parties argue, some discovery has already occurred. Complainants' first set of data requests have been propounded and some responses received. Complainants' assertion that the responses are not complete and T-Netix's argument that Complainants are on a 'fishing expedition' are issues better addressed first in negotiations among the parties and then, if necessary, in motions to compel. The record is clear that discovery was effectively halted before Respondents replied to Complainants' second set of data requests, and logic dictates that this is where discovery should start again. Respondents should likewise have the opportunity to conduct discovery.

63 Further, T-Netix's argument that WAC 480-07-460 requires that Complainants prefile direct testimony without further discovery, is unconvincing. WAC 480-07-460 provides for the mandatory prefilings of direct testimony in general rate proceedings, which this matter obviously is not. Furthermore, the time to argue that Complainants should have prefiled their witness testimony would have been when the parties agreed to the original discovery schedule on February 16, 2005, or even at the June 28, 2005, prehearing conference when Judge Rendahl requested that all discovery disputes be brought to her immediately.

64 Respondents' cooperation in the discovery process is crucial. All parties are reminded that flagrant violations of the Commission's procedural rules in the form of noncompliance with discovery schedules will not be tolerated.

65 Therefore, the Commission adopts a procedural schedule in this matter, which is set forth below and attached to this Order as Appendix A, that will promote the efficient and thorough resolution of the Superior Court's referral:

Written discovery cutoff (all parties)	October 15, 2008
Responses to written discovery (all parties)	October 29, 2008
Motions to compel (all parties)	November 5, 2008
Proposed witness lists (all parties)	December 3, 2008
Depositions completed (all parties)	January 14, 2009
Responses to Motions	January 28, 2009

ORDER

66 **THE COMMISSION ORDERS** That the procedural schedule is adopted, including a schedule for discovery among the parties and responsive briefs regarding the Motions for Summary Determination filed by AT&T Communications of the Pacific Northwest, Inc., and T-Netix, Inc., set forth in paragraph 65 and attached as Appendix A to this Order.

67 **NOTICE TO PARTIES: A party who objects to any portion of this Order must file a written objection within ten (10) calendar days after the service date of this Order, pursuant to WAC 480-07-430 and WAC 480-07-810. The service date appears on the first page of the order in the upper right-hand corner. Absent such objection, this Order will control further proceedings in this matter, subject to Commission review.**

Dated at Olympia, Washington, and effective October 2, 2008.

WASHINGTON STATE UTILITIES AND TRANSPORTATION COMMISSION

MARGUERITE E. RUSSELL
Administrative Law Judge

**APPENDIX A
PROCEDURAL SCHEDULE
DOCKET UT-042022**

<i>EVENT</i>	<i>DATE</i>
Written Discovery Cutoff (all parties)	October 15, 2008
Responses to Written Discovery (all parties)	October 29, 2008
Motions to Compel (all parties)	November 5, 2008
Proposed Witness Lists (all parties)	December 3, 2008
Depositions Completed (all parties)	January 14, 2009
Responses to both motions	January 28, 2009