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

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

SANDRA JUDD, et al., Complainants, v. AT&T COMMUNICATIONS OF THE PACIFIC NORTHWEST, INC.; and T-NETIX, INC., Respondents.	DOCKET NO. UT-042022 DECLARATION OF CHRIS R. YOUTZ RE: OPPOSITION TO T-NETIX'S MOTION FOR PROTECTIVE ORDER

Chris R. Youtz declares, under penalty of perjury and in accordance with the laws of the State of Washington, that:

1. I am one of the attorneys for Complainants in this matter. I base this declaration on my personal knowledge and am competent to testify.

2. Attached as ***Exhibit A*** is a true and correct copy of Complainants' Motion for Class Certification, filed August 25, 2000.

DATED: December 12, 2008, at Seattle, Washington.

Chris R. Youtz

CERTIFICATE OF SERVICE

I certify, under penalty of perjury and in accordance with the laws of the State of Washington, that on December 12, 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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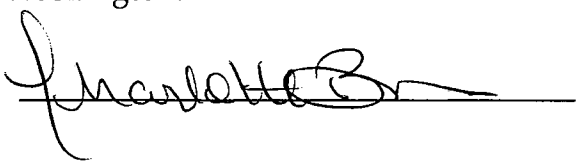

EXHIBIT A

RETURN COPY

HON. J. KATHLEEN LEARNED
Noted for Hearing: October 6, 2000, 10:00 a.m.
With Oral Argument

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

SANDY JUDD, TARA HERIVEL and ZURAYA WRIGHT, for themselves, and on behalf of all similarly situated persons,

Plaintiffs,

v.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY; GTE NORTHWEST INC.; CENTURYTEL TELEPHONE UTILITIES, INC.; NORTH-WEST TELECOMMUNICATIONS, INC., d/b/a PTI COMMUNICATIONS, INC.; U.S. WEST COMMUNICATIONS, INC.; T-NETIX, INC.,

Defendants.

NO. 00-2-17565-5 SEA

MOTION FOR CLASS CERTIFICATION

I. RELIEF REQUESTED

Plaintiffs Sandy Judd, Tara Herivel and Zuraya Wright request that this case be certified as a class action pursuant to CR 23(b)(3). The proposed class consists of all persons who accepted long-distance collect calls from Washington State prison inmates from June 20, 1996, through the conclusion of this lawsuit , except for persons who received collect calls that advised them before accepting those calls that they could obtain rate information by pressing specific keys on their telephones.

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II. STATEMENT OF FACTS

A. Background and Claims.

Inmates in Washington state prisons may only make certain types of collect telephone calls from prison payphones to speak with family members and other persons outside the prison. Since at least 1992, the Washington State Department of Corrections has contracted with private "operator service providers," also known as "alternate operator services companies," to provide "0+" operator services on the payphones used by inmates incarcerated in the State of Washington. Inmates are required to use the "0+" operator service provider assigned by contract to the prison from which the call is placed, and may place only collect calls.

Since at least 1988, telecommunications companies acting as or contracting with operator service providers have been required by state law to assure appropriate disclosure of rates when connecting intrastate and interstate long-distance telephone calls.

> The legislature finds that a growing number of companies provide, in a nonresidential setting, telecommunications services necessary to long distance service without disclosing the services provided or the rate, charge or fee. The legislature finds that provision of these services without disclosure to consumers is a deceptive trade practice.

RCW 80.36.510.

These disclosure requirements are specifically imposed on alternate operator service companies:

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

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RCW 80.36.520. *See also* RCW 80.36.524 (allowing suspension of a company that "fails to provide appropriate disclosure to consumers of the protection afforded under this chapter.")

Violation of these provisions is a *per se* violation of the Washington Consumer Protection Act:

> In addition to the penalties provided in this title, a violation of RCW 80.36.510, RCW 80.36.520, or RCW 80.36.524 constitutes an unfair or deceptive act in trade or commerce in violation of chapter 19.86 RCW, the consumer protection act. Acts in violation of RCW 80.36.510, RCW 80.36.520, or RCW 80.36.524 are not reasonable in relation to the development and preservation of business, and constitute matters vitally affecting the public interest for the purpose of applying the consumer protection act, chapter 19.86 RCW. It shall be presumed that damages to the consumer are equal to the cost of the service provided plus two hundred dollars. Additional damages must be proved.

RCW 80.36.530.

The federal government requires that disclosure be made by verbal notification before a call from an inmate was accepted that the recipient could obtain rate information by pressing no more than two keys on the telephone touchpad. *See* 47 C.F.R. § 64.703. A similar rule took effect in Washington in January, 1999. WAC 480-120-141(2)(b).

Throughout the period covered by this case, family members, attorneys and other persons have been unable to speak to Washington State prison inmates by telephone, except as recipients of "operator-assisted" collect calls. Recipients are billed for these calls by the operator service provider assigned by contract to the prison from which the call originates.

The rates for these long-distance intrastate collect calls have not been made available to recipients over the phone when receiving an inmate-initiated call.

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Nor are recipients given a separate number to call in order to learn the rates charged. The defendants further failed to comply with the specific federal and state rules described above until one of the defendants began including the required information in October, 1999, for some interstate calls.

The defendants, all telecommunications companies and operator service providers, failed to assure appropriate disclosure of rates to the plaintiffs and others similarly situated. Thus, the defendants have violated the Washington Consumer Protection Act and the members of the class are entitled to the damages specified by statute.

B. The Class Representatives.

Plaintiff Sandy Judd received and paid for intrastate long-distance collect calls from Washington State prison inmates. Tara Herivel received, and continues to receive and pay for, intrastate long-distance collect calls from Washington State prison inmates. Zuraya Wright received and paid for interstate collect calls from a Washington State prison inmate between June 20, 1996 and November of 1999.

C. The Defendants.

The defendants are telecommunications companies that are liable to members of the class for failure to properly disclose rates and other charges for inmate-initiated calls. On March 16, 1992, all of the defendants except for T-Netix, Inc. contracted with the Washington Department of Corrections to provide operator services for inmate payphones. The parties have extended this contract through four amendments. The fourth amendment, which went into effect in March of 1999, adds T-Netix, Inc. as an operator service provider at some facilities.

III. STATEMENT OF ISSUE

Should this case be certified as a class action?

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IV. EVIDENCE RELIED UPON

The Declarations of Sandy Judd, Tara Herivel, Zuraya Wright, and Chris R. Youtz are submitted in support of this motion.

V. AUTHORITY

A. Legal Standards For Class Certification.

Motions for class certification are governed by CR 23. The moving party must show that the prerequisites of CR 23(a) are satisfied, and that at least ***one*** of the three subsections of CR 23(b) is met:

> Under CR 23(a) and (b), the court must consider the appropriateness of a class under several explicit criteria in determining whether a class action should be certified. The relevant factors are (1) the impracticality of joinder of all members of the class, (2) common questions of law or fact, (3) typical or common defenses, and (4) the representativeness of the individuals suing or being sued. In addition, it must be shown either (1) that individual suits create a grave collateral estoppel risk or threaten inconsistent judgments or (2) that injunctive relief may be necessary or (3) that a class action is superior to other means of proceeding.

Washington Educ. Ass'n v. Shelton Sch. Dist. No. 309, 93 Wn.2d 783, 789, 613 P.2d 769 (1980). These are the ***only*** issues before the court on a motion for certification. *See Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177-78 (1974). The court does not examine the merits of the case in order to determine if certification is appropriate, and the court must take plaintiff's factual allegations as true for purposes of the certification motion. *Id; Washington Educ. Ass'n*, 93 Wn.2d at 790; *Blackie v. Barrack*, 524 F.2d 891, 901 (9th Cir. 1975).[1]

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[1] As the standards for certification under CR 23 mirror the requirements under the federal rule, citation to federal authority is instructive. *See, e.g., Johnson v. Moore*, 80 Wn.2d 531, 532, 496 P.2d 334 (1972); *Brown v. Brown*, 6 Wn. App. 249, 492 P.2d 581 (1971).

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In evaluating the class prerequisites, Washington courts have adopted a permissive interpretation of CR 23. *See Brown v. Brown*, 6 Wn. App. 249, 256-57, 492 P.2d 581 (1971). As the *Brown* court noted:

> We, too, favor a liberal interpretation of CR 23, rather than a restrictive one. Not only does liberal application of the rule avoid multiplicity of litigation, but (1) it saves members of the class the cost and trouble of filing individual suits; and (2) it also frees the defendant from the harassment of identical future litigation.

Id. at 256-57.

B. This Case Satisfies The Requirements Of CR 23(a).

1. Numerosity.

There are over 14,000 prison inmates currently incarcerated in the State of Washington. *See* http://www.wa.gov/doc. (attached as *Ex. B* to Youtz Decl.). Inmates are generally allowed access to prison payphones during daytime hours. Every person who is or has been called by any incarcerated person since June 20, 1996 is a potential class member, including family, friends, and attorneys. The class is expected to number in the tens or hundreds of thousands and is so large that joinder of all members is impracticable. The joinder of this many individuals as plaintiffs plainly is impracticable; thus, the numerosity requirement of CR 23(a)(1) is satisfied. *Bower v. Bunker Hill Co.*, 114 F.R.D. 587, 592 (E.D. Wash. 1986) (quoting *Jordan v. County of Los Angeles*, 669 F.2d 1311, 1319 (9th Cir.), *judgment vacated on other grounds*, 459 U.S. 810 (1982)); *Orantes-Hernandez v. Smith*, 541 F. Supp. 351, 370 (C.D. Cal. 1982) (plaintiff need not show exact size of class; numerosity met where "general knowledge and common sense indicate that it is large").

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2. Commonality.

CR 23(a)(2) requires plaintiff to show that questions of law or fact are common to each member of the proposed class. The existence of shared legal issues establishes commonality:

> Indeed, Rule 23(a)(2) has been construed permissively. All questions of fact and law need not be common to satisfy the rule. The existence of shared legal issues with divergent factual predicates is sufficient, as is a common core of salient facts coupled with disparate legal remedies within the class.

Hanlon v. Chrysler Corp., 150 F.3d 1011, 1019 (9th Cir. 1998). *See also King v. Riveland*, 125 Wn.2d 500, 519, 886 P.2d 160 (1994) (certification appropriate when defendant engaged in common course of conduct, even if conduct affected prospective class members differently); *Jordan v. County of Los Angeles*, 669 F.2d 1311, 1320 (9th Cir. 1982) ("The commonality requirement is satisfied where the question of law linking the class members is substantially related to the resolution of the litigation even though the individuals are not identically situated.").

Here, each class member's claim is based on the same conduct of the defendants: their failure to disclose rates and other charges to recipients of collect long-distance telephone calls from inmates. Common legal issues that may be raised will likely include the type of disclosure that the defendants were required to provide.

The fact that the amount of damages that each class member will receive will vary because each recipient incurred different amounts of charges for the calls accepted will not defeat class certification. The variations in damages sustained do not preclude certification. *See Blackie*, 524 F.2d at 905 ("the amount of damages is invariably an individual question and does not defeat class action treatment"); *Bower*, 114 F.R.D. at 594. *See also Jordan*, 669 F.2d at 1322 (varying ways in which uniform policy affects different class members does not preclude certification).

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3. Typicality.

The requirement of Rule 23(a)(3) is met where "the claims or defenses of the representative parties are typical of the claims or defenses of the class." CR 23(a)(3). "Under the rule's permissive standards, representative claims are 'typical' if they are reasonably co-extensive with those of absent class members; they need not be substantially identical." *Hanlon*, 150 F.3d at 1020. Thus, typicality is found

> where there is a "nexus between the injury suffered by the plaintiff and the injury suffered by the class." Such a nexus will be found where the named plaintiff's claim "stems from the same event, practice or course of conduct that forms the basis of the class claims and is based on the same legal or remedial theory."

Bower, 114 F.R.D. at 594 (quoting *Jordan*, 669 F.2d. at 1321).

Here, the plaintiffs suffered from the same conduct that forms the basis of the class claims, *i.e.*, the defendants' failure to provide proper disclosure of rate information for long-distance collect calls from inmates. The plaintiffs, like the class members, are entitled to the damages provided by RCW 80.36.530 for the defendants' *per se* violation of the Washington Consumer Protection Act.

4. Adequate Representation.

The requirement of adequate representation set forth in CR 23(a)(4) has two components: "(1) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" *Hanlon*, 150 F.3d at 1020. Where there are no conflicts between the class representatives and other class members, the focus is "primarily on class counsel, not on the plaintiff, to determine if there will be vigorous prosecution of the class action." Newberg, *Class Actions*, § 3.24, at 3-133.

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The claims and interests of the plaintiffs are not in conflict with any interests of the proposed class. The plaintiffs, like other members of the proposed class, received collect telephone calls from inmates and were not provided appropriate disclosure of the rates before accepting the calls. *See* Declarations of Sandy Judd, Tara Herivel and Zuraya Wright.

Further, Sirianni & Youtz is well qualified to serve as class counsel in this case. The firm has successfully prosecuted class actions in a variety of cases, including complex securities and health care litigation. *See Youtz Decl.* The firm also successfully represented a class of spouses of prison inmates in having a statute that allowed the state to seize 35% of the money sent by those class members to their inmate spouses declared unconstitutional. *Id.*

C. This Case Also Satisfies The Requirements Of CR 23(b)(3).

This action is properly certified under CR 23(b)(3). This subsection permits a class action when questions of law or fact common to the class members predominate over questions affecting individual members, and such an action is superior to other available methods of adjudicating the controversy. The rule "encompasses those cases in which a class action would achieve economies of time, effort and expense, and would promote uniformity of decision as to persons similarly situated without sacrificing procedural fairness or bringing about other undesirable results." Rules Advisory Committee Notes to 1966 Amendments to FRCP 23 (quoted in 3A Orland and Tegland, *Washington Practice: Rules Practice* at 561 (4th ed. 1992)).

The focus of the common questions inquiry is on "whether a class suit for the unitary adjudication of common issues is economical and efficient in the context of all the issues in the suit." Newberg, *Class Actions*, § 4.25, at 4-81. An action will satisfy the test where a common issue is the "central or overriding question," or where "there is an essential common link among class members and the defendant for which the

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court provides a remedy." *Id.* at 4-85-86. Put otherwise, common issues are said to predominate where there is a common nucleus of operative facts relevant to the dispute and those common questions represent a significant aspect of the case which can be resolved for all members of the class in a single adjudication.

Here, common issues predominate. The defendants followed a common course of conduct in failing to properly disclose rates. The fact that the class members may have incurred different charges, and, hence, have differing amounts of damages does not preclude certification. Recently, in *Pickett v. Holland America Line,* 2000 WL 1141052 (Wash. App. 2000):

> We also agree with the trial court's finding that individual issues of injury predominate over common questions. Individual questions of damages are no barrier to class certification if "computing individual damages will be virtually a mechanical task," or "capable of mathematical or formula calculation."

2000 WL 1141052 (citations omitted) at *11.[2]

Likewise, this action meets the requirement that a class action be superior to other available methods of adjudicating the controversy. Joinder is not a realistic alternative due to the large number of class members. Nor is it likely that many individual class members will elect to pursue their claims separately, given the high cost of litigation and the relatively small damage award available to most class members. "[I]ndividual lawsuits or interventions are not available methods for adjudicating a group of small individual claims in the absence of a class action." Newberg, § 4.27, at 4-108. *See also Phillips Petroleum Co. v. Shutts,* 472 U.S. 797, 809 (1985) (plaintiffs with claims averaging about $100 per person "would have no realistic day in court if a class action were not available"). Similarly, coordination or consolidation of

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[2] A copy of this case is attached to this motion.

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several related actions is not a viable option where, as here, it is not feasible for most class members to commence individual suits. Newberg, § 4.27, at 4-109. A class action is not merely "superior," it is the ***only*** viable method of affording relief to the class members in this case. Thus, the requirements for class certification under CR 23(b)(3) are satisfied.

VI. CONCLUSION

The Court should certify this action as a class action with each of the named plaintiffs as class representatives and Sirianni & Youtz as class counsel.

DATED: August 25, 2000.

SIRIANNI & YOUTZ

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