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 MEMORANDUM IN FURTHER SUPPORT OF THEIR MOTION TO COMPEL

Introduction

1. This memorandum is submitted in response to T-Netix' opposition to the Claimants' motion to compel discovery from T-Netix. T-Netix has engaged in discovery gamesmanship that neither the Commission nor the courts in Washington condone. For the first time in the years that this litigation has been pending, T-Netix admitted that it has never searched emails (and perhaps other sources of information) for responsive documents and acknowledged that after this case was commenced it discarded emails that likely contained relevant materials. While the ramifications of T-Netix' failure to preserve potentially relevant emails will be addressed when more information is received, T-Netix should be required to perform an thorough review of its files and respond fully to our data requests. The statement by T-Netix in its memorandum in opposition to our motion to compel that it had chosen not to review its email and other information on its servers casts serious doubt on the integrity of its discovery responses

throughout this litigation. As a start to remedy this problem, the Commission should grant Complainants' motion to compel.

Emails Should Be Produced

2. T-Netix refuses to search its server or other locations for emails that are responsive to the data requests. First, T-Netix falsely claims that the Complainants did not request production of emails. In both the first and second data requests to the respondents, Complainants specified that the documents to be produced included emails. In the definitions provided in the requests, "documents" are defined to include the following:

> The terms "document" or "documents" means any writing of any description including without limitation paper, ***electronic, digital and other forms of recording, email and other electronic documents that may reside on hard drives, servers or other storage media*** of any description that are under the control of or within the power of T-Netix, Inc. to gain access.

Complainants' First Data Requests to T-Netix at 2 (emphasis added)(attached as Exhibit A). The definition in the second requests to T-Netix includes emails as well. T-Netix' own definition of "documents" to be produced in its data requests also includes email.

3. It is hard to understand how a sophisticated party like T-Netix would sincerely believe that data requests do not include email or other electronic documents. The Federal Rules of Civil Procedure and other court rules specifically call for the production of electronic evidence, including emails, as part of normal document production. *See* Federal Rules of Civil Procedure, Rule 26 and the *Qualcomm* case discussed *infra*.

4. T-Netix did not object to our definition of "document" and gave no indication that it intended not to search for emails. It was not until after AT&T produced emails sent to T-Netix, which should also have been produced by T-Netix, that T-Netix claimed that it was not obligated to look for emails because we had not "specifically" requested emails and because it was too "burdensome." If a party believes that it should not have to search for emails because it is "burdensome," however, then it should specifically say so in its objections and move for a protective to limit the scope of the review. *Washington State Physicians Insurance Exchange & Assoc. v. Fisons Corp*., 122 Wash.2d 299, 858 P.2d 1054 (1993).

5. In *Fisons*, the Washington Supreme Court reversed an order denying sanctions for discovery abuse. The court details the responses to discovery from the defendant drug company, which are remarkably similar to T-Netix responses to our discovery. The court then set described a party's obligation to provide discovery. The court stated:

> It appears clear that no conceivable discovery request could have been made by the doctor that would have uncovered the relevant documents, given the above and other responses of the drug company. The objections did not specify that certain documents were not being produced. Instead the general objections were followed by a promise to produce requested documents. These responses did not comply with either the spirit or letter of the discovery rules and thus were signed in violation of the certification requirement.

Fisons at 252.

> Third, the discovery rules do not require the drug company to produce only what it agreed to produce or what it was

> ordered to produce. The rules are clear that a party ***354** must *fully* answer all interrogatories and all requests for production, unless a ****1084** specific and clear objection is made. If the drug company did not agree with the scope of production or did not want to respond, then it was required to move for a protective order. In this case, the documents requested were relevant. The drug company did not have the option of determining what it would produce or answer, once discovery requests were made.

Fisons at 252 (a copy of the *Fisons* opinion is attached as Exhibit B).

6. In *Qualcomm, Inc. v. Broadcom Corp*, 2008 WL 66932 (S.D.Cal. 2008), a court sanctioned a party for discovery "gamesmanship" when it determined that numerous relevant emails had not been produced because a party chose not to search certain computers or servers that contained that information:

> Attorneys must take responsibility for ensuring that their clients conduct a comprehensive and appropriate document search. Producing 1.2 million pages of marginally relevant documents while hiding 46,000 critically important ones does not constitute good faith and does not satisfy either the client's or attorney's discovery obligations. Similarly, agreeing to produce certain categories of documents and then not producing all of the documents that fit within such a category is unacceptable. Qualcomm's conduct warrants sanctions.

Qualcomm at 8 (attached as Exhibit C).

7. T-Netix now says that it cannot produce emails from the T-Netix employees who were recipients of the AT&T emails because they are no longer employees of T-Netix and that the emails for those employees were not transferred to the archival servers when T-Netix merged with Securus in 2004—while this action was still pending in the courts. Arlin Goldberg Dec. at 2.

8. Mr. Goldberg's efforts to locate the missing emails are wanting. He simply says that he asked some of his staff if they know what happened to the previous servers and that he "was unable to find any person with such knowledge." This is not an adequate explanation for not locating evidence.

9. Mr. Goldberg's declaration also does not help T-Netix in its argument that a search for email would be burdensome. T-Netix simply asserts in its response that this is so. However, T-Netix does not support this claim with any statement from Mr. Goldberg.

10. T-Netix and its counsel were responsible for assuring that potential evidence was preserved while this case was pending. *See, Zubulake v. UBS Warburg, LLC*, 220 F.R.D. 212 (S.D.N.Y. 2003). It now appears that no effort was made to protect this potential evidence from destruction.

11. T-Netix did not tell Complainants that it planned not to review email files to find responsive documents until after a motion to compel was filed. The requests clearly called for review of all "documents," including electronic evidence. T-Netix' late claim that it is too burdensome to review email files should be rejected, and T-Netix should be directed to review and produce responsive emails and other electronic information.

Documents Regarding Rate Disclosure Should Be Produced

12. T-Netix claims that it is not required to produce documents regarding rate disclosure for inmate calls, such as the emails sent by AT&T to T-Netix regarding its responsibility to disclose rates for Washington state inmate calls. T-Netix' position is

surprising since rate disclosure for inmate-initiated calls is at the center of this case and the referral to the Commission.

13. T-Netix performs its services for inmate calls in Washington through a subcontract with AT&T. (AT&T holds the primary contact to handle inmate-initiated calls.) T-Netix claims that the terms of the contract are relevant to whether it served as an OSP, which in turn determines whether it was required to provide rate disclosure for inmate calls. See T-Netix Opposition to Complainants' Motion to Compel at 12, ¶ 28.

14. Thus, one of the first questions asked by the Complainants in their first data requests was: "Please produce all documents that relate to the negotiation, interpretation, implementation, or performance of the contracts between T-Netix and AT&T relating to the provision of inmate telephone services in Washington State." Complainants First Data Requests, Request 2.

15. T-Netix' response was:

> T-NETIX objects to this Request on the ground that it seek "all documents" and is therefore overly broad, unduly burdensome, and oppressive. T-NETIX further objects on the ground that this Request regards "services in Washington State," rather than services in Washington Department of Corrections facilities, and therefore seeks documents that are neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. T-NETIX further objects on the ground that many, if not all, responsive documents are in the possession of complainants. Subject to and without waiving all objections stated herein, T-NETIX states that its search for responsive documents is ongoing, ***and all non-privileged, responsive documents will be produced as soon as practicable.***

T-Netix' Responses to Complainants First Data Requests, Request 2, attached as Exhibit D (emphasis added).

16. The only two specific objections to this request were that the documents should be limited to services "in Washington Department of Corrections facilities" and that many of the documents were already in the hands of Complainants. Beyond that, T-Netix objected that the request was too broad, but it then agreed that it would produce "all non-privileged, responsive documents." The Complainants were entitled to rely on this representation. As discussed above in *Fisons* and *Qualcomm*, T-Netix is not permitted to make general objections, state that it will provide responsive documents, then limit the documents that it is providing without explaining what documents are being withheld.

17. The documents responsive to this request would include documents regarding T-Netix' role and obligations as an OSP, including its duty to provide rate disclosures in accordance with the Commission's regulations.

18. T-Netix has now disclosed that it did not review emails to look for responsive documents and it is likely that it did not do an extensive review of other files to locate responsive information. It is impossible to determine what categories of documents it chose to ignore in responding to this request. This is similar to the situation in *Qualcomm* where the party requesting documents did not file a motion to compel because the producing party agreed to provide documents responsive to the request, but then chose not to review certain sources for information.

19. T-Netix should be ordered to provide all documents responsive to this request, including documents regarding providing operator services and providing disclosure of rates, and should be ordered to describe its efforts to locate responsive documents.

Documents Responsive to Requests 2 and 3 Should Be Produced

20. Data Requests Nos. 2 and 3 ask for documents regarding the platforms used by T-Netix to handle the collect calls from inmates. The diagrams T-Netix has produced to date, while helpful, are generic in nature. They do not inform us of configurations at particular institutions. They do not show the type, number, ownership, or any other information about trunking and connectivity at particular locations.

21. The connectivity diagrams will give a good, unbiased views of how calls were actually connected from the phone the inmates were using to the parties they were calling. We should not be required to simply accept Mr. Rae's description of call flows and equipment involved in calls from inmates over IntraLATA and InterLATA locations. The trunking diagrams would show the connectivity and associated call flows in an unbiased way, so that all parties can have the same starting point in determining which party was actually providing operator services. As an employee of T-Netix, Mr. Rae has a bias in interpreting the connectivity of those call flows. The fact that he disagrees with Mr. Wilson regarding the usefulness of the information is not a sufficient reason to deny discovery.

22. Both Complainants and AT&T have sought information to show what actually happened at the institutions serviced by T-Netix. T-Netix claims that it is the terms of its contract with AT&T that determine its role and responsibilities, not its actual performance of those duties. The regulations regarding rate disclosure, however, do not limit liability to those who were required to provide operator services by contract; those regulations speak in terms of operator services provided by a party. T-Netix has cited no authority that states that T-Netix' liability under the regulations is limited by its agreement with AT&T.

23. T-Netix should be ordered to provide all documents responsive to Requests 2 and 3.

Documents Responsive to Request 5 Should Be Produced

24. Request 5 of the Complainants' Second Data Requests asked for documents using the phrase "operator services."

25. T-Netix had objected to Request No. 5 on the grounds that it was too broad. In the conference with T-Netix's counsel, we agreed to limit this request to documents that contained a substantive discussion regarding operator services. T-Netix' counsel now claims that he "tabled" our discussion of this request to address other requests and that the issue was not "revisited." The supplemental response to this request states:

> Subject to and without waiving any objection herein, T-Netix has no additional responsive documents at this time, but will produce all responsive documents, if any, that it discovers in its search for documents responsive to other, more narrowly-tailored data requests that may be promulgated by

Complainants.

T-Netix Supplemental Response to Complainants' Second Data Request, Request No. 5 (attached as Exhibit E).

26. It appears that T-Netix' idea of "supplementing" its responses is simply to tell the requesting party that T-Netix will respond to a narrower request that may be later promulgated. We already agreed to modify the request to documents that contained a substantive discussion regarding operator services. T-Netix did not present any argument that this revision was too broad. It should be ordered to produce these documents.

Documents Responsive to Request 16 Should Be Produced

27. Data Request No. 16 is similar to Request 2 of our first data requests discussed above requesting documents regarding T-Netix's performance of its agreements to provide services in connection with collect telephone calls from Washington inmates. The difference is that our first request pertained to contracts with AT&T while the second request included any other contracts that T-Netix may have entered into regarding inmate calls in Washington. This calls for the same types of information and documents that T-Netix agreed to provide for the first request. T-Netix agreed to supplement its response but did so by saying that it would respond to a narrower request that may be later promulgated. *See*, Exhibit F. Telling a requesting party to "try again" with a "narrower" request defeats the purpose of a discovery conference, where the parties should be able to agree on the scope of a request. Clearly T-Netix recognizes that there is a subgroup of documents falling within this request that

should be produced, but it refuses to produce those documents or describe what it determines to be the appropriate boundaries of production. This is particularly true since T-Netix agreed to provide documents responsive to a similar data request as described above. It should be ordered to produce the documents requested.

Discovery Should be Provided for All Institutions

28. T-Netix claims that the information for the other institutions should not be provided because the claimants have not filed a motion to certify the class in this case and the information being sought is "class discovery" to support a future motion for class certification rather than for use in connection with the referral from the court.

29. Our response to T-Netix' motion for a protective order shows why T-Netix' premise is wrong, and we will not repeat those arguments. Further, as seen above, T-Netix had not objected to providing information regarding all Washington institutions when it responded to our first discovery requests. Since we have yet to receive any specific information for any of the institutions, including the four institutions that T-Netix' now claims are relevant, it is unclear what T-Netix is objection to producing. It is difficult to accept that there are no documents in T-Netix possession that pertain to one or more of the Washington prisons that it served. In addition to ordering T-Netix to respond for all institutions, the Commission should also direct T-Netix to explain why no documents regarding specific institutions have been provided. Although we raised this question in our motion, T-Netix provided no response.

Conclusion

30. For the reasons stated above, and in our motion to compel, we request that Complainants' motion for to compel be granted.

DATED: December 24, 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 December 24, 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: December 24, 2008, at Seattle, Washington.

/s/ Jean Fallow