[Service date: *December 24, 2008*]

BEFORE THE
WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION

SANDY JUDD and TARA HERIVEL, Complainants, v. AT&T COMMUNICATIONS OF THE PACIFIC NORTHWEST, INC., and T-NETIX, INC., Respondents.	Docket No. UT-042022 **T-NETIX, INC.'S REPLY BRIEF IN SUPPORT OF ITS MOTION FOR PROTECTIVE ORDER**

1. T-Netix, Inc. ("T-Netix"), through counsel and with leave from the Commission, respectfully submits this reply brief in support of its Motion for Protective Order.

INTRODUCTION

2. Notwithstanding Complainants' repeated suggestions that they are entitled to discovery extending to all potential members of a class throughout Washington State, the fact remains that the King County Superior Court (the "Court" or "trial court") never authorized class discovery and never certified a class action. Contrary to Complainants' assertions, the trial court limited the Commission's jurisdiction in this referral proceeding to consideration only of issues relating to the institutions from which Complainants actually received inmate-initiated calls and to liability, if any, under facts in existence at the time of the November 2000 referral. An examination of the referral orders demonstrates unequivocally that the Court did not intend to

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Lawyers
601 Union Street, Suite 1501
Seattle, Washington 98101
(206) 623-4711

refer the entire litigation, let alone responsibility for class-wide or pretrial discovery on the merits, to this Commission.

ARGUMENT

I. The Court's Referral Orders Expressly Limited the Commission's Jurisdiction

3. Both the trial court's initial referral in November 2000 and its reinstatement of the referral in March 2008 limited the scope of the Commission's jurisdiction to consideration of (1) whether T-Netix and AT&T were OSPs and, if so, (2) whether they violated the Commission's rate quote regulations. At the time of each referral, and still as of today, the Court had not certified a class of plaintiffs and had not authorized class-wide discovery. Therefore, discovery related to putative class members and discovery in support of class certification, including discovery related to recipients of inmate-initiated calls other than Complainants, was plainly not authorized by the Court's referrals.

4. At the time of the November 2000 referral, the Court could not possibly have intended that the Commission answer the two questions referred to it by considering circumstances arising after November 2000, including any later violations of the Commission's regulations, or by considering correctional institutions from which other, unidentified potential plaintiffs may have received inmate-initiated calls. The Court's November 2000 referral regarding T-Netix specifically asked the Commission to determine whether T-Netix "has violated," and not "is violating," the Commission's disclosure regulations:

> [T]he matter is referred to the Washington Utilities and Transportation Commission (WUTC) for further proceedings to determine if T-Netix ***has violated*** WUTC regulations.

Exh. 5 to T-Netix Mot. for Protective Order ("Mot."). Similarly, in its November 2000 referral regarding AT&T, the Court asked the Commission to determine whether "the regulations have been violated" by AT&T. Mot., Exh. 4.

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Seattle, Washington 98101
(206) 623-4711

5. The issues before the Commission, therefore, were obviously limited to those in existence at the time of the referral and did not extend to post-November 2000 conduct. This is fully supported, and reiterated explicitly, in the Court's later "reinstatement" order.

6. Reinstatement of the referral in 2008 related that referral back to the initial referral in November 2000. Specifically, on March 21, 2008, the trial court reinstated the referral to the Commission with the following instruction:

> The primary jurisdiction referral of this matter to the Washington Utilities & Transportation Commission is REINSTATED for determination of the ***issues originally before it*** in Docket No. UT-042022: (1) whether AT&T or T-Netix ***were*** OSPs and (2) whether they ***violated*** the WUTC disclosure regulations.

See Exh. 3 to T-Netix Mot. for Protective Order at 2 (emphasis added). The trial court specifically limited the referral to the "issues originally before" the Commission (*i.e.*, in November 2000). Because no conduct post-dating November 2000 could conceivably serve as a basis of liability for violation of the disclosure regulations as of November 2000, there is no merit to Complainants' argument that T-Netix and/or AT&T engaged in a continuing violation throughout a longer period over which this Commission has jurisdiction.

7. The trial court similarly constrained the scope of the referral by phrasing its issues in the past tense: whether AT&T or T-Netix "were" OSPs and whether they "violated" the Commission's disclosure regulations. Had the Court desired to know if T-Netix or AT&T "is an OSP" or "is violating" the rate quote regulations, the trial court would not have used the past tense. Consequently, there can be no serious question that by reinstating the original 2000 referral this way, the trial court limited the scope of this proceeding to facts already in existence as of the initial November 2000 referral.

8. Complainants' attempt to seek information on issues beyond the time period applicable to the November 2000 referral therefore exceeds the scope of the trial court's

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Lawyers
601 Union Street, Suite 1501
Seattle, Washington 98101
(206) 623-4711

reinstatement. Similarly, because the Court had stayed all class issues in its November 2000 referral, neither the referral nor its reinstatement were intended to extend to an entire class of plaintiffs or, by definition, other correctional facilities from which potential class members may have received inmate-initiated calls.

II. Complainants' Pending Motion for Class Certification Does Not Authorize Class-Wide Discovery at the Commission

9. While T-Netix was incorrect in stating that Complainants had not moved for class certification (See Complainants' Opposition ("Opp.") at ¶ 4), the mere *filing* of a motion for class certification in August 2000 plainly does not affect the scope of the trial court's referral to include consideration of class discovery. Complainants do not argue, because they cannot, that their motion sought leave to conduct or promulgate discovery on class-wide liability issues or to pursue discovery in support of class certification. Nor can they use the grant of their motion as a basis for class-wide discovery here, because that motion still remains pending. Complainants' implication that class discovery is permissible, prior to class certification, without an order from the trial court is meritless. See Opp at ¶¶ 5, 11.

10. Far more importantly, the trial court never acted on their motion and ***has never certified a class in this matter***. The Court expressly stayed all class and damages issues until after the Commission's determination of the two questions referred. Mot., Exhs. 4 & 5. Complainants' suggestion that it was incumbent on T-Netix to object to the primary jurisdiction referral if respondent did not want to engage in class-wide discovery before this Commission is preposterous. Complainants' Mot. to Compel Discovery from T-Netix, at ¶ 3 (Nov. 26, 2008) ("Had T-Netix felt that the referral should be limited to the calls received by Ms. Herivel or Ms. Judd, it could have requested this limitation. It did not."). To the contrary, Washington law is settled that class discovery prior to class certification is the exception, not the rule. Mot. at ¶¶ 40-45. It was thus the responsibility of Complainants to seek permission for such discovery, from the trial court, as part of the referral proceedings.

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(206) 623-4711

11. Having not done so and having not received judicial approval for ***either*** their purported class or their desired class-wide discovery, Complainants have no procedural basis on which to legitimately conduct class discovery in this administrative proceeding. Certainly Complainants' filing of a motion seeking class certification, never acted on by the Court, does nothing to warrant class discovery at the Commission. Absent a decision by the trial court that discovery in support of class certification is allowable, discovery before this Commission therefore must be limited to the two named Complainants.

III. Complainants' Suggested Discovery Framework Would Be Inefficient

12. Complainants assert that it would be inefficient for the Commission to determine the referred questions with respect only to the four institutions from which they received inmate-initiated calls because it *may* later have to make that determination for other Washington State correctional institutions if trial court grants class certification. See Opp. at ¶ 5. This is incorrect.

13. First, Complainants did not dispute that because T-Netix provided the same equipment, software, and services at all Washington DOC institutions, a violation of the Commission's regulations at one institution would likely be determinative of a violation at the others. Mot. at ¶¶ 48-51. Therefore, the matter would not need to return to the Commission for further determination even if the trial court later certifies a class.

14. Second, Complainants assume that the Court will grant class certification. As noted, the trial court stayed consideration of all class related issues and gave no indication as to whether it intended to certify a class action.

15. Third, Complainants assume that if the Court certified a class it would need to refer questions or issues to the Commission with respect to other institutions or class plaintiffs. But there is no assurance that the trial court would even want to refer additional matters to this Commission and strong reason to believe that, once its regulatory inquires are clarified, the Court

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Lawyers
601 Union Street, Suite 1501
Seattle, Washington 98101
(206) 623-4711

would apply those determinations in the ordinary course to its supervision of any class claims. Complainants' argument regarding efficiency of discovery, therefore, is based on the incorrect assumption that the Court would or might send the class portion of this case back to the Commission in yet a third primary jurisdiction referral.

16. To the contrary, limiting discovery to the institutions and time period that affect only Complainants would promote efficiency. Even if Complainants' theory regarding the uniqueness of each facility is correct, which it is not, if the Commission were to follow their requested framework for discovery, it would be allowing discovery and making determinations on correctional institutions and time periods that the Court ***may never include as part of this case***. Therefore, it is far more sensible for the Commission to limit this proceeding, as ordered by the trial court, to those institutions and the time period relevant to these two Complainants rather than pursuing hypothetical advisory opinions on claims that are not and may never become ripe.

IV. T-Netix Has Sought to Appropriately Limit the Scope of Discovery Based Upon Complainants' Responses to Data Requests

17. Complainants also assert that since T-Netix did not object when Complainants requested information related all Washington State correctional institutions in their first set of data requests in 2005, T-Netix waived its right to object to the scope of discovery sought. Opp. at ¶ 10.

18. Complainants disingenuously fail to mention or simply ignore that it was not until later, when T-Netix received responses to those first set of data requests and phone records produced by Complainants, that T-Netix first learned that Complainants identified only three institutions from which they actually received inmate-initiated calls. See Mot., Exh. 1 at 6 and Exh. 2 at 6. At that time, Complainants alleged they received those calls only "through some point in 2000." See id., Exh. 1 at 2 and Exh. 2 at 2.

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Lawyers
601 Union Street, Suite 1501
Seattle, Washington 98101
(206) 623-4711

19. Consequently, in its responses to the second round of data requests, T-Netix timely objected to discovery of information regarding institutions other than those from which Complainants actually received inmate-initiated calls and calls other than those made during the relevant time period. Once Complainants identified a fourth institution from which they received an inmate-initiated call in their responses to the second set of data requests, T-Netix supplemented its responses to include information relating to the fourth institution. Therefore, T-Netix has been consistent in its position and there is no basis whatsoever on which to find a waiver of its objection to the scope of discovery in this proceeding.

V. Complainants' Requested Discovery Poses an Undue Burden on T-Netix

20. Complainants further assert that T-Netix has not explained how producing information for additional correctional institutions beyond the four institutions from which Complainants actually received calls and beyond the relevant time period would be burdensome to T-Netix. Opp. at ¶ 7. To the contrary, T-Netix has argued, at length, that this information sought by the Complainants is *unduly* burdensome on T-Netix because it requires T-Netix to search for and assemble information on all correctional institutions over eight years beyond the time period during which Complainants actually received calls and from institutions from which the Complainants concededly never received calls. See T-Netix Opp. to Compl. Mot. to Compel at ¶ 16; Mot. at ¶ 31. As T-Netix has argued, the Complainants' data requests seek information that contains absolutely no probative value and is wholly irrelevant in that the requests exceed the scope of the primary jurisdiction referral by, among other things, seeking information related only to class discovery. See Mot. at ¶¶ 27-39. These requests are plainly burdensome when weighing the complete lack of relevance of the information sought against the burden on T-Netix to search through its files to locate information responsive to Complainants' irrelevant requests.

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Lawyers
601 Union Street, Suite 1501
Seattle, Washington 98101
(206) 623-4711

21. Nevertheless, Complainants maintain that T-Netix has not substantiated the burden on it by describing the files it would have to review or the locations of the records it would have to search to comply with Complainants' requests. Opp. at ¶ 7. In light of Complainants' insistence that T-Netix describe this information with further detail, T-Netix has prepared the Declaration of Curtis Hopfinger, attached hereto as Exhibit 7 ("Hopfinger Declaration"). As detailed in the Hopfinger Declaration, T-Netix would have to undergo extraordinary and costly efforts to search for and retrieve information relating to all Washington state correctional institutions from 1996 through the present at which T-Netix provided inmate telephone equipment and services to AT&T. See Hopfinger Declaration at ¶ 2. Complainants' data requests would be burdensome because it would take hundreds of man hours and tens of thousands of dollars to collect. See id. at ¶ 6. Specifically, as detailed in the Hopfinger Declaration, in order to locate and review documents responding to just one of Complainants' data requests relating to the engineering systems T-Netix employed at all correctional facilities in Washington state, T-Netix would be required to search through two off-site records storage facilities, holding an estimated 6900 boxes of documents. See id. at ¶ 7. Moreover, in order to perform this task, T-Netix would have to dedicate an estimated 3-4 staffers for a period of at least three weeks merely for the identification of potentially relevant documents. Id.

22. As stated, these efforts and resources described above relate to T-Netix's response to only one of Complainants' overbroad discovery requests relating to all Washington correctional institutions. Similar time, costs, and personnel would be required to locate, identify, review, and produce documents responsive to other data requests that seek information concerning all Washington state correctional institutions. See Hopfinger Declaration at ¶ 8. The estimates provided are also exclusive of Mr. Hopfinger's time and attorney time to oversee the

ATER WYNNE LLP
Lawyers
601 Union Street, Suite 1501
Seattle, Washington 98101
(206) 623-4711

process and then to review and produce documents if any are located. Accordingly, in terms of employee man hours and cost, the data requests are both burdensome and unduly burdensome.

CONCLUSION

23. The Court ordered reinstatement of the referral is clear and unambiguous when it limits the questions before this Commission to "the issues originally before it in Docket No. UT-042022: (1) whether AT&T or T-Netix were OSPs and (2) whether they violated the WUTC disclosure regulations." Complainants cannot reasonably claim that the trial court intended to extend the time frame for the Commission's consideration beyond that "originally before it" and to open discovery well beyond that needed to answer the two very specific questions. For all of the reasons discussed above and in its previous memorandum, T-Netix respectfully requests that the Commission grant its Motion for Protective Order.

RESPECTFULLY SUBMITTED this 24th day of December, 2008.

T-NETIX, INC.

By: _____

Arthur A. Butler, WSBA # 04678
ATER WYNNE LLP
601 Union Street, Suite 1501
Seattle, WA 98101-3981
(206) 623-4711
(206) 467-8406 (fax)

Glenn B. Manishin
DUANE MORRIS LLP
505 9th Street, N.W., Suite 1000
Washington, DC 20004-2166
(202) 776.7813
(202) 256.4600 (fax)

Joseph S. Ferretti
DUANE MORRIS LLP
505 9th Street, N.W., Suite 1000
Washington, DC 20004-2166
(202) 776.7863
(202) 478.2811 (fax)

CERTIFICATE OF SERVICE

I hereby certify that I have this 24th day of December, 2008, served via e-filing a true and correct copy of the foregoing, with the WUTC Records Center. The original, along with the correct number of copies (4), of the foregoing document will be delivered to the WUTC, via the method(s) noted below, properly addressed as follows:

David Danner
c/o Washington Utilities and Transportation
Commission Records Center
1300 S Evergreen Park Drive SW
Olympia, WA 98504-7250

____ Hand Delivered
____ U.S. Mail (first-class, postage prepaid)
x Overnight Mail (UPS)
____ Facsimile (360) 586-1150
x Email (records@wutc.wa.gov)

I hereby certify that I have this 24th day of December, 2008, served a true and correct copy of the foregoing document upon parties of record, via the method(s) noted below, properly addressed as follows:

On Behalf Of AT&T Communications

Letty S.D. Friesen
AT&T Communications
Law Department
Suite B 1201
2535 East 40th Avenue
Denver CO 80205

____ Hand Delivered
____ U.S. Mail (first-class, postage prepaid)
x Overnight Mail (UPS)
____ Facsimile
x Email (lsfriesen@att.com)

Confidentiality Status:

On Behalf Of AT&T Communications:

Charles H.R. Peters
Schiff Hardin LLP
233 South Wacker Drive
6600 Sears Tower
Chicago IL 60606

____ Hand Delivered
____ U.S. Mail (first-class, postage prepaid)
x Overnight Mail (UPS)
____ Facsimile (312) 258-5600
x Email (cpeters@schiffhardin.com)

Confidentiality Status:

On Behalf Of Complainants :

Chris R. Youtz
Sirianni Youtz Meier & Spoonemore
Suite 1100
719 Second Avenue
Seattle WA 98104

____ Hand Delivered
____ U.S. Mail (first-class, postage prepaid)
x Overnight Mail (UPS)
____ Facsimile (206) 223-0246
x Email (cyoutz@sylaw.com)

Confidentiality Status:

On Behalf Of Complainants :

Richard E. Spoonemore	____ Hand Delivered
Sirianni Youtz Meier & Spoonemore	____ U.S. Mail (first-class, postage prepaid)
Suite 1100	__x__ Overnight Mail (UPS)
719 Second Avenue	____ Facsimile (206) 223-0246
Seattle WA 98104	__x__ Email (rspoonemore@sylaw.com)

Confidentiality Status:

On Behalf Of Commission:

Marguerite Russell	____ Hand Delivered
Washington Utilities and Transportation	____ U.S. Mail (first-class, postage prepaid)
Commission	____ Overnight Mail (UPS)
1300 S Evergreen Park Drive SW	____ Facsimile (360) 586-8203
PO Box 47250	Email (Word version)
Olympia WA 98504-7250	__x__ (mrussell@utc.wa.gov)

Susan Arellano

[Service date: *December 24, 2008*]

EFORE THE
WASHINGTON UTILITIES AND
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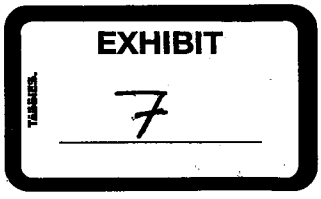
SANDY JUDD and TARA HERIVEL, Complainants, v. AT&T COMMUNICATIONS OF THE PACIFIC NORTHWEST, INC., and T-NETIX, INC., Respondents.	Docket No. UT-042022 **DECLARATION OF CURTIS L.HOPFINGER**

Curtis L. Hopfinger, under penalty of perjury, states and declares as follows:

1. I am Director of Regulatory and Government Affairs at Securus Technologies, Inc. ("Securus"), the parent company of Respondent T-Netix, Inc. ("T-Netix") in the above-captioned action. I make this declaration on the basis of my personal knowledge, information, and belief, and I am fully competent to testify to the matters stated herein.

2. This declaration has been prepared to corroborate and support the Motion for Protective Order filed by T-Netix in this proceeding in light of Complainants' objection that T-Netix failed to detailed or quantify the burden it has claimed from responding to their Second Data Requests. Specifically, in this declaration I describe the extraordinary and costly efforts that would be necessary to search for and retrieve information relating to each Washington state



correctional institution from 1996 through the present at which T-Netix provided inmate telephone equipment and services to AT&T.

3. In or about 2004, prior to my employment with Securus, T-Netix merged with Evercom Systems, Inc. under the former's parent company, Securus. Almost all of the people employed by T-Netix during the 1996 through 2000 timeframe are no longer employed by T-Netix or Securus. There is no one currently employed by T-Netix or Securus who had direct responsibility for, or has any significant first-hand knowledge of, T-Netix's rate quote activities in Washington state during that period. The few T-Netix workers employed during the 1996 – 2000 time frame that remain with Securus had other job duties and have already supplied their institutional knowledge in responses to Complainants Data Requests.

4. Pursuant to its contracts with AT&T Corp. ("AT&T"), T-Netix provided equipment and services to AT&T at nineteen (19) Washington state correctional facilities between 1996 and the present. T-Netix no longer provides equipment and services at any of these facilities.

5. It is my understanding that the Complainants and AT&T have requested information and documents in this proceeding relating to all Washington state facilities from June 1996 through the present. Almost all of Complainants' Amended Second Data Requests (approximately 21 of them) seek such information. The information sought includes, for example:

> Data Request No. 2: . . . all DOCUMENTS that describe or relate to PLATFORMS or other equipment or services that T-NETIX provided with regard to each T-NETIX INSTITUTION, including without limitation system drawings, trunking diagrams, trunking lists, configuration diagrams, systems engineering documents, systems specification documents, white papers, performance specification documents, performance analysis documents, systems architecture documents, marketing documents, and any other DOCUMENTS that describe or relate to the equipment or services

> that T-NETIX provided with regard to each T-NETIX INSTITUTION.
>
> Data Request No. 3: . . . all DOCUMENTS that show where the main components of the PLATFORM were located, how trunking was configured from the T-NETIX INSTITUTION to the PLATFORM location, how trunking was configured from the PLATFORM to the LEC or IXC switch, ...
>
> Data Request No. 5: . . . all DOCUMENTS in which T-NETIX uses the phrase "operator service" or "operator services" or "alternate operator services" or "automated operator" to describe any part of the services that it has provided, is providing, or will provide. This request for DOCUMENTS is not limited to T-NETIX INSTITUTIONS.

6. I assisted counsel for T-Netix in responding to Complainants' Data Requests and advised counsel of the substantial burden associated with responding to these requests in full. Securus has already expended over a hundred man hours and spent thousands of dollars searching for documents and data pertaining to the relevant period, 1996 through 2000, and the four relevant sites. The data retrieved by these extensive efforts has already been provided in responses to Complainants' data requests. Even if the expanded, unwarranted search for information is somehow related to this proceeding (which it is not), it would take additional hundreds of man hours and tens of thousands of dollars to collect.

7. For example, Complainants requested that T-Netix locate and provide copies of "all system drawings, trunking diagrams, trunking lists, configuration diagrams, systems engineering documents, systems specification documents, white papers, performance specification documents, performance analysis documents, systems architecture documents, marketing documents, and any other DOCUMENTS that describe or relate to the equipment or services that T-NETIX provided with regard to each T-NETIX INSTITUTION." In order to locate and review documents reflecting just these engineering matters at each of the nineteen institutions in question, Securus would be required to (a) search through two off-site records

storage facilities, holding an estimated 3300 boxes at one site and almost 3600 boxes at the other site of documents, and (b) dedicate an estimated 3-4 staffers for a period of at least three weeks merely for the identification of potentially responsive documents. All of the above is before the costs and time associated with review and production of responsive materials by me and Securus' counsel in this proceeding.

8. Similar time, costs, and personnel would be required to locate, identify, review, and produce documents responsive to the other data requests seeking information concerning all Washington state correctional facilities. Consequently, I estimate that, exclusive of legal fees and my time, and using an effective FTE daily rate of $300 (equivalent to a yearly salary of $78,000), it would cost Securus a minimum of $13,500 (though likely closer to $18,000) to review its records to determine whether potentially responsive materials even exist relating to all Washington state correctional facilities at which T-Netix provided inmate telephone equipment and services to AT&T from 1996 through the present.

I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE, INFORMATION, AND BELIEF.

EXECUTED on this 23rd day of December 2008, at Dallas, Texas.

Curtis L. Hopfinger