

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 RESPONSE TO  
COMPLAINANTS' MOTION RE  
SCHEDULE AND DEPOSITIONS**

1. Respondent T-Netix, Inc. ("T-Netix"), by its attorneys, hereby opposes in part and consents in part to Complainants Motion Re Schedule and Depositions. Specifically, T-Netix opposes Complainants' baseless request that the Commission compel T-Netix to make its former employees available for deposition on the basis that the witnesses were listed in T-Netix's Proposed Witness List. T-Netix consents to Complainants' motion to the extent that it seeks (1) depositions of current employees, (2) a deposition protocol, (3) a tiered schedule to allow expert witness depositions to be taken after fact witness depositions, and (4) suspension of the current briefing schedule until after depositions.

**I. COMPELLING WITNESSES FOR DEPOSITION**

2. Prior to March 11, 2009, none of the parties had served notices of deposition. On March 11, 2009, only 16 days before the deadline for completing depositions, T-Netix served

notices for three depositions of Complainants' witnesses and four depositions of AT&T's witnesses with letters to counsel indicating that the depositions could be rescheduled if the witnesses could not be available at the dates and location selected. The same day, AT&T's counsel contacted counsel for T-Netix to discuss the scheduling of depositions. The next day, Complainants' counsel contacted counsel for T-Netix to discuss scheduling of depositions.

3. On Friday, March 13, 2009, counsel for each party participated in a teleconference to discuss the scheduling of depositions. This is the conference referred to by Complainants in Paragraph 3 of their motion. With only 14 days left before the deadline for conducting depositions, counsel for Complainants and AT&T collectively asked that T-Netix make a total of 10 witnesses available for deposition, five of which are former T-Netix employees. The parties agreed to check on the availability of the selected witnesses and reconvene for a teleconference on the evening of Monday, March 16, 2009.

4. During the March 16, 2009 teleconference, AT&T added another former T-Netix employee to the list. Counsel for T-Netix advised counsel for AT&T and Complainants that it intends to call as witnesses only three of the 11 witnesses they requested. As such, T-Netix would make available for depositions only those witnesses.

5. It was not the intention of counsel for T-Netix to agree to make former employees available if T-Netix did not intend to call them as witnesses. In fact, counsel for T-Netix was quite clear about not having spoken to some of the witnesses prior to the March 16 teleconference. Even had the parties actually agreed to make all former witnesses available for deposition (which they would have little ability to guarantee), there would be little or no chance that all of these depositions could be taken within the remaining nine business days prior to the deadline. This is especially the case because the witnesses are located all over the country: in

Washington, Vermont, Colorado, Montana, Texas, and New Jersey. The attempt by counsel for AT&T and Complainants to lay the blame on T-Netix's decision not to make its former employees available for deposition is therefore disingenuous.

6. T-Netix agrees that it is required to make available for deposition each witness that it intends to call to testify in its case. *See* WAC 480-07-410(3). In addition, T-Netix consents to Complainants' request that T-Netix make its current employees available for deposition. Counsel for T-Netix is now working with counsel for Complainants and AT&T to schedule these five depositions.

7. T-Netix does not, however, agree that it is required to make available for depositions its former employees that it does not intend to call as witnesses. Although Complainants concede that the Commission's regulations do not require T-Netix to produce former employees (Motion at ¶ 10), Complainants argue that the Commission should compel T-Netix to produce for deposition former employees that were identified on T-Netix's Witness list.<sup>1</sup> Complainants have stated no legal basis for the Commission's authority to compel such depositions merely based upon a preliminary witness list. Furthermore, Complainants have stated no basis to warrant such compelled depositions even if the Commission had the authority to compel them.

8. As Complainants concede in Paragraph 8 of their motion, T-Netix's witness list was merely a precautionary list of witnesses who T-Netix "may call" at the hearing. That is the precise language used by T-Netix in its witness list: "T-Netix, Inc. ("T-Netix"), through counsel and pursuant to Order No. 10, states that it *may call* the following witnesses to appear in person or by deposition at the hearing in this proceeding: . . . ." (emphasis added). A copy of T-Netix,

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<sup>1</sup> T-Netix listed on its Proposed Witness List five out of six of the former employees at issue.

Inc.'s *Proposed* Witness List is attached as Exhibit A to the Motion. And since filing that list T-Netix has determined that it does not intend to call many of those people on the list as witnesses, if a hearing is in fact required, and has so advised the other parties.

9. WAC 480-07-410(3) provides that “[e]ach party will be responsible for the attendance of any of its prospective witnesses, or any of its employees, who have been scheduled for deposition.” (Emphasis added). There simply is no basis for obligating a party to make available for deposition persons whom that party is not going to call as witnesses or who are not employees. Had the Commission intended to require parties to make such persons available, the Commission could have drafted WAC 480-07-410(3) to mirror the language in WAC 480-07-410(1), which provides, in pertinent part, that “A party may depose *any person identified by another party* as a potential witness.”<sup>2</sup> Section one deals with which witnesses a party may depose and Section three deals with which witnesses a party must make available for a deposition. Had the Commission thought it proper to do so, it could have required that parties be responsible for the attendance of any person identified as a potential witness – but, it did not.

10. Indeed, T-Netix could not necessarily, even if it desired, make available for deposition witnesses, such as former employees, who are not in its control. As a precautionary measure, and consistent with typical practice in litigation matters, T-Netix added to its witness list every potential witness – both friendly and potentially adverse – that it knew at the time to possibly have knowledge of the facts at issue in this litigation. In addition to current and former

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<sup>2</sup> T-Netix points out that the remainder of WAC 480-07-410(1) provides that “A party may depose a person who has not been identified as a potential witness, if the presiding officer approves the deposition on a finding that the person appears to possess information significant to the party’s case.” One of the 11 witnesses that Complainants and AT&T have sought to depose was not listed as a potential witness, and neither Complainants’ nor AT&T have sought approval from the Court to take that deposition.

T-Netix employees, the list includes AT&T's prospective witnesses, Complainants' prospective witnesses, and even the Complainants themselves. Surely Complainants could not be heard to suggest that T-Netix has an obligation to make all of these proposed witnesses available for deposition. T-Netix is not even certain of the whereabouts of all of its former employees. Based upon last available contact information, some of which is over five years old, two of the former employees live in Colorado, one lives in Montana, and three live in suburbs around Dallas, Texas. To illustrate the point about lack of control, counsel for T-Netix recently contacted one of these six former employees, Alan Schott, who stated that it has been a long time since he had consulted as an expert on this case, and he expressly stated that he did not want T-Netix to continue to utilize him as an expert witness in this matter.

11. The simple fact is that T-Netix does not intend to call its former employees in its case. T-Netix has no legal obligation to track down its former employees at the whim of other parties merely to make it easier for them to obtain testimony from those witnesses. Accordingly, Complainants request that the Commission order T-Netix to somehow make its former employees available for deposition should be denied.

## **II. DEPOSITION PROTOCOL**

12. T-Netix consents to Complainants' request for the entry of the proposed Deposition Protocol that is attached as an Addendum to Complainants' motion with the caveat that the scope of discovery should be limited consistent with the Administrative Law Judge's ruling in Order No. 14. That is, discovery should be limited to the scope of the two Complainants' claims and to T-Netix's platform, network configuration, and disclosure activities at the four DOC facilities in question (the Washington State Reformatory (aka Monroe

Correctional Complex), Airway Heights, McNeil Island, and Clallum Bay) during the relevant period of June 1996 to December 31, 2000.

### III. EXPERT DISCOVERY

13. T-Netix consents to Complainants' request that expert depositions be taken following the completion of depositions of fact witnesses. As discussed during the telephonic conference held on Friday, March 20, 2009, a tiered deposition schedule would allow expert witnesses to review the appropriate deposition transcripts prior to their own depositions to ensure that they will not need to be deposed more than once.

### IV. SUSPENSION OF SCHEDULE

14. T-Netix consents to Complainants' request that the Commission suspend the briefing schedule for the motions for summary determination until after all of the depositions have been taken.

RESPECTFULLY SUBMITTED this 27th day of March, 2009.

T-NETIX, INC.

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**CERTIFICATE OF SERVICE**

I hereby certify that I have this 27th day of March, 2009, 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:

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I hereby certify that I have this 27th day of March, 2009, served a true and correct copy of the foregoing document upon parties of record, via the method(s) noted below, properly addressed as follows:

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*Susan Arellano*