

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

SANDY JUDD AND TARA)	DOCKET UT-042022
HERIVEL,)	
)	
Complainants,)	ORDER 17
)	
v.)	ORDER GRANTING IN PART AND
)	DENYING IN PART
AT&T COMMUNICATIONS OF THE)	COMPLAINANTS' MOTION
PACIFIC NORTHWEST, INC., AND)	REGARDING SCHEDULE AND
T-NETIX, INC.,)	DEPOSITIONS
)	
Respondents.)	
.....)	

MEMORANDUM

1 **SYNOPSIS.** *This order: 1) Grants Complainants' request that the Commission direct T-Netix to make available for deposition its current employees and any former employees T-Netix intends to call as witnesses; 2) With the exceptions of Alan Schott and Nancy Lee, denies Complainants' request to direct T-Netix to make available those individuals T-Netix listed on its list of prospective witnesses since T-Netix has modified that document and does not intend to call some of its original witnesses; 3) Denies Complainants' request that the Commission authorize the parties to seek commissions from the King County Superior Court as an aid to obtaining subpoenas in other jurisdictions for depositions because this is an unnecessary involvement of the Commission in the King County Superior Court's primary jurisdiction over this matter; 4) Grants Complainants' request to establish a deposition protocol identical to the protocol Complainants have included in their Motion; and 5) Grants Complainants' request that expert depositions be taken following the completion of fact-based witness depositions.*

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 Herivel (Complainants) against AT&T Communications of the Pacific Northwest, Inc. (AT&T), and T-Netix, Inc. (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 Joseph S. Ferretti, and Glenn B. Manishin, both of Duane Morris, LLP, Washington, D.C., represent T-Netix.

4 **PROCEDURAL HISTORY.** On November 17, 2004, Complainants filed a formal complaint with the Commission against T-Netix and AT&T under the court's referral.¹ Complainants allege that 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

5 After an extensive procedural journey whereby this matter wound its way through the King County Superior Court, Division I of the Washington Court of Appeals, and the Supreme Court of Washington, the King County Superior Court reinstated its referral to the Commission on March 21, 2008. Specifically, the King County Superior Court referred two questions to the Commission: 1) whether AT&T and T-Netix are OSPs,

¹ The procedural history in this matter is described more fully in Order 09 and Order 14 in this docket and is not repeated here.

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.

and 2) if so, whether AT&T and T-Netix violated the Commission's rate disclosure regulations.

6 On October 2, 2008, the Commission entered Order 09 which found that AT&T's Motion for Summary Determination⁴ and T-Netix's Motion for Summary Determination⁵ are still pending and established a procedural schedule for the parties to conduct discovery, take depositions, and file responses to the motions.⁶

7 **REQUEST TO AMEND PROCEDURAL SCHEDULE.** On March 25, 2009, Complainants filed a motion regarding the procedural schedule and depositions (Complainants' Motion). Specifically, Complainants request that: 1) the Commission direct T-Netix to make available for deposition the witnesses requested by Complainants and AT&T who are either current employees or former employees identified in T-Netix's witness list; 2) the Commission authorize the parties to seek commissions from the King County Superior Court, if necessary, as an aid to obtaining subpoenas in other jurisdictions for depositions; 3) the Commission establish a deposition protocol substantially similar to a sample attached to Complainants' Motion; and 4) the Commission direct that expert depositions shall be taken after the completion of depositions of fact-based witnesses.⁷

8 Complainants assert that during discovery, T-Netix provided Complainants with several emails containing the names of T-Netix's employees who were previously unknown to Complainants.⁸ These T-Netix employees were directly involved with T-Netix's response to the rate disclosure requirements.⁹ Complainants state that the parties agreed to check the availability of former employees and make arrangements

⁴AT&T's Motion was filed with the Commission on December 15, 2004, and the parties have not yet had an opportunity to respond to it.

⁵T-Netix filed its motion with the Commission on July 28, 2005, and the parties have likewise not had an opportunity to respond to it yet.

⁶Following numerous requests by all of the parties for modifications of the procedural schedule established in Order 09, the Commission directed the parties to complete depositions by March 27, 2009, and gave the parties until April 10, 2009, to respond to the motions in Order 16.

⁷*Complainants' Motion* at 6. Complainants also requested that the Commission suspend the briefing schedule for AT&T's Motion for Summary Determination and T-Netix's Motion for Summary Determination. The Commission did so in the Notice Suspending Procedural Schedule issued on March 31, 2009.

⁸*Complainants' Motion* at 1.

⁹*Id.*

for these former employees to attend depositions.¹⁰ According to Complainants, in a conference call on March 16, 2009, the parties discussed finalizing arrangements for the deposition of these witnesses, and, for the first time, T-Netix voiced its opinion that it was not obligated to produce witnesses for depositions that it did not intend to call at hearing.¹¹ Complainants argue that, due to T-Netix's decision not to make these individuals available for depositions, Complainants will now need to subpoena the witnesses, most of whom are located outside of the state of Washington.¹²

- 9 Complainants point to WAC 480-07-410(3) which requires T-Netix to make available current employees for depositions, even though T-Netix may not call them as witnesses.¹³ Complainants acknowledge that WAC 480-07-410(3) does not direct T-Netix to produce or attempt to obtain the appearance of former employees for depositions if T-Netix does not intend to call the former employees as witnesses.¹⁴ However, Complainants raise the issue of two former employees that T-Netix initially included on its proposed witness list.¹⁵ T-Netix now states it will not be calling either former employee as a witness at hearing, yet the affidavits of Alan Schott and Nancy Lee that T-Netix originally filed in support of its Motion for Summary Determination have not been withdrawn.¹⁶ Complainants, therefore, request that the Commission order T-Netix to make available former employees previously identified on T-Netix's witness list. Complainants also ask that the Commission authorize the parties to seek commissions from the King County Superior Court, if necessary, as an aid to obtaining subpoenas in other jurisdictions for depositions since several of T-Netix's former employees, including Alan Schott, reside outside of the state of Washington.¹⁷

¹⁰*Id.*

¹¹*Id.*, at 1-2. Complainants point out that AT&T has contacted its former employees and agreed to make them available. *Id.*, at 2.

¹²*Complainants' Motion* at 2.

¹³*Id.*, at 3.

¹⁴*Id.*, at 3. Complainants also admit that the Commission's jurisdiction and the King County Superior Court's jurisdiction do not extend to the former T-Netix employees currently residing in other states. *Id.*, at 4.

¹⁵*Id.*, at 3.

¹⁶*Id.*, at 3.

¹⁷*Id.*, at 4.

10 In addition to the issue of compelling witnesses for depositions, Complainants raise the concern that the parties need to have the Commission establish a deposition protocol as is the practice in Washington courts so as “to eliminate problems before they occur so as not to further delay the proceedings.”¹⁸ Complainants also contend that the procedural schedule might work more efficiently if expert witnesses were deposed after fact-based witnesses to allow the experts time to digest the information provided by fact-based witnesses before rendering expert opinions.¹⁹

11 **AT&T’S RESPONSE.** On March 26, 2009, AT&T filed its response to Complainants’ Motion, joining in the relief requested by Complainants.²⁰ AT&T agrees with Complainants that the parties had an understanding that each would employ their best efforts to present former employees and witnesses connected with the named Complainants for depositions.²¹ AT&T contends that it interpreted T-Netix’s request for former AT&T employees to be made available for depositions as an indication that T-Netix shared this understanding.²²

12 **T-NETIX’S RESPONSE.** On March 27, 2009, T-Netix filed its response, opposing in part and consenting in part to the requests in Complainants’ Motion. T-Netix opposes Complainants’ request that the Commission compel T-Netix to make available for deposition its former employees.²³ That said, T-Netix consents to Complainants’ requests: 1) To depose current employees, 2) To institute a deposition

¹⁸*Id.*, at 5.

¹⁹*Id.*

²⁰AT&T supports the implementation of a structured expert witness discovery schedule and proposes the following:

1) Within 14 days of the parties’ receipt of the deposition transcript of the last fact-based witness, the parties must disclose all of their respective experts’ opinions and all bases for those opinions. No additional opinions or bases may be offered after these disclosures.

2) Within 28 days of the parties’ disclosure of all their respective experts’ opinions and all bases for those opinions, depositions of the parties’ experts must be conducted, with Complainants’ expert to be deposed first.

3) Within 21 days of the parties’ receipt of the transcript of the last expert’s deposition, the parties must file any responses to the pending motions for summary determination.

4) Within 14 days of the filing of responses, any replies must be filed. *Id.*, at 2.

²¹*AT&T’s Response* at 1.

²²*Id.*

²³*T-Netix’s Motion* at 1.

protocol,²⁴ and 3) To implement a tiered schedule to allow expert witness depositions to be taken after fact-based witness depositions.²⁵

- 13 T-Netix asserts that, in a March 13, 2009, teleconference with the parties, only 14 days prior to the deadline for taking depositions, Complainants and AT&T requested that T-Netix make 10 witnesses available for deposition, including 5 individuals who no longer work for T-Netix.²⁶ According to T-Netix, during the March 16, 2009, teleconference call, AT&T added another former employee to the list of 10 witnesses already requested of T-Netix.²⁷ T-Netix states that it told the other parties that, since T-Netix only planned on calling three of the 11 witnesses requested, it would only make those three witnesses available for deposition.²⁸
- 14 T-Netix admits that it is required to make available to the parties to depose any witnesses T-Netix will call at hearing.²⁹ Furthermore, T-Netix agrees to make its current employees available for deposition and is currently arranging those with Complainants and AT&T.³⁰ T-Netix maintains that it never intended to make former employees available to the other parties if it did not intend to call them as witnesses.³¹ Even so, T-Netix contends that it does not have to make available former employees for depositions simply because it listed such individuals on its proposed witness list.³² According to T-Netix, its proposed witness list does not necessarily indicate witnesses that T-Netix will actually call at hearing, and T-Netix has already determined that many of the individuals contained within its witness list will not be called at hearing.³³

²⁴T-Netix adds one caveat to Complainants' original proposal. T-Netix requests that the Commission specifically include language in the deposition protocol which reiterates the limited scope of the docket in Order 14 to the "Complainants' claims and to T-Netix's platform, network configuration, and disclosure activities at the four [Washington Department of Corrections] facilities in question ... during the relevant period of June 1996 to December 31, 2000." *Id.*, at 5-6.

²⁵*Id.*

²⁶*Id.*, at 2.

²⁷*Id.*

²⁸*Id.*

²⁹*Id.*, at 3, citing to WAC 480-07-410(3).

³⁰*Id.*

³¹*Id.*, at 2.

³²*Id.*, at 3, 4, citing to WAC 480-07-410(1) and -410(3).

³³*Id.*, at 3-4.

15 T-Netix points out that its former employees are no longer under its control, and therefore, T-Netix would not necessarily be able to command them to be available for depositions.³⁴ T-Netix cites to the example of its former employee, Alan Schott, who, when contacted by T-Netix, stated that it had been a long time since he had worked on this proceeding and specifically asked that T-Netix not “continue to utilize him as an expert witness in this matter.”³⁵

16 **DECISION.** Complainants have requested that the Commission direct T-Netix to make available for depositions the witnesses requested by Complainants and AT&T who are either current employees or former employees identified in T-Netix’s witness list. T-Netix’s only disagreement with this request is that it should not have to make available those former employees it initially put on its witness list but who T-Netix has subsequently decided not to call at hearing.³⁶ The applicable Commission rule mandates that each party is responsible for the attendance of any of its prospective witnesses or any of its employees who have been scheduled for deposition. T-Netix, therefore, is correct that each of the parties may change direction and decide to modify its witness list when it does not intend to call previously named individuals as witnesses at hearing. However, the Commission concludes that T-Netix *is* still obligated to make available individuals whose affidavits it has relied upon in support of its Motion for summary determination, including Alan Schott and Nancy Lee. Given that T-Netix has used Mr. Schott’s supplemental affidavit in support of its motion, T-Netix will need to either make Mr. Schott available for Complainants and AT&T to depose or withdraw his supplemental affidavit from consideration by the Commission.

17 The Complainants have also requested that the Commission authorize the parties to pursue commissions³⁷ from the King County Superior Court, if necessary, as an aid to obtaining subpoenas in other jurisdictions for depositions. The Commission has very specific powers relating to discovery and the taking of depositions. For example,

³⁴*Id.*, at 4. For some of its former employees, T-Netix states that the last available contact information is over five years old. *Id.*, at 5.

³⁵*Id.*, at 5.

³⁶*T-Netix’s Response* at 4.

³⁷The type of “commission” sought by Complainants would appear to be “a warrant or authority or letters patent, issuing from the government, or one of its departments, or a court, empowering a person or persons named to do certain acts, or to exercise the authority of an office (as in the case of an officer in the army or navy).” *Black’s Law Dictionary* 186 (6th ed. 1991).

pursuant to RCW 34.05.446, the Commission may issue subpoenas having statewide effect for the attendance of witnesses at depositions.³⁸ Complainants have not cited to any legal authority that would instill the Commission with the power to authorize the parties to do something that they have the ability to pursue on their own. In addition, the complaint before the Commission was referred by the King County Superior Court, and as the Commission has stated many times, that court continues to retain primary jurisdiction over this matter.³⁹ As a result, all of the parties are free to pursue remedies from the King County Superior Court as each deems necessary.

18 Complainants have requested that the Commission establish a deposition protocol that would specifically address procedural issues during depositions, including the form objections to deposition questions may take, and when counsel may advise deponents not to answer. T-Netix has agreed to this request with the caveat that the Commission reiterate its previous limitation on the scope of discovery as stated in Order 14. While the Commission does not typically establish deposition protocols in its cases, this case is anything but typical. The Commission's rules provide that the parties should use Washington Superior Court Civil Rule 30 (CR 30) as a guide when conducting depositions.⁴⁰ CR 30(h) contains prohibitions and directives substantially similar to the deposition protocol provided by Complainants. Given the contentious nature of discovery in this matter up to this point and to prevent further delay associated with uncertainty regarding the taking of depositions, the Commission finds that the parties should employ the deposition protocol supplied by Complainants.

19 With regard to T-Netix's suggestion that the Commission reiterate its ruling from Order 14, T-Netix has presented no evidence demonstrating that such action is warranted. The parties, at this point, should be well aware of the procedural tracks this case has taken and do not need a reminder from the Commission. Further, the Commission's rules provide that parties must limit the scope of questioning in a deposition to information that is relevant to the issues in the adjudicative proceeding

³⁸RCW 34.05.446(1) and (6). *See*, RCW 34.05.588.

³⁹*See, Judd, et al., v. AT&T, et al.*, Docket UT-042022, Order 06 (Aug. 18, 2005) and Order 09 (Oct. 2, 2008).

⁴⁰WAC 480-07-410(3).

or that may lead to the production of information that is relevant.⁴¹ Therefore, the Commission declines to grant T-Netix's requested caveat.

20 Finally, Complainants also request that the Commission provide that expert witness depositions be taken following the completion of depositions of fact-based witnesses.⁴² Complainants' argument that this will permit the experts to digest information obtained from the fact-based witnesses in reaching their expert opinions is logical. Therefore, the Commission finds Complainants' request that fact-based witnesses be deposed first followed by expert witnesses is reasonable and should be granted.

21 With regard to the timing of the depositions, AT&T has proposed a generalized schedule with deadlines for the taking of depositions based on such occurrences as "[w]ithin 14 days of the parties' receipt of the transcript of the last fact witness's deposition."⁴³ The Commission concludes that a more definitive procedural schedule for both the completion of depositions and the filing of responses to AT&T's and T-Netix's Motions for Summary Determination is necessary. As a result, the parties should be directed to file an agreed adjustment to the procedural schedule based upon the above decision by **Friday, May 1, 2009**. If the parties do not file an agreed adjustment to the procedural schedule by this time, one will be instituted by the Commission.

ORDER

THE COMMISSION ORDERS That

22 (1) Complainants' Motion Regarding Schedule and Depositions is granted in part and denied in part, in accordance with the above decision.

⁴¹WAC 480-07-410(3) states that "[p]arties must limit the scope of questioning in a deposition to the same standard set forth in WAC 480-07-400(4)." However, WAC 480-07-400(4) deals not with the limited scope of discovery and deposition questioning but with the timing of discovery. WAC 480-07-400(3) is undoubtedly the section that should have been referenced as it directly addresses what information the parties can and cannot request during discovery. The Commission will address this error in a future rulemaking.

⁴²Both T-Netix and AT&T support this request.

⁴³*AT&T's Response* at 2.

- 23 (2) T-Netix, Inc. is directed to make available for deposition its current employees, any former employees T-Netix intends to call as witnesses at hearing, and Alan Schott and Nancy Lee, unless T-Netix withdraws either witness' affidavits filed in support of its Motion for Summary Determination.
- 24 (3) The parties will use the deposition protocol attached to Complainants' Motion Regarding Schedule and Depositions in the taking of depositions in this matter.
- 25 (4) The parties will depose fact-based witnesses first, followed by expert witnesses.
- 26 (5) The parties will file an agreed adjustment to the procedural schedule including deadlines for the completion of depositions and the filing of responses to T-Netix, Inc.'s and AT&T Communications of the Pacific Northwest, Inc.'s Motions for Summary Determination by Friday, May 1, 2009. If the parties do not file such an adjustment to the procedural schedule, one will be instituted by the Commission.

Dated at Olympia, Washington, and effective April 10, 2009.

WASHINGTON STATE UTILITIES AND TRANSPORTATION COMMISSION

MARGUERITE E. FRIEDLANDER
Administrative Law Judge