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FILED HONORABLE J. KATHLEEN LEARNED

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KING COUNTY  
CLERK OF COURT  
SEATTLE, WA.

SUPERIOR COURT OF WASHINGTON  
IN AND FOR KING COUNTY

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

Plaintiffs,

v.

AMERICAN TELEPHONE AND  
TELEGRAPH COMPANY *et al.*,

Defendants.

No. 00-2-17565-5-SEA

DEFENDANT T-NETIX'S RESPONSE TO  
PLAINTIFFS' SUPPLEMENTAL  
MEMORANDUM IN RESPONSE TO  
PARTIAL DECISION ON MOTIONS TO  
DISMISS

**I. PLAINTIFFS HAVE FAILED TO STATE A COGNIZABLE CLAIM ALLEGING ANY VIOLATION OF WUTC RULES**

This case has never involved the allegation that Defendants violated any rule promulgated by the Washington Utility and Transportation Commission ("WUTC"). Rather, the sole claim is a purported violation of the Washington Consumer Protection Act, RCW §§ 19.86 *et seq.* ("CPA"). Amended Complaint ¶¶19-20. As the Court correctly recognized, Plaintiffs only "challenge the validity and sufficiency of the WUTC regulations" as a means of proving their CPA claim. Partial Decision on Summary Judgment and Order for Further Briefing at 2 (hereafter "Order"). The rules

Defendant T-Netix's Response to Plaintiffs' Supplemental Memorandum - 1

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**ORIGINAL**

1 themselves were raised merely to suggest that the CPA should have been applied to Defendants by  
2 the WUTC. Plaintiffs' Supp. Br. at 2 (*citing* Plaintiffs' Mem. at 13).

3 The Court's conclusion that "[t]he pleadings contain a claim that can be read as asserting a  
4 violation of the regulations" is a charitable reading of the Complaint. Order at 1. Contrary to  
5 Plaintiffs' assertion, however, this is not "all that is necessary" to defeat Defendants' motions to  
6 dismiss. Plaintiffs' Supp. Br. at 3. Rather, by Order of the Court, the burden is now upon Plaintiffs  
7 to show that their pleadings have alleged "actual violations" of any WUTC rule by Defendants.  
8 Order at 2.

10 Nothing in the Complaint or any subsequent pleadings gave notice to any Defendant to  
11 defend a claim of WUTC rule violations. Now, in order to survive dismissal, Plaintiffs have  
12 fundamentally altered the nature of this case, characterizing it as a matter of administrative rule  
13 violations. This lack of notice violates both fundamental principles of due process and the general  
14 rules of pleading under CR 8.

16 In any event, Plaintiffs have not alleged or shown that Defendants violated any WUTC rule,  
17 including the rule governing disclosure of rates by operator service providers, the rule at issue here.  
18 See WAC 480-120-141. The supplemental brief fails to indicate with specificity the manner in  
19 which any Defendant provides inmate services, whether the rule in fact governs any Defendant's  
20 service, or whether this Court has jurisdiction to assess and penalize any alleged violation. Plaintiffs  
21 have not met the standard for alleging misconduct redressable by this Court and they cannot rest on a  
22 Complaint that fails to provide notice of the specific claims asserted against Defendants.  
23 Consequently, this case should be dismissed as to all Defendants and leave to amend the Complaint  
24 should be denied.  
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Defendant T-Netix's Response to Plaintiffs' Supplemental  
Memorandum - 2

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1 **II. EVEN IF PROPERLY RAISED, ANY CLAIM FOR VIOLATION OF WUTC**  
2 **RULES MUST BE ADJUDICATED AT THE COMMISSION UNDER THE**  
3 **ADMINISTRATIVE PROCEDURE ACT**

4 The Court has correctly determined that, under the primary jurisdiction doctrine, any alleged  
5 violation of Washington's telephone regulations must be determined by the WUTC. Order at 2-3. It  
6 is axiomatic that the application and adjudication of administrative rules must occur at the agency  
7 that promulgated them. *Moore v. Pacific Northwest Bell*, 34 Wn. App. 448, 662 P.2d 398 (1983);  
8 *see also* T-Netix Motion at 5-8; T-Netix Reply to Opp. at 3-4. Despite the Court's dispositive ruling  
9 on this point, however, Plaintiffs continue to argue that primary jurisdiction is inappropriate in this  
10 case because "the Disclosure Statutes on their face show that the defendants should be liable for  
11 violations." Plaintiffs' Supp. Br. at 3. This case is no longer about the so-called "Disclosure  
12 Statutes," of course, and Plaintiffs' continued reliance upon those provisions after the Court's  
13 holding is meritless.

14 Whether T-Netix and the other service provider Defendants violated the operator service  
15 provider rules in WAC480-120-141 is a question that must be resolved by the WUTC. The  
16 pleadings demonstrate that the application of these rules as to each defendant requires careful  
17 consideration of the nature of an "operator services provider" and "telecommunications common  
18 carrier" in the context of inmate services. These questions present issues of ultimate fact, resolution  
19 of which is a predicate to determining liability. This conclusion is a function not only of the Court's  
20 decision, Order at 2, but also of common sense. Courts sitting without a jury decide questions of  
21 fact and of law; where a question of fact lies peculiarly within the expertise of an authorized agency,  
22 referral to that agency is necessary as a precursor to disposition of the remaining question of law.  
23 *Moore*, 34 Wn. App. at 453.  
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Defendant T-Netix's Response to Plaintiffs' Supplemental  
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1 **III. FEDERAL PREEMPTION BARS ZURAYA WRIGHT, A FLORIDA RESIDENT,**  
2 **FROM CLASS REPRESENTATION AND REQUIRES DISMISSAL OF**  
3 **PLAINTIFFS' CLAIM AS IT RELATES TO INTERSTATE CALLS**

4 As T-Netix has consistently argued in this case, the Communications Act of 1934, as  
5 amended, flatly bars any state court or agency from adjudicating disputes arising out of interstate  
6 telecommunications. 47 U.S.C. § 152(b). T-Netix Motion at 11-13; T-Netix Reply to Opp. at 2-3.  
7 The rates, terms and conditions under which any Defendant provides interstate long distance calls  
8 from Washington state prisons are subject to the exclusive jurisdiction of the FCC and federal courts.  
9 *See Louisiana Pub. Svc. Comm'n v. FCC*, 106 S. Ct. 1890, 1898 (1986). Plaintiffs continue,  
10 however, to seek to assess liability on Defendants based on their provision of interstate calls, stating  
11 that the "Disclosure Statutes . . . apply to both intrastate and interstate calls." Plaintiffs' Supp. Br. at  
12 3. This continued assertion is incorrect as a matter of settled law and should be disposed of by the  
13 Court in a final judgment.

14 The interstate jurisdictional issue is especially pressing in light of Plaintiffs' request for class  
15 certification prior to any referral of the case under primary jurisdiction. Plaintiffs' Supp. Br. at 5.  
16 Because their claims are related solely to interstate calls, Ms. Wright and those she would represent  
17 should not be added to any certified class in this case. If these putative class members were certified  
18 in this case, the Court would in fact be asserting jurisdiction over interstate communications in  
19 contravention of the Communications Act.

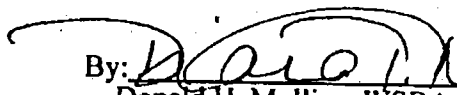
20 For this reason, if the Court does not dismiss this case in its entirety, it must nonetheless  
21 dismiss Plaintiffs' claim as to interstate telephone calls and remove Ms. Wright from the putative  
22 class.  
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DATED this 27<sup>th</sup> day of October, 2000.

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Defendant T-Netix's Response to Plaintiffs' Supplemental  
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