

RECEIVED
REGULATORY DEPARTMENT

05 JAN 25 AM 9:39

STATE OF WASH.
UTIL. & TRANSP.

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' SECOND MOTION FOR CONTINUANCE OF RESPONSE
DEADLINE TO AT&T'S MOTION FOR SUMMARY DETERMINATION**

Relief Requested

1. Complainants Sandy Judd and Tara Herivel submit this request for a continuance to allow them to file a response to respondent AT&T Corp.'s motion for summary determination. As discussed more fully below, complainants request that a response deadline be set at the prehearing conference scheduled for February 16, 2005. Alternatively, complainants request that the response deadline be set for May 6, 2005. In addition, complainants request the Commission to authorize discovery from T-Netix, as T-Netix possesses information that is relevant to the issues raised by AT&T's motion for summary determination.

2. T-Netix does not oppose the request for a continuance. Meier Declaration, ¶ 2. It has indicated it prefers to discuss discovery issues at the

ORIGINAL

Commission's February 16, 2005 prehearing conference. *Id.* Counsel was unable to reach AT&T before filing this motion. *Id.*, ¶ 3.

Statement of Facts

3. On December 15, 2004, AT&T filed and served a motion for summary determination, together with its answer to the complaint in this proceeding. Within a week of receiving AT&T's motion, complainants and AT&T were able to agree to a continuance of the response deadline. The agreed motion was premised on counsel's lack of availability during the holidays and the need to conduct discovery on matters raised by AT&T's motion. By notice dated December 22, 2004, the Commission granted the request for an extension to February 1, 2005.

4. T-Netix filed a similar motion for continuance on December 30, 2004. That motion was granted and the Commission set February 1, 2005 as the deadline for T-Netix's response.

5. In connection with the earlier motion for continuance, counsel for AT&T and complainants reached agreement on the following discovery to be conducted before the February 1 response date:

- Within a reasonably prompt time to allow complainants to review documents and prepare a response to the Motion for Summary Determination, and in advance of any depositions, AT&T will produce written discovery to complainants consisting of all documents in its possession relating to the contracts and subcontracts in effect from June 1996 to the present between the parties in this proceeding.
- Within a reasonably prompt time to allow complainants to review documents and prepare a response to the Motion for Summary Determination, and in advance of any depositions, AT&T will

produce written discovery to complainants consisting of all documents in its possession sufficient to identify where telecommunications traffic from the correctional facilities at issue in this proceeding connect to AT&T's point of presence.

- AT&T will permit up to three depositions, including a deposition of Frances Gutierrez, a deposition of someone knowledgeable about the contracts and subcontracts at issue in this proceeding, and a deposition of someone knowledgeable about the question of whether AT&T provided operator services under the contracts at issue in this proceeding. Counsel will cooperate on the scheduling of these depositions to allow them to occur sufficiently in advance of the deadline for complainants' response to the Motion for Summary Determination so as to allow for an adequate time to review the depositions and prepare the response.
- Within a reasonably prompt time to allow AT&T to review documents and in advance of any depositions of complainants, complainants will produce to AT&T all written documents in their possession relating to the inmate telephone services provided to complainants under the contracts at issue in this proceeding.
- AT&T may depose Ms. Judd and Ms. Herivel.
- If either AT&T or complainants conclude that they need additional discovery beyond that stated above, they will file a motion and attempt to show good cause for such additional discovery.

Complainants' Motion For Continuance Of Response Deadline To AT&T's Motion For Summary Determination (filed December 21, 2004).

6. To date, the following discovery has occurred:

- On January 14, complainants produced documents in their possession relating to the inmate telephone services provided to them. Meier Decl., ¶ 4.
- On January 17, AT&T produced certain contract documents. Not all contract-related documents have been produced, however. *Id.*
- AT&T has not produced any documents relating to the issue of "where telecommunications traffic from the correctional facilities at issue in this proceeding connect to AT&T's point of presence." *Id.*, ¶

5. Counsel for AT&T has explained that certain documents are confidential and will not be produced without a protective order. *Id.* Counsel for AT&T has stated that it will provide complainants' counsel with a draft protective order, but this has not occurred yet. *Id.*

- AT&T has not identified particular persons to be deposed, other than Frances Gutierrez. *Id.*, ¶ 6. In any event, depositions cannot take place before documents are produced. *Id.*

7. Before preparing this motion, counsel for complainants contacted counsel for AT&T and counsel for T-Netix. *Id.*, ¶¶ 2-3. On January 21, 2004, counsel for AT&T indicated that AT&T would not oppose a reasonable continuance. *Id.*, ¶ 3. Attempts to reach AT&T's counsel since that time have been unavailing. *Id.*

8. Counsel for T-Netix has indicated that T-Netix does not oppose the request for continuance outlined in this motion. *Id.*, ¶ 2. Counsel indicated that T-Netix prefers to discuss discovery issues at the prehearing conference scheduled for February 16, 2005. *Id.*

Statement of Issues

9. (a) Whether complainants should be granted a continuance to respond to AT&T's Motion for Summary Determination?

(b) Whether the response date should be set by the presiding ALJ at a prehearing conference scheduled for February 16, 2005? Alternatively, whether the response date should be continued to May 6, 2005?

(c) Whether the Commission should authorize discovery from T-Netix on matters raised by AT&T's motion for summary determination?

Evidence Relied Upon

10. Declaration of Jonathan P. Meier

Argument

A. A continuance is necessary to permit discovery to take place.

11. WAC 480-07-385 permits any party to request a continuance and requires the Commission to grant such a request upon a showing of good cause and lack of prejudice. Complainants' request meets this test.

12. AT&T's motion relies heavily on certain contract documents. AT&T's production to date consists almost entirely of documents that were attached to its motion. AT&T has not produced any emails, memos, or documents that are not part of the formal contracts or subcontracts at issue (with the limited exception of two letters between AT&T and T-Netix that relate to the contracts). Complainants expect that additional contract-related documents exist and will be produced. These are likely to be essential in responding to AT&T's motion.

13. AT&T has not produced any documents relating to the technical question of exactly what services it provided in connection with inmate telephone calls. That is the primary question raised by its motion. It has indicated it will not do so until a protective order is in place. An order will need to be proposed, reviewed, and approved before this production takes place.

14. Depositions cannot realistically be taken until complainants' counsel and expert have had adequate time to review AT&T's documents and prepare for the depositions. AT&T agreed to produce documents "[w]ithin a reasonably prompt time

to allow complainants to review [them] and prepare a response to the Motion for Summary Determination, and in advance of any depositions.” To date, AT&T has neither produced all relevant documents nor identified potential deponents. Complainants do not doubt AT&T’s good faith in responding to discovery, but note that the process is taking significantly longer than anticipated.

15. Good cause for a continuance exists in light of the slow progress made on discovery to date. Complainants are unaware of any prejudice that would result from a continuance.

16. Complainants request that the Commission defer setting a response deadline until the prehearing conference scheduled in this matter for February 16, 2005. A deadline can be set with greater precision at the prehearing conference since more information will be available, at that time, regarding the progress that the parties have made in completing discovery. If additional discovery or deadlines for complying with discovery requests are necessary, the prehearing conference can serve to resolve these issues as well.

17. Alternatively, complainants request that the response deadline be continued until May 6, 2005.

B. The Commission should authorize discovery from T-Netix.

18. Under WAC 480-07-400, traditional discovery (including data requests and depositions) is available in any proceeding that involves “violations of provisions in Titles 80 and 81 RCW.” Alternatively, such discovery is available whenever the Commission determines that the “needs of the case” require it. *Id.*

19. This proceeding requires the Commission to determine whether AT&T and/or T-Netix provided operator services, as that term is set forth in WAC 480-120-141 (1991) and WAC 480-120-141 (1999), and whether AT&T or T-Netix violated these regulations. The regulations, in turn, were promulgated pursuant to RCW 80.36.520. Complainants have asserted, in King County Superior Court, that respondents' violations of the regulations constitute violations of the Consumer Protection Act pursuant to RCW 80.36.530. *See generally* Complaint. This proceeding will therefore aid the King County Superior Court in determining whether "violations of provisions" in Title 80 RCW have occurred. Accordingly, this proceeding is an appropriate case for discovery contemplated by WAC 480-07-400(1)(c)(iii) through (vi), WAC 480-07-410, and WAC 480-07-415.

20. It is also appropriate to order discovery from T-Netix because the "needs of the case" require it. In moving for summary determination, AT&T points an accusatory finger squarely at T-Netix:

T-Netix directed the calls from the prison telephones to the appropriate carrier and provided automated operator announcements. It is T-Netix equipment, programmed by T-Netix, that makes the rate disclosures at those facilities. If there were mistakes made in regard to those rate disclosures, as the plaintiffs allege, they would be the responsibility of T-Netix because T-Netix serves as the OSP at those facilities.

AT&T's Motion for Summary Determination, p. 12, ¶ 22. AT&T also pointed the finger at T-Netix in King County Superior Court, where it moved to dismiss plaintiffs' complaint on the ground that AT&T never provided operator services. Meier Declaration, Exh. A, pp. 2-3.

21. T-Netix, on the other hand, has pointed the finger right back at AT&T. In King County Superior Court, T-Netix claimed that it “only provides software and equipment for use in connection with AT&T’s inmate telephone services. T-Netix does not provide any telephone service to inmates in Washington ...” Meier Decl., Exh. B, p. 3, n. 4. Instead, T-Netix claimed that “only AT&T” provided the inmate telephone services at issue. *Id.*

22. T-Netix argued that “application of these rules as to each defendant requires careful consideration of the nature of an ‘operator services provider’ and ‘telecommunications common carrier’ in the context of inmate services. These questions present issues of ultimate fact, resolution of which is a predicate to determining liability.” Meier Decl., Exh. C, p. 3. The issue of who provides operator services, argued T-Netix, is a “question of fact” that lies within competence of WUTC. *Id.*

23. T-Netix was the exclusive provider of certain telecommunications services at least five correctional facilities. See AT&T Motion for Summary Determination, Exh. 12. AT&T is the only other contracting party with regard to these facilities. *At least one of these two defendants provided the operator services for these facilities.*

24. By identifying each other as the operator services provider, and (in T-Netix’s case) by arguing that this is a question of fact to be decided by the Commission on an appropriate factual record, it is clear that discovery from T-Netix will be relevant to determining which company provided operator services. AT&T has

essentially conceded this point by relying, in its motion for summary determination, on contract-related documents authored by T-Netix personnel. *See* AT&T Motion for Summary Determination, Exh. 12. T-Netix likely has additional documents, as well as witnesses who can testify regarding its provision of services to Washington state inmates and their friends and families.

25. At a minimum, complainants should be able to obtain the same discovery from T-Netix that AT&T has agreed to provide. In other words, the Commission should order T-Netix to provide the following discovery:

- Within a reasonably prompt time to allow complainants to review documents and prepare a response to the Motion for Summary Determination, and in advance of any depositions, T-Netix will produce written discovery to complainants consisting of all documents in its possession relating to the contracts and subcontracts in effect from June 1996 to the present between the parties in this proceeding.
- Within a reasonably prompt time to allow complainants to review documents and prepare a response to the Motion for Summary Determination, and in advance of any depositions, T-Netix will produce written discovery to complainants consisting of all documents in its possession sufficient to identify where telecommunications traffic from the correctional facilities at issue in this proceeding connect to AT&T's point of presence.
- T-Netix will permit a deposition of someone knowledgeable about the contracts and subcontracts at issue in this proceeding, and a deposition of someone knowledgeable about the question of whether T-Netix or AT&T provided operator services under the contracts at issue in this proceeding. Counsel will cooperate on the scheduling of these depositions to allow them to occur sufficiently in advance of the deadline for complainants' response to the Motion for Summary Determination so as to allow for an adequate time to review the depositions and prepare the response.


- If complainants conclude that they need additional discovery beyond that stated above, they may file a motion and attempt to show good cause for such additional discovery.

26. Production of documents should begin immediately. At the prehearing conference scheduled in this matter on February 16, 2005, the presiding ALJ may take into account whatever progress has been made regarding discovery with T-Netix and can set a new deadline for complainants' response to AT&T's motion for summary determination with this information at hand. If additional discovery or deadlines for complying with discovery requests are necessary, the prehearing conference can serve to resolve these issues as well.

27. Alternatively, complainants request that all discovery be completed by T-Netix sufficiently in advance of May 6, 2005, in order to allow complainants an adequate time to prepare a response to AT&T's motion for summary determination.

DATED: January 24, 2005.

SIRIANNI YOUTZ
MEIER & SPOONEMORE



Jonathan P. Meier (WSBA #19991)
Attorneys for Complainants

1100 Millennium Tower
719 Second Avenue
Seattle, WA 98104
Tel.: (206) 223-0303
Fax: (206) 223-0246

CERTIFICATE OF SERVICE

I certify, under penalty of perjury and in accordance with the laws of the State of Washington, that on January 24, 2005, I served a copy of the foregoing document on all counsel of record in the manner shown and at the addresses listed below:

Charles H.R. Peters
SCHIFF HARDIN LLP
6600 Sears Tower
Chicago, IL 60606-6473
Attorneys for Respondent AT&T

By United States Mail
 By Legal Messenger
 By Federal Express
 By Facsimile
Fax: (312) 258-5600
Phone: (312) 258-5500

Letty S.D. Friesen
AT&T
919 Congress Avenue, Suite 900
Austin, TX 78701-2444
Attorneys for Respondent AT&T

By United States Mail
 By Legal Messenger
 By Federal Express
 By Facsimile
Fax: (303) 298-6301
Phone: (303) 298-6475

Laura Kaster
AT&T
One AT&T Way, Room 3A213
Bedminster, NJ 07921
Attorneys for Respondent AT&T

By United States Mail
 By Legal Messenger
 By Federal Express
 By Facsimile
Fax: (832) 213-0130
Phone: (908) 532-1888

Sandy B. Rasmussen
Donald H. Mullins
BADGLEY-MULLINS LAW GROUP
701 Fifth Avenue, Suite 4750
Seattle, WA 98104
Attorneys for Respondent T-NETIX, Inc.

By United States Mail
 By Legal Messenger
 By Federal Express
 By Facsimile
Fax: (206) 621-6566
Phone: (206) 621-9686

Glenn B. Manishin
Stephanie A. Joyce
KELLEY DRYE & WARREN LLP
1200 19th Street, NW, Suite 500
Washington, DC 20036
Attorneys for Respondent T-NETIX, Inc.

By United States Mail
 By Legal Messenger
 By Federal Express
 By Facsimile
Fax:
Phone:

DATED: January 24, 2005, at Seattle, Washington.

