

December 20, 2010

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

Re: *Sandy Judd and Tara Herivel, Complainants v. AT&T Communications of the Pacific Northwest, Inc., and T-Netix, Inc.*, Docket UT-042022

Dear Mr. Peters:

I received your letter of December 15, 2010, in which you request on behalf of your client, AT&T, that I recuse myself from any involvement in the above-referenced case based on Washington Rules of Professional Conduct (RPC) 1.9 and 1.11. I disagree with your interpretation of these rules and my obligations under the RPC.

You quoted RPC 1.9(a) in your letter, but the language in that section bears repeating:

A lawyer who has formerly represented a client in a matter shall not thereafter ***represent*** another person in the same or substantially related matter in which ***that person's interests are materially adverse to the interests of the former client*** unless the former client gives informed consent, confirmed in writing.

(Emphasis added.) This rule can apply to “a lawyer currently serving as a public officer or employee,” RPC 1.11(d), but even a cursory review of the language demonstrates that my involvement in this proceeding poses no conflict with RPC 1.9.

I am assisting the Commissioners in their consideration and disposition of AT&T's Petition for Administrative Review of Order 23, but I am not representing the Commissioners or the Commission as an attorney. That responsibility belongs to the

Assistant Attorney General. Accordingly, I am not “represent[ing] another person” for purposes of RPC 1.9(a). In addition, the interests of the Commissioners or the Commission are not “materially adverse” to the interests of AT&T. The Commissioners and the Commission are neutral decision-makers, not opposing parties. On its face, therefore, RPC 1.9 does not preclude me from working on this case in my current capacity.

Your letter ignores these two crucial aspects of the rule and states only that “AT&T believes that these two matters are ‘substantially related’ for purposes of Rule 1.9 because the facts probed by the Commission in both proceedings significantly overlap.” Whether this proceeding is “substantially related” to Docket UT-060962 is irrelevant in light of the remainder of Rule 1.9, but even if that were not the case, AT&T’s belief is groundless.

Comment 3 to RPC 1.9 states,

Matters are “substantially related” for purposes of this Rule if they involve the same transaction or legal dispute or if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client’s position in the subsequent matter.

This case does not involve “the same transaction or legal dispute” or pose “a substantial risk” that AT&T’s confidential information could be used against it. I represented AT&T as outside regulatory counsel in Docket UT-060962, which was a complaint case brought by the Commission against AT&T for overcharges by AT&T’s billing agent on collect calls from the Airway Heights Correctional Facility in Spokane made between March and June 2005. Commission Staff and the Company reached a settlement in that case prior to any testimony being filed, and the Commission approved the settlement in January 2008.

Docket UT-042022, in which I have never represented AT&T or participated in any other way prior to joining the Commission earlier this year, involves collect calls from Washington state prisons, including Airway Heights, but the similarities with Docket UT-060962 end there. This proceeding is a referral from the Superior Court, which asked the Commission to determine as a matter of primary jurisdiction whether AT&T (or T-Netix) was an operator services provider (OSP) in conjunction with collect calls placed from four state prisons between June 1996 and December 2000, and if so, whether either company violated Commission rules governing OSPs. This is an entirely different legal dispute, and any confidential information I might have received as counsel for AT&T in

Docket UT-060962 would not be germane or of any use against AT&T in this case. Accordingly, there has not been, and will not be, any harm to AT&T as a result of my participation in this proceeding.

You also cite RPC 1.11(d), but that rule similarly does not preclude me from assisting the Commissioners in this case. Subsection (d) provides in relevant part:

Except as law may otherwise expressly permit, a lawyer currently serving as a public officer or employee:

(1) is subject to Rules 1.7 and 1.9; and

(2) shall not:

(i) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless the appropriate government agency gives its informed consent, confirmed in writing;

Subsection (d)(1) does not apply because you make no claims with respect to RPC 1.7, and RPC 1.9 is inapplicable as discussed above. Subsection (d)(2) also does not apply because as you implicitly recognize, this proceeding is not the same matter as Docket UT-060962, which was closed almost three years ago.

No RPC provision, therefore, requires that I recuse myself from involvement in this proceeding, and I will not do so. I have informed the Commissioners and the Commission's Executive Director of your request, and they concur with my decision.

Sincerely,

GREGORY J. KOPTA
Director, Administrative Law Division

cc: Parties of Record