

**BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION**

**SANDY JUDD, and TARA HERIVEL,**

**Complainants,**

**v.**

**AT&T COMMUNICATION OF THE PACIFIC  
NORTHWEST, INC., and T-NETIX, INC.,**

**Respondents.**

**Docket No. UT-042022**

**AT&T'S MOTION TO RECUSE GREGORY J. KOPTA**

Respondent AT&T Communications of the Pacific Northwest, Inc. ("AT&T"), by and through its attorneys, respectfully submits this Motion to Recuse Gregory J. Kopta.

**Relief Requested**

1. AT&T respectfully requests that the Commission recuse Mr. Kopta from any further involvement in this proceeding and that it take all necessary steps to insulate Mr. Kopta and anyone with whom he has communicated about this proceeding.

**Statement of Facts**

2. On December 15, 2010, AT&T's counsel, Charles H.R. Peters, submitted a letter to Mr. Kopta asking him to recuse himself from this proceeding pursuant to Rules 1.9 and 1.11 of the Washington Rules of Professional Conduct (RPC) based on Mr. Kopta's representation of AT&T in a prior Commission investigation, Docket No. UT-060962. (Exhibit A hereto, 12/15/2010 Peters Letter to Kopta.) Mr. Kopta responded on December 20, 2010, denying any conflict under Rules 1.9 or 1.11 and declining to recuse himself. (Exhibit B hereto, 12/20/2010 Kopta Letter.) According to Mr. Kopta's response, the Commissioners and the Commission's

Executive Director concurred with his decision. (*Id.* at 3.) AT&T has the utmost respect for Mr. Kopta; however, it respectfully disagrees with the analysis of Rules 1.9 and 1.11 in his response.

3. Mr. Kopta represented AT&T in Docket No. UT-060962. Docket No. UT-060962 was a Commission investigation of AT&T involving collect telephone calls from Washington prisons. In that proceeding, the Commission specifically requested data from AT&T regarding its billing practices and its relationships with other entities, such as T-Netix. Through his representation of AT&T in Docket No. UT-060962, Mr. Kopta had access to AT&T's confidential information relating to those areas. Recently, the Commission under Mr. Kopta's signature requested information from AT&T regarding its billing practices and relationships with T-Netix and other entities in order to rule in the current proceeding, and other parties have argued that those matters are somehow relevant to the outcome of this proceeding.

4. The Superior Court of Washington for King County referred this matter to the Commission to determine, *inter alia*, what entity served as the operator services provider ("OSP") for the calls at issue. Throughout the relevant time period, the Commission's regulations have defined an OSP as the party "providing a connection to intrastate or interstate long-distance or to local services from locations of call aggregators." *See* WAC 480-120-021 (1991)(1999); WAC 480-120-262(1). While AT&T believes that the Commission's determination of which entity served as the OSP should be determined solely on the basis of which entity owned the P-III platform that the ALJ found provided the connection from the prison aggregator locations to intrastate or interstate long distance and local service, the Commission's recent bench requests issued under Mr. Kopta's signature and the other parties' new arguments have injected material related to Docket No. UT-060962 into this proceeding. As

a result, Mr. Kopta's previous representation of AT&T results in a conflict and, therefore, he should be recused.

### **Statement of Issue**

5. Whether Gregory J. Kopta's previous representation of AT&T in Docket No. UT-060962 results in a conflict pursuant to Rules 1.9 and 1.11 of the Washington Rules of Professional Conduct, and therefore Mr. Kopta should be recused from participation in this proceeding.

### **Evidence Relied Upon**

6. AT&T relies on the following evidence in support of its motion:

- Charles H.R. Peters 12/15/10 letter to Gregory J. Kopta (Ex. A).
- Gregory J. Kopta's 12/20/10 letter to Charles H.R. Peters (Ex. B).
- The UT-060962 WUTC Staff Investigation Report (Ex. C).
- The Commission's November 30, 2010 Bench Requests. (Ex. D)
- Complainants' Response to Responses by AT&T and T-Netix to Bench Requests 11, 12, 13, 14, and 15. (Ex. E)

### **Argument**

7. Rule 1.9 states:

A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a 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.

Mr. Kopta offers three reasons for his decision not to recuse himself pursuant to Rule 1.9: (1) the previous proceeding, Docket No. UT-060962, is not "substantially related" to this proceeding; (2) the Commission is not "materially adverse" to AT&T for purposes of Rule 1.9; and (3) he does not "represent" the Commission for purposes of Rule 1.9. AT&T addresses each of these arguments in turn.

8. First, Mr. Kopta misapplies the “substantially related” standard. AT&T agrees with Mr. Kopta that “[t]his is an entirely different legal dispute,” and that matters such as AT&T’s relationship with T-Netix, its billing practices and what its lawyers said during proceedings in that other case should “not be germane or of any use against AT&T in this case.” However, despite AT&T’s objections, those matters relevant to Docket No. UT-060962 have been improperly injected into this proceeding. In fact, in the Complainants’ Response to AT&T’s Response to Bench Request No. 12, Complainants directly quote statements made on behalf of AT&T in a hearing where Mr. Kopta represented AT&T. (Ex E at 2-3.) The Complainants improperly rely on those statements to support their position in this proceeding. Furthermore, the Commission, under Mr. Kopta’s signature, has requested information related to AT&T’s billing practices, which were directly at issue in Docket No. UT-060962. Although, as AT&T has objected, all of this information is irrelevant to the specific primary jurisdiction question at issue here — namely, who provided the requisite “connection” under the Commission’s OSP regulation — despite AT&T’s objections, this information has recently been raised in proceeding.

9. “To determine whether the two representations are substantially related, we must: (1) reconstruct the scope of the facts of the former representation; (2) assume the lawyer obtained confidential information from the client about all these facts; and (3) determine whether any former factual matter is sufficiently similar to a current one that the lawyer could use the confidential information to the client’s detriment.” *Sanders v. Woods*, 89 P.3d 312, 314 (Wash. Ct. App. 2004). Docket No. UT-060962 involved AT&T and collect telephone calls from Washington prisons, and the Commission specifically requested data from AT&T regarding its billing practices and its relationships with other entities, such as T-Netix. (Exhibit C hereto,

Docket No. UT-060962, at 9.). Washington law, therefore, assumes that Mr. Kopta obtained confidential information from AT&T about these facts.

10. Mr. Kopta also argues that his representation of AT&T in UT-060962 covered a different time period, March through June of 2005, than the relevant period in this case, June 1996 through December 2000. (Ex. B at 2.) However, Mr. Kopta's access to AT&T's confidential information was not so limited, but instead extended to the information that has recently become a focus of this proceeding. For example, in the course of responding to data requests in Docket UT-060962, Mr. Kopta learned information about how AT&T structured its relationship with T-Netix. *See* Ex. E at 9. That information was not limited to the precise time period of March through June 2005.

11. Second, Mr. Kopta defines "represent" too narrowly, claiming that only Washington's Assistant Attorney General represents the Commission. (Ex. B. at 1-2.) Mr. Kopta represents the Commission because, in his words, he is "assisting the Commissioners in their consideration and disposition of AT&T's Petition for Administrative Review of Order 23." (*Id.* at 1.) "The essence of the attorney/client relationship is whether the attorney's advice or assistance is sought and received on legal matters." *In re Disciplinary Proceeding Against Holcomb*, 173 P.3d 898, 906 (Wash. 2007). *See also* ABA Comm. on Ethics and Professional Responsibility, Formal Opinion 99-415, at n. 8 (stating that an attorney represents a party and may be disqualified if he "'participated personally and substantially' in a matter"). In other words, "representation" is not limited to "advocacy" in a litigation context, but also includes any advice or assistance with legal matters, such as Mr. Kopta's work for the Commission in this proceeding. Furthermore, Rule 1.11(d) explicitly applies the conflict rules to lawyers working in a public capacity – a lawyer currently serving as a public officer or employee . . . is subject to

Rule[] . . . 1.9” – and Rule 1.11(e) makes clear that representations include a broad range of matters and proceedings.

12. Third, Mr. Kopta similarly defines “materially adverse” too narrowly, claiming that the Commission is not adverse to AT&T because it is not an opposing party. (Ex. B at 2.) Though courts have stated that the term “materially adverse” cannot be defined with exactitude, *Roberts & Schaefer Co. v. San-Con, Inc.*, 898 F. Supp. 356, 359 (S.D. W.Va. 1995), Rule 1.9 is described as “a prophylactic rule to prevent *even the potential* that a former client’s confidences and secrets may be used against him.” *In re Corn Derivatives Antitrust Litigation*, 748 F.2d 157, 162 (3d Cir. 1984) (emphasis added). Regardless of how the Commission ultimately rules in this proceeding — whether against Complainants, against T-Netix, or against AT&T — Mr. Kopta’s involvement coupled with his knowledge of AT&T’s confidential information gained through a prior representation means that the prophylactic rule embodied in Rule 1.9 has been violated. Contrary to Mr. Kopta’s narrow definition, “material adversity” is not limited to opposing sides in a lawsuit, but instead covers a broad range of matters and proceedings. *See, e.g.*, Rule 1.11(e). Here, the mere fact that Mr. Kopta’s knowledge of AT&T’s confidential information *could* have influenced the nature of the Commission’s bench requests to parties demonstrates that the premise underlying Rule 1.9 is implicated.

13. AT&T agrees that Docket No. UT-060962, including the consideration of billing and the structure of AT&T’s relationship with T-Netix, should not bear on this proceeding. However, because issues raised in Docket No. UT-060962 have been inserted into this proceeding, despite AT&T’s objections, AT&T is required to file this Motion.

**Conclusion**

14. WHEREFORE, AT&T respectfully requests that the Commission recuse Mr. Kopta from any further involvement in this proceeding and take the necessary steps to insulate Mr. Kopta and anyone with whom he has communicated about this proceeding.

Dated: January 11, 2011

**SUBMITTED BY:**

**AT&T COMMUNICATIONS OF  
THE PACIFIC NORTHWEST, INC.**

By: /s/ Charles H.R. Peters

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**CERTIFICATE OF SERVICE**

Pursuant to WAC 480-07-150, I hereby certify that I have this day, January 11, 2011, served this document upon all parties of record by e-mail and Federal Express overnight delivery at the e-mail addresses and mailing addresses listed below:

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Pursuant to WAC 480-07-145, I further certify that I have this day, January 11, 2011, filed MS Word and PDF versions of this document by e-mail, and six copies of this document by Federal Express, with the WUTC at the e-mail address and mailing address listed below:

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Pursuant to the Prehearing Conference Order 08 and Bench Request Nos. 5 & 6, I further certify that I have this day, January 11, 2011, provided a courtesy copy of this document, in MS Word, to ALJ Friedlander by e-mail at the following e-mail address: mfriedla@utc.wa.gov.

Dated: January 11, 2011

/s/ Charles H.R. Peters  
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