

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

1. AT&T asks the Commission to recuse Gregory Kopta, the Director of the Administrative Law Division, from further involvement in this matter because he represented AT&T prior to being appointed to his current position. Further, AT&T demands that the Commission "insulate" any staff member with whom Judge Kopta had spoken with regarding this case from any future involvement in this matter.

2. We agree that the Commission has discretion to remove Judge Kopta from further involvement in this matter, but does not have the duty to do so for the reasons we discuss below. However, if the Commission decides that Judge Kopta should have no further involvement in this matter, the Commission is not required to ignore the evidence that has been provided through the bench requests or the work done by WUTC staff to date on this matter because of AT&T's delay in raising this issue before the Commission.

3. AT&T fails to explain why it has taken so long to raise its objection to Judge Kopta. The first document issued by Judge Kopta was served on September 28, 2010. He also issued a notice re-opening the record and bench requests on October 6, 2010. Thus, by October, AT&T knew that Judge Kopta was involved in this matter. Further, one of the AT&T attorneys working on this matter, Letty Friesen, appeared on behalf of AT&T with Judge Kopta in the case that AT&T now alleges creates a conflict, and if there was a problem with Judge Kopta's involvement in this matter it should have been immediately recognized by her.

4. AT&T alleges that Judge Kopta may have used confidential information received while representing AT&T because the Commission's bench requests asked whether AT&T billed for telephone calls from the prisons involved in this proceeding. The first data request issued by the Commission on October 6, asked for billing information from AT&T. If AT&T truly feels that these bench requests were inspired by Judge Kopta's access to confidential information from his prior representation of AT&T then AT&T should have said something when it received these requests. Instead, AT&T used these data requests as a platform to make arguments -- rather than provide answers -- to try to help bolster its arguments in its appeal of the order for summary determination. When AT&T failed to answer the simple question of whether it, or someone acting on its behalf, billed recipients for collect calls from the prisons involved in this case (Bench Request 13), we pointed out that AT&T had billed recipients of these calls as shown by the admissions that it made in the 2006 proceeding regarding Airway Heights. Only then did AT&T seek to remove Judge Kopta from this matter. If AT&T is

successful, then it will presumably next seek to strike all filings made in connection with the bench requests. This should not be permitted.

5. Further, there is no showing that any of the staff members involved in this matter, other than Judge Kopta, represented AT&T. These staff members should not be "insulated" from participating in this matter simply because they may have had conversations with Judge Kopta regarding the case. To remove them from the case, would add additional, substantial delay to the resolution of this matter.

6. As authority for its motion to recuse Judge Kopta, AT&T cites Rule 1.9 of the Rules of Professional Conduct ("RPC") for the State of Washington. This provision provides:

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.

7. Judge Kopta is required to be recused only if 1) he is "representing" the Commission, 2) the Commission's interests in this proceeding are "materially adverse" to AT&T, and 3) this proceeding is "substantially related" to a prior proceeding where Judge Kopta represented AT&T. All of these requirements must be met; none of them are.

8. *First*, Judge Kopta does not "represent" any party in this proceeding. RPC 1.9 contemplates a situation where an attorney represents a *party* with interests adverse to a former client. The Commission is not a party. The Commission is not an

advocate against AT&T; the Commission is performing an adjudicative function at the request of the Superior Court in this matter.

9. AT&T cites *In Re Disciplinary Proceedings against Holcomb*, 162 Wn. 2d 563, 173 P. 3d 898 (2007), to support its argument that Judge Kopta "represents" the Commission. *Holcomb* was a disciplinary action against an attorney who received numerous loans from a client without any written agreement or payment of interest. This violated RPC 1.8, which prohibits improper transactions with a client. The attorney argued that he was not dealing directly with client for the loans since the money was received from a trust established by the client. The court held that the client and his trust were one and the same for purposes of determining whether the attorney had engaged in improper transactions with a client. The attorney handled a lawsuit for the client and there was no issue whether the attorney "represented" the client. Rather, the issue was whether that representation extended to the client's trust in determining whether RPC 1.8 was violated. This case did not involve RPC 1.9 and adds nothing to AT&T's argument that Judge Kopta "represents" the Commission in this proceeding.

10. *Second*, RPC 1.9 states that the new client being represented must have interests that are "materially adverse to the interests of the former client." Even assuming that the Commission is the "client" represented by Judge Kopta, AT&T has not explained how the Commission's interests are materially adverse to AT&T's interests. The Commission is an impartial decision-maker in this matter. AT&T has cited no authority showing that RPC 1.9 is applicable under these circumstances.

11. To support its argument, AT&T's cites *In re Corn Derivatives Antitrust Litig.*, 748 F.2d 157 (3d Cir. 1984). In that case "two clients retained the same law firm to file suit, and . . . later, that law firm chose to represent one of those clients against the other in the course of the same litigation." *Id.* at 161. This is a classic example of the application of RPC 1.9. The court's conclusion in that case was:

A client has an expectation that the attorney will diligently pursue his goals until the matter is completely resolved, absent an effective waiver. In litigation, an attorney may not abandon his client and take a adverse position in the same case. This is not merely a matter of revealing or using the client's confidences and secrets, but of a duty of continuing loyalty to the client.

*Id.* at 161. The principles applied by the court in *Corn Derivatives* pertain to conflicts arising where an attorney changes sides in litigation. The case does not support AT&T's claim that the Commission's interests are "materially adverse" to AT&T.

12. *Third*, the prior matter is not "substantially related" to this proceeding.

13. The case that AT&T claims creates a conflict involved a complaint made because recipients of collect telephone calls from two prisons were overcharged. That matter was resolved in a settlement agreement where AT&T agreed to refund the overcharges and pay a penalty. The current matter is a referral from the Superior Court for King County to determine whether AT&T was an operator services provider for collect calls from inmates under its contract with the Washington Department of Corrections. Other than the fact that the two cases involved calls handled by AT&T from a prison there appears to be no similarity between the two issues in the case. AT&T claims vaguely that Judge Kopta used confidential information from that case to

help formulate bench requests. The fact that the bench requests asked for information regarding billing responsibilities for calls from the prisons involved in this case does not by itself implicate that confidential information was used from another case. AT&T fails to make any showing, through affidavit or otherwise, that Judge Kopta used confidential information received when he represented AT&T for any purpose in this matter.

14. AT&T fails to show that the Commission has a duty to recuse Judge Kopta. Nonetheless, should the Commission decide in its discretion to do so, it should not "insulate" staff members who work on this matter or take action that otherwise would delay resolution of this case.

DATED: January 19, 2011.

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## SERVICE LIST

Pursuant to WAC 480-07-150, I certify that on January 19, 2011, I served a copy of the foregoing on all counsel of record by e-mail and U.S. Mail at the below addresses:

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Pursuant to WAC 480-07-145, I further certify that on January 19, 2011, I filed MS Word and PDF versions of the listed documents by e-mail, and the original and 12 copies of the listed documents by overnight delivery (Federal Express or UPS), with the WUTC at the below address:

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Pursuant to the Prehearing Conference Order 08, I further certify that on January 19, 2011, I provided a courtesy copy of the listed documents, in MS Word, to Administrative Law Judge Marguerite E. Friedlander by e-mail to [mfriedla@utc.wa.gov](mailto:mfriedla@utc.wa.gov).

DATED: January 19, 2011, at Seattle, Washington.

/s/ Theresa A. Redfern