

**BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION**

SANDY JUDD AND TARA)	DOCKET UT-042022
HERIVEL,)	
)	ORDER 24
Complainants,)	
)	
v.)	ORDER DENYING AT&T's
)	MOTION TO RECUSE GREGORY J.
AT&T COMMUNICATIONS OF THE)	KOPTA
PACIFIC NORTHWEST, INC., AND)	
T-NETIX, INC.,)	
)	
Respondents.)	
.....)	

BACKGROUND

- 1 This proceeding involves a formal complaint filed with the Washington Utilities and Transportation Commission (Commission) by Sandy Judd and Tara Herivel (Complainants) against AT&T Communications of the Pacific Northwest, Inc. (AT&T), and T-Netix, Inc. (T-Netix) (AT&T and T-Netix collectively referred to as Respondents).

- 2 Complainants originally filed a complaint in Superior Court in June 2000, alleging that they received collect calls from inmates in Washington State correctional facilities served by Respondents, that Respondents provided operator services to the correctional facilities, and that Respondents were operator service providers (OSPs) that violated the rate disclosure statute, RCW 80.36.520, by failing to assure rate disclosures for the collect calls Complainants received. The Superior Court referred two questions to the Commission:
 - 1) Whether AT&T or T-Netix were OSPs under the contracts at issue, and
 - 2) If so, if the Commission's regulations were violated.

- 3 Complainants filed a complaint with the Commission seeking resolution of these questions. Following extensive proceedings in both the courts and the Commission, the Administrative Law Judge issued Order 23 on April 21, 2010. Order 23 concludes AT&T was an OSP during the relevant time period, T-Netix was not an OSP, and the Commission should schedule a prehearing conference to establish the procedural steps to determine whether AT&T violated Commission rules.
- 4 AT&T filed a petition for administrative review of Order 23 on May 11, 2010. T-Netix and the Complainants filed answers opposing AT&T's petition, and the Complainants also filed their own petition for administrative review of certain conclusions and findings in Order 23. The Commission subsequently reopened the record and issued two sets of Bench Requests on October 6, 2010, and November 30, 2010, both of which were signed by Gregory J. Kopta, the Director of the Commission's Administrative Law Division.
- 5 On December 15, 2010, AT&T's counsel submitted a letter to Mr. Kopta asking him to recuse himself from this proceeding pursuant to Washington Rules of Professional Conduct (RPC) 1.9 and 1.11 because Mr. Kopta represented AT&T in Docket UT-060962 while in the private practice of law before joining the Commission. Mr. Kopta responded by letter dated December 20, 2010, stating that Rules 1.9 and 1.11 are inapplicable to these circumstances and declining to recuse himself.
- 6 On January 11, 2011, AT&T filed a Motion to Recuse Gregory J. Kopta (Motion). AT&T again contends that Mr. Kopta's prior representation of AT&T in Docket UT-060962 precludes his participation in this proceeding under RPC 1.9 and 1.11 and requests that the Commission recuse him from any further involvement in this docket.
- 7 On January 19, 2011, Complaints filed a response to the Motion, stating that while the Commission has discretion to remove Mr. Kopta from further involvement in this proceeding, RPC 1.9 and 1.11 do not require the Commission to do so.

DISCUSSION

- 8 We begin by observing that this is the second time AT&T has sought to preclude someone who previously was associated with AT&T from participating in this proceeding. In Order 03, the presiding administrative law judge denied AT&T's

request to disqualify Complainants' expert witness because he is a former AT&T employee and thus allegedly could not participate in this proceeding without violating his obligations to preserve the integrity of AT&T's confidential information. We similarly deny AT&T's latest motion.

9 AT&T bases its Motion solely on RPC 1.9(a) and 1.11(d). RPC 1.9(a) provides,

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.

RPC 1.11(d)(1), in turn, states that "a lawyer currently serving as a public officer or employee" is subject to Rule 1.9.¹

10 AT&T argues that Mr. Kopta "represents" the Commission for purposes of RPC 1.9(a) "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.'"² According to AT&T, "'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."³ AT&T further asserts, "Rule 1.11(d) explicitly applies the conflict rules to lawyers working in a public capacity . . . and Rule 1.11(e) makes clear that representations include a broad range of matters and proceedings."⁴

11 We disagree. The term "represent" as used in RPC 1.9(a) refers to the practice of law and the establishment of an attorney-client relationship: "A lawyer who has formerly *represented* a client in a matter shall not thereafter *represent* another person" The commentary to this Rule speaks only in terms of a lawyer representing current and former *clients*. Comment [1], for example, provides, "After termination of a client-lawyer relationship, a lawyer has certain continuing duties with respect to

¹ RPC 1.11(d)(1).

² Motion ¶ 11.

³ *Id.*

⁴ *Id.*

confidentiality and conflicts of interest and thus may not *represent another client* except in conformity with this Rule.” (Emphasis added.)

- 12 The Commission is not Mr. Kopta’s client. The Commission has not retained Mr. Kopta as legal counsel nor is Mr. Kopta engaged in the practice of law in his current position as Director of the Commission’s Administrative Law Division. The Commission seeks his advice and assistance on a variety of matters in the course of his employment, but not as an attorney. By state law, the Office of the Attorney General provides the Commission with attorneys.⁵
- 13 AT&T nevertheless appears to contend that the Rule’s restriction on “represent[ing] another person” should be interpreted to apply more broadly than the phrase “represented a [former] client.” AT&T, however, cites no authority in support of that interpretation. We will not depart from RPC 1.9(a)’s plain language and accompanying commentary without solid grounds for doing so.
- 14 RPC 1.11(d) does not alter our analysis. That Rule simply provides that “a lawyer currently serving as a public officer or employee” is subject to Rule 1.9. This means nothing more than that a lawyer whose only current client is a governmental entity must comply with RPC 1.9(a). Because no attorney-client relationship exists between Mr. Kopta and the Commission, RPC 1.11(d) is inapplicable.
- 15 AT&T argues that RPC 1.11(e) “makes clear that representations include a broad range of matters and proceedings.”⁶ That provision, however, defines the term “matter,” not “representations.” “Matter” is not used in RPC 1.11(d)(1), which is the provision that makes lawyers in public practice subject to RPC 1.9.⁷ RPC 1.11(e), moreover, expressly applies only to the use of that term in Rule 1.11, and thus does not apply to RPC 1.9(a). RPC 1.11(e) does not support AT&T’s Motion.

⁵ RCW 43.10.067.

⁶ Motion ¶ 11.

⁷ That term is used in RPC 1.11(d)(2)(i), which states that such a lawyer “shall not 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.” (Emphasis added.) AT&T does not – and could not – claim that RPC 1.11(d)(2) applies to these circumstances because this proceeding is not the same matter as Docket UT-060962, regardless of how “matter” is defined.

- 16 Mr. Kopta does not “represent” the Commission within the meaning of RPC 1.9(a) and 1.11(d).⁸ Accordingly, those Rules do not preclude Mr. Kopta from assisting the Commission in his current capacity in this proceeding based on his prior representation of AT&T in another Commission docket.

ORDER

- 17 **THE COMMISSION ORDERS** AT&T Communications of the Pacific Northwest, Inc.’s Motion to Recuse Gregory J. Kopta is **DENIED**.

Dated at Olympia, Washington, and effective January 26, 2011.

WASHINGTON STATE UTILITIES AND TRANSPORTATION COMMISSION

JEFFREY D. GOLTZ, Chairman

PATRICK J. OSHIE, Commissioner

PHILIP B. JONES, Commissioner

⁸ Because we find RPC 1.9(a) inapplicable on these grounds, we do not reach AT&T’s other arguments that the Rule applies because the Commission’s interests in this proceeding allegedly are “materially adverse” to AT&T’s interests in Docket UT-060962 and because the two proceedings purportedly are “substantially related.” To the extent necessary, we will address these issues in our order on AT&T’s Petition for Administrative Review of Order 23.