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APR 29 2011

IN THE SUPERIOR COURT OF WASHINGTON
FOR THURSTON COUNTY

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

Petitioner,

v.

WASHINGTON STATE UTILITIES AND
TRANSPORTATION COMMISSION,

Respondent,

and

SANDY JUDD and TARA HERIVEL

Interested Parties,

and

T-NETIX, INC.,

Interested Party.

Case No.: 1 - 2 - 00992 - 8

**PETITION FOR JUDICIAL
REVIEW OF ADMINISTRATIVE
AGENCY DECISION AND FOR
DECLARATORY RELIEF**

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COMMISSION

1. This is a petition for judicial review and for declaratory judgment brought by AT&T Communications of the Pacific Northwest ("AT&T") under the Washington PETITION FOR JUDICIAL REVIEW OF ADMINISTRATIVE AGENCY DECISION AND FOR DECLARATORY RELIEF - 1

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1 Administrative Procedure Act (“APA”), RCW Chapter 34.05, seeking judicial review of the
2 March 31, 2011 Final Order (“Final Order”) of the Washington State Utilities and Transportation
3 Commission (“Commission”).

4 2. In its Final Order (attached hereto as Ex. A), the Commission responded to
5 questions that the Superior Court of Washington, King County, referred to it, under the doctrine
6 of primary jurisdiction, in a pending action, *Judd et al. v. AT&T et al.*, Case No. 00-2-17565-5
7 SEA (the “Litigation”). The Commission conducted an adjudicatory proceeding, Docket UT-
8 042022 (the “Adjudication”), to consider the referred questions. In its Final Order the
9 Commission answered the referred questions by ruling that AT&T was the operator services
10 provider (“OSP”) for certain collect calls made from four correctional facilities between 1996
11 and 2000, and also ruling that AT&T violated the Commission’s regulations.

12 3. AT&T challenges the Final Order under RCW 34.05.570(3) on the grounds that
13 (1) the Final Order is in violation of constitutional provisions as applied; (2) the Commission
14 engaged in unlawful procedure or decision making processes, or failed to follow a prescribed
15 procedure; (3) the Commission has erroneously interpreted or applied the law; (4) the Final
16 Order is not supported by substantial evidence; and (5) the Final Order is inconsistent with a rule
17 of the Commission.

18 PARTIES

19 4. Petitioner AT&T is a telecommunications company that provided intrastate,
20 interLATA long-distance telephone service to certain Washington state correctional facilities.
21 AT&T’s mailing address is One AT&T Way, Bedminster, NJ 07921.

22 5. Respondent Commission is an agency of the state of Washington responsible for
23 regulating the rates and services of private or investor-owned utility and transportation
24 companies. The Commission’s authority includes propounding regulations regarding the
25 necessary rate disclosures for collect telephone calls. The mailing address of the Commission is
26 1300 S. Evergreen Park Dr. SW, PO Box. 47250, Olympia, WA 98504-7250.

PETITION FOR JUDICIAL REVIEW OF ADMINISTRATIVE AGENCY DECISION AND FOR
DECLARATORY RELIEF - 2

1 6. Sandy Judd and Tara Herivel are the plaintiffs in the Litigation and were
2 complainants in the Adjudication.

3 7. T-Netix, Inc. (“T-Netix”) is a defendant in the Litigation and was a respondent in
4 the Adjudication.

5 **JURISDICTION AND VENUE**

6 8. This Court has jurisdiction over this action, and venue is proper, under RCW
7 34.05.570(3) and RCW 34.05.514(1).

8 9. Judicial review of the Commission’s Final Order is proper under the APA, and
9 this is not a “case in which the sole issue is a claim for money damages or compensation and the
10 agency whose action is at issue does not have statutory authority to determine the claim.” RCW
11 34.05.510. The Adjudication was not a claim for money damages, but rather a claim for
12 declaratory relief. The Litigation is not a case whose *sole issue* is a claim for money damages,
13 because the plaintiffs also seek injunctive relief in that action.

14 **STATEMENT OF FACTS**

15 10. Sandy Judd and Tara Herivel, along with another individual who was not a party
16 in the Adjudication, filed the Litigation, a putative class action complaint in the Superior Court
17 for King County on behalf of all individuals who received collect toll calls from Washington
18 state prisons since 1996. The complaint alleged that multiple telephone companies, including
19 AT&T and T-Netix, failed to provide required rate information to the putative class members.
20 At all relevant times, the party obligated to provide the rate information has been designated as
21 either the Operator Service Provider (“OSP”) or the Alternative Operator Service Company
22 (“Alternative OSC”).
23

24 11. The Superior Court referred two preliminary issues to the Washington Utilities
25 and Transportation Commission (“WUTC”) under the doctrine of primary jurisdiction: (1) “in
26

1 the first instance” who was the OSP; and (2) “in the first instance” did AT&T or T-Netix violate
2 any rate disclosure regulations.

3 12. The Commission conducted an adjudicatory proceeding to answer the questions
4 referred by the court. After discovery closed, AT&T filed a motion for summary determination,
5 pursuant to WAC 480-07-030, asking the Commission to rule as a matter of law that it was not
6 the OSP. T-Netix also filed a similar motion for summary determination.
7

8 13. The term OSP was defined by WAC 480-120-021 as “any corporation, company,
9 partnership, or person providing a connection to intrastate or interstate long-distance or to local
10 services from locations of call aggregators.”

11 14. On April 21, 2010, the Commission’s Administrative Law Judge (“ALJ”) issued a
12 decision on AT&T’s and T-Netix’s respective motions for summary determination. The ALJ
13 ruled that the party that owned the P-III Premise platform, the hardware that physically
14 connected calls from the correctional facilities to long-distance or local services, was the OSP.
15 The ALJ found, albeit erroneously, that AT&T owned the P-III Premise platform, and was
16 therefore the OSP. The ALJ recognized that the second referred question, whether either AT&T
17 or T-Netix had violated the Commission’s regulations, was not raised by the motions for
18 summary determination. The ALJ therefore made no finding as to that question. Instead, she
19 recognized that it would need to be addressed in subsequent proceedings.
20

21 15. In response to the ALJ’s order, AT&T filed a petition for administrative review to
22 the Commission. AT&T argued that the ALJ was correct in determining that the identity of the
23 OSP turned on who provided the physical connection of a call from the prison to the local or
24 long-distance service provider, and that the owner of the P-III Premise platform was indeed the
25 OSP. AT&T explained, however, that the evidence, including T-Netix’s judicial admissions,
26

1 established that T-Netix was the owner of the P-III Premise platform. T-Netix, therefore, was
2 the OSP.

3 16. On March 31, 2011, the Commission issued a Final Order. Confronted with
4 indisputable evidence that T-Netix, not AT&T, owned the P-III platform, the Commission
5 abandoned the definition of an OSP contained in its own regulations. It determined that the OSP
6 was not the party who provided the physical connection from the correctional facilities, but
7 rather was the party who “has the direct business relationship with the consumer” and “actually
8 charges the consumer for services.” Final Order, Ex. A, at ¶¶ 14, 27. The Commission ruled
9 that AT&T actually billed the end user for services, and therefore AT&T was the OSP. The
10 Commission also held in the Final Order that the P-III platform “did not make rate information
11 available to consumers.” That finding was erroneous. Moreover, no party had raised in the
12 pending motions for summary determination the issue of whether rate disclosures were provided,
13 and AT&T was denied any opportunity to present evidence on this issue. That issue was to be
14 addressed after the Commission first resolved the issue of who was the OSP.
15
16

17 **REASONS FOR GRANTING RELIEF**

18 **A. The Commission Ignored the Plain Language of the “OSP” Definition.**

19 17. WAC 480-120-021 states that the party providing the connection between the call
20 aggregators (in this case, the correctional facilities) and long-distance or local service is the OSP.
21 The plain language of the regulation indicates that the party providing the physical connection is
22 the OSP. At all relevant times, the Commission’s regulations defined an OSP in terms of the
23 party providing the physical connection.
24

25 18. Furthermore, prior to 1999, the definition of OSP excluded any “local exchange
26 company” (“LEC”). AT&T has been a certified LEC since 1997. Therefore, the Commission

1 should have found that AT&T's status as a LEC precluded it from being an OSP for at least a
2 portion of the relevant period.

3 19. The Commission, however, erroneously interpreted or applied this regulation,
4 ruling that the party who provided the physical connection was not the OSP, but rather that the
5 party who billed customers for services was the OSP. The Commission also erroneously
6 interpreted or applied the regulation by finding that AT&T was not entitled to the LEC
7 exemption. The Commission's Final Order therefore violates RCW 34.05.570(d).
8

9 20. The Final Order is also inconsistent with WAC 480-120-021, and the Commission
10 failed to explain the inconsistency by stating facts and reasons to demonstrate a rational basis for
11 the inconsistency. The Final Order therefore violates RCW 34.05.570(h).
12

13 **B. AT&T Did Not Provide "Operator Services."**

14 21. The evidence before the Commission established that T-Netix, not AT&T,
15 provided all of the operator services to the correctional facilities at issue. T-Netix played the rate
16 quotes, provided automated operator services, determined how and to whom calls were routed,
17 and facilitated billing and call completion. The evidence before the Commission further
18 establishes that T-Netix owned the Premise P-III Platform.
19

20 22. The Commission's decision that AT&T, rather than T-Netix, was the OSP, was
21 not supported by evidence that is substantial when viewed in light of the record. The Final Order
22 violates RCW 34.05.570(e).
23

24 **C. The Commission's Decision Violates the Due Process Clause.**

25 23. The Due Process Clause of the 14th Amendment of the United States Constitution
26 as well as the Due Process Clause of Article I, Section 3 of the Washington Constitution, require
that a party receive fair notice before being deprived of property or otherwise penalized. If a

1 party has not received fair notice of an agency's interpretation of a regulation or statute before
2 the conduct subject to regulation occurs, the regulation or statute is unconstitutional as applied to
3 that party.

4 24. AT&T did not receive notice that the Commission would interpret WAC 480-
5 120-021 in such a way that the party who billed for services, not the party who provided the
6 physical connection between the call aggregator and long-distance or local services, would be the
7 OSP. The Commission provided no pre-enforcement warning of this interpretation, and this
8 interpretation is not ascertainable with reasonable certainty from the face of the regulation.
9

10 25. AT&T also did not receive prior notice that, even though it was indisputably a
11 LEC during the relevant time period, it would not be entitled to the LEC exemption stated in the
12 plain language of the regulation.
13

14 26. The Commission's interpretation, as applied to AT&T, therefore violates
15 constitutional provisions and RCW 34.05.570(a).

16 **D. The Commission Erroneously Determined that AT&T Violated its**
17 **Regulation Without Giving AT&T an Opportunity to Address the Issue.**

18 27. The Commission erred by prematurely answering the second question referred to
19 it: whether AT&T violated the rate disclosure regulations. AT&T and T-Netix, in their motions
20 for summary determination, only briefed and presented evidence on the first question, which
21 party was the OSP. No pending motion addressed the second question. The ALJ, in her Initial
22 Order, recognized that additional proceedings would be necessary to address that question. Judd
23 and Herivel likewise explicitly acknowledged that additional proceedings would be required to
24 address the second question.
25
26

1 28. By reaching the second question without any briefing, before AT&T was given an
2 opportunity to present relevant evidence or argument, the Commission engaged in unlawful
3 procedure and failed to follow its own prescribed procedure. The Commission's rules and
4 proscribed procedure mandate that a motion for summary determination should only be granted
5 where "the pleadings filed in the proceeding, together with any properly admissible evidentiary
6 support (e.g. affidavits, fact stipulations, matters of which official notice may be taken), show
7 that there is no genuine issue as to any material fact and that the moving party is entitled to
8 judgment as a matter of law." The Commission's rules and proscribed procedure similarly
9 provide a party who answers a motion for summary determination with an opportunity to
10 respond and present evidence showing, at a minimum, that a genuine factual issue exists or that a
11 judgment is not appropriate as a matter of law. The Commission, in addressing the second issue
12 before it had even been raised, violated its own rules and procedures. The Final Order therefore
13 violates RCW 34.05.570(c).
14
15

16 29. The Commission's ruling that AT&T failed to comply with the rate disclosure
17 regulations also violated AT&T's due process rights and is not supported by substantial
18 evidence. The Commission's decision therefore violates RCW 34.05.570(a) and (e).
19

20 REQUEST FOR RELIEF

21 30. For the reasons detailed above, AT&T requests that this Court award AT&T the
22 following relief:

23 31. That the Final Order be set aside.

24 32. That the Court declare that AT&T was not the OSP as defined by WAC 480-120-
25 021.

26 33. That the Court declare that the Commission's interpretation of the term OSP, if
accepted, cannot be constitutionally applied to AT&T in this instance.

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CERTIFICATE OF SERVICE

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1 I do hereby certify that on this 29th day of April, 2011, I caused to be served a true and
2 correct copy of AT&T's Petition for Judicial Review of Administrative Agency Decision and for
3 Declaratory Relief to be served by the method indicated below and addressed to the following:

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1300 S. Evergreen Park Drive SW
Olympia, WA 98504

1 I declare under penalty of perjury under the laws of the State of Washington that the
2 foregoing is true and correct.

3
4 EXECUTED at Seattle, King County, Washington, this 29th day of April, 2011.

5 
6 _____
7 Bradford J. Axel

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