February 2, 2012

***By Hand & Email***

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David Danner

Secretary and Executive Director

Washington State Utilities and Transportation Commission

1300 S. Evergreen Park Drive S.W., P.O. Box 47250

Olympia, WA 98504-7250

**Re:WUTC Docket No. UT-042022
*Judd, et al., v. AT&T, et al.***

Dear Mr. Danner:

We write to request a prehearing conference to address a remand of a portion of the Final Order in this matter to the Commission by the Thurston County Superior Court. We represent the complainants in these proceedings.

## OVERVIEW AND PROCEDURAL HISTORY

In 1988, in response to the telecommunication industries’ practice of failing to disclose toll rates, the legislature mandated transparency. It directed the WUTC to promulgate rules to ensure full disclosure of rates. RCW 80.36.510-.520.

The WUTC issued detailed regulations in 1991. Under those regulations, “alternate operator services” companies were required to disclose rates for a particular call “immediately, upon request, and at no charge to the consumer.” WAC 480-120-141(5)(a)(iv) (1991). The operator was required to provide “(a) A quote of the rates or charges for the call, including any surcharge; (b) The method by which the rates or charges will be collected; and (c) The methods by which complaints about the rates, charges, or collection practices will be resolved.” *Id*. In 1999, the WUTC amended the regulation to require automatic verbal rate disclosures triggered by a call recipient pressing the keys on the telephone keypad. WAC 480-120-141(2)(b) (1999).

The legislature made noncompliance with the WUTC regulations a violation of the Washington Consumer Protection Act. RCW 80.36.530.

Plaintiffs filed this King County lawsuit in the summer of 2000 as a putative class action, asserting that five companies had violated the Washington Consumer Protection Act by failing to comply with the WUTC regulations on collect calls placed from Washington state prisons. All five companies filed motions to dismiss. Three of those companies (Qwest, Verizon, and CenturyTel) were dismissed by the trial court.

The two remaining defendants—T-Netix and AT&T—also moved to dismiss, but the trial court did not grant their motions. AT&T alternatively requested that the matter be referred to the Washington Utilities and Transportation Commission (“WUTC”) under the doctrine of primary jurisdiction.[[1]](#footnote-1)

 The court agreed and referred two questions to the WUTC: (1) whether T‑Netix and AT&T were operator service providers (OSPs) and (2) whether they had violated WUTC the regulations that require OSPs to disclose rates to consumers.[[2]](#footnote-2) The court stayed all further activity in the case, including a pending motion for class certification, until the WUTC made its ruling.

Plaintiffs appealed and eventually argued their case in the Washington Supreme Court, which affirmed the dismissals, including a holding that liability for violating the statute depended on showing a violation of WUTC regulations. *Judd v. American Tel. & Tel. Co*., 152 Wn.2d 195, 95 P.3d 337 (2004). Thus, in November 2004, a complaint was filed with the WUTC to address the questions referred by the court.

The parties hired experts and began discovery in the WUTC proceedings. T-Netix then filed a motion for summary determination in the WUTC, arguing that plaintiffs lacked standing. The administrative law judge denied the motion and denied AT&T’s separate motion to be dismissed on standing grounds. The WUTC affirmed the administrative law judge’s decision on the ground that the WUTC lacked jurisdiction to determine whether plaintiffs had standing.

T-Netix requested the court to lift the stay on trial court proceedings and filed a motion for summary judgment on the standing issue, repeating the same arguments it had made in the agency. On September 6, 2005, the Superior Court granted T-Netix’s summary judgment motion and revoked its referral to the Commission.[[3]](#footnote-3) The Superior Court later clarified that the ruling also applied to AT&T.[[4]](#footnote-4)

On December 18, 2006, the Washington Court of Appeals reversed the lower court’s decision on T-Netix’s summary judgment motion and remanded the case back to the Superior Court to refer the matter back to the WUTC.[[5]](#footnote-5) On December 4, 2007, the Supreme Court of Washington denied T-Netix’s petition for review.[[6]](#footnote-6) On March 21, 2008, the Superior Court issued an order reinstating the referral to the Commission.

On April 21, 2010, following extensive proceedings in the Commission, the administrative law judge issued Order 23, an initial order concluding that 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 address the procedural steps to address the issue of whether AT&T violated Commission regulations.

AT&T filed a petition for review of Order 23 by the full Commission on May 11, 2010. On May 21, 2010, T-Netix and the plaintiffs filed answers opposing AT&T’s petition. The Commission reopened the record to receive additional evidence.

On March 31, 2011, the Commission issued Final Order 25, which addressed the two questions referred from the King County Superior Court. For the first question of whether AT&T and T-Netix were Operator Service Providers for collect telephone calls from Washington Department of Corrections facilities, the Commission responded that AT&T was an Operator Service Provider. For the second question of whether WAC 480-120-141 was violated in connection with those calls, the Commission responded that AT&T had violated the regulation. A copy of that order is attached as Exhibit A.

## THE APPEAL OF FINAL ORDER 25

On April 29, 2011 respondents AT&T and T-Netix each filed a petition for review under the Washington Administrative Procedure Act of Final Order 25. AT&T filed a petition in Thurston County Superior Court (No. 11-2-00992-8) to vacate both of the conclusions reached by the Commission. T‑Netix also filed a petition in Thurston County Superior Court (No. 11-2-00998-7) to vacate the Commission’s findings that WAC 480-120-141 had been violated and to challenge the admission into evidence of telephone bills that were considered by the Commission. These petitions were consolidated for consideration in one proceeding.

The Thurston Superior Court affirmed the Commission's ruling that AT&T was the OSP for the calls at issue in this case. AT&T then asked Judge Paula Casey if she was also affirming the Commission's decision that AT&T could not claim an exemption as an LEC. This was an argument raised in a footnote in AT&T's brief that was not argued during the oral presentations. Judge Casey indicated that she would review the parties’ briefs and provide a written letter ruling on that issue. She later affirmed the Commission’s conclusion that AT&T is not entitled to invoke the LEC exemption allowed by WAC 480-120-021 (1991).

The second question regarding whether AT&T had violated WAC 480-120-141 presented two issues: (1) whether AT&T and T-Netix were denied due process because an additional hearing was not held to determine whether the regulations had been violated, and (2) whether there was sufficient evidence in the record to support a finding that the regulations had violated. Judge Casey only considered the first issue, and ruled that AT&T and T-Netix were denied due process because they did not have an additional opportunity to submit evidence regarding the issue of whether the regulations had been violated. Judge Casey did not make a ruling on whether the evidence considered by the Commission was sufficient to support to support its decision. Accordingly, she ruled that “the parties were not provided the full opportunity to present evidence on that issue, and this matter is remanded to the WUTC to receive additional evidence on that issue and reconsider its response to the [question of whether the regulation had been violated].”

A copy of the Court’s Order on the Petitions for Administrative Review is attached as Exhibit B.

## THE PROCEEDING IN THE KING COUNTY SUPERIOR COURT

After the Commission issued Final Order 25, the King County proceedings were assigned to Judge Beth Andrus. Both Judge Andrus and Judge Casey requested defendants to allow the King County court to review the petitions for administrative review, but the defendants refused to do so. The defendants then sought to stay the proceedings in King County, which Judge Andrus denied. She has established a discovery schedule, a schedule for determining the motion for class certification (which is now under consideration by her), and a trial date of June 25, 2012.

## REQUEST FOR PREHEARING CONFERENCE

We request that the Commission address the issues raised by the remand from the Thurston County Superior Court as soon as possible with the parties at a prehearing conference. This matter is now in its 11th year of litigation with a trial date set in King County Court in June, 2012.

We also request that the Commissioners preside over the additional proceedings contemplated by the remand as permitted by WAC 480-07-330. The order that was remanded by the court was decided by the full commission and the Commission would be in the best position to receive additional evidence and determine how that evidence affects its original decision. Further, there is no doubt that if this remand is assigned to an administrative law judge for an initial decision that the order would be appealed to the full commission. It will unquestionably be more efficient if the full commission considers the remand.

 Very truly yours,

 SIRIANNI YOUTZ

 SPOONEMORE

 /s/ Chris R. Youtz

 Chris R. Youtz

 Richard E. Spoonemore

CRY:tr

Enclosures

cc *(w/enc.)*: Letty S.D. Friesen

Charles H.R. Peters/David C. Scott/Doug Snodgrass

Arthur A. Butler

Stephanie A. Joyce

Clients

1. Primary jurisdiction is a doctrine which requires that issues within an agency’s special expertise be decided by the appropriate agency. *Tenore, v. AT&T Wireless Services,* 136 Wash.2d 322, 345, 962 P.2d 104, 115 (1998). [↑](#footnote-ref-1)
2. *See,* WAC 480-120-141 (1991) and (1999). [↑](#footnote-ref-2)
3. *Judd v. Am. Tel. & Tel. Co*., King County Superior Court, No. 00-2-17565-5 SEA, *Order Granting Defendant T-Netix’ Motion for Summary Judgment*, September 6, 2006. [↑](#footnote-ref-3)
4. *Judd*, 136 Wash.App. 1022, not reported in P.3d, (2006). [↑](#footnote-ref-4)
5. *Judd*, 136 Wash.App. 1022, not reported in P.3d, (2006). [↑](#footnote-ref-5)
6. *Judd v. Am. Tel. & Tel. Co.,* 162 Wash.2d 1002, 175 P.3d 1092 (2007). [↑](#footnote-ref-6)