

IN THE SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

SANDY JUDD, TARA HERIVEL, and
COLUMBIA LEGAL SERVICES, for
themselves, and on behalf of all similarly
situated persons,

Plaintiffs,

v.

AMERICAN TELEPHONE AND
TELEGRAPH COMPANY, and T-NETIX,
INC.,

Defendants.

Case No.: 00-2-17565-5 SEA

**AT&T'S MOTION TO
TERMINATE OR WITHDRAW
PRIMARY JURISDICTION
REFERRAL**

I. INTRODUCTION

AT&T respectfully requests that the Court terminate or withdraw its referral, under the doctrine of primary jurisdiction, of certain questions to the Washington Utilities and Transportation Commission (WUTC). At the hearing on January 27, 2012, the Court questioned whether anything was truly to be gained by remanding the question of whether any regulations had been violated to the WUTC, as opposed to resolving that issue in this Court. The Court is correct. The most efficient way to resolve that issue, as well as this litigation as a whole, is to address that question in the Circuit Court of King County along with the rest of the case.

1 Everyone recognizes that this Court's referral to the WUTC was limited and that this
2 Court has always had the ultimate authority to make the necessary factual findings and legal
3 determinations to dispose of this case.

4 The Court referred two issues to the Commission for
5 determination; it did not transfer the entire case to the Commission
6 for resolution as sometimes happens in primary jurisdiction
7 referrals.

8 Pls.' Reply in Further Supp. of Mot. for Reassignment at 2 (April 14, 2011).

9 The [Commission's Final] order . . . referred "further factual
10 inquiry and the ultimate disposition of Complainants' claims to the
11 [King County] Superior Court."

12 Pls.' Mot. to Amend Compl. at 6 (April 20, 2011) (citing WUTC Final Order at ¶¶ 85, 86); *see*
13 *also* WUTC Final Order at ¶¶ 1, 35, 38 ("Indeed, we make no findings on the latter issue
14 ["whether either company provided operator services to the Complainants"], leaving that
15 determination to the Superior Court.").

16 In the present case, the King County Court . . . bears the ultimate
17 responsibility for accepting [the Commission's] responses and
18 assessing liability. Logically the King County Court would want
19 to evaluate arguments as to why those answers are flawed and
20 should not be adopted by the court. . . . Judicial efficiency and
21 comity are advanced by having the King County Court address
22 those claims in the first instance.

23 Pls.' Opp'n to T-Netix's Mot. for Recon. of Order to Transfer Venue at 9 (June 21, 2011).

24 This Court should take full control of this litigation. The referral to the WUTC has
25 served its purpose, and permitting a portion of the case to go back to the WUTC would only
26 further complicate this Court's ultimate disposition of the case and create conflict and confusion.
The Court should terminate or withdraw the referral.

II. RELIEF REQUESTED

AT&T requests that the Court enter an order terminating or withdrawing its primary
jurisdiction referral.

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III. STATEMENT OF FACTS

This Court referred to the WUTC two questions: (1) whether AT&T or T-Netix were OSPs, and (2) whether they violated the WUTC's disclosure regulations. Order Granting AT&T's Mot. to Dismiss (Nov. 8, 2000). The WUTC, in its Final Order, concluded that AT&T was an OSP for calls from inmates at four correctional facilities, and that AT&T violated the rate disclosure regulations. Final Order at ¶¶ 76, 78, 83, 84. AT&T and T-Netix sought judicial review of the WUTC's decision in Thurston County Superior Court. The Thurston County court affirmed the WUTC's response to the first question, but reversed and remanded the second question, whether AT&T or T-Netix violated disclosure regulations, back to the WUTC. (February 2, 2012 Final Order attached as Ex. A to the Declaration of Bradford J. Axel, at 3) Plaintiffs' subsequently requested a prehearing conference with the WUTC. (February 2, 2012 Letter from C. Youtz to D. Danner attached as Ex. B to the Axel Decl.) Plaintiffs' request failed to inform the WUTC that this Court had raised the question of whether or not the case should be sent back to the WUTC. *Id.* AT&T now requests that this Court decide whether AT&T and T-Netix violated the rate disclosure regulations on its own rather than referring the question back to the WUTC.

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IV. STATEMENT OF ISSUES

1. Should the Court terminate or withdraw its primary jurisdiction referral and resolve the question whether AT&T or T-Netix violated any rate disclosure regulation?

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V. EVIDENCE RELIED UPON

AT&T relies upon the previous filings and orders in this litigation, the WUTC's Final Order, the February 2, 2012 Final Order of the Thurston County court (Axel Decl. Ex. A), the February 2, 2012 letter from C. Youtz to D. Danner (Axel Decl. Ex. B), and the January 4, 2012 CR 30(b)(6) deposition of John Midgley of Columbia Legal Services (Axel Decl. Ex. C).

1 **VI. ARGUMENT AND AUTHORITIES**

2 **A. The Court Has Authority to Terminate or Withdraw the Referral.**

3 This Court, having made the limited referral to the WUTC, retains the discretion and
4 authority over that referral and may terminate or withdraw it as the Court deems appropriate.
5 Indeed the Court did just that in August 2005 when, in the midst of proceedings in the WUTC,
6 the Court lifted the stay on proceedings in the King County Superior Court in order to consider
7 and decide T-Netix’s motion for summary judgment on standing grounds. Order Lifting Stay
8 (Aug. 16, 2005) (implicitly rescinding referral to allow Court to decide motion). The Court
9 should do the same now. “The application of the doctrine of primary jurisdiction is not
10 mandatory in any given case, but rather is within the sound discretion of the court; it is
11 predicated on an attitude of judicial self-restraint.” *Chaney v. Fetterly*, 100 Wn. App. 140, 149,
12 995 P.2d 1284 (2000) (internal quotations omitted); *see also D.J. Hopkins, Inc. v. GTE*
13 *Northwest, Inc.*, 89 Wn. App. 1, 7-8, 947 P.2d 1220 (1997) (“As to the trial court’s application of
14 the doctrine of primary jurisdiction, . . . the decision of the court is reviewed for an abuse of
15 discretion.”).

16 **B. The Referral to the WUTC Has Served Its Purpose.**

17 AT&T originally requested that certain technical questions be referred to the WUTC
18 because identifying the OSP under the statutory and regulatory definitions at issue required a
19 determination of who provided a specific “connection” in the telecommunications network, and
20 the WUTC, having expertise with respect to how the telecommunications network functions,
21 seemed to be the natural forum for making that determination. The WUTC has now made its
22 determination on the OSP issue (which AT&T will continue to appeal), so there is no further
23 benefit to be gained from the WUTC’s telecommunications expertise. In fact, the question that
24 Plaintiffs now seek to send back to the WUTC — whether rate quotes were or were not played
25 during the various prison collect calls at issue — turns on evidence, not technical expertise. As
26 the Court is well aware from the class certification briefing and argument, the rate quote question

1 largely requires considering the testimony of T-Netix's witnesses that rate quotes were played, as
2 compared to Plaintiffs' unfounded and vague declarations that rate quotes were not played, and
3 related evidence that may come out in discovery. The Court is well suited to engage in that type
4 of fact finding. Indeed, Plaintiffs recognize that the Court "bears the ultimate responsibility for .
5 . . assessing liability" on the rate quote question. Pls.' Opp'n to T-Netix's Mot. for Recon. of
6 Order to Transfer Venue at 9 (June 21, 2011).

7 **C. Another WUTC Proceeding Will Further Complicate this Court's Ultimate**
8 **Disposition of the Case and Create Conflict and Confusion.**

9 This case has changed significantly since the WUTC issued its Final Order. Plaintiffs
10 have added a new named plaintiff and putative class representative, Columbia, which was not a
11 party to and did not participate in the earlier proceeding before the WUTC. This Court has also
12 issued orders, including a summary judgment order, that affect the claims and defenses in the
13 case, and the Court's forthcoming ruling on class certification may further affect the case.
14 Sending the case back to the WUTC for additional proceedings there will only further complicate
15 the proceedings in this Court and the ultimate disposition of the case. Maintaining the
16 proceedings entirely in the King County will streamline the case and eliminate unneeded
17 complexity.

18 If the issue of rule violations were to be remanded to the WUTC, the litigation would be
19 pending in at least three different forums at the same time: this Court, the WUTC and Division
20 II of the Court of Appeals. Moreover, any decision by the WUTC could be appealed to the
21 Superior Court of Thurston County. (As the Court is aware, AT&T did not oppose the Thurston
22 County Court's earlier desire to transfer to this Court the appeal from the WUTC's Final Order,
23 though that transfer ultimately did not occur.) As such, a remand to the WUTC risks further
24 prolonging this litigation and having key issues resolved by different tribunals. That approach
25 requires this Court, as well as others, to interpret and apply the rulings of other adjudicatory
26 bodies. Where possible, much can be gained by avoiding that sort of overlap.

1 Proceeding in the WUTC, where discovery was limited, is not efficient at this stage in the
2 litigation. Consider the issue of scope. As the Court recognized in its recent summary judgment
3 order, the proceedings before the WUTC and the WUTC's Final Order were limited to four
4 specific prisons. That scope limitation arose from the fact that Plaintiffs Judd and Herivel could
5 prove that they received prison collect calls from only those four prisons. However, Plaintiffs
6 now claim to have expanded the scope of the case by subsequently adding Columbia as a named
7 plaintiff. The parties have taken no discovery in the WUTC about Columbia or any of the other
8 prisons Columbia seeks to inject into the litigation. Sending a very different and purportedly
9 expanded case back to the WUTC could only result in unnecessary complication, and any
10 determinations or rulings that might come out of additional WUTC proceedings are likely to be
11 subject to additional confusion and potential conflict.

12 The inclusion of evidence related to Columbia into the WUTC proceedings has already
13 created confusion in this case. In its recent summary judgment order, the Court ruled that AT&T
14 was the OSP for intra-LATA calls from Clallam Bay, as Plaintiffs argued, because: (1) the
15 WUTC considered a page of a bill from Columbia that reflected AT&T's logo and an intra-
16 LATA call from Clallam Bay, and (2) the WUTC ruled that AT&T was the OSP for all calls
17 from Clallam Bay for which AT&T provided service or which AT&T carried. The problem is
18 that, because Columbia was not a party to the WUTC proceeding, it was not deposed in that
19 proceeding. Indeed, Columbia was not deposed until after the Court granted Plaintiffs' leave to
20 amend their complaint in April 2011 in proceedings before this Court following the conclusion
21 of the WUTC proceeding. During its deposition, Columbia acknowledged that it had a special
22 telephone plan with AT&T that was available to businesses but not ordinary residential
23 consumers who would have been the primary recipients of prison collect calls. (Axel Decl.
24 Ex. C at 63) Thus, while the page from Columbia's bill cited in the WUTC record contained
25 AT&T's logo, it does not establish that ordinary residential consumers who received intra-LATA
26 prison collect calls from Clallam Bay also would have received bills bearing AT&T's logo or

1 that AT&T would have been the OSP for those calls. Columbia's special business telephone
2 plan was not representative of ordinary residential consumers. Accordingly, extrapolating from
3 one or two pages of Columbia's bill is improper.

4 For the purposes of this motion, the key point is that multiple proceedings in different
5 forums have resulted in unnecessary confusion and complexity. Plaintiffs have attempted to use
6 this lack of clarity to their advantage with varying degrees of success. For example, Plaintiffs
7 argued unsuccessfully that the WUTC's Final Order covered more prisons than the four that
8 were specifically at issue there (it did not), and that AT&T was the OSP for all intra-LATA calls
9 from all PTI prisons (it was not, though Plaintiffs appear to have persuaded the Court that this
10 was true for Clallam Bay). Similarly, Plaintiffs have successfully whipsawed AT&T on the LEC
11 exemption issue, arguing in the WUTC that AT&T did not provide any local exchange services,
12 but then arguing in this Court that it did. The Court is familiar with that issue, so AT&T will not
13 reargue it here. But the point is that such conflicts need not, and should not, arise again. The
14 best way to avoid such problems is not to send the case back to the WUTC at all.

15 **D. Keeping the Proceedings in this Court Will Advance Efficiency.**

16 In addition to avoiding problems, keeping the case in this Court will advance efficiency.
17 Plaintiffs previously recognized this, though they appear now to have reneged on that position.
18 This Court is in the best position to manage discovery, determine how best to proceed with a new
19 party and avoid further disparate rulings. The simplest and most streamlined path for the Court
20 and the parties is to proceed in the King County Superior Court, not the WUTC.

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VII. CONCLUSION

AT&T respectfully requests that the Court grant this motion and the relief requested herein and terminate or withdraw its primary jurisdiction referral.

DATED this 14th day of February, 2012.

STOKES LAWRENCE, P.S.

By: /s/ Bradford J. Axel
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1 **DECLARATION OF SERVICE**

2 I do hereby certify that on this 14th day of February, 2012, I caused to be served a true
3 and correct copy of the foregoing AT&T's Motion to Terminate or Withdraw Primary
4 Jurisdiction Referral by the method indicated below and addressed to the following:
5

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

20 EXECUTED at Seattle, King County, Washington, this 14th day of February, 2012.

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22 _____
23 Deborah L. Messer, Practice Assistant
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