

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

DECLARATION OF BRADFORD J.
AXEL IN SUPPORT OF AT&T'S
MOTION TO TERMINATE OR
WITHDRAW PRIMARY
JURISDICTION REFERRAL

I, Bradford J. Axel, am over the age of 18, have personal knowledge of all the facts stated herein and declare as follows:

1. I am a shareholder with the law firm Stokes Lawrence, P.S. and one of the attorneys representing AT&T in this case.

2. Attached hereto as **Exhibit A** is a true and correct copy of the Thurston County Superior Court's February 2, 2012 Final Order on AT&T's and T-Netix's Petitions for Judicial Review.

DECLARATION OF BRADFORD J. AXEL IN SUPPORT OF AT&T'S MOTION TO TERMINATE OR
WITHDRAW PRIMARY JURISDICTION REFERRAL - 1

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3. Attached hereto as **Exhibit B** is a true and correct copy of Chris R. Youtz's February 2, 2012 letter to David Danner, Secretary and Executive Director of the Washington State Utilities and Transportation Commission.

4. Attached hereto as **Exhibit C** is a true and correct copy of an excerpt from the January 4, 2012 deposition of John Midgley.

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

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

/s/ Bradford J. Axel
Bradford J. Axel (WSBA #29269)

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 Declaration of Bradford J. Axel by the method indicated below
4 and addressed to the following:

5
6 *Via Email*
7 Chris Youtz
8 Richard E. Spoonemore
9 Sirianni Youtz Meier & Spoonemore
10 999 Third Avenue, Suite 3650
11 Seattle, Washington 98104
12 chris@sylaw.com
13 rspoonemore@sylaw.com

Via Email
Arthur A. Butler
Ater Wynne LLP
601 Union Street, Suite 1501
Seattle, Washington 98101-2341
aab@aterwynne.com

12 *Via Email and U.S. Mail*
13 Stephanie A. Joyce
14 Arent Fox LLP
15 1050 Connecticut Avenue NW
16 Washington, D.C. 20036
17 joyce.stephanie@arentfox.com

Via Email
Donald H Mullins
Duncan Turner
Badgley-Mullins Law Group PLLC
701-Fifth Avenue, Suite 4750
Seattle, WA 98104
donmullins@badgleynullins.com
duncanturner@badgleynullins.com

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.

21 

22 Deborah L. Messer, Practice Assistant

EXHIBIT A

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EXPEDITE
(if filing within 5 court days of hearing)
 Hearing is set:
Date: February 2, 2012
Time: 1:30 pm.
Judge/Calendar: Hon. Paula Casey

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

Intervenors,

and

T-NETIX, INC.,

Interested Party.

T-NETIX, INC., a Delaware corporation,

Petitioner,

v.

WASHINGTON STATE UTILITIES AND
TRANSPORTATION COMMISSION,

Respondent.

NO. 11-2-00992-8

and

NO. 11-2-00998-7

~~PROPOSED~~
ORDER ON PETITIONS FOR REVIEW

I. BACKGROUND

1 The King County Superior Court in *Judd, et al., v. AT&T, et al.*, Case No. 00-2-17565-5
2 (SEA) referred two questions to the Washington Utilities and Transportation Commission
3 (“WUTC”) under the doctrine of primary jurisdiction. The court requested the WUTC to
4 determine: (1) whether AT&T and T-Netix were Operator Service Providers for inmate-initiated
5 collect telephone calls from Washington Department of Corrections facilities (“the First
6 Question”); and (2) If so, whether WAC 480-120-141 was violated in connection with those calls
7 (“the Second Question”).

8 The Commission answered those questions in Final Order Number 25. The Commission
9 responded that AT&T was the Operator Service Provider and that it had violated WAC 480-120-
10 141.

11 AT&T filed a petition in this court (No. 11-2-00992-8) to vacate both of those
12 conclusions. T-Netix filed a petition in this court (No. 11-2-00998-7) to vacate the
13 Commission’s findings that WAC 480-120-141 had been violated, that the T-Netix equipment
14 was not capable of providing rate quotes, and to challenge the admission into evidence of
15 telephone bills that were considered by the Commission. Sandra Judd and Tara Herivel were
16 permitted to intervene to oppose both petitions. T-Netix was permitted to intervene to oppose
17 AT&T’s petition on the issue of whether AT&T was an Operator Service Provider.

18 The petitions were later consolidated for consideration in one proceeding.

19 II. PROCEEDINGS BEFORE THIS COURT

20 This court considered the petitions filed by AT&T and T-Netix on December 9, 2011.
21 The court received the full record of proceedings from the WUTC and considered the following
22 submissions from the parties:

- 23 1. AT&T Petition for Judicial Review of Administrative Agency Decision and for
24 Declaratory Relief;
- 25 2. T-Netix Petition for Judicial Review and Declaratory Judgment;

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3. AT&T's Opening Brief in Support of Its Petition for Judicial Review, including Appendix and Exhibits A-I;
 4. Petitioner's Brief of T-Netix, Inc.;
 5. Intervenor's Response to AT&T's Petition for APA Review;
 6. Intervenor's Response to T-Netix's Petition for APA Review;
 7. Declaration of Chris R. Youtz In Opposition to Petitions for Judicial Review;
 8. Washington Utilities and Transportation Commission's Combined Response Brief to Opening Briefs of AT&T and T-Netix;
 9. Intervenor's Brief of T-Netix;
 10. AT&T's Reply in Support of Its Petition for Judicial Review;
 11. Petitioner's Reply Brief of T-Netix, Inc.; and
 12. Declaration of Arthur A. Butler In Support of Petitioner's Reply Brief of T-Netix,

Inc. *13 AT&T's demonstrative exhibits presented at oral argument.*

The court also considered the oral arguments of the parties.

III. RULING

~~The Court rules that~~ The WUTC's response to the First Question, that AT&T was the Operator Service Provider, ~~and all related findings,~~ is affirmed.

The WUTC's conclusion that AT&T is not entitled to invoke the exemption of LECs from the definition of an Alternate Operator Services Company (the predecessor term for an Operator Service Provider) in WAC 480-120-021 (1991) for collect calls from inmates at the DOC Facilities between June 20, 1996, and December 31, 2000 is affirmed.

~~With respect to the Second Question regarding whether WAC 480-120-141 was violated,~~ The Court finds that the parties were not provided the full opportunity to present evidence on that issue and this matter is set aside and remanded to the WUTC to receive additional evidence, ~~on that issue and reconsider its response to the Second Question.~~

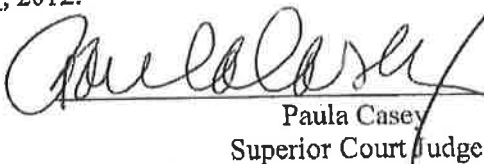
1 The Commission's statement in Paragraph 58 of the Final Order No. 25 that the T-Netix
2 P-III equipment "was not able to receive a consumer request and provide a rate quote" is set
3 aside and remanded to the WUTC.

4 The Commission's decision to admit into evidence telephone bills from Columbia Legal
5 Services is affirmed.

6 Unless otherwise provided in this order, all findings of fact, conclusions of law, and
7 rulings made by the Commission are affirmed.

8 No evidence outside of the record was considered in reaching this decision.

9 DATED: February 2, 2012.

10 
11 Paula Casey
12 Superior Court Judge

13 Presented by:

14 ATER WYNNE LLP

15 /s/ Arthur A. Butler

16 Arthur A. Butler, WSBA # 04678

17 ATER WYNNE LLP

18 601 Union Street, Suite 1501

19 Seattle, WA 98101-3981

20 Telephone 206.753.3011

21 Facsimile 206.467.8406

22 Stephanie A. Joyce *

23 ARENT FOX LLP

24 1050 Connecticut Avenue, NW

25 Washington, DC 20036

26 Telephone 202.857.6081

Facsimile 202.857.6395

Attorneys for T-Netix, Inc.

* Admitted pro hac vice by order dated June 3, 2011

EXHIBIT B

SIRIANNI YOUTZ
SPOONEMORE

February 2, 2012

BY HAND & EMAIL

records@utc.wa.gov • Tel. (360) 664-1234

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.

A. 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.

SIRIANNI YOUTZ
SPOONEMORE

David Danner
February 2, 2012
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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

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 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.

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).

² See, WAC 480-120-141 (1991) and (1999).

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SPOONEMORE

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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 The Superior Court later clarified that the ruling also applied to AT&T.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 On December 4, 2007, the Supreme Court of Washington denied T-Netix's petition for review.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

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.

⁴ *Judd*, 136 Wash.App. 1022, not reported in P.3d, (2006).

⁵ *Judd*, 136 Wash.App. 1022, not reported in P.3d, (2006).

⁶ *Judd v. Am. Tel. & Tel. Co.*, 162 Wash.2d 1002, 175 P.3d 1092 (2007).

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SPOONEMORE

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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.

B. 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 been 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 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]."

SIRIANNI YOUTZ
SPOONEMORE

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

C. 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.

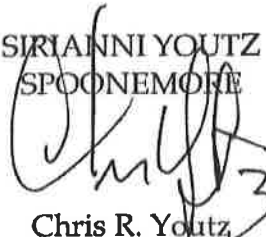
D. REQUEST FOR PREHEARING CONFERENCE

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



Chris R. Youtz

Richard E. Spoonemore

**SIRIANNI YOUTZ
SPOONEMORE**

**David Danner
February 2, 2012
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**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**

EXHIBIT C

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SUPERIOR COURT OF WASHINGTON, KING COUNTY

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

Plaintiffs,)

vs.)

No. 00-2-17565-5 SEA

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

Defendants.)

30(B)(6) DEPOSITION UPON ORAL EXAMINATION

OF

COLUMBIA LEGAL SERVICES

JOHN MIDGLEY

9:06 A.M.

JANUARY 4, 2012

800 FIFTH AVENUE, 39TH FLOOR

SEATTLE, WASHINGTON

REPORTED BY: JULIE R. HEAD, CRR, RPR, CCR No. 3119

1 Q. Okay. I think you referenced connectivity and
2 MegaCom earlier as services you thought --

3 A. Yes. I've seen those on the bills and I think
4 they're on that disc or some of those names are on
5 the -- the disc that AT&T provided to us. So -- Yeah,
6 the place I've become familiar with them is by looking
7 at the bills.

8 Q. Okay. And do you see on the same page, under
9 the MegaCom section, there are two lines. One says,
10 promotional savings, one says, discount plan savings.

11 A. I see that.

12 Q. So, was it part of Columbia's phone plan with
13 AT&T that there were savings and discounts for -- for
14 calls?

15 A. There were some. I've seen them on these
16 bills, so there certainly were some, yes.

17 Q. Do you know if this -- this type of plan CLS
18 had with AT&T was a business -- a business phone plan?

19 A. So far as a know.

20 Q. Okay. So, not the type of thing that a
21 resident in a house could get?

22 A. I -- I can't imagine that it was, but I don't
23 know -- I haven't specifically asked that question, but
24 our accounts -- our own accounts are business accounts.

25 Q. Sticking with this first Exhibit 114, do you